

MARCH/APRIL 2009  
VOL. 81 | NO. 3

NEW YORK STATE BAR ASSOCIATION

# Journal



NEW YORK HERALD. SUNDAY. OCTOBER 23. 1898.



WHICH WILL ESCAPE?

## "Tammany Hall Had a Right to Expect Proper Consideration"

The Judicial Nominations Controversy of 1898

by William H. Manz

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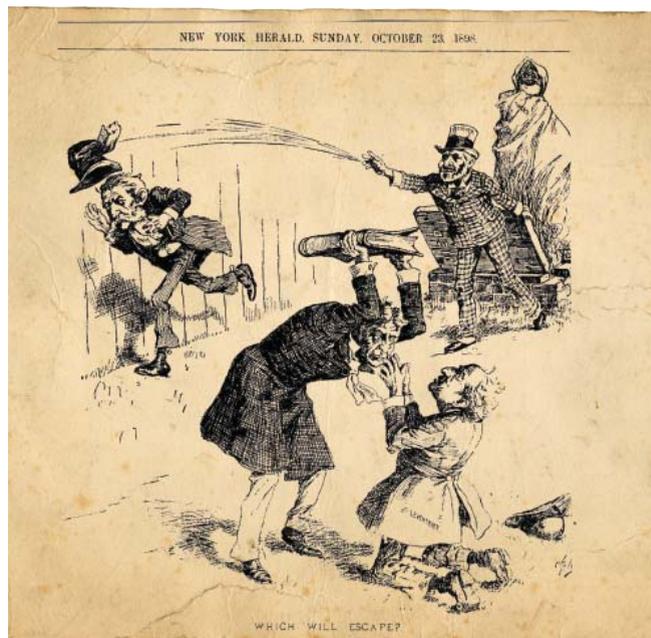
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## A Gold Medal Career, an Agent for Change: Frederick A.O. Schwarz, Jr.

The results of the 2008 elections, both in New York and nationwide, leave no doubt that Americans are ready for change. But, recognizing the need for change and bringing about change are two different things.

Certainly, the transfer of leadership to a new administration is one way to effect change. We are already seeing signs that the way of doing business at the White House is shifting, from President Obama's order to close Guantanamo Bay within a year, to Attorney General Eric Holder's view that waterboarding is torture. But, how does real change happen – change that isn't tied to the monarchical convictions or partisan notions of our political leaders?<sup>1</sup>

In his powerful message, our 2009 Gold Medal recipient, Frederick A.O. Schwarz, Jr., urged: "Change needs teachers." In accepting the State Bar's highest honor at the President's Dinner on January 31, 2009, Mr. Schwarz explained that public access to information, even facts detailing mistakes made by presidential administrations, is key to public understanding, which then leads to the public's outcry for change. Mr. Schwarz's writings, speeches, and career path reveal that he is one of our profession's greatest teachers, and perhaps one of our most prolific agents of change.

From his early work assisting the government of Northern Nigeria in developing its statutory law, to his public service as Corporation Counsel advising Mayor Ed Koch on crucial issues such as race relations, the AIDS crisis and good government reforms, to his latest book condemning the Bush White House's efforts to seize uni-

lateral control over national security policy,<sup>2</sup> Mr. Schwarz has served the public and our profession by bringing to light important issues and essential reforms, most notably in the area of campaign finance.

And now, Mr. Schwarz has taken on the mantle of eradicating the culture of secrecy, which, over the past eight years, has become more pervasive in the realm of executive power and has lowered our moral standing around the globe. Mr. Schwarz spoke on the issue of secrecy, and has graciously given us permission to print his thoughtful, informative remarks in this issue of the *Journal*.

Mr. Schwarz has said, "The story of America lies in the law. . . . And lawyers tell the story. Every day, every step of the way, lawyers [are] trying to move America toward a better, fairer, fuller life." This is the higher calling to which we all aspire. Law as a calling also has guided Mr. Schwarz throughout his formidable legal career.

Mr. Schwarz aptly reminds us that answering this higher call requires more than being a counselor; lawyers are teachers. Indeed, educating the public – both young and old – is one of the State Bar's core objectives. From our Law, Youth and Citizenship program to our People's Law School, which recently launched a Web-based program for those facing mortgage foreclosure,<sup>3</sup> we assist our clients and the public and thereby improve civic literacy. Our profound mission is to empower the public to seek protection of their rights, including the right to a transparent government.

As lawyers, we must be life-long learners, too. We can all learn a great deal from the extraordinary career of



Frederick Schwarz, and I am honored to commend to you his thought-provoking Gold Medal speech, as well as his enlightening book, *Unchecked and Unbalanced: Presidential Power in a Time of Terror*. We serve the public and our profession best when we remember that there is always something new to learn, always another viewpoint worth considering. I trust that you will learn as much as I have from our distinguished colleague, Mr. Schwarz.

### Abuses of Presidential Power: Where Do We Go From Here? Addressing the Culture of Secrecy Introduction

Our country just voted for change. And change we must.

Focusing on some elements of change particularly central to lawyers, we must reverse overreactions to 9/11 such as Guantanamo, torture, and extraordinary rendition to torture.

We must reject Dick Cheney's theory that a president has the right to "assert monarchical notions of prerogative that will permit him to exceed the laws." Articulated in 1987 when Cheney was in Congress, this idea flowered after 9/11 in secret Justice

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## PRESIDENT'S MESSAGE

Department opinions that permitted the President to approve, for example, torture and warrantless wiretapping in violation of the law.

And we must restore *justice* to the Justice Department by cleansing it of partisan abuses.

These actions and policies undermined the Constitution, tarnished the rule of law, and compromised American values. President Obama is on his way to rejecting them all. This – coupled with Barack Obama's election itself – will help strengthen America by beginning to restore our standing in the world.

But the hard work has just begun. We must move beyond curing symptoms (like Guantanamo) to addressing root causes.

A central root cause of our recent move toward harmful exercises of presidential power is excessive secrecy. Excessive secrecy stifles debate. It neuters checks and balances. It smothers the popular judgment that gives life to democracy.

There are two aspects of excessive secrecy. The first is nontransparent decision making by narrow coteries of executive branch officials without meaningful debate or discussion. The other is the secrecy stamp that blinds outsiders to documents, coupled with the executive privilege claim that stitches up the lips of witnesses.

Excessive secrecy in both senses is the subject of my talk tonight.

### Growth of Secrecy

Human nature pushes powerful people toward secrecy. It seems easier. It avoids challenge. It fosters illusions of grandeur. Nonetheless, effective leaders know that secrecy often produces decisions that are less wise.

Crisis has often made it tempting to ignore the wise restraints that make us free, and to rush into actions that do not serve the nation's long-term interests.

From the Founding to the 1940s, these actions were usually public. Thus, the Alien and Sedition Acts in 1798, the Palmer Raids in 1919, and the

herding of Japanese citizens into concentration camps early in World War II, however wrong, were all public acts. So too was Lincoln's unilateral suspension of habeas corpus.

But starting in the late 1940s, more and more questionable or improper government actions have been decided in secret without meaningful debate. And then their implementation has been hidden from the public, and often from Congress. The number of documents that are stamped secret has also grown exponentially, particularly in the last eight years.

Everybody who knows modern American government knows there is far too much secrecy. Lee Hamilton, as Vice Chair of the 9/11 Commission, estimated that 70% of what he saw was "needlessly classified." My own observation in the mid-seventies as Chief Counsel for the Senate's Church Committee was more qualitative than quantitative. While there were obviously genuine secrets that must be respected, it seemed to me that far too much was kept secret not to *protect America*, but to keep embarrassing and improper information *from Americans*.

In fact, in crafting covert action roles for both the FBI and the CIA, presidents made a conscious decision to keep the American public ignorant.

Thus, leading up to World War II, Franklin Roosevelt authorized the FBI to go beyond investigating "conduct forbidden by the laws of the United States" by throwing in the amorphous term "subversion." (As it turned out, this vague term helped open the door to many secret FBI misdeeds over the following decades.)

In ordering the Bureau to expand its domestic security role, Roosevelt agreed with Bureau Director Hoover that it was "imperative" to proceed "with the utmost degree of secrecy. . . to avoid criticism or objections." Therefore, the expansion was not revealed – even to Congress.

The story is the same for the CIA. In creating the CIA, the 1947 National Security Act emphasized coordination and evaluation of intelligence. It

did not even mention covert action. However, a year later, the National Security Council secretly authorized the CIA to engage in covert action. Neither Congress (nor the public) had any chance to debate this transformative change, or to consider what covert tactics might be consistent with the nation's character.

Until the Church Committee, and for much of the time since, Congress compounded the risks posed by excessive executive branch secrecy by limiting itself to oversight that was tepid, at best. The FBI was given a free ride. Congress also found it easier, and safer, to give the CIA a free pass. Congressional Committees charged with oversight made no written record, asked no tough questions, and often indicated a preference *not* to know what was done.

For at least five years after 9/11, Congress was, once again, lax in its oversight. During this time, not a single congressional committee issued a subpoena to the White House. And, at the same time, the White House secretly, and repeatedly, abused its powers.

Unfortunately, the courts have, in general, also been a weak counter to excessive executive power, especially in the national security field. Despite some post-9/11 curbs on detention powers, courts often uncritically accept executive demands for secrecy. And the courts have generally failed to recognize how our growing culture of government secrecy undermines our constitutional frame.

### Harm Caused by Excessive Secrecy

The harm caused by excessive secrecy is not an abstraction. Undue government secrecy threatens our most basic constitutional and democratic principles. The combination of secrecy and a lax Congress also greatly increases risks of abuse and of decisions harmful to America's long-term interests.

Our Founders recognized, and our history proves, that decisions made in secret without debate are more likely to be bad decisions. As James Madison

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put it, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Similarly, as Madison explained in the 51st Federalist, because people are not “angels,” government must, among other things, “control itself.” But, if, as is increasingly the case, secrecy blinds Congress, the public, and others to the truth, “control” is impossible.

Of course, citizens have the final checking power at the ballot box. But to play their proper role, citizens must know what is being done by their government.

Making decisions without debate, and with the expectation of perpetual secrecy, has harmful consequences. One is that the “decider” is less likely to consider risks. The Church Committee observed this in its analysis of covert action. Thus, for example, five decades later we are still living with the harm caused by the CIA’s overthrow of Iran’s Mohammad Mossadegh.

Only time will tell how lasting will be the damage from our misinformed foray into Iraq, or the government’s secret decisions to descend to torture and indefinite detention. But clearly, our nation has been hurt in the short term. As Colin Powell said after some post-9/11 tactics had been exposed: “The world is beginning to doubt the moral basis of our fight against terrorism.”

Similarly, when programs are devised and operated in secret, they all too often abandon American values. Indeed, they are far more likely to use tactics of the enemy. This was explicitly recommended by the secret report of a high level presidential task force in 1954. In the Cold War, the task force argued, “hitherto acceptable norms of human conduct do not apply.” Tactics “more ruthless than [those] employed by the enemy” should be adopted if necessary.

Based upon its investigation, and exposure, of secret, “ruthless” Cold War tactics deployed both at home and abroad, the Church Committee concluded that “[t]he United States must not adopt the tactics of the enemy. Means are as important as ends. Crises make it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened.”

Apt three decades ago, those words are even more apt today. For to combat the unspeakable acts of Bin Laden and his ilk, the Bush Administration secretly resorted, for example, to torture – using techniques copied from our Korean War enemies.

The post 9/11 reasoning of Alberto Gonzales and John Yoo could have been copied from the 1954 task force. Thus, they claimed the “nature of the new war” rendered “obsolete” the Geneva Conventions’ limit on questioning prisoners – forgetting the limits were designed to prevent repetition of World War II torture of American prisoners. Indeed, after the Gonzales and Yoo opinions, our government engaged in acts for which we had prosecuted Japanese soldiers as war criminals.

Because they abandoned America’s values, the secret policies of the recent Administration made us less safe. Less safe because our allies became less willing to cooperate. And less safe because we handed our enemies a powerful recruiting tool.

### **What to Do?**

Of course there are laws and executive orders that can be passed or promulgated to combat excessive secrecy. President Obama’s first executive order began to open up government. And the Brennan Center has just completed a lengthy report calling for legislation to repudiate claims of executive privilege that block proper inquiries by Congress.

But legislation seldom comes unless the public is convinced of the need for

change. This truth lies behind the saying that “I don’t care who writes the laws as long as I can write the songs.” (Of course one really wants to do both, but always remembering that popular understanding is a midwife for laws.)

Change needs teachers. And what needs to be taught is that good policy is more likely when derived through transparency.

Similarly, for presidential decision making, the controlling factor is not laws, but understanding – a president’s understanding of history, as well as the confidence, maturity, intellectual curiosity, interest in debate and open-mindedness of each president. Fortunately, our new President seems to have an extremely open and reflective style of making decisions.

Through more attention to civic literacy we can increase the chances of future presidents doing the same.

To build the case for change, we also need to show how excessive secrecy has harmed the country. If, as a nation, we knowingly blind our eyes to the truth, we increase the risk of repetition when the next crisis comes. We need to lay out for the public and for future administrations what went wrong and what went right.

Part of knowing the truth is simple: the Obama Administration should release all the Justice Department legal opinions that purport to justify torture, rendition to countries that torture, or warrantless wiretapping, as well as those that conclude presidents have some supposed “inherent power” to ignore laws. There is no justification for keeping such opinions secret. Their release will help “arm” the people and the Congress “with the power which knowledge gives.”

But there is more to do to let the public know the truth and learn the lessons. This is why I recommend the creation of a non-partisan independent Commission with a mandate to investigate national counter-terrorism policies. This is a different approach than taken by people who clamor for crimi-

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March 25–26 New York City

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April 2 Albany

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(9:00 am – 1:00 pm)

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April 3 Rochester

April 17 Albany; New York City

April 24 Buffalo; Long Island

### Practical Skills Series: Family Court Practice

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April 20 Albany

April 21 Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

### Starting Your Own Practice

(8:30 am – 5:00 pm)

April 21 New York City

### †5th Annual International Estate Planning Institute (two-day program)

April 23–24 New York City

### †Advanced Tax Return and Financial Statement Analysis for Matrimonial Lawyers

(9:00 am – 1:00 pm)

*Fulfills NY MCLE requirement (4.0): 4.0 professional practice/practice management*

April 24 Rochester; Westchester

May 8 Long Island

May 29 Syracuse

June 5 New York City

June 12 Albany

### Civil Trial Practice in the Ninth Judicial District

(3:00 pm – 5:00 pm)

April 30 White Plains

### International Practice Day/Beginner Level

April 30 New York City

### Practical Skills Series: Basic Elder Law Practice

May 5 Albany; Buffalo; Long Island; Rochester; Syracuse

May 11 Westchester

May 15 New York City

### Basic Securities Law for the Business Practitioner

May 7 New York City

### DWI on Trial – The Big Apple IX Seminar

(two-day program)

May 7–8 New York City

### 2009 Insurance Coverage Update

May 8 Albany; Buffalo; New York City

May 15 Long Island; Syracuse

### General Auto Liability

May 13 New York City; Syracuse

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May 28 Long Island

May 29 Buffalo

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May 14 Syracuse

May 20 Albany; Long Island

May 27 Buffalo

June 3 Rochester

June 9 New York City

June 12 Westchester

## 2009 Health Law Institute – Mini Masters in Public Health

May 15 Westchester

## †International Practice Day/Advanced Level

May 15 New York City

## Practical Skills Series: How to Commence a Civil Lawsuit

May 19 Albany; Buffalo; Long Island;  
New York City; Syracuse;  
Westchester

## Effectively Handling Consumer Bankruptcies

(9:00 am – 1:00 pm)

May 28 New York City

May 29 Long Island

June 5 Rochester

June 10 Albany; Syracuse

## New York State's Brownfields Program and Beyond

June 2 New York City

June 4 Albany

June 10 Long Island

June 11 Syracuse

## Practical Skills Series: Collections and the Enforcement of Money Judgments

June 2 Albany; Long Island;  
New York City; Syracuse;  
Westchester

## Practical Ways to Handle Employment Issues in Today's Volatile Economy

June 3 Albany

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## PRESIDENT'S MESSAGE

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nal investigations. Instead, it reflects the approach of Abraham Lincoln who, soon after his 1864 reelection, said we should "study the incidents" of recent history, "as philosophy to learn wisdom from, and none of them as wrongs to be revenged."

Of course, as President Obama said, his Administration wants to move forward and "make sure that moving forward, we are doing the right thing." But to move forward wisely, we need to understand the past. We need to understand and explore root causes as well as symptoms. We need to understand whether it is correct, as I argue, that America loses its greatest strength when it abandons its values. President Obama surely understands this. But the public needs to understand as well. For without public understanding, it is almost inevitable that the next time we face a terrorist incident – as we surely will – the country will slip back into excess.

America is best when we "confront our mistakes and resolve not to repeat them. If we do not, we will decline; but, if we do, our future will be worthy of the best of our past."

And so to finish:

Instead of the silence of secrecy, let freedom ring.

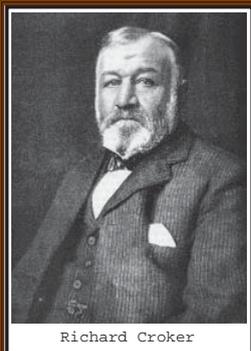
Instead of the darkness of secrecy, let the light shine.

And let us pledge that the only thing that ends up hidden in a "secure, undisclosed location" is . . . secrecy itself. ■

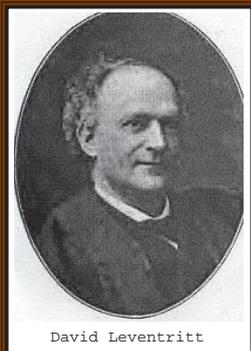
1. On January 27, 2009, President Obama also created a Task Force whose duty is to propose changes in the manner of trying Guantanamo Bay detainees. Our State Bar advocated for and, with the skillful voice of Fernando Bohorquez, Chair of our Civil Rights Committee, succeeded in convincing the ABA House of Delegates on February 16, 2009, to urge President Obama to make certain changes so that detainees receive basic, fundamental human rights. A copy of the resolution can be found at [www.nysba.org/guantanamoresolution](http://www.nysba.org/guantanamoresolution). The State Bar is sending copies to President Obama and his Task Force.

2. Frederick A.O. Schwarz, Jr. & Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror*.

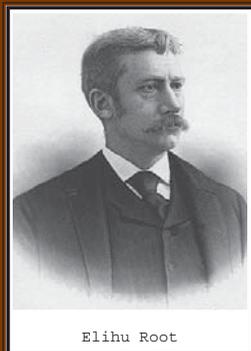
3. This program, entitled "Saving Your Home from Foreclosure," can be found at [www.nysba.org/peopleslawschool](http://www.nysba.org/peopleslawschool).



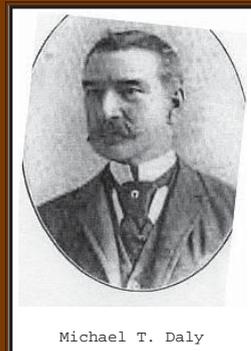
Richard Croker



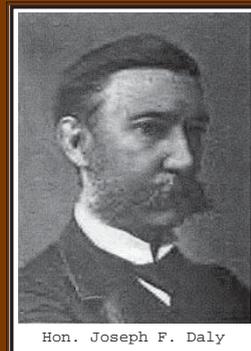
David Leventritt



Elihu Root



Michael T. Daly



Hon. Joseph F. Daly

# “Tammany Hall Had a Right to Expect Proper Consideration”

The Judicial Nominations Controversy of 1898

By William H. Manz

NEW YORK HERALD. SUNDAY. OCTOBER 23. 1898.



WHICH WILL ESCAPE?

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“Justice Daly was elected by Tammany Hall after he was discovered by Tammany Hall, and Tammany Hall had a right to expect proper consideration at his hands.”<sup>1</sup> This candid statement made in 1898 by Boss Richard Croker, explaining his refusal to renominate a respected state supreme court justice, provoked a major controversy over politics, patronage, and judicial nominations. It still is the most contentious episode in the long-running debate over the selection of judges in New York, an issue that most recently surfaced in January 2008, when Justice Antonin Scalia, writing for the Supreme Court in *New York State Board of Elections v. Lopez Torres*,<sup>2</sup> rejected claims that New York's judicial nominating convention system violates the First Amendment.<sup>3</sup>

### Elective Judiciary

*Lopez Torres* and the Croker-Daly affair both resulted from the elective judiciary system established by the Constitution of 1846. Until 1821, New York judges were chosen by a special “Council of Appointment,” a method that was later changed to appointment by the governor with the consent of the state Senate. The 1846 switch to an elective judiciary was due in part to popular democratic sentiments that originated with the Andrew Jackson Administration in the 1820s and to dissatisfaction with an appointed judiciary spawned by the Anti-Rent movement, which swept through upstate New York during the early 1840s.<sup>4</sup>

Fears that politicians would seek to influence judicial selections were realized in 1857, when Mayor Fernando Wood attempted to block the renomination of Court of Appeals Judge Hiram Denio, because Denio had upheld a law establishing a state-controlled police force in New York City.<sup>5</sup> Wood failed, but in 1863 the city's Democratic leadership successfully replaced two well-regarded judges, Superior Court Chief Justice Joseph F. Bosworth and Court of Common Pleas Judge Henry Hilton, with John H. McCunn and Albert Cardozo. Particularly galling to many was the election of McCunn, described by the *New York Times* as “probably the worst man that ever offered himself as a candidate for a judgeship in any civilized country.”<sup>6</sup> The paper also made the dire prediction that in the future “we should have doled out to us from the Bench the rough and pungent wisdom of the pot-house and the prize-ring.”<sup>7</sup>

Despite complaints about the elective judiciary, delegates to the Constitutional Convention of 1867 did not attempt to restore the old appointive system, limiting their reform efforts to extending the length of judicial terms. In a referendum held six years later, the voters decisively rejected a return to the old system. The previous year, the newly established Bar Association had struck a blow in support of judicial quality with its successful effort to oust three Tammany judges, Cardozo, McCunn, and the equally notorious George G. Barnard. Thereafter, Tammany Hall refrained from nominating the likes of McCunn and calls for reform in the judicial selection process became more muted.

Tammany's effort to improve the image of its judicial candidates was successful.

Judicial selection was scarcely mentioned at the Constitutional Convention of 1895, the same year that a prominent reformer, attorney James C. Carter, wrote to Governor Levi Morton regarding seven New York City trial judges, stating:

I suppose all of them owe their positions pretty much to Tammany Hall, and I have been surprised at two things: first, that that organization should have selected such good men, and, second, that they should have exhibited so little subserviency to the power to which they are indebted for their places.<sup>8</sup>

However, this view of Tammany's control of judicial nominations abruptly changed when it became known that Croker was refusing to renominate Justice Daly.

### Justice Joseph F. Daly

Joseph F. Daly, the object of Croker's displeasure, had been on the bench since 1870. Interested in the theater, literature, and rare books, he was described as "an exemplar of the character of a cultured Catholic gentleman."<sup>9</sup> Daly was a member of the Law Institute, the Geographic Society, and the Friendly Sons of St. Patrick. He was also president of the exclusive Catholic Club, and in May 1898 played a prominent role in the celebration of the silver jubilee of Archbishop Michael Corrigan. The brother of one of the city's leading theater managers and producers, Augustin Daly, Joseph Daly was a founding member of the Players Club, an organization intended to bring together leading lawyers and businessmen with persons from the theatrical world.

Born in Plymouth, North Carolina, in 1840, Daly was the son of Irish immigrant Denis Daly, a shipmaster and lumber merchant. After his father's death in 1849, his

mother relocated the family to New York City. As a youth, Daly was a member of an amateur theatrical society and is credited with writing several plays that were originally attributed to his brother, Augustin. He began his legal career as an office boy with the firm of Robert B. and Silas Weir Roosevelt, uncles of Theodore Roosevelt, rising to clerk, and then managing clerk, before becoming a member of the firm after his admission to the bar in 1862. By 1867, he was a partner in his own firm, Daly, Henry & Olin.

Daly's public career began in 1864 as counsel for the Citizens' Association, a municipal reform group founded by businessman and philanthropist Peter Cooper. Six years later, he was nominated for justice of the Court of Common Pleas by Tammany Hall. According to Boss Tweed, Daly and two other prominent Association members, Nathaniel Sands and Stephen M. Henry, were nominated to "take care of them," and because they were "strong men who could help us in every way."<sup>10</sup> Daly, who maintained that he'd never spoken to Tweed in his life, believed he was slated by a top Tweed associate, attorney Peter B. "Brains" Sweeny, because Tammany wanted to "exhibit an intention to put on the bench the most independent and fearless men who could be found" and "exhibit a determination to elevate the judiciary."<sup>11</sup> Such intention is reflected in Tammany-connected Corporation Counsel Richard O'Gorman's 1870 campaign speech, which praised the organization's judicial slate as one of which any party or community could be proud.<sup>12</sup>

Tammany's effort to improve the image of its judicial candidates was successful. *The New York Times*, which only a few years before had been condemning Tammany's judicial nominees in the harshest terms, described the Common Pleas ticket as "a very good one" and characterized Daly as "a young lawyer of rare promise."<sup>13</sup> Following the common practice of the day, Daly paid an assessment of \$3,500 for campaign costs<sup>14</sup> and along with the entire Tammany ticket was easily elected. In 1884, Daly was renominated by Tammany, paid assessments totaling \$7,000,<sup>15</sup> and was duly reelected. Six years later, he was elevated to chief justice of the Court of Common Pleas, but when that court was abolished by the Constitution of 1896, he became one of the 22 supreme court justices in the First Judicial District.

Daly enjoyed a good reputation as a jurist. He was praised for the "high order of his judicial work and his unswerving integrity."<sup>16</sup> While on the bench, his more notable cases included the applicability of Sunday closing laws to theatrical productions,<sup>17</sup> whether New York City stock held by the Sinking Fund commissioners counted against the city's debt limit,<sup>18</sup> and an acrimonious dispute over the dramatization of Mark Twain's novel *The Prince and the Pauper*.<sup>19</sup> He also had his share of unseemly domestic relations cases, including the demand of a young man that his uncle's widow return the \$28,000

he'd given her after they allegedly agreed to marry,<sup>20</sup> and a divorce suit where a woman accused her wealthy husband of having an affair with her sister.<sup>21</sup>

### Boss Richard Croker

Unlike Daly, Richard Croker had no reported interest in the theater or the arts, but instead favored strong cigars and race horses. In manner and appearance, however, the Boss did not conform to the stereotypical image of a machine politician. Instead, the usually taciturn Croker was once described as "a mild-mannered, soft-voiced, sad-faced, green-eyed chunk of a man."<sup>22</sup> His supporters lavishly praised him; wealthy Democratic attorney Henry Lauren Clinton once characterized Croker as "the shrewdest, most far-sighted, the ablest, most popular, and successful leader Tammany Hall has had within the last forty years."<sup>23</sup> To supporters, he projected an aura of sagacity, and it was said that "[n]o man that ever lived was half as wise as Croker sometimes looks."<sup>24</sup>

Naturally, good government reformers took a decidedly different view, seeing Croker as the personification of all the evils of late-19th-century New York City politics. His often vociferous critics included the *New York Times*, which variously derided him as "a notorious ruffian"<sup>25</sup> and a "Tammany politician of the lowest type."<sup>26</sup> Whatever one's opinion of Croker, however, his political power was undeniable. As reformer Carl Schurz remarked in 1898: "It is no mere jest when people call Richard Croker the King of the City of New York."<sup>27</sup>

The so-called "king" enjoyed a lifestyle consistent with such a title. By the early 1890s, Croker had become enormously wealthy, not by stealing from the city treasury like the Tweed Ring, but through what he called "honest graft" – lucrative investments made available by those anxious to curry favor with the powerful political boss. With his wealth, Croker built an expensive home, purchased a horse farm, and acquired a string of race horses. He took annual vacations to Europe, and while in Britain lived the life of an aristocratic sportsman. Separated from his wife by 1898, he moved into an apartment at the newly refurbished and lavishly appointed Democratic Club at 617 Fifth Avenue.

Born in Blackrock, Ireland, in 1843, and brought to the United States at the age of two, Croker's first Manhattan home was a shanty town located in what is now western Central Park. After his father, Eyre Coot Croker, a blacksmith and veterinary, obtained regular employment with a horse car company, the family was able to move to a home near Third Avenue, at the edge of the so-called "Gas House District." The future boss received a minimal education in the public schools, and as a teenager was employed in a railroad machine shop. Adept with his fists, the burly Croker won several prize fights and

CONTINUED ON PAGE 16

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became a leader of a group of young toughs known as the Fourth Avenue Tunnel Gang.

Croker entered Democratic politics as a member of a Gas House District faction led by Jimmy “the Famous” O’Brien, a Tweed district leader. He was rewarded in 1868 with a seat on the Board of Alderman. But after O’Brien fell out with Tweed, Croker along with every member of the Board was legislated out of office by the new Tweed-backed Charter of 1870. O’Brien’s faction soon rejoined Tammany Hall, but with the fall of Tweed, O’Brien again split from the organization. Croker, however, remained, attaching himself to the new Tammany boss, “Honest John” Kelly, and was elected a coroner in 1873.

A year later, an Election Day brawl with a group led by O’Brien almost brought a sudden end to Croker’s career. An O’Brien supporter was fatally wounded, but

### Tammany Hall Returns

By 1897, the electorate had soured on reform government, particularly Theodore Roosevelt’s efforts to enforce the Sunday liquor laws. In the words of one commentator, the Strong Administration “had got between the people and its beer.”<sup>30</sup> Sensing victory, Croker made a grand return from Britain and retook control of Tammany from James C. Sheehan, a none-too-popular former Buffalo resident who had been in charge in his absence. He then engineered the mayoral nomination of an obscure City Court judge, Robert A. Van Wyck, who was elected easily, receiving more votes than Fusion candidate Seth Low and Republican Benjamin Tracy combined.

Croker and Tammany Hall expected even greater things in the gubernatorial election of 1898. The Boss’s hand-picked candidate, the Mayor’s brother, Augustus Van Wyck, was a relatively unknown Brooklyn supreme court justice with a spotless reputation. His opponent,

O’Brien and several supporters testified that Croker had indeed shot the victim, but the defense produced several witnesses who claimed that Croker was exchanging blows with O’Brien at the time of the shooting.

before dying stated that it was Croker who had shot him. Croker denied shooting anyone and maintained that he never carried a gun. At trial, O’Brien and several supporters testified that Croker had indeed shot the victim, but the defense produced several witnesses who claimed that Croker was exchanging blows with O’Brien at the time of the shooting. The jury deadlocked at six-to-six and Croker was released; there was no second trial, and in subsequent years the general consensus was that he did not fire the fatal shot.<sup>28</sup>

Despite his murder trial, Croker won reelection as a coroner in 1876, but he did not survive the Republican and anti-Tammany victory in the 1879 elections, finishing last among eight candidates.<sup>29</sup> Thereafter, Croker did not seek elective office, but instead concentrated his efforts on Tammany politics and making himself indispensable to “Honest John” Kelly. After Kelly’s death in 1884, Croker was one of the group of four who assumed control, and by 1886 he was the undisputed leader of Tammany Hall. Under Croker’s leadership, Tammany won four consecutive mayoral elections, but in 1894, sensing that the Lexow Committee’s revelations of widespread police corruption made a victory by the reformers all but certain, he announced his retirement and left for England.

As expected, Republican mayoral candidate, William L. Strong, crushed Tammany Democrat Hugh J. Grant in 1894.

Theodore Roosevelt, was not particularly popular in New York City, and the Republican Party had been hurt by an Erie Canal reconstruction scandal, and charges of mismanagement of the recently ended Spanish-American War. Croker predicted a 100,000-vote margin of victory, while a report in the *New York Herald* of October 14 maintained that so many voters had swung over to the Democrats that Van Wyck would win by 70,000 votes.<sup>31</sup>

### Ingratitude

New York City Democrats were elated by the prospect of a Van Wyck victory, but many were disturbed by rumors that Tammany Hall was not going to renominate Justice Daly. These rumors were soon confirmed when Daly was told not to expect renomination because of his refusals to make a patronage appointment and sign a judicial order,<sup>32</sup> actions that violated Croker’s conceptions of gratitude, party discipline, and loyalty. As the Boss once said, “gratitude is the finest word I know. I would much prefer a man to steal from me than to display ingratitude.”<sup>33</sup> He believed that “[l]egitimate patronage is legitimate politics.”<sup>34</sup> And he did not exempt judges, candidly admitting at the Mazet Committee hearings in 1899 that they should “appoint their subordinates as a true mem-

# Law. And order.

## Cases and Matters

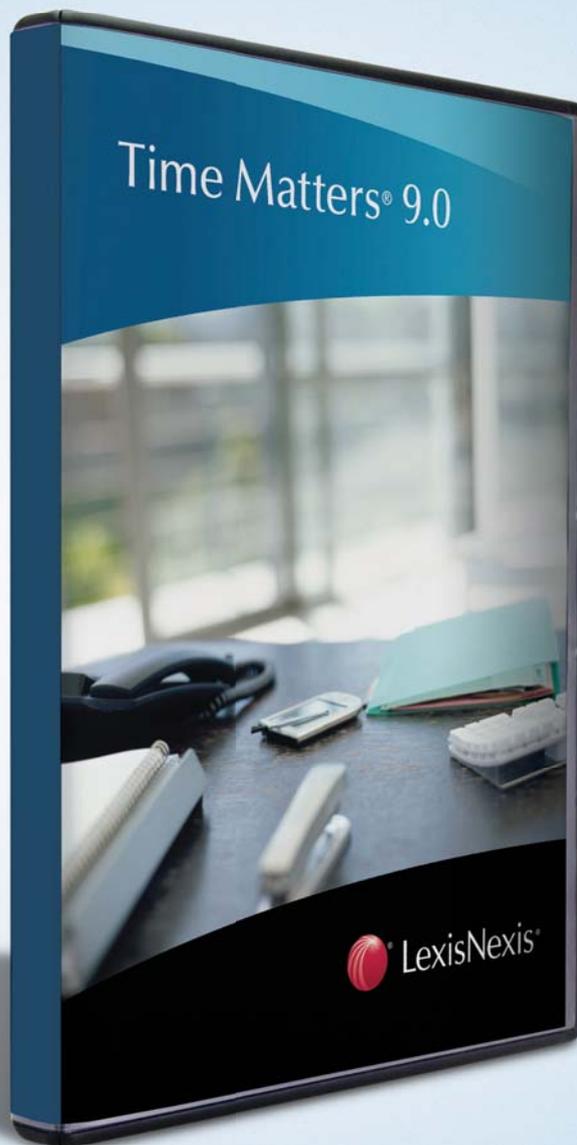
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ber of the party should . . . [and] [i]n all matters of patronage, they should consider the organization.”<sup>35</sup>

Justice Daly had angered Croker when he refused to appoint Michael T. Daly chief clerk of the Court of Common Pleas. Known as Croker’s “second self,” Michael T. Daly was a loyal, long-time city office holder, who had served as clerk of both the Marine Court and City Court. The Common Pleas clerkship had been held for years by one-time Tammany sachem Nathaniel Jarvis. But, in 1889, Jarvis, already accused of dissipating the \$100,000 estate of a Bombay merchant declared incompetent while visiting New York, was implicated in a fraudulent divorce obtained by New York County Sheriff and Tammany sachem James A. Flack. When the scandal-plagued Jarvis resigned, Samuel Jones, a wealthy ex-judge, was asked by the justices to take the position. Croker requested that Jones be replaced. Justice Daly refused, maintaining that the clerk must be an experienced attorney.

Justice Daly’s other offense was his refusal to sign an order changing the location of judicial sales. Judicial sales had once been held at an auction house at 111 Broadway. When this establishment closed, the sales were moved to the Real Estate Exchange. In 1892, well-known auctioneer Peter F. Meyer opened a rival establishment at the 111 Broadway address, and Croker asked that the sales be moved to their old location. Unknown to Daly, the Boss was Meyer’s silent business partner. Daly refused to make the order before holding a hearing so that all interested parties could be heard, and again he incurred Croker’s displeasure.<sup>36</sup>

When rumors started circulating that Daly would not be renominated, Croker began getting unwelcome inquiries from the judge’s supporters. These were not well received, and it was said that “[t]o arouse Mr. Croker to an angry mood it is necessary only to mention the name of Judge Daly.”<sup>37</sup> When Tammany officially passed over Daly for renomination, it slated a supreme court ticket consisting of Judge James Fitzgerald of the Court of General Sessions, George Andrews who had been a supreme court justice from 1883 to 1897, and well-known Manhattan attorney David Leventritt.

### ***“What is there left of government if judges are to obey bosses?”***

Tammany’s failure to renominate Daly brought immediate protests from the legal community, whose main theme was Croker’s alleged assault on judicial independence. On October 16, the Bar Association endorsed Daly and William N. Cohen, a Republican who had been appointed to a supreme court vacancy a year and a half earlier by Republican Governor Frank S. Black. A petition supporting Daly and Cohen was signed by over 3,000 lawyers. Numerous meetings were held, including large

events at Cooper Union, Apollo Hall, and Carnegie Hall. A Committee of One Hundred, which included many prominent attorneys, was formed to support Daly and Cohen.

Among Croker’s most vocal critics was Elihu Root, Chairman of the Bar Association’s Judicial Nominations Committee. At the Cooper Union meeting, Root said: “The question is whether the people of this city, with the issue clearly drawn, are going to approve the domination of the courts by Mr. Richard Croker.” Not content with attacking Croker and endorsing Daly and Cohen, Root induced the Association to pass a controversial resolution, opposed by some members, condemning Tammany nominee David Leventritt. Citing alleged irregularities in his law practice years before, it stated that Leventritt’s “professional and moral standing are low” and “his presence on the bench would lower its tone and impair its credit and efficiency.”<sup>38</sup>

From the start, Theodore Roosevelt realized that the judicial independence issue could be a great help to his campaign. On October 10, before Daly had been officially passed over, he suggested: “Don’t you think we should nominate Daly! It would be a great card for us.”<sup>39</sup> Wasting little time, the Republicans did just that the next day. Judicial independence then became a major theme for Roosevelt throughout the state. In Little Falls he told his audience that “we should have on the bench men who recognize obligations to no party organization in their functions and duties,” and added a warning to upstate voters that a Governor Van Wyck “could send Mr. Croker’s judge to sit in judgment anywhere from Buffalo up to Plattsburgh and down to New York.”<sup>40</sup> Agreeing with Roosevelt, an upstate newspaper asked: “What is there left of government if judges are to obey bosses?”<sup>41</sup>

Croker fueled the controversy by departing from his usually closed-mouth approach to political matters. According to a leading Daly supporter, John D. Crimmins, a wealthy Catholic contractor and real estate dealer, the whole controversy might never have arisen if Croker had simply stated that the judge had been on the bench for 28 years and it was time to give somebody else a chance. Instead, Croker issued his statement about Tammany being entitled to proper consideration from the judge. He also tried to defend Tammany’s record on judicial nominations, and maintained that he’d never asked Daly for any favors in his life.

Not content with defending Tammany’s judicial record, Croker also went on the offensive. He characterized the Bar Association as “nothing more than a partisan machine run by Elihu Root, a Republican and a corporation lawyer,”<sup>42</sup> and suggested that a new bar group be formed. He attacked both Root and another Association leader, Joseph H. Choate, as “partisan trust lawyers,”

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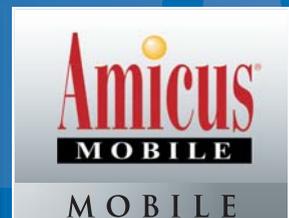
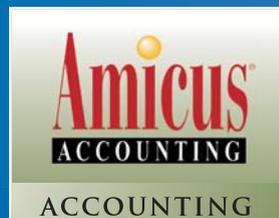
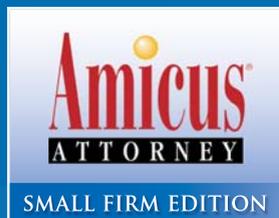
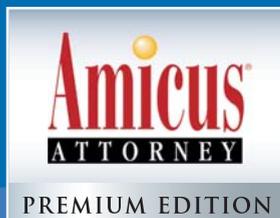


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2009

maintaining they “represent[ed] a Puritanical element, of whose domination this city has had enough.”<sup>43</sup> Recalling that Root once served as Boss Tweed’s defense attorney and that Daly was nominated by the Tweed organization, he characterized Root’s efforts on Daly’s behalf as “an attempt by Tweed’s lawyer to re-elect Tweed’s judge.”<sup>44</sup> He also claimed that Daly was not “not an upright judge,”<sup>45</sup> although the best Tammany could do to substantiate this statement was the charge that Daly had given a disproportionate number of references to his old law partner, Stephen M. Henry.<sup>46</sup>

A few years later, after learning of property transfers to his new wife, Croker’s surviving children attempted to have him declared incompetent.

At the final Tammany election rally on November 3, Croker’s allies weighed in on the issue. Register Isaac Fromme denounced Daly as a “grinning hypocrite,” while Syracuse Mayor James K. McGuire compared Croker favorably to Republican Boss Thomas C. Platt, who, he claimed, named the judges and clerks in 50 New York counties. Referring to Croker’s request that Michael T. Daly be appointed clerk of the Court of Common Pleas, prominent German-American attorney Theodore Sutro stated: “It is ridiculous to say that to have expected such an appointment was tampering with justice. A Judge is not elected to appoint clerks, but to dispense justice.”<sup>47</sup>

On Election Day, Tammany’s entire judicial slate was victorious. Daly polled over 120,000 votes, but each of the three Tammany nominees received over 160,000.<sup>48</sup> In the governor’s race, Augustus Van Wyck won New York City by over 80,000 votes, and carried Buffalo and Albany, but Roosevelt’s majorities elsewhere enabled him to eke out a statewide majority of 17,794 out of approximately 1.3 million votes cast.<sup>49</sup> Croker attributed Van Wyck’s defeat to the popularity of “the soldier candidate,” and took a final shot at Daly and his supporter, Crimmins, labeling them “soreheads.”<sup>50</sup>

However, many commentators took an entirely different view of the election results. *The New York Times* stated: “To Richard Croker and to him alone belongs the responsibility for the Democratic defeat in the State of New York. He enforced his brutal and selfish will in the judiciary nominations at a moment when the tide was visibly carrying his party to certain victory.”<sup>51</sup> Many oth-

ers, including prominent Democrats, agreed. Well-known attorney William B. Hornblower observed: “[10,000] votes, in my judgment, [were] lost to Van Wyck and transferred to Roosevelt because of the turning down of Judge Daly and the views expressed as to the right of the Tammany organization to consideration from the Judges elected by Tammany Hall and the right of the organization to control the action of the judiciary.”<sup>52</sup>

### After the Election

Roosevelt’s victory was the first in a series of setbacks for Croker that led to his downfall as Tammany leader. In 1900, he made an ill-advised venture into national politics, enthusiastically backing losing presidential candidate William Jennings Bryan. Worse, in 1901, Tammany’s mayoral candidate, Edward M. Shephard, was decisively defeated by Fusionist reformer Seth Low. Many attributed the defeat to an ice trust scandal: Croker and both Van Wyck brothers were revealed to be major stockholders in a company that had planned to monopolize the New York City ice business and double prices.

Croker retired as Tammany leader in early 1902, and thereafter split his time between his Irish estate and a Florida home. In 1907, his horse won the Epsom Derby, but King Edward VII snubbed the ex-Boss by not inviting him to the traditional Buckingham Palace post-race dinner. Otherwise, it was Croker’s personal life that made the news, including the untimely deaths in 1905 of his sons Frank (in a Florida race car accident) and Herbert (after an alleged visit to a Kansas City opium den), and daughter Ethel’s 1912 divorce from a stable employee and subsequent remarriage to a Long Island millionaire. A month after his estranged wife died, in 1914, the 71-year-old Croker married 30-year-old Bula Benton Edmondson. A few years later, after learning of property transfers to his new wife, his surviving children attempted to have him declared incompetent. Croker’s death in Ireland, in 1922, set off a nasty, long-running battle over his estate between Bula and his children. It reached the Florida Supreme Court,<sup>53</sup> the New York State Court of Appeals,<sup>54</sup> and the United States Supreme Court.<sup>55</sup>

Justice Daly attempted to regain a place on the state Supreme Court in 1899, running as a Republican, but was defeated. He then refused Governor Roosevelt’s offer of an appointment as New York County Surrogate, but in 1900, served on the commission to revise the laws of Puerto Rico. He also managed the estate of his brother, Augustin, who had died in 1899, but otherwise his activities were largely taken up with the practice of law. In recognition of his service to Catholic causes, he was made a Knight Commander of St. Gregory by Pope Benedict XV in 1916. When he died later that year, he was described in a *New York Times* editorial as “an able lawyer and an

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upright judge . . . [who] earned and kept the respect of the community.”<sup>56</sup>

After the 1898 election, Tammany’s control of judicial selections again ceased to be a major issue. Daly’s opponent in that election, the much-maligned David Leventritt, became a respected jurist. In 1906, on a motion by Elihu Root, the Bar Association removed its 1898 resolution condemning him, and passed another stating that his judicial service had “been marked by ability, learning, diligence and a strong sense of justice.”<sup>57</sup> Two years later, when for financial reasons Leventritt resigned to return to his law practice, the dinner held in his honor at the Hotel Astor was attended by over 500 members of the bench and bar. When he died in 1926, Root called his death a “real loss,” while another commentator observed that Leventritt’s record “proved the wisdom of putting on the bench men who had a large experience and practice before the bar.”<sup>58</sup>

### Judicial Selection – Judicial Quality

In 1909, Governor Charles Evans Hughes proposed a bill to provide for direct primary elections for judges. Two years later, a watered-down version was enacted that allowed the use of party emblems on the ballot and the use of party funds to promote the leadership’s candidates.<sup>59</sup> There was almost immediate dissatisfaction with the system, and in 1917, the *New York Times* editorialized: “Already nearly every one sees that Judges ought to be selected by conventions rather than by direct primary.”<sup>60</sup> Three years later, Governor Miller called the primary system “a delusion and a snare,”<sup>61</sup> while the *Times* called it “wasteful and useless,” claiming that “the nomination of State and judicial officials by party conventions is a necessary and a long step in the right direction.”<sup>62</sup> In 1921, over the objections of Tammany Hall, which found the primary system advantageous, the Legislature enacted a law establishing the state’s current nominating convention system.

Not surprisingly, the convention system did not end complaints about party control of judicial nominations. A particularly noteworthy incident occurred in 1931, when three of 12 newly created supreme court positions were allotted to the Brooklyn Democratic organization, with one nomination going to the undistinguished 31-year-old son of its boss, John H. “Uncle John” McCooey. *The New York Times* characterized this arrangement as “of the most sordid kind,”<sup>63</sup> but voter indifference was demonstrated when the candidates of the “No Deal Judiciary Party” were defeated by a margin of five to one. In 1943, judicial elections drew attention when a Democratic/Republican supreme court nominee, Thomas A. Aurelio, was overheard on a tapped telephone pledging “undying loyalty” to mobster Frank Costello.<sup>64</sup> Both parties withdrew their

endorsements, but there was no election law provision for taking Aurelio off the ballot, and he garnered sufficient votes in the general election to win a seat on the bench.<sup>65</sup>

Despite calls for reform by the Bar Association, in 1953 and 1973 gubernatorial commissions rejected eliminating judicial elections in favor of an appointment system. More recent proposals include the Feerick Commission’s plan to reform judicial elections,<sup>66</sup> and the commission-based appointment plans called for by the Commission on Government Integrity in 1988,<sup>67</sup> the New York State Bar Association’s 1993 Model Plan,<sup>68</sup> and the 2006 recommendations of the City Bar’s Judicial Selection Task Force.<sup>69</sup> Regardless of what plan, if any, is ever adopted, the goal should, of course, be the same as many of those who supported Justice Daly in 1898 – placing the best candidates on the bench. ■

1. Lathrop Stoddard, *Master of Manhattan: The Life of Richard Croker* 203 (1931).
2. 128 S. Ct. 791 (2008).
3. For a recent discussion of the judicial selection process, see James A. Gardner, *New York’s Selection Process is Fine – It’s the Party System That Needs Fixing*, N.Y. St. B.J. (Sept. 2007) p. 42.
4. The Anti-Rent movement involved tenant farmers’ refusal to pay rents due under manorial land tenures that dated from the days of Dutch rule. For a history of this movement, see Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics: 1839–1864* (2001).
5. See *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857).
6. *The City Judiciary Elections – Its Hopeless and Hopeful Aspects*, N.Y. Times, Nov. 7, 1863, at 4.
7. *Id.*
8. Letter from James C. Carter to Governor Levi P. Morton (Feb. 19, 1895) (Levi P. Morton Papers, Syracuse University), quoted in Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 Law & Hist. Rev. 577, 601 (2002).
9. Edward J. McGuire, *The Catholic Club and Its Library*, 7 Rosary Mag. 162, 175 (1895).
10. *Justice Daly and Tweed*, N.Y. Times, Oct. 19, 1898, at 2 (quoting Part II, Documents of the Board of Alderman 222–23 (1877)). Nathaniel Sands was nominated for tax commissioner, and Daly’s law partner, Stephen M. Henry, was nominated for dock commissioner.
11. 1 Report of the Special Committee of the Assembly Appointed to Investigate the Public Offices of the City of New York and the Counties Therein Included 376 (1900) (“Mazet Committee Report”).
12. *Id.* at 380.
13. *Tammany Nominations*, N.Y. Times, May 10, 1870, at 8.
14. 1 Mazet Committee Report, *supra* note 11, at 380.
15. *Id.*
16. *Id.*
17. See *Neuendorff v. Duryea*, 6 Daly 276 (Ct. Common Pleas, N.Y. Co. 1875), *aff’d*, 69 N.Y. 557 (1877).
18. See *The Sinking Fund Decision*, N.Y. Times, Dec. 7, 1885, at 4; *Defining the City Debt*, N.Y. Times, Feb. 2, 1886, at 8; *Bank for Sav. in the City of N.Y. v. Grace*, 7 N.E. 162 (N.Y. 1886).
19. See *House v. Clemens*, 9 N.Y.S. 484 (Sup. Ct., N.Y. Co. 1890).
20. See *Miscellaneous City News: Mrs. Jackson-Hunt’s Nephew*, N.Y. Times, May 7, 1879, at 2.
21. See *Accused by Her Son*, N.Y. Times, June 2, 1892, at 10.
22. William Allen White, *Croker*, McClure’s Mag., Feb. 1901, at 325.

23. Henry Lauren Clinton, Celebrated Trials 538 (1897). For a highly flattering profile of Croker, see Henry W. Walker, *Public Spirited Citizens: Richard Croker, in The Brown Book: A Biographical Record of Public Officials of the City of New York for 1898-9*, at 307-11 (1899).
24. Matthew P. Breen, Thirty Years of New York Politics Up-to-Date 766 (1899).
25. *Notes of the Campaign*, N.Y. Times, Nov. 6, 1876, at 4.
26. *The Democratic Canvass*, N.Y. Times, Oct. 26, 1879, at 1. For a comprehensive reformist attack on Croker, see City Club, *Some Things Richard Croker Has Said and Done* (1901).
27. Stoddard, *supra* note 1, at 195 (quoting Carl Schurz, *Our New Monarchy*, Harper's Weekly, Jan. 29, 1898).
28. *Id.* at 56.
29. *Result of the City Vote*, N.Y. Times, Nov. 6, 1879, at 2.
30. Stoddard, *supra* note 1, at 167.
31. John A. Corry, A Rough Ride to Albany: Teddy Runs for Governor 181 (2000).
32. 1 Mazet Committee Report, *supra* note 11, at 369.
33. Stoddard, *supra* note 1, at 79-80.
34. N.Y. Herald, Oct. 30, 1898, sec. 7, at 5.
35. 1 Mazet Committee Report, *supra* note 11, at 344.
36. Daly later claimed that even if he had known the removal of the sales to 111 Broadway was a matter of personal interest to Croker, it would have made no difference. *Id.* at 371.
37. *Pressing Croker to Accept Daly*, N.Y. Herald, Oct. 9, 1898, at 4.
38. *Bar Association Acts*, N.Y. Times, Oct. 16, 1898, at 1.
39. Corry, *supra* note 31, at 193.
40. *Crokerism an Issue in Roosevelt's Talk*, Brooklyn Daily Eagle, Oct. 23, 1898, at 4.
41. *The Republican Campaign*, Northern Trib. (Gouverneur, NY), Oct. 26, 1898, at 4.
42. *The Leventritt Charges*, N.Y. Times, Oct. 17, 1898, at 1.
43. *Id.*
44. *Attacks Root and Daly*, Brooklyn Daily Eagle, Oct. 25, 1898, at 13.
45. *Croker Denounces Daly*, N.Y. Times, Oct. 25, 1898, at 1.
46. *Croker Says That Daly Favored a Friend*, N.Y. Herald, Oct. 26, 1898, at 6. A study compiled for the Mazet Committee indicated that in 1898 Daly gave 23 of 217 references to Henry. He also gave 21 to his other old law partner, Stephen H. Olin. 4 Mazet Committee Report, *supra* note 11, at 3,694.
47. *Tammany's Final Rally*, N.Y. Times, Nov. 4, 1898, at 1.
48. *The City's Vote Revised*, N.Y. Times, Nov. 10, 1898, at 1.
49. Corry, *supra* note 31, at 275.
50. *Storm Ahead for Croker*, N.Y. Times, Nov. 11, 1898, at 1.
51. *Croker's Work*, N.Y. Times, Nov. 9, 1898, at 6.
52. *Id.*
53. See *Croker v. Croker*, 83 Fla. 472, 92 So. 221 (Fla. 1922).
54. See *Croker v. Croker*, 252 N.Y. 345, 169 N.E. 408 (N.Y. 1929).
55. See *White v. Croker*, 273 U.S. 715 (1926).
56. Untitled editorial, N.Y. Times, Aug. 8, 1916, at 8.
57. *David Leventritt, Ex-Justice Dies*, N.Y. Times, Jan. 9, 1926, at 17.
58. *Bench and Bar Mourn Leventritt*, N.Y. Times, Jan. 11, 1926, at 27.
59. Less than a month after the bill passed, a major scandal developed over the sale of judicial nominations. Queens County Democratic leader Joseph "Curly Joe" Cassidy and candidate William Willett were later convicted and sent to Sing Sing. See *Willett in Sing Sing with "Boss" Cassidy*, N.Y. Times, Jan. 14, 1915, at 6.
60. *The State Convention*, N.Y. Times, May 1, 1917, at 12. In 1919, the primary system's ineffectiveness was demonstrated when Justice Joseph Newburger, another 28-year veteran of the bench, was denied renomination by Tammany Hall. Here, Newburger opted to skip the Democratic primary, ran as an independent, and benefiting from a low voter turnout in an off-year election, defeated the organization candidate.
61. *Miller Declares Primary a Fraud*, N.Y. Times, Oct. 23, 1920, at 4.

62. *The Direct Primary*, N.Y. Times, Mar. 30, 1921, at 11.
63. *Judicial Spoils*, N.Y. Times, Oct. 24, 1931, at 16.
64. *The Aurelio Nomination*, N.Y. Times, Aug. 30, 1943, at 14.
65. Aurelio was renominated and reelected in 1957 without incident and retired in 1962. See *Justice Thomas A. Aurelio, 81, of State Supreme Court, Dies*, N.Y. Times, Jan. 6, 1973, at 32.
66. See generally Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York (2006).
67. See generally *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, in Government Ethics Reform for the 1990s: The Collected Reports of the New York State Commission on Government Integrity 271-301 (Bruce A. Green ed., 1991).
68. See generally Report of Action Unit No. 4 of the New York State Bar Association: a Model Plan for Implementing the New York State Bar Association's principles for selecting judges (1993).
69. See generally Judicial Selection Task Force of the Association of the Bar of the City of New York, Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State (2006).

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# BURDEN OF PROOF

BY DAVID PAUL HOROWITZ



## “Brill, Baby, Brill”

Half dozing during the Biden/Palin vice presidential debate, I sat up with a start when I heard Governor Palin chide Senator Biden: “The chant is *Brill, baby, Brill.*” *Brill?* In Alaska? I turned to my wife, Susan. “See, I’m not the only one talking about *Brill*’s impact on New York’s summary judgment practice.” Susan replied, wearily: “You idiot! They are talking about the nation’s energy policy, and what Governor Palin said was: ‘Drill, baby, drill.’ As in oil!” Chastened, I turned back to watch the rest of the debate and, mercifully, was soon sound asleep.

Sadly, this is only one of many times when I have been embarrassed by mistakenly thinking others share my obsession with *Brill*.

Once, while ordering dinner at Le Bernadin, the waiter, in the midst of describing the evening’s specials, asked if anyone at the table was acquainted with *Brill*. Much to the table’s mortification, this sparked a five-minute soliloquy by me about *Brill*’s impact, not only on summary judgment, but upon disclosure practice and expert disclosure. In the cab to Grand Central after dinner, Susan explained, wearily, that *brill* was a type of fish,<sup>2</sup> and one of the specials on the menu that evening.

All right, I admit, I am obsessed with *Brill*. To get over this, and as part of the healing process, on this anniversary of the decision, let me recount *Brill*’s impact on my practice, and yours.

### *Brill v. The City of New York*

Decided a mere five years ago, the Court of Appeals’s landmark decision

in *Brill* clarified that the statutory deadline for moving for summary judgment was to be strictly construed, and the provision permitting late motions by leave on “good cause shown” under Civil Practice Law and Rules 3212(a) “require[d] a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy.”<sup>3</sup>

The timing issue in *Brill* was, to some, a garden-variety scenario:

On June 18, 2002, close to a year after the trial calendar papers were filed, the City moved for summary judgment. The City gave no explanation for filing the motion after the 120-day limit specified in CPLR 3212(a), simply arguing that it did not have prior written notice of the alleged defect at the accident site and that plaintiffs could not show an exception to the prior written notice requirement. Supreme Court determined that in the interests of judicial economy, and since Mrs. Brill did not manifest any prejudice from the delay, it would decide the summary judgment motion on the merits. The court granted the City’s motion, finding plaintiffs did not prove that the City had notice of a

defect at the accident site, and the Appellate Division affirmed.<sup>4</sup>

The Court of Appeals noted that it was undisputed that the motion was late and no excuse was offered for the delay. “Thus, there was no ‘leave of court on good cause shown,’ as required by CPLR 3212(a). The violation is clear.”<sup>5</sup>

For the Court, this was the easy part. “What to do is the more vexing issue.”<sup>6</sup> Referencing its decision five years earlier in *Kihl v. Pfeffer*,<sup>7</sup> the Court characterized the moving parties’ conduct in *Brill* as “present[ing] the same] scenario” as *Kihl*. But *Brill*, “another example of sloppy practice threatening the integrity of our judicial system, rests instead on the violation of legislative mandate.”<sup>8</sup>

So what was to happen to the *Brill* litigation?

What is to happen in this case is that summary judgment will be reversed and the case returned to the trial calendar, where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial. Hopefully, as a result of the courts’ refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that

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“good cause” means good cause for the delay, and because movants will develop a habit of compliance with the statutory deadlines for summary judgment motions rather than delay until trial looms.<sup>9</sup>

Post-*Brill*, the timing of motions for summary judgment, specifically the issues of whether a motion or cross-motion is untimely and, if untimely, whether “good cause” exists to permit a late motion, is one of the most significant issues facing both the court system and litigants today.

### CPLR 3212

When enacted, CPLR 3212 provided that a motion for summary judgment could be made at any time after joinder of issue and placed no cut-off date on a party’s ability to so move. In response to the practice of parties that make “eve of trial” motions for summary judgment,<sup>10</sup> often necessitating the adjournment of scheduled trials, CPLR 3212(a) was amended in 1996. It established outer time limits on a party’s right to move for summary judgment tied to, and triggered by, the filing of the note of issue.<sup>11</sup> The note of issue trigger for starting the clock on a party’s right to move for summary judgment clearly contemplated that disclosure was complete at the time the note of issue was filed.<sup>12</sup> The completion of disclosure prior to the clock starting to run was critical because it permitted parties to make an informed decision whether to move for summary judgment and ensured that parties had the benefit of all available disclosure to both draft, and oppose, summary judgment motions and cross-motions.

CPLR 3212(a), as amended, permits the court to set a time limit for parties to move for summary judgment, which may not be less than 30 days following the filing of the note of issue. This minimum time limit is designed to afford litigants at least 30 days to draft and serve summary judgment motions and cross-motions following the completion of disclosure. In the event the court does not set a deadline, the statute mandates a “default” dead-

## Care must be taken to monitor the deadlines for changes.

line of 120 days following the filing of the note of issue for moving for summary judgment.<sup>13</sup>

Notwithstanding the deadlines set forth in CPLR 3212(a), the statute further provides that a “late” motion for summary judgment may be made “with leave of court on good cause shown.” While the statute makes clear that the request for leave is directed to the discretion of the trial court, the court’s discretion is not unfettered, as *Brill* so aptly demonstrates.

### “Am I Late?”

Whether or not a motion for summary judgment is timely requires a two-step analysis. First, parties must determine

the deadline that applies to a particular case. Second, parties must accurately calculate the deadline.

Determining the applicable deadline requires a review of all orders issued by the court in a particular matter, the individual justice’s “part rules,” local judicial district rules, and CPLR 3212(a). Not only is it necessary to consult the aforementioned sources for summary judgment deadlines, care must be taken to monitor the deadlines for changes, a point nicely illustrated in *Crawford v. Liz Claiborne, Inc.*, where the local rule differed from the I.A.S. Justice’s rules, and the judicial district rule changed from 60 to 120 days during the pendency of the case.<sup>14</sup> If there

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is no shorter period mandated for a particular case, the default period of 120 days controls.

Once the deadline for moving for summary judgment in a particular case is ascertained, calculating the deadline and determining whether a motion is late would be a straightforward task but for a split in the appellate divisions over the accrual date for starting the clock to run on the deadline.

The requested discovery must be relevant to the issues to be resolved on the motion.

CPLR 3212(a) states that the time to move for summary judgment is calculated from the “filing of the note of issue.”<sup>15</sup> The Third Department has held that the time to move accrues when the note of issue is filed, not served, and rejected the defendant’s argument that the five-day period for mailing contained in CPLR 2103(b)(2) extended its time to move.<sup>16</sup> The First Department has reached a different conclusion, holding that the recipient of a motion for summary judgment cannot be charged with knowledge of the unilateral filing by an opposing party, so that the accrual date when the time to move begins to run is the completion of service and, where done by mail, by adding the additional five days provided by CPLR 2103(b)(2).<sup>17</sup>

### Disclosure as Good Cause

Discovery outstanding after the filing of a note of issue may constitute good cause for a late motion. Yet the requested discovery must be relevant to the issues to be resolved on the motion.<sup>18</sup> Perfunctory claims of law office failure will not satisfy the requirement for filing a late motion.<sup>19</sup>

The juxtaposition of post-note disclosure and summary judgment timing is, of course, magnified in those counties where post-note disclosure is the norm, rather than the exception.

### A Suggestion

The wisdom of the *Brill* decision has been hotly debated for the last five years, and the debate shows no sign of abating. However, *Brill* sets the stage for the actors making and opposing summary judgment motions, and its mandates must be followed.

When a party seeks leave to have a late summary judgment motion heard, a two-fold burden is imposed upon the party against whom summary judgment is sought. First, the party must oppose the application for leave to serve the motion late. Second, not knowing whether leave to serve the motion late will be granted, the motion must be opposed on the merits. Imposing the burden of opposing on the merits a summary judgment motion that is ultimately denied leave is a tremendous waste of client and attorney resources. It also provides the party seeking leave to make the late motion with the tactical benefit of having the opposing party unnecessarily, and unfairly, “lay bare” its proof.

Wouldn’t it be more equitable to have the party seeking leave to make the late motion move, in the first instance, only for leave to make the motion? This first step, which should include the movant annexing to the application for leave the full motion it intends to serve if leave is granted, would enable the party opposing the motion to oppose only the application for leave, without the necessity, and burden, of interposing its opposition on the merits. If the court chose to grant leave, the court, in its order, could set a briefing schedule for opposing and reply papers.

While this procedure imposes the burden upon the court of deciding two motions in cases where leave is granted, this imposition should be outweighed by the streamlining of motion practice in cases where leave is granted, and

the reduction in work associated with those motions where leave is denied.

### Conclusion

I don’t think this therapy has helped. In the days since I first drafted this article, everywhere I go, it seems to me, people are still talking about *Brill*. ■

1. *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004).
2. “brill |bril|. noun. a European flatfish that resembles a turbot. Scophthalmus rhombus, family Scophthalmidae (or Bothidae). ORIGIN late 15th cent.: of unknown origin.” Apple Dictionary & Thesaurus.
3. *Brill*, 2 N.Y.3d at 652.
4. *Id.* at 650.
5. *Id.* at 652.
6. *Id.* at 653.
7. 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87 (1999).
8. *Brill*, 2 N.Y.3d at 653.
9. *Id.*
10. *See, e.g., Latimer v. City of New York*, 219 A.D.2d 622, 631 N.Y.S.2d 395 (2d Dep’t 1995) (summary judgment was warranted as a matter of law and should have been granted notwithstanding that the motion was made at the eve of trial).
11. 1996 N.Y. Laws ch. 492, effective January 1, 1997, amended CPLR 3212(a), by adding the clause beginning “provided however.” This amendment provides that a motion for summary judgment may not be made later than 120 days after the filing of the note of issue except with leave of court. It further provides that the court may set a date, no earlier than 30 days after the filing of the note of issue, after which a motion for summary judgment may not be filed.
12. *See, e.g., Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000).
13. *Brill*, 2 N.Y.3d at 652.
14. 11 N.Y.3d 810, 869 N.Y.S.2d 378 (2008).
15. CPLR 3212(a).
16. *Coty v. County of Clinton*, 42 A.D.3d 612, 388 N.Y.S.2d 825 (3d Dep’t 2007).
17. *Szabo v. XYZ Two Way Radio Taxi Ass’n*, 267 A.D.2d 134, 135, 700 N.Y.S.2d 179 (1st Dep’t 1999).
18. *See, e.g., Wider v. Heller*, 24 A.D.3d 433, 805 N.Y.S.2d 130 (2d Dep’t 2005).
19. *Breiding v. Giladi*, 15 A.D.3d 435, 789 N.Y.S.2d 449 (2d Dep’t 2005).

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# Accidents Abroad and Inconvenient Forums

By Thomas A. Dickerson

**T**ravel law involves the traveler's rights and remedies against airlines, cruise lines, trains, buses, rental car companies, hotels, resorts, casinos, theme parks, tour operators, Internet travel sellers, travel agents and others arising from wrongful death, physical injury or a failure to deliver travel services promised and paid for.

Before I became a judge I prosecuted many lawsuits involving a variety of travel problems including, to name just a few: hotel "bait and switch" schemes, improper handling of airline baggage claims, misrepresented services, misrepresented History Book Club tours, failure to enforce federal tour operator regulations, flight delays and cancellations, death or physical injuries arising from a train crash, a bus crash, the contraction of typhoid fever, a delayed flight with cabin temperature reaching 120 degrees, an angry camel in Egypt, a wild horse in Mexico, unsafe snorkeling during a bird-watching tour of Costa Rica, the serving of food during Passover that was not Glatt Kosher, failure to deliver tickets to the Super Bowl, and airline ticket price fixing.

This article presents a summary digest and a discussion of some of the more noteworthy recent developments and cases decided in this field of law.

## Travel Accidents Abroad

One of the most interesting areas of travel law involves accidents sustained by U.S. citizens that occur outside of the United States, whether in a foreign country or on a cruise ship.<sup>1</sup> Such cases raise a variety of complex liability and procedural issues including *forum non conveniens* and the enforcement of forum selection clauses in travel contracts.

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## Types of Accidents Abroad

Traveling abroad, whether by international air carrier, aboard a cruise ship or while participating in a tour, can be a wonderful experience – until you have an accident. Decisions involving travel accident claims have involved the following types of claims in the locations indicated below.

### Wrongful Deaths

Egypt: *Guidi v. Inter-Continental Hotels Corp.*<sup>2</sup> (guests murdered in hotel restaurant by terrorists); Nunavut, Canada: *Brunner v. Hampson*<sup>3</sup> (hunters burned in fire); Uganda: *Haubner v. Abercrombie & Kent International, Inc.*<sup>4</sup> (tourists abducted from safari tents and murdered by rebels); Botswana: *Shea v. Global Travel Marketing, Inc.*<sup>5</sup> (infant mauled and killed by hyenas).

The worst strategy is being forced to sue in the foreign jurisdiction where the accident occurred.

### Assaults

Puerto Rico: *Woods-Leber v. Hyatt Hotels of Puerto Rico*<sup>6</sup> (mongoose attacks guest sunbathing at hotel pool); Jamaica: *Schreiber v. Camm*<sup>7</sup> (guests at Jamaican vacation estate shot by security guard); St. Thomas: *Manahan v. NWA, Inc.*<sup>8</sup> (tourist mugged on walk to restaurant from hotel).

### Rapes, Sexual Assaults and Molestations

Galapagos Islands: *O'Keefe v. Inca Floats, Inc.*<sup>9</sup> (sexual assault during cruise to Galapagos Islands); Bahamas: *Doe v. Sun International Hotels, Ltd.*<sup>10</sup> (guest raped at resort); St. Thomas: *Flanagan v. Wyndham International, Inc.*<sup>11</sup> (children molested in hotel day care facility).

### Robberies

Kenya: *Dow v. Abercrombie & Kent*<sup>12</sup> (tourists on safari assaulted and robbed by bandits while camping in the Oololo Escarpment in the Masai Mara reserve).

### Water Sports Accidents

Mexico: *Gardemal v. Westin Hotel Co.*<sup>13</sup> (tourist drowns snorkeling off of Lovers' Beach); *Yurchak v. Atkinson & Mullen Travel, Inc.*<sup>14</sup> (jet ski accident); *Walker v. Wedge Hotel*<sup>15</sup> (para-sailing accident); Hong Kong: *Nowak v. Tak How Inc. Ltd.*<sup>16</sup> (guest drowns in hotel pool); Gabon: *Irwin v. World Wildlife Fund, Inc.*<sup>17</sup> (boating accident in Gamba lagoon); Turks & Caicos: *Welch-Rubin v. Sandals Corp.*<sup>18</sup> (shoulder injury boarding boat).

### Slips, Trips and Falls

Jamaica: *Hofer v. The Gap, Inc.*<sup>19</sup> (guest falls into turtle pond at hotel after flip-flop breaks).

### Riding Accidents

Egypt: *MacLachlin v. Marriott Corp.*<sup>20</sup> (tourist in Egypt thrown from angry camel breaks eight ribs and fractures pelvis); Bahamas: *Tucker v. Whitaker Travel, Ltd.*<sup>21</sup> (tourist thrown from horse); Hawaii: *Courbat v. DaHano Ranch, Inc.*<sup>22</sup> (horse riding accident); Namibia: *Hall v. Voyagers International Tours, Inc.*<sup>23</sup> (tourist trampled by wild elephant).

### Riding in Tour Buses, Limos and Golf Carts

Vietnam: *Pearl Cruises v. Cohon*<sup>24</sup> (cruise passengers injured in automobile accident during shore excursion); Scotland: *Ramage v. Forbes International, Inc.*<sup>25</sup> (tour bus accident); Peru: *Vermeulen v. Worldwide Holidays, Inc.*<sup>26</sup> (tour van accident in Peru); Dominican Republic: *Lang v. Corporacion De Hotels, SA*<sup>27</sup> (golf cart struck by truck).

### Driving a Rental Car

Mexico: *Chung v. Chrysler Corp.*<sup>28</sup> (students killed in rental car crash); Italy: *Travalja v. Maieliano Tours*<sup>29</sup> (rental car accident); Romania: *Kermisch v. Avis Rent-A-Car*<sup>30</sup> (tourists arrested in Romania for mistreating their rental vehicle).

### Riding in Airplanes

China: *Barkanik v. General Administrator of Civil Aviation*<sup>31</sup> (tourist killed in airplane crash during tour); Kenya: *Abercrombie & Kent v. Carlson Marketing Group*<sup>32</sup> (tourists killed when plane crashes into a mountain); *Rizzutti v. Basin Travel Service*<sup>33</sup> (tourists killed in crash of aircraft).

### Suing at Home Is Better

The best strategy, of course, in litigating on behalf of injured travelers is to sue available defendants in the United States. The worst strategy is being forced to sue in the foreign jurisdiction where the accident occurred.

From the tourist's standpoint safety standards may be lower. See, for example *Wilson v. Best Travel*<sup>34</sup> (tourist falls through weak plate glass window in Athens hotel; plate glass thickness standards lower in Greece than in England, where tourist resided). Or the drinking age might be different: *Knoell v. Cerkvenik-Anderson Travel, Inc.*<sup>35</sup> (18-year-old from Arizona visiting Mexico consumes large quantities of alcoholic beverages for three days and jumps to death from third-story hotel balcony; Arizona Dram Shop law does not apply; drinking age in Mexico is lower than in Arizona). And the quality of medical care may be much lower: *Gianocostas v. RIU Hotels, SA*<sup>36</sup> (diabetic tourist misdiagnosed at hotel and local hospital).

## Not a Lot of Sympathy

From counsel's standpoint the law may be less sympathetic to the injured traveler in other countries. See, for example, the following cases: Egypt: *MacLachlin v. Marriott Corp.*<sup>37</sup> (tourist thrown from angry camel in Egypt; "an Egyptian forum which is based partially on Koranic law would be unduly harsh to plaintiff"); France: *In re Air Crash Off Long Island, New York*<sup>38</sup> (air crash; France does not allow punitive damages); Dominican Republic: *Gianocostas v. Interface Group*<sup>39</sup> (diabetic tourist misdiagnosed in Dominican Republic); Turkey: *Mercier v. Sheraton International, Inc.*<sup>40</sup> (contract dispute; Turkey may not recognize claims for breach of contract or tortious interference with contract); China: *Barkanic v. General Administration of Civil Aviation*<sup>41</sup> (air crash; maximum recoverable damages limited to \$20,000).

## No Juries; No Contingency Fees

In addition, foreign procedural law may be very different. Among other things, the law may bar contingency fee arrangements with attorneys and jury trials. Bermuda: *Bruemmer v. Marriott Corp.*<sup>42</sup> (hotel guest playing golf falls off cliff adjacent to tee area for 18th hole and subsequently dies from his injuries; no contingent fees in Bermuda); Bahamas: *Doe v. Sun International Hotels, Ltd.*<sup>43</sup> (18-year-old female guest raped at hotel; no jury trials

or contingency fees in Bahamas); France: *In re Air Crash Off Long Island, New York*<sup>44</sup> (France does not allow contingency fee arrangements); Cayman Islands: *Wilson v. Humphreys Cayman Ltd.*<sup>45</sup> (rape at hotel; no contingency fees or jury trials in Cayman Islands); Jamaica: *Reid-Walen v. Hansen*<sup>46</sup> (motorboat accident; no contingency fees or jury trials in Jamaica); England: *Neville v. Anglo American Management*<sup>47</sup> (tour bus accident; no contingency fees or jury trials in England); Israel: *Gyenes v. Zionist Organization of America*<sup>48</sup> (student drowned in Jordan River; no right to jury trial in Israel).

## Is the Forum Selected Convenient?

In response to a lawsuit brought in the United States, the defendants may seek to dismiss the lawsuit because the U.S. forum selected is not convenient (*forum non conveniens*) or a clause in the cruise passenger ticket, hotel registration form or tour participant contract may state that all lawsuits must be brought in a specific forum (forum selection clause).

## Application of Foreign Law

In addition, the defendants may seek an early determination by the court that the law of a foreign country applies to one or more issues in the case (choice of law). The applicable law, foreign or domestic, bears on the convenience

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of the selected forum, the theory being that foreign courts are better able to interpret their own law than the courts of a U.S. forum. *Mercier v. Sheraton International, Inc.*<sup>49</sup> (contract dispute; difficulty in interpreting Turkish law one reason for dismissal); *Rudisill v. Sheraton Copenhagen Corp.*<sup>50</sup> (fall in Danish hotel bathtub; Danish courts better able to apply Danish law); *Carnival Cruise Lines, Inc. v. Oy Wartsila AB*<sup>51</sup> (contract dispute; Finnish courts better able to interpret Finnish law).

### Conditions for Dismissal

Should the court grant a *forum non conveniens* motion it may condition dismissal upon the defendant agreeing to the transfer of the case to a distant forum for trial. For example, see *Chhawchharia v. The Boeing Co.*<sup>52</sup> (dismissal subject to defendant submitting to jurisdiction of English or Scottish courts, waiving any statute of limita-

tion defense, conceding liability for all compensatory damages, providing access to all evidence, and paying the awarded damages); *Diaz v. Mexicana de Avion, S.A.*<sup>53</sup> (dismissal subject to defendant accepting service in and jurisdiction of Mexican courts, waiving statute of limitations, producing all evidence and witnesses, and agreeing to satisfy any judgments).

### Plaintiff's Choice Is Important

Although it is not dispositive (see *Piper Aircraft Co. v. Reyno*<sup>54</sup> (air crash)) the forum selected by the plaintiff, particularly if he or she resides in that forum, will be given serious consideration before dismissing a lawsuit on the grounds of *forum non conveniens*. A good example is found in *Guidi v. Inter-Continental Hotels Corp.*<sup>55</sup> (murder in Egyptian hotel; "the choice of an American court over a foreign court should be given the heightened deference").

### Advertising in the Forum

If a defendant advertises and solicits business in the forum, it should expect to be available for lawsuits brought by injured residents. In *Reid-Walen v. Hansen*,<sup>56</sup> a case involving a motorboat accident in the Bahamas, the court found that because of a Bahamian hotel's solicitation of business in the United States the owners "should not be (totally) surprised . . . that they may be sued in the courts of the U.S." And, in *Nowak v. Tak How Inv. Ltd.*<sup>57</sup> a case involving a drowning in a Hong Kong hotel pool, the court held that a cost of doing business is being available

### Availability of Alternative Forum

Generally, the court will not dismiss a lawsuit unless there is an alternative forum available to hear the plaintiff's claim. As stated by one court, "[t]he court must be alert to the realities of the plaintiff's position, financial or otherwise, and his or her abilities as a practical matter to bring suit in the alternate forum."<sup>58</sup> The courts differ widely on just how different the alternative forum can be to still be "available." Factors to be considered include whether the foreign forum recognizes U.S. legal theories, allows contingency fee arrangements with attorneys, provides for jury trials and limits recoverable damages.

### Location of Witnesses and Evidence

Proving or defending an accident case may require the production of witnesses and documentary and physical evidence that is located in the forum where the accident occurred. In arguing for dismissal the defendant will show the court a list of essential witnesses that are beyond the court's jurisdiction and, therefore, unavailable for trial. See, for example, *Mastrondrea v. Occidental Hotels Management*<sup>59</sup> ("[T]he Hotel points to Mexico as the locus of the accident. . . . [I]t also addresses the fact that Mexican witnesses are not within the subpoena power of the New Jersey courts and it notes the language difference between Mexico and the United States"); *Loya v. Starwood Hotels & Resorts*<sup>60</sup> ("Mr. Loya's death and the activities leading up to his accident, occurred in Mexico. A trial of that action will require evidence from people who were present before, during and after Mr. Loya's accident. . . . Those sources of proof are predominantly located in Mexico"); *Perez-Lang v. Corporacion De Hoteles, SA*<sup>61</sup> ("The Defendants have established that the courts in the Dominican Republic have subpoena power over individuals and documentary evidence . . . many of these witnesses are not within the employ of the Defendants, meaning they are outside the compulsory process of this Court"); *Miyoung Son v. Kerzner International Resorts, Inc.*<sup>62</sup> ("most of the relevant witnesses are not employees of the Kerzner Defendants . . . but this Court cannot effectively subpoena these foreign nationals residing in the Bahamas and compel them to appear before this Court").

Generally, the court will not dismiss a lawsuit unless there is an alternative forum in which to hear the plaintiff's claim.

### View of the Premises

The defendant may also assert that the jury must have a view of the accident scene. *Perez-Lang v. Corporacion De Hoteles, SA*<sup>63</sup> (“[T]his Court notes that the instant action is one in which such a visit to the accident scene might be beneficial due to the nature of the complaint, e.g., the location and design of the roads at the Resort. A series of photographs of the Resort might be a sufficient substitute but an in-person viewing might be deemed necessary”); *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*<sup>64</sup> (guest swimming struck by motorboat operated by Ocean Motion; “Defendants assert the need for the trier of fact to view the premises. . . . However . . . the accident occurred in the ocean off the beach where the Westin resort is located, so any viewing of the actual precise accident scene is likely to be difficult or impossible. Photographs are available that show the location of the buoys at the time of the accident”); *Miyoung Son v. Kerzner International Resorts, Inc.*<sup>65</sup> (“[A] view of the site of Mrs. Son’s accident is meaningless because the ‘shifting sands are no longer as they were at the time of the accident’”).

### Alternative Forms of Evidence and Costs

The court must examine the actual necessity of each listed witness and decide whether there are alternative forms of evidence that will make the witness’s presence unnecessary such as depositions, video presentations (*Mastrondrea v. Occidental Hotels Management*<sup>66</sup> (“should it be relevant to the Hotel in defending the action, it is free to make an accurate videotape of the steps upon which plaintiff fell and to show that videotape to the jury”)) and sworn statements. In addition, the court must consider the costs involved. *O’Donnell v. Club Mediterranee, S.A.*<sup>67</sup> (guest at Club Med in Turks & Caicos slipped trying to board boat and suffered ankle fracture; “As a threshold matter defendants are large companies with vast resources, rendering it unlikely that the expense of [witness] travel would be particularly burdensome to them . . . as defendants are in the business of recreational travel, it would seem that arranging his transportation here would be a very slight burden at most”).

The court must also consider the language of the reports and records. *Phillips v. Talty*<sup>68</sup> (car accident in St. Martin; “all of the pertinent reports and records generated out of the investigation and medical treatment are in French, the language in which French Courts located in St. Martin conduct their proceedings, and which the vast majority of witnesses in this case speak”). And the courts must con-

sider the application of the Hague Evidence Convention: *Ramirez De Arellano v. Starwood Hotels & Resorts Worldwide, Inc.*<sup>69</sup> (“Spain is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters . . . and the protocols under that treaty can be used to obtain evidence”).

### Forum Selection Clauses

It is quite common for travel suppliers to insert a clause into their consumer contracts requiring dissatisfied customers to file lawsuits in a specific forum, typically, one that is convenient for the travel supplier but not for the consumer. Such clauses can have a dramatic effect upon the consumer’s enthusiasm in prosecuting his or her claim. Forum selection clauses are used by cruise lines. See, for example, *Carnival Cruise Lines, Inc. v. Shutte*<sup>70</sup> (Florida forum selection clause enforced); *Heinz v. Grand Circle Travel*<sup>71</sup> (passengers sustained injuries from malfunctioning doors aboard Blue Danube cruise ship on the Rhine in Germany; travel contract contained clause “all claims . . . must be litigated in Basel, Switzerland”). Forum selection clauses are also used by hotels. For example, *Ward v. Kerzner International Hotels Limited*<sup>72</sup> (guest injured riding bicycle; “the guest registration document is not ambiguous. It is apparent from the face of the document that each of the two forum selection clauses requires a signature. While the first forum selection clause pertains broadly to any claim against the defendants, the second clause pertains only to water sport activities. The defendants do not dispute that Mr. Ward’s accident had nothing to do with water sports. Since Mr. Ward did not sign or clearly accept the terms of the forum selection clause pertaining to the type of accident involved in this case (*forum non conveniens* motion denied”). And they are sued by tour operators, such as in *Global Travel Marketing, Inc. v. Shea*<sup>73</sup>

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(estate of child tourist on safari killed by hyenas bound by contract clause requiring arbitration of disputes in Fort Lauderdale, Florida; “we hold that an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor or minor’s estate in a tort action arising from the contract”).

## Conclusion

In litigating a travel law case involving accidents in a foreign jurisdiction, counsel should carefully consider how the travel services were marketed and the presence of forum selection, arbitration and choice of law clauses in the travel contract in an effort to fashion a complaint that can be brought in and remain in the courts of the United States. ■

1. See Thomas A. Dickerson, *The Modern Cruise Passenger’s Rights and Remedies – Part 1*, N.Y. St. B.J. (Mar./Apr. 2007), p. 10; *The Modern Cruise Passenger’s Rights and Remedies – Part 2*, N.Y. St. B.J. (June 2007), p. 18.
2. 203 F.3d 180 (2d Cir. 2000), *opinion amended*, 224 F.3d 142 (2d Cir. 2000).
3. 441 F.3d 457 (6th Cir. 2006).
4. 351 Ill. App. 3d 112, 812 N.E. 2d 704 (2004).
5. 908 So. 2d 392 (Fla. Sup. 2005).
6. No. 97-1269, 1997 WL 476360 (1st Cir. 1997).
7. 848 F. Supp. 1170 (D.N.J. 1994).
8. 821 F. Supp. 1105 (D.V.I. 1991), *recon. denied*, 821 F. Supp. 1110 (D.V.I. 1992), *aff’d*, 995 F.2d 218 (3d Cir. 1993).
9. No. C-97-1225 VRW, 1997 WL 703784 (N.D. Cal. 1997).
10. 20 F. Supp. 2d 1328 (S.D. Fla. 1998).
11. 231 F.R.D. 98 (D.D.C. 2005).
12. No. 99 C 6923, 2000 WL 688949 (N.D. Ill. 2000).
13. 186 F.3d 588 (5th Cir. 1999).
14. No. 05-2584, 2006 WL 3076675 (3d Cir. 2006).
15. No. 01-3564 (CIV), 2003 WL 23218085 (S.D. Fla. 2003).
16. Civ. A. No. 94-11691-WGY, 1995 WL 521874 (D. Mass. 1995).
17. 448 F. Supp. 2d 29 (D.D.C. 2006).
18. No. 3:03CV481 (MRK), 2004 WL 2472280 (D. Conn. 2004).
19. 516 F. Supp. 2d 161 (D. Mass. 2007).
20. N.Y.L.J., Jan. 18, 1994, p. 29, col. 2 (N.Y. Sup. 1994).
21. 620 F. Supp. 578 (E.D. Pa. 1985), *aff’d mem.*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 477 U.S. 986 (1986).
22. 141 P.3d 427 (Haw. Sup. 2006).
23. No. 5:01-CV-1375, 2007 WL 2088878 (N.D.N.Y. 2007).
24. 728 So. 2d 1226 (Fla. App. 1999).
25. 987 F. Supp. 810 (C.D. Cal. 1997).
26. 922 So. 2d 271 (Fla. App. 2006).
27. 522 F. Supp. 2d 349 (D.P.R. 2007).
28. 903 F. Supp. 160 (D.D.C. 1995).
29. 213 A.D.2d 155, 622 N.Y.S.2d 961 (1st Dep’t 1995).
30. 71 A.D.2d 790, 419 N.Y.S.2d 793 (4th Dep’t 1979).
31. 923 F.2d 957 (2d Cir. 1991).
32. Civ. A. No. 88-7889, 1989 WL 46222 (E.D. Pa. 1989).
33. 125 Wash. App. 602, 105 P. 3d 1012 (Wash. App. Div. 3 2005).
34. 1 All ER 353, 1993 WL 9630313 (QBD) (1993).
35. 181 Ariz. 394, 891 P.2d 861 (1994), *vacated*, 185 Ariz. 546, 917 P.2d 689 (Ariz. 1996).
36. 2008 WL 483766 (Mass. Sup. 2008).
37. N.Y.L.J., Jan. 18, 1994, p. 29, col. 2 (N.Y. Sup. 1994).
38. 65 F. Supp. 2d 207 (S.D.N.Y. 1999).
39. 450 Mass. 715, 881 N.E.2d 134 (Mass. Sup. 2008).

40. 935 F.2d 419 (1st Cir. 1991).
41. 923 F.2d 957 (2d Cir. 1991).
42. No. 90 C 4190, 1991 WL 30141 (N.D. Ill. 1991).
43. 20 F. Supp. 2d 1328 (S.D. Fla. 1998).
44. 65 F. Supp. 2d 207 (S.D.N.Y. 1999).
45. 916 F.2d 1239 (7th Cir. 1990).
46. 933 F.2d 1390 (8th Cir. 1991).
47. 191 A.D.2d 240, 594 N.Y.S.2d 747 (1st Dep’t 1993).
48. 169 A.D.2d 451, 564 N.Y.S.2d 155 (1991).
49. 935 F.2d 419 (1st Cir. 1991).
50. 817 F. Supp. 443 (D. Del. 1993).
51. 159 B.R. 984 (S.D. Fla. 1993).
52. 657 F. Supp. 1157 (S.D.N.Y. 1987).
53. No. SA-86-CA-1065, 1987 WL 275695 (W.D. Tex. 1987).
54. 454 U.S. 235, 255 (1981).
55. 203 F.3d 180 (2d Cir. 2000).
56. 933 F.2d 1390 (8th Cir. 1991).
57. 899 F. Supp. 25 (D. Mass. 1995).
58. *Radigan v. Innisbrook Resort & Golf Club*, 142 N.J. Super. 419, 361 A.2d 610 (1976), *modified*, 150 N.J. Super. 427, 375 A.2d 1229 (1977).
59. 918 A.2d 27 (N.J. Super. A.D. 2007).
60. No. C06-0815 MJP, 2007 WL 1991163 (W.D. Wash. 2007).
61. 575 F. Supp. 2d 1345 (S.D. Fla. 2008).
62. No. 07-61171-CIV, 2008 WL 4186979 (S.D. Fla. 2008).
63. 575 F. Supp. 2d 1345.
64. No. 07-61744-CIV, 2008 WL 2844020 (S.D. Fla. 2008).
65. No. 07-61174-CIV, 2008 WL 4186979 (S.D. Fla. 2008).
66. 918 A.2d 27 (N.J. Super. A.D. 2007).
67. No. 05-CV-610 (ARR), 2008 WL 794975 (E.D.N.Y. 2008).
68. 555 F. Supp. 2d 265 (D.N.H. 2008).
69. 448 F. Supp. 2d 520 (S.D.N.Y. 2006).
70. 499 U.S. 585 (1991).
71. 329 F. Supp. 2d 896 (W.D. Ky. 2004).
72. No. 08-23087-CIV-Jordan, 2005 WL 2456191 (S.D. Fla. 2005).
73. 908 So. 2d 392 (Fla. Sup. 2005).

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Unlike other professions, unflattering associations with vile creatures such as bloodsucking leeches seem reserved for lawyers – a comparison viewed by many as insulting to leeches. Anyone who seriously doubts that lawyers are reviled by the general populace need only recall the audience reaction to the scene in *Jurassic Park* where the lawyer is eaten by a Tyrannosaurus Rex, generating thunderous applause for the T-Rex. One reason for this disconnect may be that the adversary system has become too adversarial and far too uncivil.

## Zealous Advocacy

Of course, it is fundamental to our adversary system that as advocates we are required to zealously advance the interests of only one side, our client's. The ethical underpinning of our adversary system is found in the Preamble to the ABA Model Rules of Professional Conduct, which provides that “[a]s advocate, a lawyer zealously assert[] the client's position under the rules of the adversary system.”<sup>1</sup> The Commentary to Model Rule 1.3 illuminates this:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's

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cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>2</sup>

In short, our role as advocates is to try to properly achieve the best result for our client, which is not necessarily a fair or just one.

Not surprisingly, we place a premium on qualities like aggressiveness, tenacity, perseverance and determination, which are all traits associated with success in the adversary system. If these traits are not balanced by good judgment, or at least a sense of perspective, they can lead to lawyers who believe litigation should resemble armed combat, a phenomenon that has become all too common. Unfortunately, there are too many zealots in our profession, sometimes referred to as "hardball players" or "Rambo-litigators," who, like Vince Lombardi, believe winning is not only the most important thing, it is the

or burying their adversary in unnecessarily lengthy and overly dense interrogatories and document requests. As hard as these vexatious tactics can be on the lawyers on the receiving end, there are much worse abuses that subvert the discovery process and undermine the transparency so essential to ferreting out the truth. Our adversary system relies heavily on the honesty and good faith of lawyers to interpret document demands in a fair and sensible way – not in a crabbed, disingenuous and strained manner designed to keep admissions against their client's interests from ever seeing the light of day. When winning becomes the only thing, the adversary system suffers.

### **Ethics Temper Zealous Advocacy**

Aggression, belligerence and abusive tactics are by no means inherent in our adversarial system, and civility

The Model Rules include numerous requirements that inform the *manner* in which zealous advocacy must be carried out and that temper its mandate.

only thing. These myopic lawyers seem to believe that zealous advocacy is synonymous with rudeness, and that making everyone's life miserable is part of earning their retainer and is what clients demand from their lawyers.

### **The Problem**

Whether it is because clients expect obnoxious tactics to advance their interests, or because some lawyers believe they help to achieve better results, or because the Bar, especially in large cities, has grown so competitive and impersonal, our civility and professionalism seem to be continually declining and at a rapid pace. As New York's Chief Judge Judith Kaye stated, "[i]t is also undeniable with our exploding numbers and increased bottom line pressures, the practice of law has grown tougher and meaner, eroding a core tradition of courtesy and civility."<sup>3</sup> Evidence of this can be seen daily in courtrooms throughout the country, where lawyers are heard hurling the nastiest of accusations at their colleagues and impugning their motives and integrity – even in telephone calls between lawyers. Nowhere is this more obvious than in the discovery process, which is conducted largely away from direct judicial supervision and tends to encourage the most extreme behavior by some members of the Bar – even when they are being videotaped.<sup>4</sup>

The arsenal of "hardball tactics" ranges from serving papers at the proverbial 11th hour to stubbornly refusing to stipulate to any extension of time or adjournment, no matter how great their adversary's need, how reasonable the request, and how irrelevant to their client's interests;

and mutual respect are not mutually exclusive with our role as zealous advocates. Even a cursory review of the Model Rules reveals numerous requirements that inform the *manner* in which zealous advocacy must be carried out and that temper its mandate. The Preamble to the Model Rules reminds us that lawyers wear multiple hats: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>5</sup> The Comment to Rule 1.3 explicitly provides that "[a] lawyer is not bound . . . to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."<sup>6</sup>

On its face, Model Rule 3.4 mandates that a lawyer be fair to opposing counsel; it specifically precludes a lawyer from, among other things, obstructing access to evidence or embargoing witnesses. Similarly, the Comment to Rule 3.2 provides that failure to expedite litigation is not reasonable "if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." The Model Rules do not accept the justification that "similar conduct is often tolerated by the bench and bar."<sup>7</sup> Rule 3.3 contains a host of additional requirements designed to assure fairness of proceedings under the heading "Fairness to the Tribunal." Rule 4.1 mandates lawyers to be truthful when dealing with others on the client's behalf, with very limited exceptions. Under these

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rules, mutual respect, civility and courtesy not only can co-exist with zealous advocacy – they are required.

### Delaware Supreme Court Demands Civility

The Delaware Supreme Court deserves great credit for its leadership in attempting to restore civility by cracking down on lawyers who seek to convert the deposition process into a death match. Emblematic of the kind of extreme incivility that gives hardball litigation its name is the infamous deposition conduct chronicled in former Chief Judge Veasey's addendum to the court's opinion in *Paramount Communications, Inc. v. QVC Network Inc.*<sup>8</sup> The court criticized the conduct of a Texas lawyer defending the deposition, in Texas, of a witness in a Delaware case. The lawyer's conduct was typified by statements like: "Don't 'Joe' me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon."<sup>9</sup>

Even though the deposition conduct had not been the subject of any motion to the Chancery Court or the Delaware Supreme Court, and no one had claimed any prejudice from these antics, the Delaware Supreme Court *sua sponte* took matters into its own hands, literally telling the offending lawyer to stay out of town. As the court observed:

The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation. One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future – a lesson of conduct not to be tolerated or repeated.<sup>10</sup>

Not surprisingly, the Delaware Supreme Court found the lawyer's actions "outrageous and unacceptable," and indicative of "an astonishing lack of professionalism and civility."<sup>11</sup> The court pointedly said that "it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."<sup>12</sup>

Last year in *In re Abbott*,<sup>13</sup> in the context of a disciplinary proceeding, the Delaware Supreme Court extended its initiative to obnoxious rhetoric in briefs, and disciplined a lawyer who used "unnecessary invective and rhetoric in his briefs." The court quoted Justice Sandra Day O'Connor:

I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.<sup>14</sup>

Significantly, the matter reached the Delaware Supreme Court on appeal by the Office of Disciplinary Counsel after the Delaware Board on Professional Responsibility of the Supreme Court had determined that the lawyer's rhetoric had *not* transgressed ethics rules and had not violated either Rule 3.5 ("[a] lawyer shall not . . . (d) . . . engage in undignified or discourteous conduct") or Rule 8.4(d) ("conduct prejudicial to the administration of justice"). The Delaware Supreme Court rejected the Board's conclusions and held that the lawyer had crossed the line and subjected him to a public reprimand. While there is certainly room for honest debate about the wisdom of invoking the disciplinary machinery to censor overheated rhetoric in briefs (especially where no prior warning has been issued and the lawyer has no prior record), the Delaware Supreme Court's view that it needed to do so shows there is a much larger and more serious problem.

### Civility Codes of Conduct

Delaware is not the only jurisdiction to recognize the problem of incivility. This problem has not escaped the notice of other courts and bar associations. It has resulted in myriad studies and the enactment of numerous codes of conduct designed to moderate attorney behavior and instill professionalism and civility among lawyers.

In 1998, the ABA Section of Litigation adopted Guidelines for Conduct hoping they would "elevate the tenor of practice [so that] some progress might be made towards greater professional satisfaction."<sup>15</sup> The Preamble noted that the Guidelines aspire to help lawyers achieve "the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service."<sup>16</sup> Thus, lawyers are urged to maintain a conduct

characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.<sup>17</sup>

The Guidelines then list 31 specific guideposts to inform lawyers' behavior towards their adversaries.

Shortly thereafter, the Seventh Circuit adopted Standards for Professional Conduct, which remind lawyers that "[i]n fulfilling [their] duty to represent a client vigorously as lawyers, [they] will be mindful of [their] obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner."<sup>18</sup> The Model Code of Civility and Professionalism promulgated by the Litigation Section of the California Bar encourages lawyers to "avoid hostile, demeaning, abusive, threatening or humiliating words in oral and written communications with other counsel, and with all

## Our clients are much better off when the lawyers treat each other with courtesy and respect.

party and third-party witnesses.<sup>19</sup> The Texas Lawyer's Creed similarly states that a lawyer "can disagree without being disagreeable. [A lawyer] recognize[s] that effective representation does not require antagonistic or obnoxious behavior."<sup>20</sup> The New York State Unified Court System Standards of Civility provide that "[i]n depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect."<sup>21</sup>

It is a sad commentary on the state of our profession that we require comprehensive guidelines to understand simple norms of decency that should be self-evident to anyone, much less to educated professionals. As former American Bar Association President Lee Cooper stated:

Deteriorating civility interrupts the administration of justice. It makes the practice of law less rewarding. It robs a lawyer of the sense of dignity and self-worth that should come from a learned profession. Not least of all, it . . . brings with it all the problems . . . that accompany low public regard for lawyers and lack of confidence in the justice system.<sup>22</sup>

The codes of conduct do prove, however, that there is no ethical reason that lawyers, especially litigators, are expected, much less required, to relinquish their humanity or sense of goodwill. As one judge eloquently put it: "Becoming a lawyer does not require you to lose your humanity. Even though you have reached that lofty place – lawyerhood – don't leave your courtesy and common decency behind. Act like a human. If you have forgotten how, fake it."<sup>23</sup> Justice Anthony M. Kennedy has also echoed this sentiment:

Civility is the mark of an accomplished and superb professional, but it is more even than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.<sup>24</sup>

Of course, it goes without saying that our clients retain us to win, not for our popularity with our colleagues, and we all want to win for our clients. But, there is absolutely no reason to believe that incivility or overzealousness contributes in any way to better results. And there are numerous excellent reasons why civility and courtesy can benefit lawyers themselves as well as their clients.

### Self Interest and Client Interest Dictate Civility

From a purely selfish perspective, it is certainly a lot more pleasant to deal with another member of the Bar with whom you have mutual respect and a positive relationship. Compare the feeling of satisfaction that comes from learning your new adversary (or for that matter

new co-counsel) is someone you know, like and trust – as opposed to the angst engendered by encountering a new opponent who has a score to settle. Indeed, it is far less stressful to deal with other lawyers who follow the "Golden Rule" rather than the doctrine of mutually assured destruction. And, while we are on the subject of self-interest, a lawyer's primary assets, especially a trial lawyer's, are a good name and reputation, and word of mouth travels at warp speed around the legal community and through courthouses – including chambers. Treat an adversary civilly, and that adversary can be not only a great reference, but can also serve as a great potential source of client referrals.

Our clients are also much better off when the lawyers treat each other with courtesy and respect. After all, any client who is headed for litigation can hardly be expected, except in rare cases, to have a cordial relationship with the other side or to be able to communicate with the other side free from emotion. So, it is up to the lawyers to at least try to tamp down the antagonism and keep the lines of communication open. Lawyers who treat each other respectfully, no matter how intense their clients' dispute, can speak "off the record," discuss issues openly and explore potential ways to resolve the satellite disputes that inevitably arise, or even settle the entire case. At a minimum, civility can also go a long way to reduce litigation expenses. It is likely to be far less expensive for both sides where a cordial relationship exists between the lawyers rather than where both sides engage in the "scorched earth" tactics of hardball litigation. Routine scheduling and discovery matters can be agreed upon without costly motion practice. Where mutual trust exists and both sides respect the adversary system, document production and depositions often can be worked out in a fair and equitable manner – without *unnecessary* motions to compel or for protective orders.

Last, it is certainly a "round world"; and, as they say, "what goes around comes around." Anyone tempted to yield to the dark side ought to remember that in all likelihood there will come a time when your client – or you – may need something from opposing counsel, and a reservoir of goodwill will really come in handy.

Before being accused of being too Pollyannaish, I hasten to add that a certain amount of tension is inherent in the litigation process. No matter how civil the lawyers may be to each other, the parties will no doubt encounter legitimate positional differences along the way that cannot be resolved and may require judicial resolution – after all, it is litigation. Just because lawyers respect and trust opposing counsel, does not mean they will not be zealous in protecting their own client's interests. "Trust" is fine, but "verification" is still necessary. ■

1. Model Rules of Prof'l Conduct Preamble (2007).

2. Model Rules of Prof'l Conduct R. 1.3 cmt. (2007).

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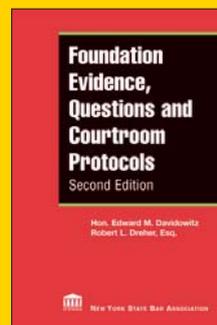
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3. Hon. Judith Kaye, "How Do We Make the Standards of Civility Work?"; see S. Gillers, *Regulation of Lawyers* (6th ed.) p. 499 ("The use of "hardball" tactics in litigation and elsewhere is seen to [be a token of] a decline in professionalism").
4. To be sure, videotaped depositions may have a salutary effect on at least some lawyers by causing them to modulate their more outlandish behavior, but it has not uniformly achieved this result. Ironically, there are instances where videotaping has actually captured for posterity some of the worst deposition conduct imaginable, which then has been widely disseminated over the Internet for all to see – a phenomenon that can be confirmed simply by searching YouTube for "depositions."
5. Model Rules of Prof'l Conduct Preamble (2007).
6. Model Rules of Prof'l Conduct R. 1.3 cmt. (2007).
7. Model Rules of Prof'l Conduct R. 3.2 cmt. (2007).
8. 637 A.2d 34, 52–57 (Del. 1994).
9. *Id.* at 54.
10. *Id.* at 52.
11. *Id.*
12. *Id.* at 54. Other instances of improper behavior abound. The Court of Special Appeals of Maryland in *Mullaney v. Aude*, 126 Md. App. 639, 730 A.2d 759 (Md. Ct. Spec. App. 1999), condemned counsel's deposition behavior as "a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of 'sexual [deposition] tactics.'" 730 A.2d at 768. Remarking that while in the adversarial system lawyers are expected to "withstand pressure, adversity, and the strategic maneuvers of their opponents[,] . . . bias relating to sex, race, religion, or other specified groups is [no longer] considered acceptable as a litigation strategy." *Id.* at 769. In the same vein, Judge Pollack in *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D.N.Y. 1987), following counsel's conduct at deposition that "was harassing, wasteful, vexatious, and ruined the usefulness of the December 30th deposition [and] a sad and embarrassing display of unprofessionalism," ordered sanctions and that the deposition be conducted in the courthouse in the court's presence.
13. 925 A.2d 482 (Del. 2007).
14. *Id.* at 488 (quoting Sandra Day O'Connor, *Professionalism*, 78 Or. L. Rev. 385, 387 (1999)).
15. American Bar Association, Section of Litigation: Guidelines Introduction (1998), text available at <http://www.abanet.org/litigation/conductguidelines/counsel.html>.
16. American Bar Association, Section of Litigation: Guidelines Preamble (1998), text available at <http://www.abanet.org/litigation/conductguidelines/counsel.html>.
17. *Id.*
18. Standards For Professional Conduct Within The Seventh Federal Judicial Circuit, Preamble (1991), available at <http://www.ca7.uscourts.gov/Rules/rules.htm#standards>.
19. State Bar of California Litigation Section's Model Code of Civility and Professionalism Section 3(a) (2006), available at [http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/2006-01\\_model-code.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/2006-01_model-code.pdf).
20. The Texas Lawyer's Creed – A Mandate for Professionalism Section III.9 (1989), available at [http://www.txethics.org/reference\\_creed.asp](http://www.txethics.org/reference_creed.asp).
21. The New York State Unified Court System Standards of Civility "Lawyers' Duties to Other Lawyers Litigants and Witnesses" VII (1997), available at <http://www.nycourts.gov/jt1p/standardsofcivility.pdf>.
22. American Bar Association, Section of Litigation: Guidelines Introduction (1998), text available at <http://www.abanet.org/litigation/conductguidelines/counsel.html>.
23. See M. Seigel, *To Err Is Human*, Litig. (Winter 2008), vol. 34, at 14 (quoting Tennessee Court of Criminal Appeals Judge Penny White).
24. Anthony M. Kennedy, *Law and Belief*, in 34-JUL Trial 22 (1998).



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# The Struggles of Lawyer-Leaders and What They Need to Know

By Roland B. Smith

Today, lawyer-leaders must be as agile as whitewater guides in treacherous rapids. The current global economic downturn has created enormous uncertainty. While certain firms and practice areas have directly benefited from the downturn, most need to think more strategically and swiftly in determining how best to navigate the rapids of change. Lawyer-leaders are discovering that being in practice today is like being in a state of perpetual whitewater.

Law firm leadership differs from practice management. Leadership is about producing change, while management focuses on producing predictability over processes. As part of a series on the changing nature of leadership in law firms, this article explores the leadership of law firms today and the skills necessary to succeed, thrive and soldier forward during uncertain conditions. It draws from ongoing research by the Center for Creative Leadership (CCL), involving hundreds of attorneys in both global firms and midsized U.S. firms.<sup>1</sup> It also draws from a survey of more than 100 senior or managing part-

ners who participated in a leadership training program designed for senior executives.<sup>2</sup> This article will look at the issues the partners identified, along with insights derived from a recent New York Bar Association seminar entitled "Leadership Skills for Lawyers."<sup>3</sup>

## Revisiting the Challenges and Lawyer-Leader Concerns

In recent years, law firms have faced a range of challenges – including industry consolidation, increased client demands, competition for talent and the emergence of nontraditional competitors.

The current global economic crisis is intensifying many of these competitive pressures. As a result, industry consolidation is expected to continue and possibly to accelerate. In some cases, consolidation is occurring out of opportunity; in others, it is out of necessity. Some firms have even dissolved under the weight of the pressure.

As the crisis deepens, clients are becoming more selective about using legal services. At the same time, they

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have more complex challenges and are looking for quality and excellence. A study that looked at law firm failures from 1998 to 2004 was updated to look at the current economic conditions and the recent dissolution of firms. The study indicated that failing firms exhibit flaws in one of three areas: below-average financial performance, internal dynamics, and external dynamics.

Some of these internal issues could be attributed to productivity problems associated with an unwillingness to deal aggressively with underperforming partners. The study also revealed that most of the failed firms suffered from a lack of clear strategies and clearly articulated and compatible goals among partners. Of paramount interest was that these firms lacked strong leadership. The study also identified several warning signs, including: problems of strategic focus, poor leadership, partner defections, and an unhealthy culture.<sup>4</sup>

Firms and their leaders are at an “inflection point” that marks the beginning of a significant move either up or down. Strategic leadership is an imperative if firms are to tip the scale towards upward movement, enabling them to successfully navigate the rapids of change.<sup>5</sup>

Recent trends in the legal sector, coupled with current market pressures, have increased the competitive nature of the legal profession.<sup>6</sup> Future success will be based not only on the historic practice and transactional skills that make attorneys important, but also will depend on the ability of lawyer-leaders to transform their firms and inspire the people within them. Leaders must be skilled in clarifying strategic direction and in influencing and aligning various constituencies to achieve commitment to the firm’s objectives.

Recently, CCL asked a group of attorneys to identify their current challenges. Their responses highlighted the dilemma of trying to find balance. Here, “balance” refers not only to the tensions between being a producer and a leader, but also between being an attorney and having a private life. Some of the competing pressures the respondents identified included (1) taking care of client needs versus the day-to-day management needs of the firm or practice, (2) spending time on tactical elements of client accounts versus time on strategic planning and development and (3) spending time on the technical aspects of lawyering versus investing in the people side of the practice.

### **Law Firm Challenges That Require Strategic Leadership Skills<sup>7</sup>**

- Managing talent.
- Making decisions and setting strategic direction.
- Retaining clients and promoting client satisfaction.
- Addressing growth, developing new and existing markets and practice areas.
- Taking care of yourself while taking care of the firm.

### **Defining Leadership Within Law Firms**

If leadership is about producing dramatic change with an extremely useful outcome, then what kind of leadership skills do attorneys need to develop? The list below summarizes what managing and senior partners said when asked what they hoped to learn by participating in a leadership development course.

### **Leadership Development Needs Identified by Managing and Senior Partners**

1. How do I communicate more effectively?
2. How do I listen better?
3. How can I learn to be more patient?
4. How can I become more self-aware?
5. How can I increase my ability to influence others?
6. How do I lead change successfully?
7. How can I drive innovation?
8. How do I increase my credibility as a leader?
9. How can I delegate more effectively?
10. How can I increase team performance (client team, firm leadership, practice group, regional office, firm-wide)?
11. How can I improve as a leader while maintaining my rainmaker status?
12. How do I get partners to find the right balance between personal and firm success?
13. What should the definition of a leader be within the context of a law firm, and how do you make it (leadership) work tactically and practically?
14. What leadership qualities are critical and which are “nice to have”?
15. How do I handle the added pressure that comes with being in a leadership position within a firm?
16. How can I improve my ability to develop associates?
17. What should I be doing to mentor new partners?
18. How can I better understand the new generation of lawyers?
19. How can I improve my leadership image?
20. What do I need to know to motivate underperforming partners?
21. How do I better manage difficult people?
22. How effective am I in providing feedback to others and how can I improve?
23. How can I regain some of my enthusiasm for practicing law?
24. How can I translate my confidence as a lawyer into confidence as a leader of lawyers?
25. How can I manage my time more effectively? What are some tools?
26. What are the strategies other lawyer-leaders use to set priorities?
27. What can I do to improve my strategic thinking, decision making and tactical business leadership skills?

- 28. How do I find balance between work and home?
- 29. How can I take the top challenges our firm faces and translate them into an action plan that all partners will support?
- 30. How can I effectively transfer my technical knowledge and experience to others in order to allow me more time to lead?

**Next Steps for Lawyer-Leaders:  
Thinking and Acting Beyond**

The first step in improving your effectiveness as a lawyer-leader is to admit you need help. This is less about disclosing your vulnerabilities and more about developing humility. After acknowledging a need for change (either for yourself, your group or your firm), you are in a position to move forward. Reflecting on your abilities relative to the 30 questions above is a first step. Accepting feedback from others on your effectiveness as a leader and determining how you need to improve is another.

Because leadership is not currently taught in law schools in any significant manner, you should not be surprised that leadership skills development is an issue. Furthermore, you should not be too hard on yourself, your leadership team or your firm if you are not yet successful in this area. It was not so long ago that firms and lawyers first acknowledged the need for “practice management.”

While the passage from law school to lawyer can be difficult and may require support, the journey from lawyer to lawyer-leader can be even more treacherous. It requires self-awareness, flexibility and the acquisition of new skills, knowledge and experiences. The challenges of an ever-changing environment make leadership development an imperative, though. Firms can no longer assume that leaders will simply emerge from the ranks.

The wish list articulated by firm partners who were beginning their leadership development journey confirms that though technical excellence and intellect are critical factors for success as a lawyer, emotional intelligence is the differentiating factor for successful leadership.<sup>8</sup>

Developing emotional intelligence starts with becoming self-aware. You are able to read emotions, recognize their impact and appropriately use gut feelings to inform and guide decisions. You can pursue an effective parallel success strategy for your practice group, regional office or firm by complementing technical and professional expertise with new leadership capabilities.

As an effective lawyer-leader, you will be more strategically agile and able to successfully navigate the rapids of change that are characterized by complexity, economic turbulence and growing competition. ■

1. Roland B. Smith, 2008. *Leading in Times of Complexity and Uncertainty: The Changing Nature of Leadership in Law Firms*. Ongoing, unpublished research. Center for Creative Leadership.
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3. *Leadership Skills for Lawyers. 2008*. Presentation sponsored by the New York State Conference of Bar Leaders and the Law Practice Management Committee. November 7–8. Tarrytown House Estate.
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6. Shawn W. Cutler & David A. Daigle, *Using Business Methods in Law: The Value of Teamwork Among Lawyers*. 25 T. Jefferson L. Rev. 195, 195, 2002.
7. Roland B. Smith & Paul Marrow, *The Changing Nature of Leadership in Law Firms*, N.Y. St. B.J. (Sept. 2008), p. 33; see Winnings, *supra* note 5.
8. Center for Creative Leadership. 2003. *Leadership Skills and Emotional Intelligence*, available at [http://www.ccl.org/leadership/pdf/assessments/skills\\_intelligence.pdf](http://www.ccl.org/leadership/pdf/assessments/skills_intelligence.pdf).

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# Changes for Powers of Attorney in New York

By Rose Mary Bailly and Barbara S. Hancock

On January 27, 2009, Governor David Paterson signed Chapter 644 of the Laws of 2008, amending the General Obligations Law to provide significant reforms to the use of powers of attorney in New York. Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association.

The power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. The power of attorney is also a simple document to create. It can be obtained from any number of Web sites on the Internet or in a stationery store, and its execution merely requires the principal's signature and its acknowledgment before a notary public. But this simplicity belies the extraordinary power that the instrument can convey, and its popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

The instrument's power is also demonstrated by the potential authority the agent can hold. This can include power to transfer assets that pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds and retirement benefits.

The principal can delegate these sweeping powers to the agent without fully recognizing their scope (particularly if the principal executes the document without the benefit of legal counsel). The agent can act immediately,

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The revised Power of Attorney Law has an original effective date of March 1, 2009. However, the effective date was delayed until September 1, 2009, after the extension was passed by the Senate (S.1728) on February 24 and by the Assembly (A.4392) on February 10. The bill was signed into law by the Governor as Chapter 4 of the Laws of 2009.

The New York State Bar Association supported this extension in order to provide practitioners with sufficient time to prepare for these significant changes.

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This article is based on the New York State Law Revision Commission's *2008 Recommendation on Proposed Revisions to the General Obligations Law – Powers of Attorney*. The Commission's 2008 Recommendation, Chapter 644 and other material related to Chapter 644 can be found at the Commission's Web site: <http://www.lawrevision.state.ny.us>.

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unless the instrument is a springing power of attorney, *i.e.*, one that becomes effective upon the occurrence of a specified event such as the principal's incapacity. In all cases, the agent can act without notifying the principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the principal's incapacity, the agent acts without oversight when an incapacitated principal is no longer able to control or review the agent's actions – a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, the N.Y. General Obligations Law (GOL), which governs powers of attorney, has been silent as to a number of matters. These omissions include descriptions of the agent's fiduciary obligations and accountability, the manner in which the agent should sign documents where a handwritten signature is required, the limits of the agent's authority to make gifts to third parties and to himself or herself, the manner in which the principal

The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.<sup>2</sup> The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney and their signatures have been acknowledged.<sup>3</sup>

A power of attorney executed prior to the effective date of Chapter 644 will continue to be valid, provided that the power of attorney was valid in accordance with the laws in effect at the time of its execution.<sup>4</sup>

### Major Gifts and Other Property Transfers

Chapter 644 requires that a grant of authority to make major gifts and other asset transfers must be set out in a major gifts rider to a statutory power of attorney, which contains the signature of the principal duly notarized and which is witnessed by two persons who are not named in

## The execution requirements alert the principal to the gravity of granting the agent this type of authority.

can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney, and the effect on powers of attorney of the 2003 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding medical records. The statute's provisions have been ambiguous in other areas such as gift-giving authority and authority to make other property transfers.

Based on its study, the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and easy creation, the General Obligations Law's silence about several significant matters, and ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use. Chapter 644 addresses these statutory gaps and clarifies the ambiguities to assist parties creating powers of attorney and third parties asked to accept them.

### General Provisions

Chapter 644 creates a new statutory short form power of attorney. On or after the chapter's effective date, to qualify as a statutory short form power of attorney, an instrument must meet the requirements of GOL § 5-1513.<sup>1</sup>

the instrument as permissible recipients of gifts or other transfers, in the same manner as a will.<sup>5</sup> In the alternative, the principal may grant such authority to the agent in a nonstatutory power of attorney executed in the same manner as a major gifts rider.<sup>6</sup> The creation of a major gifts rider or its alternative nonstatutory power of attorney allows the principal to make an informed decision as to whether the agent may make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a major gifts rider or a nonstatutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.<sup>7</sup> All statutory provisions relating to major gifts and property transfers have been located in a new GOL § 5-1514, rather than spread throughout the statute.

Powers of attorney often serve two very different purposes: management of the principal's everyday financial affairs and reorganization or distribution of the principal's assets in connection with financial and estate planning. The General Obligations Law has allowed the use of the statutory short form power of attorney for both purposes.

The former statutory language and statutory form made it difficult for a principal to make an informed deci-

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sion about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions were scattered among other arguably more routine provisions. The statutory gifting authority was listed 13th (M) of 16 powers, and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth (F) and 12th (L) respectively; all of these could easily be overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allow the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal might have been thinking of more routine matters, such as the need for more insurance or a different type of insurance and might have been unaware that he or she had given the agent authority that could alter the estate plan or reduce his or her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or designate himself or herself as the beneficiary of the principal's insurance policies and retirement benefits.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. The statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries of insurance policies and retirement plans, did not require on their face that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might appear from a reading of the statute, that the agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. However, cases interpreting the statute appeared to hold that if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits, the principal must grant gifting authority in addition to authority over joint bank accounts, and insurance and retirement benefits.

Finally, the statute permitted modifications to the statutory short form to authorize significant transfers; but, like the powers listed explicitly on the form, they could be buried amid masses of legal text and could fail to attract the principal's attention to the significance of these modifications.

### **HIPAA Privacy Rule**

Chapter 644 adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in construction § 5-1502K,<sup>8</sup> so that an agent can examine, question, and

pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule would prevent the agent's access to the records. This provision is applicable to all powers of attorney executed before, on or after the effective date of Chapter 644.<sup>9</sup> It does not change the law forbidding the agent from making health care decisions.<sup>10</sup>

The General Obligations Law has been silent as to the relationship between the power of attorney, an agent's authority to access medical records under New York law, and the Privacy Rule, a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA. The ambiguity about an agent's authority to access medical records under New York law arose out of several factors. Neither subdivision K on the statutory short form (power to access records), nor § 5-1502K, which construed the term "records," contained an express reference to medical records. Moreover, § 18 of the Public Health Law, which identifies qualified persons who are entitled to access to a patient's health records, does not include all agents acting pursuant to a power of attorney.<sup>11</sup> As a result, health care providers have refused to make records available to an agent seeking clarification of a medical bill, without the express language in the power of attorney document authorizing such release.

The ambiguity thus created is exacerbated by the HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an agent if the agent can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care."<sup>12</sup>

The General Obligations Law has limited the authority of the agent to financial matters, and expressly prohibits the agent from making health care decisions for the principal. The Public Health Law defines a health care decision as "any decision to consent or refuse to consent to health care."<sup>13</sup> "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."<sup>14</sup>

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to § 2981 of the Public Health Law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the principal.<sup>15</sup> As a practical matter, payment issues are left to the principal or the principal's agent. The Privacy Rule regarding access to records does not take into account a

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents.

statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the agent.

### Agent

Chapter 644 includes a statutory explanation of the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.<sup>16</sup> A notice to the agent is added to the statutory short form explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority.<sup>17</sup> If the agent intends to accept the appointment, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.<sup>18</sup>

Chapter 644 also requires that, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required.<sup>19</sup> In all transactions (including electronic transactions) where the agent purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument.<sup>20</sup> Chapter 644 allows for the principal to provide in the power of attorney that the agent receive reasonable compensation if the principal so desires.<sup>21</sup> Without this designation, the agent is not entitled to compensation.<sup>22</sup>

Both the durable and springing durable power of attorney permit the agent to continue to act after the principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an agent to act for the principal precisely at a time when the principal needs assistance, to permit the principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the principal's incapacity leaves the principal unable to monitor the agent's actions and to revoke the power if he or she is not satisfied with the agent's conduct. Thus an agent could take actions on behalf of the principal for months or years, without any supervision and not always to the benefit of the principal. Recognizing that the potential for financial exploitation was inherent in the delegation of authority to an agent, public hearings in the early 1990s led to a two-pronged recommendation for reform – educating the principal and holding the agent accountable. Changes to the law regarding the principal's education were adopted but

the statute was not revised to reflect the agent's accountability until now.

### Principal

Chapter 644 adds a section to the statute that explains how the power of attorney can be revoked.<sup>23</sup> It expands the "Caution" to the principal so that the principal will be better informed about the serious nature of the document.<sup>24</sup> Chapter 644 also permits the principal to appoint someone to monitor the agent's actions on behalf of the principal,<sup>25</sup> and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal.<sup>26</sup> Such accountability is consistent with the common law requirement that where one assumes to act for another he or she should willingly account for such stewardship.

### Third Parties

Chapter 644 provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause.<sup>27</sup> The basis for a reasonable refusal includes, but is not limited to, the agent's refusal to provide an original or certified copy of the power of attorney and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when he or she executed the document, or when acceptance of a nondurable power of attorney is sought on the principal's behalf.<sup>28</sup> When a third party unreasonably refuses to accept a power of attorney, the statute authorizes the agent to seek a court order compelling acceptance of the power of attorney.<sup>29</sup> Chapter 644 expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies<sup>30</sup> and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.<sup>31</sup> The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated.<sup>32</sup> A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.<sup>33</sup>

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the principal execute a document prepared by the institution. The

enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document. In 1986, the General Obligations Law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form. Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

### Other Major Provisions

Chapter 644 increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code.<sup>34</sup> It adds a provision allowing gifting to a "529" account, up to the annual gift tax exclusion amount.<sup>35</sup> These "529" accounts, authorized in the Internal Revenue Code at § 529, are popular tax-advantaged savings accounts for education expenses. Chapter 644 amends the provisions regarding gift splitting to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.<sup>36</sup>

### Other Provisions

An attorney who has been instructed by the principal not to disclose the document to the agent at the time of the agent's appointment may do so without concern that it is already a legally effective document because the instrument does not become effective until the agent signs.<sup>37</sup> An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office.<sup>38</sup> In addition, the default statutory provisions regarding annual exclusion gifting will always be up to date with federal law.<sup>39</sup>

Financial institutions may demand an affidavit that the power of attorney is in full force and effect when they are asked to accept it.<sup>40</sup>

Investigative agencies and law enforcement officials can request a copy of the power of attorney and the records of the agent<sup>41</sup> and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.<sup>42</sup>

Additionally, the basis for termination and revocation of a power of attorney and resignation of an agent are described,<sup>43</sup> as are the relationships among co-agents and the initial and successor agents.<sup>44</sup>

### Conclusion

With these changes, New York's law has been updated and refined to reflect the complexities that surround the

use of powers of attorney in financial and estate planning matters.<sup>45</sup>

1. 2008 N.Y. Laws ch. 644, § 2, 5-1501B; § 19, 5-1513. All statutory references for amendments to the General Obligations Law are to the sections in Chapter 644.
2. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1).
3. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3).
4. 2008 N.Y. Laws ch. 644, § 21.
5. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(a), § 19, 5-1514.
6. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(b), § 19, 5-1514.
7. 2008 N.Y. Laws ch. 644, § 19, 5-1514(5).
8. 2008 N.Y. Laws ch. 644, § 12.
9. 2008 N.Y. Laws ch. 644, § 21.
10. 2008 N.Y. Laws ch. 644, § 12, 5-1502K(1).
11. See N.Y. Public Health Law § 18(1)(g) (PHL) (refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed).
12. 45 C.F.R. § 164.502(g)(2).
13. PHL § 2980(6).
14. PHL § 2980(4).
15. See PHL § 2987.
16. 2008 N.Y. Laws ch. 644, § 19, 5-1505.
17. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(2); § 19, 5-1513(n).
18. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(c); § 19, 5-1513(o).
19. 2008 N.Y. Laws ch. 644, § 19, 5-1507(1).
20. 2008 N.Y. Laws ch. 644, § 19, 5-1507(2).
21. 2008 N.Y. Laws ch. 644, § 19, 5-1506(1).
22. *Id.*
23. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
24. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(1); § 19, 5-1513(a).
25. 2008 N.Y. Laws ch. 644, § 19, 5-1509.
26. *Id.*
27. 2008 N.Y. Laws ch. 644, § 18, 5-1504.
28. *Id.*
29. 2008 N.Y. Laws ch. 644, § 19, 5-1510(2)(i).
30. 2008 N.Y. Laws ch. 644, § 2, 5-1501(5).
31. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(b)(1).
32. 2008 N.Y. Laws ch. 644, § 18, 5-1504(3).
33. *Id.*
34. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
35. *Id.*
36. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(2).
37. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3)(a).
38. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(a)(1).
39. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
40. 2008 N.Y. Laws ch. 644, § 18, 5-1504(5).
41. 2008 N.Y. Laws ch. 644, § 19, 5-1505(2)(a)(3).
42. 2008 N.Y. Laws ch. 644, § 19, 5-1510(1).
43. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
44. 2008 N.Y. Laws ch. 644, § 19, 5-1508.
45. In so doing, New York's law has come in line with the laws of many other jurisdictions and the recent amendments to the Uniform Power of Attorney Act, available at [http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm).

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# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I am a member of a bar association listserve in which members discuss legal issues that affect their practices. Often, a member will post a question that relates to a specific matter he or she is handling, and begins by writing, "I have a client who . . ." The posting attorney then goes on to explain the matter, provide an analysis, including questions and uncertainties, and his or her perception of the strengths and weaknesses of the client's position.

Such a post typically generates numerous responses. I have often considered seeking advice from the members of the listserve concerning matters I am handling, but have hesitated to do so because I am concerned about revealing a client confidence without the client's consent. I am also concerned that a potential or actual adversary might read my post and obtain an advantage by knowing my thoughts about the matter. Does posting a hypothetical about a specific client matter violate the obligation to keep client communications confidential?

Sincerely,  
Lawyer Online

## Dear Lawyer Online:

As modern lawyers access the new methods of communication that advanced technology has to offer, their duty to protect the confidentiality of client information has not changed. The unique features of electronic communication require that precautions be taken to avoid the casual disclosure of client information.

Unquestionably, a lawyer's ability to seek advice from knowledgeable colleagues is, and always has been, an important resource that provides considerable benefits for clients. Even before the dawn of the information age, forums such as bar association functions, continuing legal education courses, and even holiday cocktail parties provided fertile ground for testing ideas and gaining insight into both simple and complex legal matters. Nevertheless, those communications, and the more common and casual ones

that now take place on-line, may create unanticipated violations of our duty to protect client information.

Every discussion of an attorney's duty to protect client confidences must start with DR 4-101 of the Code of Professional Responsibility [22 N.Y.C.R.R. § 1200.19] – at least, that is, until April 1, 2009 when the Rules of Professional Conduct will take effect. The parallel provision to DR 4-101 in the new Rules is Rule 1.6. There are differences in wording, and a new exception has been added permitting lawyers to reveal confidential information "to prevent reasonably certain death or substantial bodily harm." The two Rules are otherwise substantively similar. Both prohibit an attorney from revealing client information except in specific circumstances, including where the client has consented after a full disclosure, defined under the new Rule as "informed consent."

For the purpose of answering your question, we will assume that your client has not consented to the revelation of the information and that none of the other exceptions in the old or new Rules apply. Obviously, you could ask your client for consent to submit the question to the listserve after providing a thorough explanation of the risks of doing so. If you decide to make a discreet request for assistance from the other members of the listserve without client consent, you should consider the following issues.

Does the disclosed information constitute a "confidence" under DR 4-101 or "confidential information" under Rule 1.6? Both are defined as information gained during the representation of a client that (1) is protected by the attorney-client privilege under applicable law, or (2) is likely to be embarrassing to the client, or (3) the client has requested it be kept confidential. You might also examine CPLR 4503, which generally provides that information coming into the possession of an attorney through the attorney-client relationship may not and shall not be revealed to a third party.

Determining what may or may not be embarrassing to a client is a rather subjective test. However, in certain circumstances the mere fact of representation by a particular attorney may be embarrassing, such as when a client consults a criminal or matrimonial attorney, or when an attorney retains an expert in a disciplinary matter.

Clearly, the facts involved in the questions you have considered posting came into your possession through the attorney-client relationship, and you must protect that confidential information. The answer to your question therefore seems to turn on two concerns: whether the posting will reveal your client's identity and the nature of the confidential communications you are required to protect.

Ethical Consideration 4-2 may be helpful in answering your question. Written long before the advent of listserves, it states, in pertinent part:

A lawyer must always be sensitive to the rights and wishes of [a]

CONTINUED ON PAGE 52

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

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

client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in the professional relationship. Thus, in the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should [the lawyer], in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or [the client's] confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

Suppose, for example, that Robert Shapiro posted a listserv message that read, "I once represented a former football star accused of murdering his wife. He told me he was guilty. What was my ethical duty to the court?" Everyone would know exactly who his client was, and he would be violating his duty to keep client communications confidential. The same would be true if he made that statement at a cocktail party.

You are not Robert Shapiro, you say? Well, consider the possibility that although your post to the listserv might not explicitly disclose your client's identity, the facts in your "hypothetical" question might. If you are a matrimonial attorney posting to a listserv comprised of divorce lawyers, one of them may be your adversary and recognize the facts. If you are a trust and estates attorney, the same may be true. The principle applies to all fields of law.

Casual conversation with a colleague at a bar association meeting where you seek help with a matter is one thing, but broadcasting your query to what may be thousands of recipients is quite another, and can be quite dangerous. Moreover, unlike a verbal conversation, which is present in one individual's memory, digital

communications can be forever and may spread without limitation.

The American Bar Association Standing Committee on Ethics and Professional Responsibility discussed *Ethical Issues in Lawyer-to-Lawyer Consultation* in Formal Ethics Opinion 98-411. Although the Opinion focused on one-on-one consultations and did not address the implications of seeking advice on a listserv, the principles discussed still apply to your question.

"If the hypothetical facts discussed allow the consulted lawyer subsequently to match those facts to a specific individual or entity, the information is not already generally known, and the disclosure may prejudice or embarrass the client, the consulting lawyer's discussion of the facts may have violated his duty of confidentiality under Rule 1.6." [ABA Formal Opinion 98-411, page 2.] Moreover, the Committee stated that "disclosure of privileged communications by the consulting lawyer could be held to waive the attorney-client privilege." [Id.] The Committee also recommended that the consulting lawyer avoid consulting with a lawyer who is likely to be or become the adverse party's lawyer, and to obtain assurances of confidentiality from the consulted lawyer.

While these precautions might work in a lawyer-to-lawyer consultation, the impracticality of seeking and obtaining such protections from the members of a listserv – comprised of what could be thousands of participants – is obvious. Those giving advice on a listserv, as well as those seeking it, should also be mindful of the obligation to keep client information confidential, because this is a duty that goes to the very core of the attorney-client relationship. For example, a personal injury defense attorney might have valuable advice to offer a plaintiff's counsel who posts a question. What if the defense attorney's carrier client turns out to be the insurer on the matter? See *In re Caliguiri*, 50 A.D.3d 90, 851 N.Y.S.2d 148 (1st Dep't 2008).

And there are other dangers in posting to a listserv that might not directly

involve confidential client communications, but could adversely affect the client or the outcome of the client's matter. Consider, for instance, the hypothetical facts described in Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion 514 (8/19/05). The Opinion was titled *Ethical Issues Involving Lawyer and Judicial Participation in Listserv Communications*.

There, a poster sought an accountant as an expert witness and a member of the listserv responded with the recommendation of a particular certified public accountant (CPA). That post was followed by yet another which sharply criticized the CPA's credentials. A judge who subscribed to the listserv realized that the CPA would soon be testifying before him. The judge posted his own message advising that messages should be censored to avoid *ex parte* communications.

Although the L.A. County Bar Ethics Committee found no actual violation of the prohibition against *ex parte* contacts with a judge "on the merits" of a pending matter, it warned that

since one can never know who might read or react to an e-mail posted on the Internet, and because it is likely that judges will be included in listservs or other open communications lists, it is incumbent on attorneys to avoid including any confidential or private information in a listserv or other Internet posting that could be identified to a particular case or controversy.

We all need the help of colleagues from time to time. But we must always be mindful of protecting confidential client information. When there is any possibility that you might compromise a client's position or inadvertently disclose confidential information, erring on the side of caution is best. In considering a post to the listserv, you should analyze whether the specific facts could potentially be identified with a specific client by someone receiving the hypothetical query. If there is any possibility

of such a disclosure, you should consult with the client before making the post. That consultation should include a full disclosure of the information you intend to post, who might receive the information, and the consequences if the information ends up in the hands of a potential adversary or other unauthorized party.

The Forum, by  
Lawrence F. DiGiovanna  
Brooklyn, New York

*We received the following response to the question from "Involved," which was published in the February Forum:*

### Dear Involved:

You, Sir, are a rat. Having trifled with the young lady's affections, you now churlishly express doubts.

Might these circumstances "ultimately cause problems" for you and your firm? Of course, there is no way to have a "relationship" without problems. However, consider the following possibilities:

- she does something which requires you to report her to the firm;
- you do something which puts her in a difficult position: either of you has influence on the other's compensation or performance rating;
- she controls the assignment of company business to you: there can be good faith disagreements over how to handle a situation;
- your loyalty may be conflicted between the company and her.

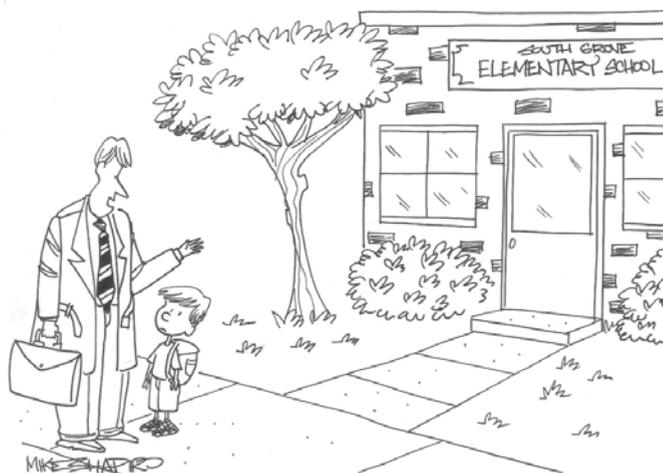
Severing your relationship is a futile response, even if that is what you want. Sitting down with her and working out a set of rules to avoid professional entanglement probably would be constructive.

Best wishes,  
David M. Goldberg  
Brooklyn, New York

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I work for a mid-sized upstate law firm which represents various businesses throughout the area. Three of these businesses (we can refer to them as Installer One, Installer Two and the Owner) recently became adversaries in litigation concerning an oil spill. Briefly, Installer One and Installer Two separately installed two different safety mechanisms to an oil heating system located in the basement of the Owner. Allegedly, both of these safety mechanisms failed and suit was brought by the Owner against both Installers. My firm declined to represent any of the three businesses in that litigation after initial consultations about the matter. However, the Owner's insurance company has now refused to cover the costs associated with the spill, and the Owner wants to challenge that refusal in court. Its principal has requested our representation in the matter. Although we do not represent the Installers with regard to the pending oil spill litigation, would it be proper for the firm to represent the Owner in its insurance coverage case?

Sincerely,  
Caught in the Middle



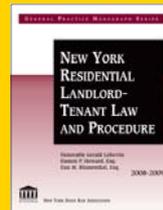
"Remember, son, we don't say kindergarten.  
We say pre, pre, pre, pre, pre law."

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## New York Residential Landlord-Tenant Law and Procedure

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New York residential landlord-tenant law is daunting to newcomers and the experienced alike, given its patchwork statutory framework, discordant case law, and emotion-laden disputes involving homes, money, and the charged landlord-tenant relationship. This monograph introduces the fundamentals of residential landlord-tenant law and offers a guide to the procedural mechanics practitioners face in landlord-tenant disputes.



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readers. Writing in the same typeface signals that all the information is significant. Using different typefaces gives a document a cut-and-paste, distracting appearance. The document will look like a ransom note.<sup>9</sup> Use different typefaces in advertisements, not legal documents.

Some type is monospaced; some is proportionally spaced. Monospaced: Every letter takes up the same amount of space. Example: Courier. In Courier, a capital “W” takes up the same space as a lowercase “i.” Proportionally

“White space helps readers focus on the text.”

spaced: Every letter is spaced according to its proportion. For example, a capital “W” takes up more space than a lowercase “i.” Examples: Garamond and Times New Roman. The difference in type is noticeable in characters that are narrow in proportional fonts like f, i, j, l, r, t, commas, and periods. Proportionally spaced type is easier to read and occupies less horizontal space than monospaced types. Use monospaced type only when typing on a typewriter.

**2. Type Size.** Type size, like typeface, affects a document’s clarity and readability. Type size, the height of an individual character, is measured in “points.” The most common type size — 12-point type — is one-sixth of an inch high. A 72-point type size equals a one-inch character height. Type size should never be smaller than 10-point type size or larger than 14 points. Large type sizes (16 points and larger), like all-capital letters,<sup>10</sup> decrease readability and look aggressively artificial, as if you’re yelling at the reader. Small typefaces (10 points or smaller) resemble fine print, discouraging readers from reading the text.

Some type sizes vary even when the writer chooses the same point size. They vary because of the x-height: the height of a lowercase “x” rather than the average of all the letters on a line of text. Type size with a larger x-height is easy to read. Type size with a smaller x-height fits more characters on a line.

In New York, the Civil Practice Law and Rules (CPLR) 105(t) explains how to determine whether you’ve complied with text-size requirements: CPLR 2101(a) provides that the letters in a summons be no less than 12 points and that the letters in all other litigation papers be no less than 10 points; CPLR 4544 renders some contracts inadmissible in evidence if the print is less than 8 points (or 5½ points for upper-case type); and CPLR 8019(e) provides that papers filed with a county clerk for recording and indexing must contain print no less than 8 points.

You’ve met the CPLR requirement “if the x-height of the type is a minimum of 45 percent of the specified point size.”<sup>11</sup> The x-height is equal to the measure, in millimeters, of the lowercase letters, without ascenders or descenders like the line topping an “h” or the line bottoming a “p,” divided by .351. For example, if the lower-case letter “m” in the word “motion” measures two millimeters and the lowercase letter “r” in the word “regulation” also measures two millimeters, the measurement of the letters divided by .351 equals 5.698, which satisfies CPLR 105(t): It’s greater than 45% of the required font size of 10 points.<sup>12</sup>

At least one expert recommends using 13-point type size,<sup>13</sup> but the standard for federal appellate briefs is 14-point type.<sup>14</sup> For the rules applicable to New York state courts and to federal courts in New York, see the next issue’s Legal Writer column: “Document Design: Pretty in Print — Part II” (May 2009).

**3. White Space.** The trend in court rules is to move from page limits to word limits. That trend encourages legal writers to add plenty of white space to enhance legibility.

White space refers to the area on the page where no text appears. White space includes the margins, the space around headings, and the space around block quotations. White space doesn’t include the blank lines in double-spaced text. White space affects document readability. White space helps readers focus on the text: It makes the text stand out. White space also lets readers rest after reading the text: It breaks the monotony. White space gives readers information in bite-sized bits to enable the reader to digest information. The goal is to have about 50% text and 50% white space.<sup>15</sup>

To maximize white space:

- Use 1.25-inch margins;
- Avoid long paragraphs;
- Add headings and subheadings;
- Indent a full tab for each paragraph;
- Skip a space between paragraphs whether you single-space or double-space your text;
- Add a line between sections;
- Use bullet points and numbered lists;
- Use left-justified (right-ragged) margins;
- Avoid block quotations and lengthy footnotes or endnotes; and
- Add a line before and after block quotations and between footnotes and endnotes.<sup>16</sup>

**4. Margins.** In Word and WordPerfect, the margin default rule is one inch on the top, bottom, right, and left, a vestige from monospaced typewriter fonts. Experts recommend 1.25 inches, however, and some recommend even more for a 12-point proportionally spaced font: “The smaller your font size, the larger your margins will need to be, and vice versa.”<sup>17</sup> Some courts also require that margins exceed one inch. Read the court’s rules before filing any legal document. If a court requires briefs to have at least one-inch margins, you may increase the left- and right-side margins beyond the one-inch standard to maximize legibility and readability.<sup>18</sup> The extra space will give

## “Using different typefaces will make the document like a ransom note.”

the judges and their law clerks space on which to write notes.

If a court requires you to bind a document, add an extra half-inch to the gutter margins. A gutter margin is the space created by the adjoining inside margins of two facing pages in a book or the space between columns on a page. If a court requires you to print on one side of the paper, add extra space to the left side of the page. If a court requires you print on both sides of the paper, add extra space to the left margin.

**5. Alignment.** Alignment refers to lining up text with a vertical line on a page. Alignment falls into four categories: right-aligned, left-aligned, center-aligned, and full justification. Right-aligned text is set flush with the right-hand margin. Left-aligned text is set flush with the left-hand margin. Centered text is set centered on the page. Fully justified text is lined up at both the left and right sides.

Avoid fully justified formatting in typed documents as opposed to published documents. Full justification, especially with monospaced type, leads to odd spacing between letters and words. The text in full justification is forced to the left- and right-hand side of the page. Full justification makes letters appear stretched. The text will appear to slide down the page. Full justification might also lead to rivers of white space. A “river” refers to the white space between words that appear near each other on consecutive lines of text. Rivers also occur when the line length is too long or too short.

Legal writers, as opposed to publishers, should stick to left-aligned text; it’s easiest to read. The uneven margin on the right-hand side, also known as a right-ragged effect, helps readers find the beginning of the next line. It helps readers keep on reading.

Use center-aligned text for titles, captions, headings, and page numbers.

Legal writers rarely use flush-right text, although they may use it to set the court name and case number on pleadings and motions.

Avoid using more than one text alignment on a page. It’s messy and difficult to read.<sup>19</sup>

### **6. Horizontal and Vertical Spacing.**

Horizontal spacing refers to the space in the text before a sentence (called “indentations” or “indents”) and the space between sentences. Vertical spacing refers to single- or double-spacing between lines of text.

All legal-writing and publishing authorities recommend using one space between words and one space after punctuation marks.<sup>20</sup>

Most authorities recommend using one space between sentences. As the Seventh Circuit explains, “[p]ut only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, extra spaces lead to . . . wide, meandering areas of white space up and down a page [that] interfere with the eyes’ movement from one word to the next.”<sup>21</sup>

Use your computer’s hard-space function where you don’t want a line to break and separate citation symbols like the section symbol (§) or the paragraph symbol (§¶). Use the hard-space function before and between a series of ellipses. This will ensure that the ellipses are spaced evenly. *Incorrect:* “The judge ordered her to...produce the documents.” *Correct:* “The judge ordered her to . . . produce the documents.”

Indenting paragraphs, block quotations, and lists gives the text definition and makes it stand out. Most readers prefer indented paragraphs. Indent the first line of each paragraph. Although the Seventh Circuit recommends short indents,<sup>22</sup> the Legal Writer recommends indenting paragraphs one full tab, or one-half inch from the margin. A full tab is the default indent in Word and WordPerfect, and a full tab increases white space. Don’t use the spacebar to create an indent; use a tab. For block

quotations, indent on the left-hand margin and the right-hand margin; the indents should be equally sized, or double indented. Keep indents uniform: If you use one-half inch indents for paragraphs, use the same width throughout the text.

Width, sometimes called the length of text lines, also affects readability. Our eyes naturally shift from one set of words to the next, pausing between each set of words. This stop is called a “fixation pause.”<sup>23</sup> Legibility decreases when the width of a text line becomes small. A document that contains fewer fixation pauses allows greater retention and comprehension.<sup>24</sup> The optimal length of text lines depends on the type size. For a 12-point type size, line length should range from 2.75 to 4 inches. Line length explains why block quotations are difficult to process. Block quotations contain shortened text lines. They force readers to search for the next text line and cause the reader to tire.<sup>25</sup>

For office documents and letters, single-space between lines of text, but add a line (hard return or “enter”) after every paragraph. Single-spacing is user-friendly. Single-spacing leads to shorter documents and thus looks more concise: A paragraph that could be the size of a page if double-spaced becomes half the size when single-spaced. Single-spacing also makes it easier for readers to see and read: The text jumps out at the reader. Double-spacing makes reading difficult: Readers have a hard time following the text. The structure of the text gets lost on the page. But many courts require double-spacing between lines. See the next issue’s Legal Writer column for more on this topic.

**7. Headings.** Headings and sub-headings are visually effective mechanisms that enable better recall of substantive information. Headings group related information. Readers are more likely to remember information sepa-

rated into parts, especially information contained in the heading itself. Create persuasive and conclusory headings to make information sink in.<sup>26</sup>

Headings and subheadings should be the same size as the text. Headings may be set to a slightly larger size than the text — if the text is 12 points — but should not exceed size 14-point font. Use a different typeface to distinguish text from headings and subheadings, just as you’d do so, sparingly, on the cover page of a document: “The contrast between the serif and sans-serif typefaces should make the latter jump off the page.”<sup>27</sup>

Headings and subheadings may be formatted in bold to make the text stand out. Place headings in a hierarchy: Use boldface capital letters for the main heading, boldface capitals and lowercase letters for the next level, and boldface italics for subheadings.<sup>28</sup> Indent them the same width from the margin. Leave plenty of room for dot leaders in the table of contents so that the headings and subheadings don’t obscure the page numbers. Except for main section headings, left justify all other headings. Single-space headings even if you double-space the document. Insert an extra space in the text before a main heading to help readers breathe before they read further.

In the next issue, the Legal Writer will continue in Part II with more document design. ■

tional advice as it is for its exceptional design — offers another example. You’re hiring a lawyer. You get three résumés, all with identical information. Whom would you interview first? Butterick dryly notes that “Steven and Roscoe have a few things to learn.”

Anastasia K. Johnson  
ATTORNEY AT LAW

Roscoe S. Feinberg  
attorney at law

STEVEN R. COLTRANE  
ATTORNEY AT LAW

5. Robbins, *supra* note 2, at 119–20.
6. Ellen Lupton, *Cold Eye*, Print Mag. (Summer 2003), available at *The Science of Typography* [http://www.typoscience.com/articles/the\\_science\\_of\\_typography](http://www.typoscience.com/articles/the_science_of_typography) (last visited Jan. 29, 2009).
7. Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers 5, <http://www.ca7.uscourts.gov/rules/type.pdf> (last visited Jan. 29, 2009) (“Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space.”) (hereinafter “Seventh Circuit”); Typography, *supra* note 4, at <http://www.typographyforlawyers.com/?p=687> (last visited Jan. 29, 2009) (“It bewilders me to visit big law firms [that] clearly spent top dollar on their websites and their Aeron chairs but that still use Times . . . .”); Raymond P. Ward, *Writer’s Corner, Good Writing, Good Reading: Advice on Typography*, [Jan. 2005] For the Defense 60, available at <http://home.earthlink.net/~thelegalwriter/sitebuildercontent/sitebuilderfiles/typography.pdf> (last visited Jan. 29, 2009) (“While Times New Roman is acceptable for most legal writing, it’s not the best font you can use for briefs.”).
8. Seventh Circuit, *supra* note 7, at 5.
9. Bryan A. Garner et al., *The Redbook: A Manual on Legal Style* Rule 4.4(b), at 79 (2d ed. 2006).
10. Seventh Circuit, *supra* note 7, at 6 (“Capitals all are rectangular, so the reader can’t use shapes (including ascenders and descenders) as cues.”).

11. CPLR 105(t); see *Gouveneur Gardens Hous. Corp. v. Lee*, 2 Misc. 3d 525, 526, 769 N.Y.S.2d 829, 830-831 (Hous. Part Civ. Ct. N.Y. County 2003).
12. For more on this topic, see *Glorius v. Siegel*, 2004 N.Y. Slip Op. 51378(U), \*2-3, 2004 WL 2609413, at \*2, 2004 N.Y. Misc. LEXIS 2195, at \*2-3 (Hous. Part Civ. Ct. N.Y. County 2004).
13. See Garner, *supra* note 9, Rule 4.5(a), at 79.
14. Fed. R. App. P. 32(a)(5).
15. Raymond P. Ward, *Writer’s Corner, Good Writing, Good Reading: Advice on Typography*, [Jan. 2005] For the Defense 60, available at <http://home.earthlink.net/~thelegalwriter/sitebuildercontent/sitebuilderfiles/typography.pdf> (last visited Jan. 29, 2009).
16. Some of these suggestions come from Morkan, *supra* note 1, at 31.
17. Typography, *supra* note 4, at <http://www.typographyforlawyers.com/?p=944> (last visited Jan. 29, 2008).
18. Robbins, *supra* note 2, at 124.
19. *Id.* at 131.
20. Garner, *supra* note 9, Rule 4.12, at 83.
21. Seventh Circuit, *supra* note 7, at 5.
22. *Id.* at 6 (“Indent the first line of each paragraph ¼ inch or less. Big indents disrupt the flow of text.”).
23. Robbins, *supra* note 2, at 122.
24. *Id.*
25. *Id.* at 123.
26. *Id.* at 125.
27. Raymond P. Ward, *Writer’s Corner, The Right Tool for the Job*, [Winter 2008] *Certworthy* 16, 16, available at [http://raymondward.typepad.com/newlegalwriter/typography\\_and\\_document\\_design](http://raymondward.typepad.com/newlegalwriter/typography_and_document_design) (last visited Jan. 29, 2009); accord Morkan, *supra* note 1, at 29. Morkan calls this contrast “emphasis” and “cueing,” a technique designed “to get your reader’s attention and direct it to particular points in your argument.”
28. Garner, *supra* note 9, Rule 4.20(f), at 87.

1. Linda L. Morkan, *Appellate Advocacy, The Gestalt of Brief Writing: Visual Rhetoric in the Appellate Brief* [July 2008] For the Defense 27, 31, available at <http://www.rc.com/publications/Morkan.pdf> (last visited Jan. 29, 2009) (“Readers love visual aids. Love them to death, eat-them-up kind of love.”).
2. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. Ass’n Legal Writing Directors 108, 112 (2004), available at [http://www.ca7.uscourts.gov/Rules/Painting\\_with\\_Print.pdf](http://www.ca7.uscourts.gov/Rules/Painting_with_Print.pdf) (last visited Jan. 29, 2009).
3. Wayne Schiess, *Schiess’s Basic Document Design for Lawyers*, <http://www.utexas.edu/law/faculty/wschiess/legalwriting/2008/07/schiesss-basic-document-design-for.html> (last visited Jan. 29, 2009) (advising lawyers to do as the experts say “[u]nless required by rule or your boss”).
4. Matthew Butterick, *Typography for Lawyers*, <http://www.typographyforlawyers.com/?p=106> (last visited Jan. 29, 2009) (hereinafter “Typography”). Butterick’s site — as noteworthy for its excep-



# LANGUAGE TIPS

BY GERTRUDE BLOCK

**Q**uestion: What does the word *enormity* mean? President Barack Obama and other knowledgeable persons use it to mean “something very large or enormous.” In one speech, for example, the President said, “Despite the *enormity* (my emphasis) of the task that lies ahead, I stand here today as hopeful as ever that the United States of America will endure – that it will prevail, that the dreams of our founders will live in our time.” That sounds wonderful, if *enormity* is the right word. Is it?

**A**nsWER: No. Words often change meaning over time, but *enormity* has not. An *enormity* is “a great wickedness, a monstrous or outrageous act, or a very wicked crime.” To describe great size or magnitude, Mr. Obama should have chosen words like “vastness” or “immensity,” as in, “The largest elephant was a beast of unusual immensity.”

Unfortunately, as two look-alike words become popular, our language tends to “level,” so nuances of meaning disappear, and distinctions are lost. Another word that has suffered that loss is the adverb *willfully*. Obama described a bipartisan group as “willfully unbiased,” when he should have said *willingly* unbiased (or merely “unbiased”).

The word *willfully* is quite different from *willingly*. *Willingly* means simply, “voluntarily or intentionally.” It contains no pejorative slant. But *willfully* is pejorative, meaning “stubbornly determined on having one’s own way.” It appears in contexts like “She caused me harm by willfully deceiving me.” Legal dictionaries define *willfully* as implying pejorative intent. It is defined as “voluntarily and intentionally assisting or advising another to disobey or disregard the law.” Another valuable distinction will have been lost if *willfully* becomes synonymous with “voluntarily.”

The original meaning of some nouns is virtually forgotten. Not too long ago, being called an *opportunist* was disparaging, for an opportunist described

someone who took advantage of every opportunity to gain advancement, despite the harm to others. Now, being an opportunist is no longer a slur.

News journalists apparently believe that *notorious* and *famous* are synonyms, which they may soon become unless educated speakers continue to recognize that they are opposites. You are famous if you are the pilot who recently successfully landed a commercial passenger plane in the Hudson River, saving all the passengers and crew. But the perpetrator of the Ponzi scheme is not famous, he is notorious.

The nice distinction between *disinterested* and *uninterested* has also vanished. You were once pleased if you were dubbed “disinterested,” which traditionally has meant “unbiased” or “without prejudice.” Its look-alike companion *uninterested* contained no such compliment; it meant “without interest,” a mere statement of fact. Now *uninterested* has almost disappeared, and *disinterested* has taken on its meaning. Oliver Stone obviously did not intend a compliment when he said of Sarah Palin: “She has a disinterested, narrow-minded belief system and a jingoistic world view.”

There is a small but important difference between the words *incident* and *incidence*, which many people do not notice. Both nouns mean “occurrence or event,” but an incident refers to a definite and separate event, sometimes causing a crisis (as in, “an international incident”). On the other hand, *incidence* can refer to the extent or frequency of an occurrence: “the incidence of malaria in tropical climates.”

The vice president for government relations at a small college recently demonstrated that she was unaware of that distinction when she said, “We had not expected to find incidences of students already stopping and dropping out, students who have had to change their educational plans because of lack of credit.”

Do you know the difference between the adjectives *flagrant* and *blatant*? Lawyers who read this column have

asked me to complain that their colleagues use *blatant* when they mean *flagrant*. *Blatant* means “obtrusive or brazen,” as in the phrase “a blatant lie.” It can also refer to conspicuously tasteless behavior, as in: “a blatant display of wealth.”

On the other hand, behavior that is outrageous and egregious is “flagrant.” The Latin root of *flagrant* means “burning,” so the literal meaning of *flagrante delicto* is “while the crime was blazing,” that is, “in the act” (while the crime was being committed). You probably know the term “flagrantly against the evidence,” indicating that a conclusion was so clearly reached against the weight of the evidence that it would shock the conscience of a reasonable person.

When misused words might affect a conclusion, the distinction in meaning is important. But some distinctions seem insignificant. For example, does it matter whether we maintain the difference between *loan* and *lend*? Some readers think we should. That, and other such distinctions, will be the subject of a forthcoming column. ■

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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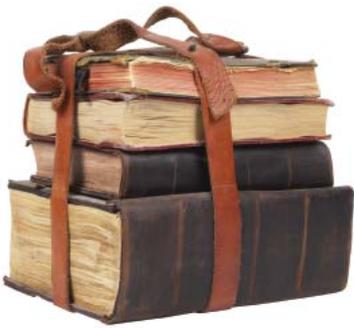
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BY GERALD LEBOVITS



GERALD LEBOVITS is a judge at the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research help on Parts I and II of this column, he thanks Alexandra Standish, his court attorney, and law students Jamie Bunyan (St. John's University) and Suzy-Anne Bouveret (University of Ottawa, Civil Law Section). Judge Lebovits's e-mail address is GLebovits@aol.com.

## Document Design: Pretty in Print — Part I

**H**ow a document looks is as important as what it says. Document design isn't only about including visuals — charts, diagrams, exhibits, graphics, maps, photographs, and the like — an aid all readers appreciate.<sup>1</sup> Document design, or typography, refers to the visual component of a word: typeface, type size, white space, margins, alignment, horizontal and vertical spacing, headings, footnotes, endnotes, superscript, straight and curly quotes, boldface, italics, and underlining.

Design has pragmatic and aesthetic functions. Sometimes what's pretty isn't pragmatic. Because typography affects legibility and readability,<sup>2</sup> lawyers must, when in doubt, prefer legible to beautiful and, then, complying with rules to legibility. For court documents, always tailor them to the court's rules. Court rules might be different from what the legal-writing typographers recommend. For internal office documents, always tailor them to your firm's preference.<sup>3</sup> When office preferences or court rules don't conflict with what the typographers suggest, trust the typographers.

Without effective, legible typography, the reader won't appreciate a document's content. When you have a choice, make the document accessible, comprehensible, persuasive, and professional.

Persuasion isn't only about substance. How a lawyer speaks in court affects whether the lawyer will persuade. Will the lawyer read from a brief monotonously? Not if the lawyer wants to persuade. To persuade, the lawyer will engage the judge and grab

attention by delivery speed, delivery volume, making eye contact, gesturing, and extemporizing, all without shouting or banging on the table. As one design expert explains, "You do this because you don't merely want to be heard — you want to persuade. The text matters, but so does the presentation."<sup>4</sup>

**1. Typeface.** Readers appreciate nice-looking, readable documents. The more readable the document, the more the reader will understand and recall its substance. The goal of document design is to maximize legibility.

Typeface — called "fonts" on computers — are grouped based on visual characteristics. Typefaces fall into three categories: decorative, serif, and sans serif. Decorative typefaces resemble handwriting or calligraphy. They're inappropriate in legal documents. Use decorative typefaces for informal writing like advertisements, e-mails, logos, or personal invitations. Examples of decorative typefaces: Algerian, Comic Sans, Lucida Calligraphy, and Old English.

Legal writers should format documents using a serif typeface, the most legible kind. Serif typefaces are characterized by decorative or finishing strokes, also known as "feet" or "wings," added to the bottom of each character. The feet or wings are most noticeable on the letters "m" and "n." The decorative lines on a serif typeface guide the reader's eyes from one stroke to the next.<sup>5</sup> Because serif typefaces make documents more readable, writers use these typefaces in legal documents, books, magazines, and newspapers. Examples of serif typefaces:

Courier New, Garamond, and Times New Roman.

Although "[s]cience leaves the designer more or less at sea in terms of font choice,"<sup>6</sup> most experts reject Times New Roman, the default font in Word and WordPerfect.<sup>7</sup> Here's the classic Seventh Circuit advice: "Use typefaces . . . designed for books. Both the Supreme Court and the Solicitor General use Century. . . . [F]aces in the Bookman and Century families are preferable to faces in the Garamond and Times families."<sup>8</sup>

**"Legal writers should stick to left-aligned (right-ragged) text."**

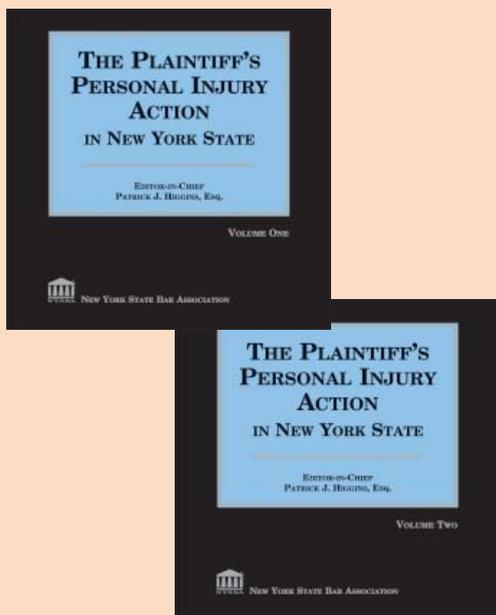
Unlike a decorative or serif typeface, the sans-serif typeface — "sans" means "without" in French — has no decorative finishing strokes. Sans serif typefaces are difficult to read in long passages. Use sans serif typefaces for emphasis, headings, short passages, or single lines of text. Examples of sans serif typefaces: Arial, Helvetica, Gill Sans, and Univers.

Except for the cover page and to contrast headings from text (see below), don't mix typefaces in a document; use only one typeface. To make stylistic changes, choose roman, italic, or bold styles. Different typefaces will confuse

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