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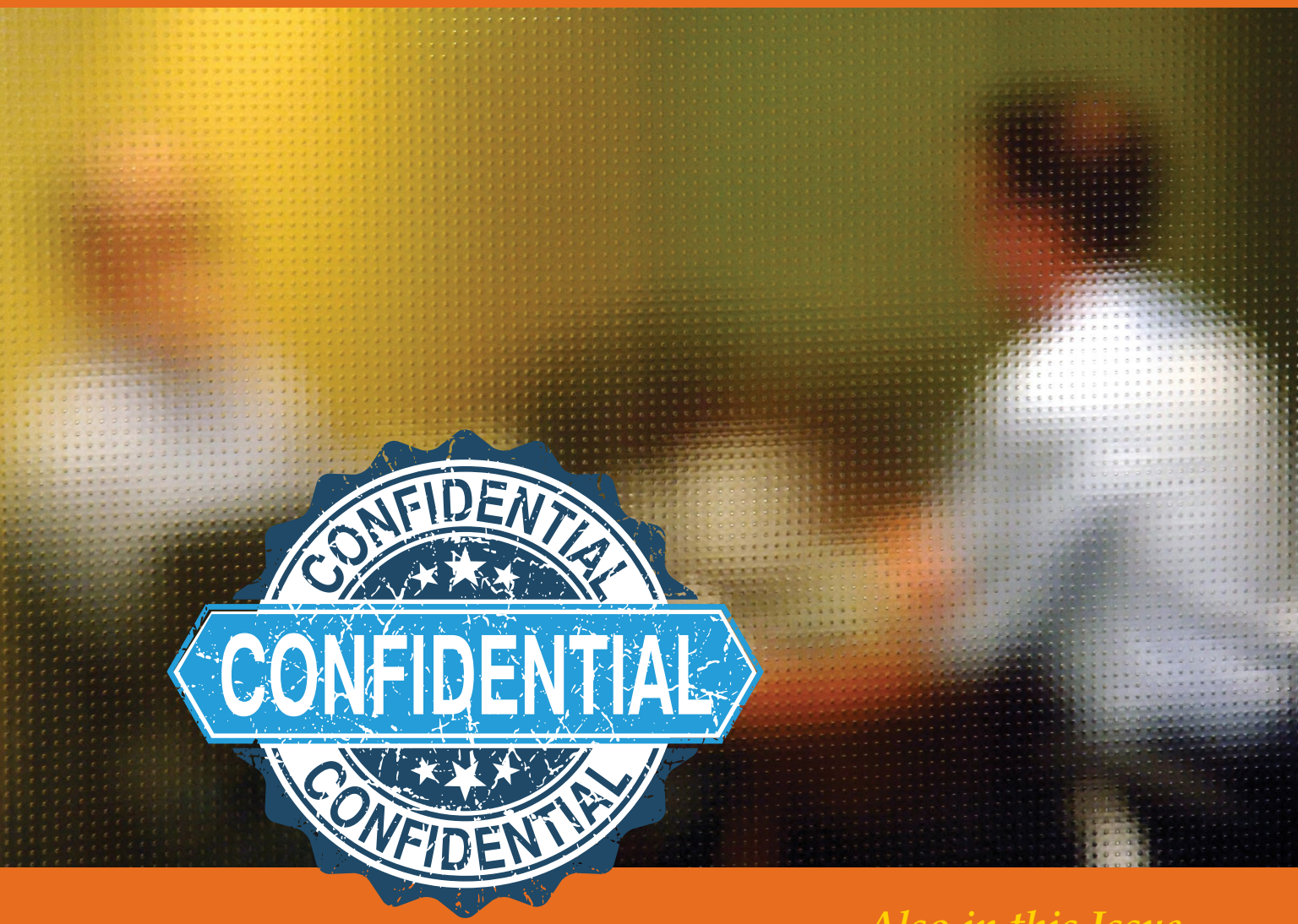

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By Jason Canales and Cristina I. Calvar

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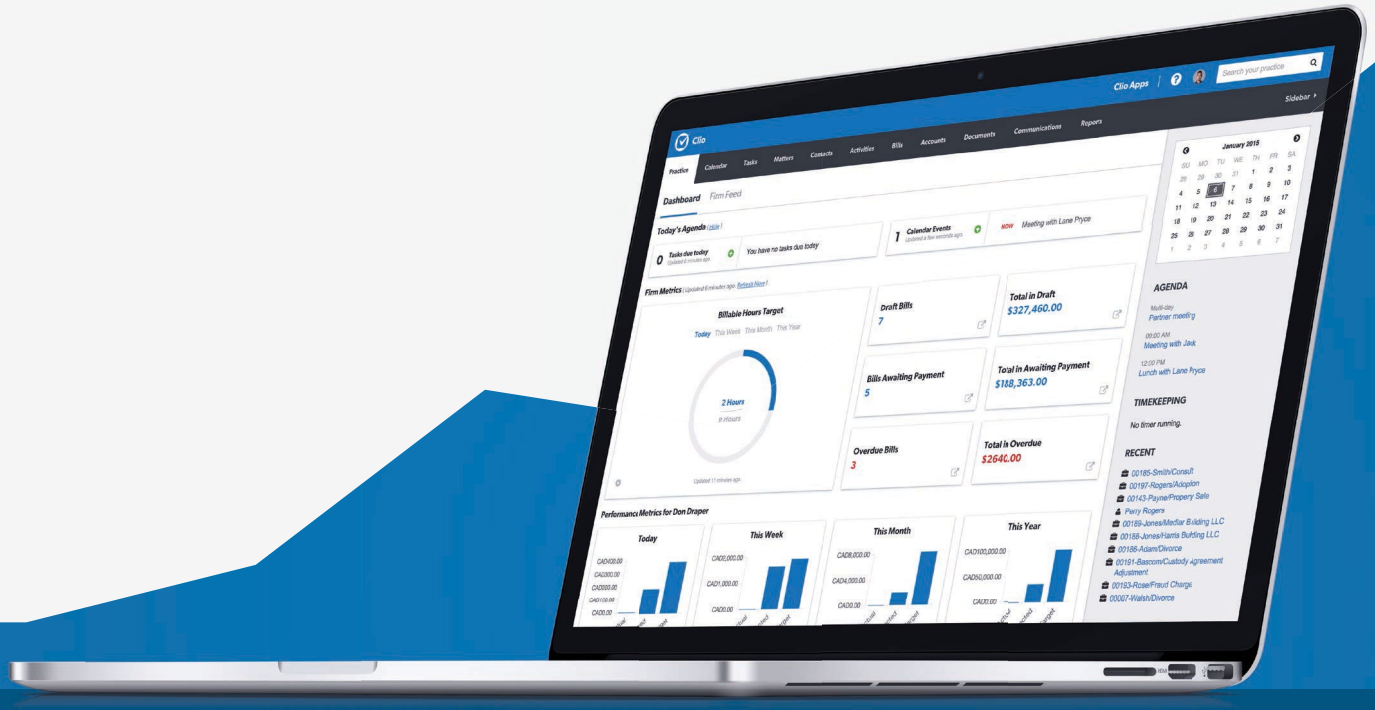

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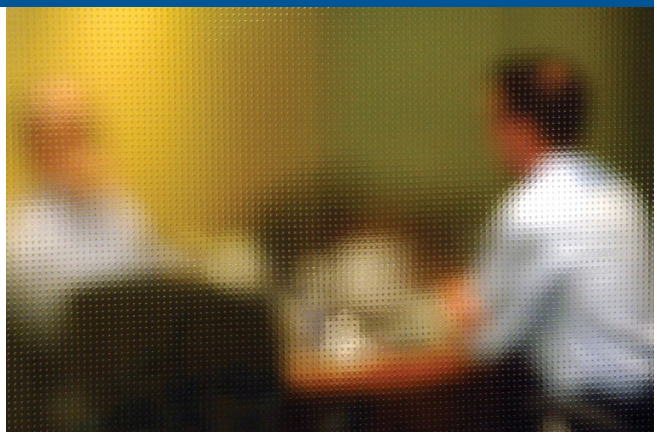
CONTENTS

FEBRUARY 2016



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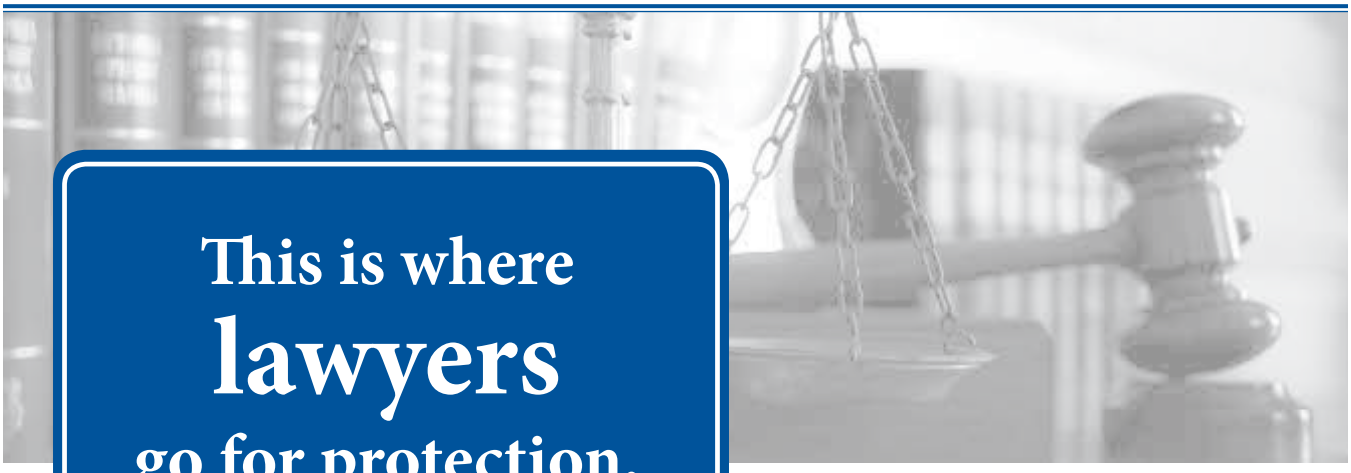

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DAVID P. MIRANDA

At the Crossroads of Law and Technology

Technology is supposed to make our lives easier, allowing us to do things more quickly and efficiently. But too often it seems to make things harder, leaving us with fifty-button remote controls, digital cameras with hundreds of mysterious features and book-length manuals, and cars with dashboard systems worthy of the space shuttle.

James Surowiecki, staff writer, *The New Yorker*

As the result of the convergence of four major technology innovations – cloud computing, analytics, mobile devices and social media – we are increasingly inundated with data and content. We are now on the cusp of a new period of technological advancement and economic transformation based upon collecting, analyzing, synthesizing and commercializing the data and content that is so pervasive in our daily lives.

We are pummeled each day with thousands of bits of data, pithy and purposeful, snarky and smart, factual and funny. Every second over 7,000 tweets, 50,000 Google searches and 2.4 million emails are sent. There are nearly 1 billion websites; each day, bloggers post almost 3 million blog posts (http://internetlivestats.com).

And predicted for the future is more, lots more. Larger databases, bigger archives and more computing power, to use, manipulate, integrate and analyze the vast amounts of data available in a digitized world, as well as virtual court appearances and virtual depositions. Increasingly, lawyers will get their information, manage their practices, and be found by clients online. The organized bar must lead the profession to help lawyers leverage technology in their practices and connect the underserved with lawyers.

For lawyers, who are sponges for information, getting on the Internet is like taking a drink from a fire hydrant. The ABA's Legal Technology Survey Report 2015 noted that 73% of lawyers regularly access the Internet outside of the office, most likely on a mobile device. The mobile device of choice for 90% of lawyers is the smartphone, followed by the laptop (79%). Eighty percent of respondents report that they have telecommuted, and 11% of solos describe their practice as "virtual."

Not surprisingly, one of the major topics of discussion at the Annual Meeting of our Bar Association was how lawyers can control the onslaught of information. Even if we filter down to just the legal information being tweeted, linked-in, emailed or listserved, it is overwhelmingly difficult to find the information we really need. As litigators who engage in discovery know, having too much data is almost as bad as having no data. Further, because the flood of information is instant and ongoing, our clients have come to expect instant responses to their questions. But competent legal advice can't be parceled out in 140 characters or less.

The convergence of technology with content has created a nearly overwhelming stream of information. Our Bar Association alone produces *over 80 million pages* of documents a year. While this may overwhelm us as attorneys, it makes us indispensable to our clients. Lawyers decipher the flow of information and filter out what is most important to properly advise and counsel our clients. To do that, we have to be able to harness, manage, and curate the content so we can find what we need, when we need it. Once we gain a firm grasp of that information, we must communicate clearly to effectively serve our clients.

Solo and small-firm practitioners are the fastest-growing segment of our Bar Association, and we have formed a solo and small-firm team so we can address their needs and provide relevant resources to our members. We recognize and understand the problems lawyers confront when organizing and curating information, and managing our practices. To address our members' desire to get the information they need for their practice, NYSBA developed LawHUB℠ in partnership with USI. LawHUB℠ is a comprehensive and personal online dashboard, and NYSBA is the first bar association in the nation to develop such a product.

LawHUB℠, a cloud-based software platform, will help transform your practice by prioritizing, organizing and

DAVID P. MIRANDA can be reached at dmiranda@nysba.org.

streaming the information you need. It is a free member benefit designed to help members save time, increase practice efficiency, and make it easier to connect and network with others in your legal community. LawHUB[SM] is a game changer because, unlike other technology tools, it filters the clutter. It sorts through incoming information and gives you what you've asked for. Everything you need, at your fingertips.

LawHUB[SM] is designed so NYSBA members can customize their dashboard to their own interests and practice, so you get only the information and resources you want. And, anytime, you can move beyond your curated content and access all the resources NYSBA has to offer.

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LawHUB[SM] is only one example of how NYSBA is leveraging technology to offer value to you, our members, and help you in your practice. Today, you can get your CLE online, webcast, streamed or downloaded. You can bundle programs for deep discounts or purchase individual segmented program topics that are most relevant to your needs right now.

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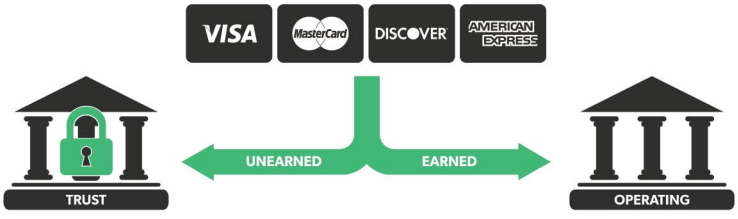

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March 1 New York City

2016 March Marketing Conference – A Best Practices Program for Solo Practitioners
(live & webcast)
March 3 New York City

Easement Law in New York
(9:00 a.m. – 12:15 p.m.)
March 9 Albany
March 16 New York City

12th Annual International Estate Planning Institute
(two-day program)
March 10–11 New York City

Contesting New York State Tax Assessments
(12:00 p.m. – 2:00 p.m.; live & webcast)
March 17 Albany

Bridging the Gap – Spring 2016
(two-day program)
March 23–24 New York City (live program)
Albany, Buffalo (video conference from NYC)

Introduction to Equity Crowdfunding
(9:00 a.m. – 1:00 p.m.; live & webcast)
April 19 New York City

Creditor & Domestic Relations Rights to Retirement Benefits
(12:00 p.m. – 1:30 p.m.; live & webcast)
May 5 Albany

Starting a Solo Practice in New York 2016
(live & webcast)
May 6 New York City

What You Need to Know as a Guardian Ad Litem
(9:00 a.m. – 1:00 p.m.)
May 17 Long Island
May 18 Syracuse
May 19 Albany, Rochester
May 26 New York City

DWI on Trial – Big Apple XVI
(live & webcast)
May 18 New York City

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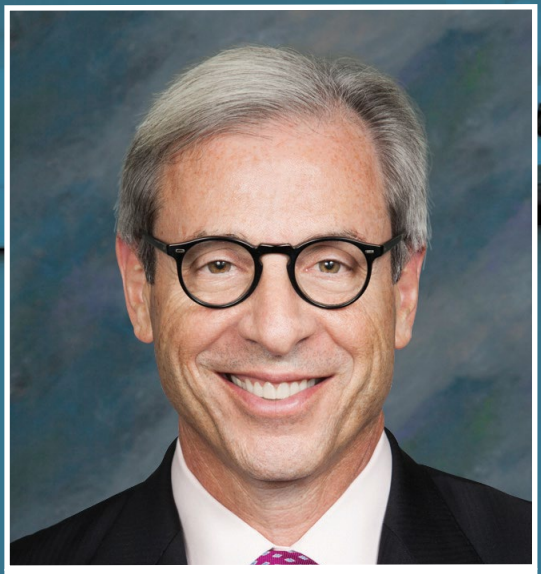

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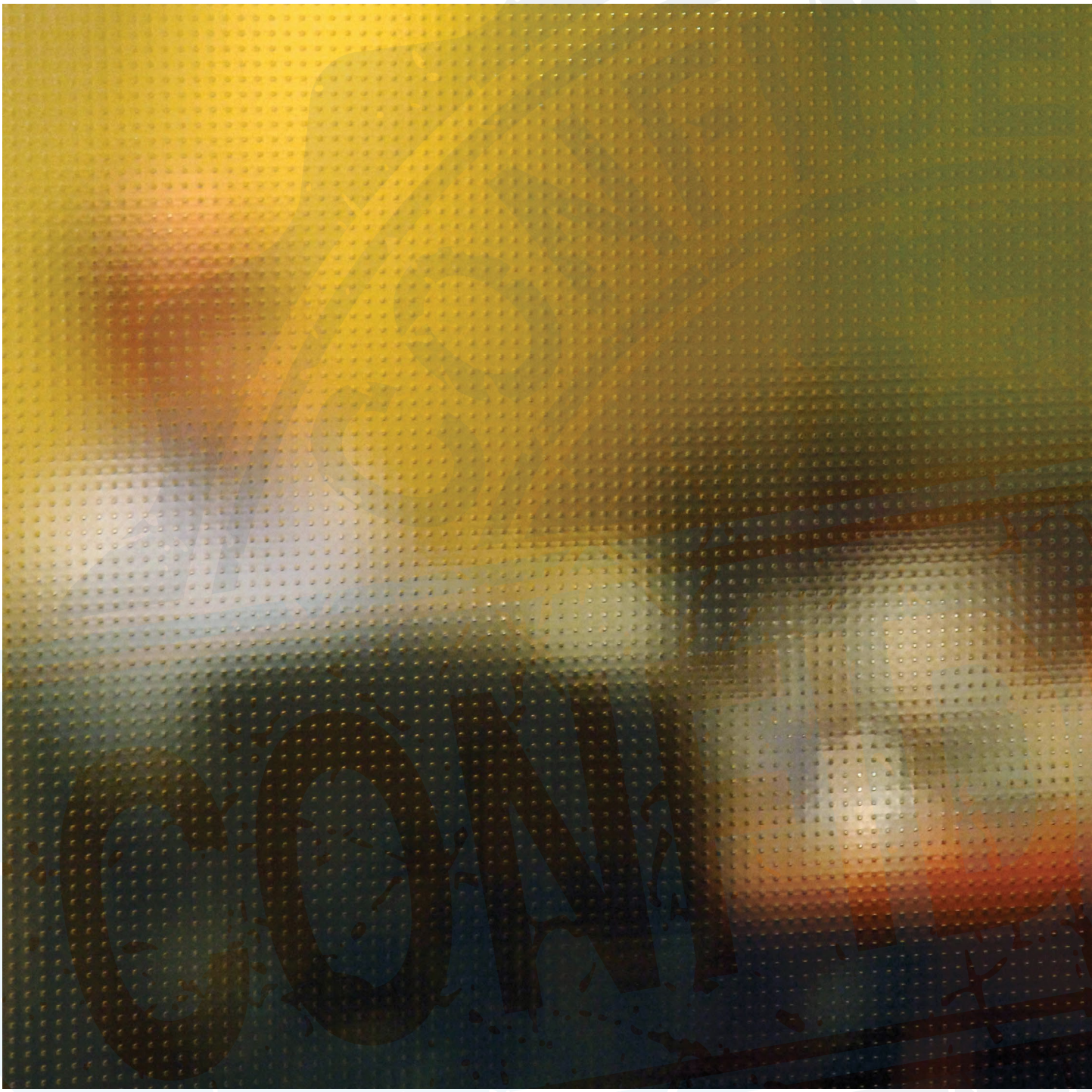

Keeping Up With *Upjohn*

Preserving Attorney-Client Privilege in Corporate Internal Investigations

By Jason Canales and Cristina I. Calvar

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Today's heightened regulatory enforcement environment – a by-product of corporate scandals and the 2008 financial crisis – mandates more than ever that corporations conduct internal investigations, audits, and risk assessments. In addition to legally mandated disclosure requirements, corporations may decide to conduct routine investigations pursuant to contractual obligations, i.e., government settlement agreements and implementation of internal policies to assess possible employee misconduct. When conducting *any* investigation, corporations must remain vigilant if they wish to preserve their right to invoke the attorney-client privilege in any subsequent government inquiry, action or other civil or criminal litigation, and must carefully delineate the often blurred lines among investigations that are conducted for purely business purposes, purely legal purposes, or for a mix of both legal and business purposes.

Recent case law developments suggest that to retain the attorney-client privilege and to defeat possible challenges in New York, corporations should, among other things, understand the scope of the investigation, identify the

purpose(s) of the investigation, involve counsel in the investigation and communicate the confidential nature of the investigation to employees. Because investigations are often conducted on an expedited schedule, companies should have an internal investigation process in place, which preserves the attorney-client privilege from the outset.

Upjohn and Its Progeny

A keystone of the attorney-client privilege is that for the privilege to apply to a communication, the communication must have been made for the purpose of obtaining legal advice. But when investigations are conducted for multiple purposes involving business and legal concerns, will the attorney-client privilege attach to the communication?

Upjohn Co. v. United States[1] remains the leading case on attorney-client privilege in the corporate context. Extending the attorney-client privilege to corporate communications, the Supreme Court in *Upjohn* summarily ruled that the privilege protected interview notes and memoranda (1) prepared and collected by in-house counsel (2) as part of a factual investigation to determine the nature of alleged illegal activities and to enable in-house counsel "to be in a position to give legal advice to the company" in light of the fact that (3) the interviewed employees were "sufficiently aware" of the legal purpose and confidentiality surrounding the investigation.[2]

> *Upjohn Co. v. United States* remains the leading case on attorney-client privilege in the corporate context.

In support of its holding, the Court observed that the purpose of privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[3] Accordingly, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[4] While the Supreme Court impliedly recognized that corporate counsel may need to take measures, such as internal control programs, to comply with regulatory legislation and corporate policy even before a legal action arises, the Court declined to specifically comment on whether an investigation can have more than one purpose or whether the legal purpose must predominate over any other purpose. Moreover, though the Court readily acknowledged that investigations may concurrently serve business-related and legal purposes, it has not yet had the occasion to consider the relationship between business and legal purposes and its implications for the attorney-client privilege.

D.C. Circuit Leads the Way

Endeavoring to address the question left unanswered in *Upjohn*, the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*[5] unanimously articulated the proper test in determining whether the attorney-client privilege applies to corporate communications when business and legal purposes are concurrently served. That is, an attorney-client communication is protected so long as "one of the significant purposes" of the communication is to obtain or provide legal advice, even if it is not the only purpose.[6]

In *Kellogg Brown*, a former Kellogg Brown & Root (KBR) subcontractor filed a False Claims Act claim alleging KBR defrauded the U.S. government by accepting kickbacks. The subcontractor sought documents related to KBR's prior internal investigation into the alleged illegal activities. KBR withheld the documents and asserted that the investigations were conducted pursuant to KBR's internal control system, Code of Business Conduct (COBC), implemented by in-house counsel. Applying a "but for" formulation, the district court concluded that the internal investigation resulted from KBR's need to comply with government regulations and corporate policy, rather than to obtain legal advice.[7]

The D.C. Circuit reversed the district court's privilege ruling. The D.C. Circuit initially noted that the facts presented were not materially distinguishable from *Upjohn*. Comparing the COBC investigations to the investigation conducted in *Upjohn*, the circuit court held that (1) the distinction between in-house and outside counsel in conducting internal investigations is not determinative; (2) non-attorneys may conduct interviews during internal investigations so long as the investigations are conducted at the direction of attorneys; and (3) there are no magic words that a company must use in order to gain the benefit of the privilege so long as the employees know that an investigation of a sensitive nature is occurring and that the information disclosed will be protected.

Ultimately, appreciating the possible eradication of the attorney-client privilege within the context of internal investigations that would result from a contrary holding, the appellate court maintained that the "but for" analysis was incompatible with the jurisprudence of attorney-client privilege. Recognizing that attorney-client communications may serve dual purposes – business and legal – the D.C. Circuit articulated the "primary purpose" test for determining whether a communication is privileged: "Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was *one* of the significant purposes of the attorney-client communication."[8] Thus, the D.C. Circuit maintains

that the primary purpose test will be satisfied as long as rendering or obtaining legal advice is identified as a significant purpose.

Second Circuit on the Right Track

While the D.C. Circuit's decision is not binding on New York courts, there is a willingness on the part of the Second Circuit to employ a somewhat more flexible standard to meet the continually changing demands of corporate and regulatory compliance. Endorsing the Supreme Court's rationale, the Second Circuit acknowledged that the attorney-client privilege often "accommodates competing values."[9] That is, while the purpose is to encourage attorneys and their clients to communicate fully and frankly, the availability of sound legal advice inures to the benefit not only of the client who wishes to know his options, "but also of the public which is entitled to compliance with the ever growing and increasingly complex body of law."[10] Correspondingly, the Second Circuit maintains that the "primary" or "predominant purpose" standard applies in assessing whether the attorney-client privilege protects certain documents.[11] While "primary" and "predominant" are used interchangeably, the standard remains the same – "whether the predominant purpose of the communication is to render or solicit advice."[12]

In *County of Erie*, the Second Circuit Court of Appeals observed that the privilege "is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."[13] Nonetheless, rendering and soliciting legal advice must be the predominant purpose of the communication. The predominant purpose is assessed "in light of the advice being sought," the "overall needs and objectives that animate the client's request for advice," as well as the capacity that the lawyer serves.[14] For instance, the court commented that in the corporate context, in-house lawyers "are more likely to mix legal and business purposes" and that a lawyer's "dual legal and non-legal responsibilities may bear on" the purpose of a particular communication.[15]

Though the Second Circuit has not yet had the occasion to address whether a communication may have more than one predominant purpose, a recent decision from the Southern District of New York held that *Upjohn* and its progeny only requires a showing that legal advice serve *a* primary purpose.[16] The district court case, *General Motors Litigation*, echoes the facts presented in *Kellogg Brown.* Therein, General Motors, the defendant in the multi-district proceeding, announced a recall of its vehicles based on an ignition switch defect. Shortly thereafter, General Motors retained a law firm to conduct an internal investigation concerning the defect and delays in pursuing the recalls. As part of the investigation, lawyers reviewed documents, interviewed former and current employees, and produced a written report. While General Motors disclosed the report during discovery of the multi-district proceeding, it withheld the materials underlying the report, which were the subject of the parties' dispute. Despite the parties' arguments as to the predominant purpose of the investigation and related memoranda, the district court deferred to *Kellogg Brown* and *Upjohn* in concluding that General Motors demonstrated "that the provision of legal advice was a 'primary purpose'" of the communications reflected in the memoranda.[17]

New York State Courts Trail Close Behind

In New York, the attorney-client privilege is governed by Civil Practice Law & Rules 4503 (CPLR), which is rooted in common law.[18] Section 4503(a) of the CPLR provides that a privilege exists for confidential communications made between attorney and client in the course of professional employment.[19] Like the Second Circuit, the New York courts require that for privilege to apply "the communication from attorney to client must be made 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.'"[20] Specifically, the "communication itself must be primarily or predominantly of a legal character."[21]

To satisfy the primary purpose test, courts contemplate the type of advice sought or rendered. That is, "[t]he fact that business advice is sought or even given does not automatically waive the privilege, where the advice given is predominantly legal, as opposed to business, in nature. However, the privilege does not extend to business advice, even if provided by an attorney."[22] Thus, while a lawyer's communication to a client may include business advice in its legal analysis, courts will look at the full content and context of the communication to determine whether it was made in order to render legal advice.[23] Presently, in New York, though business advice may be sought, the legal character of the communication must predominate over any business concerns for the privilege to apply.

For instance, in *Spectrum Systems International Corporation v. Chemical Bank*, the N.Y. Court of Appeals found that a law firm's report to a corporate client was predominately of a legal character despite the fact that the report integrated facts of a business nature and "suggest[ed] measures to prevent future corruption." The Court of Appeals held that attorney-client privilege cannot be narrowly defined because that is "at odds with the underlying policy of encouraging open communication[,] poses inordinate practical difficulties in making surgical separations so as not to risk revealing client confidences[, and] denies that an attorney can have any role in fact-gathering incident to the rendition of legal advice and services."[24] Thus, after reviewing the report and the record, the court held that the communication was privileged because any business-related issues were integrated with the "law firm's assessment of the client's

legal position, and [thereby] evidence[d] the lawyer's motion to convey legal advice."[25]

Contrastingly, in *Ford v. Rector*,[26] the state appellate division held that privilege did not extend to an investigation directed by attorneys because it found that counsel solely assisted the company in internal business operations and did not render any legal advice. After reviewing the withheld documents in their full content and context, the court concluded that the documents did not contain "*any* legal analysis or legal opinions."[27]

A Steady Pace Wins the Race: Tips to Maintain the Privilege

While *Kellogg Brown* provides a more favorable and suppler approach for corporations conducting internal investigations, it is not yet established in New York that an attorney-client communication will be privileged where the provision and solicitation of legal advice constitutes "one of the significant purposes" of the communication. Corporations, therefore, must diligently and thoroughly take steps to effectively ensure that privilege attaches at the inception of the investigation and endures until the investigation is fully concluded. To ensure that privilege applies, counsel should not only prudently monitor court decisions, but should be quick to adapt their practices and consider employing the following measures in their internal practices:

Identify the Purpose(s) of the Internal Investigation

A persistent issue in the application of the attorney-client privilege in a corporate setting, and particularly with regard to in-house counsel, relates to the requirement that the purpose of the communication be to secure legal advice. Before conducting an investigation, corporations and counsel should identify the purposes of the internal investigation. Not only will doing so protect the corporation if suit follows, but it will also compel companies and counsel to discuss the possibility of litigation and the confidential nature, if any, of the investigations. By identifying the purposes served, corporations and counsel will have the opportunity to ultimately structure the investigations in a manner that ensures that privilege not be lost.

The identification of the purposes of an investigation also permits in-house counsel to determine the role that they are serving. Where in-house lawyers may mix legal and business functions and perform legal and non-legal responsibilities, it is advisable that in-house lawyers and corporate officers identify the legal role that in-house lawyers will play in conducting interviews as well as other investigation-related activities.

It is also advisable to counsel, namely in-house counsel, to specifically document the legal purpose of the investigation or any legal advice that is rendered. While it has not yet been litigated, and this is certainly not the be-all and end-all, companies should consider updating internal handbooks and policies to explicitly state that any and all internal investigations, including but not limited to audits and risk assessments, are to be conducted at the direction of counsel for the purpose of seeking legal advice.

Discretionarily Employ Outside Counsel

As a preliminary matter, the involvement of outside counsel is not a necessary predicate for privilege to apply. Likewise, the status of in-house counsel does not dilute the attorney-client privilege. For instance, in *Kellogg Brown*, the circuit court explicitly held that inside legal counsel "is fully empowered to engage in privileged communications."[28]

Nonetheless, for in-house counsel to fully effectuate their role, in-house counsel must recognize that they must act within their legal capacity when conducting the investigation. This, again, goes to the purpose of the investigation and the advice that is being sought from the lawyer – business versus legal – to serve the client. Because the responsibility of in-house counsel encompasses both legal and non-legal functions, it is key that in-house lawyers appreciate the dual role that they play and take the opportunity to identify the predominant purposes of the investigation prior to its commencement.

Ensure That Counsel Actively Plays Its Part

While the presence of in-house counsel or outside counsel is not determinative as to the scope of privilege, counsel – not managerial personnel or employees – should commence internal investigations and audits. This requirement is generally satisfied when a lawsuit is anticipated. However, in practice it is often the managerial personnel of the Human Resources Department that first learn of any allegations of misconduct pursuant to internal handbooks and policies, or designated personnel that may discover misconduct through a designated channel, such as a hotline. Although it may be impractical

to involve a lawyer with every complaint of misconduct, companies should implement a policy that directs counsel to initiate and direct the investigation once it is determined that a formal investigation will be launched.

It is also critical that counsel be involved throughout the important stages of the investigation, and where counsel is not directly involved, any conduct by non-attorneys should be at the direction of counsel. This is important when non-attorneys or investigators conduct witness interviews or other investigative work. It is also recommended that counsel or corporate policy provide advance authorization with respect to the role and conduct of the non-attorney throughout the investigation. Any memorandum that authorizes the type of involvement of non-attorneys and demonstrates that the conduct be supervised or directed by counsel will help to defeat challenges to privilege.

Disclose the Confidential Nature of the Investigation

To preserve privilege, courts will also require counsel and companies to inform involved parties, such as employees, to be sufficiently aware that (1) an investigation is being conducted for a legal purpose and (2) that such communications to counsel or counsel's agents should be kept confidential. This is also referred to as the *Upjohn* Warning.

Courts have held that while companies need not use "magic words" to convey the *Upjohn* Warning, their employees must be made to understand the nature of the investigations. Though this warning may be orally communicated, it is in the best practice of the corporation to include a standard provision in the company's handbook or internal policies, distribute routine acknowledgement forms with respect to any updates or amendments made to the handbook or internal policy, send out an interoffice memorandum to all employees involved in the investigation explaining the confidential nature of the investigation, and direct counsel and non-attorneys directed by counsel to orally communicate the warning at the start of every interview or in-person communication. Likewise, companies should implement a procedure to ensure and demonstrate in writing that any and all involved employees understand the nature of the investigation. Electronic surveys or handwritten acknowledgement forms are simple ways for corporations to obtain employee signatures and memorialize that an employee was informed and understood the nature of the investigation.

Such communications should be conveyed prior to the commencement of any investigation. Otherwise, it will be difficult for the company to show that the employee had a contemporaneous understanding of the confidential nature of the investigation.

As such, if privilege is challenged, it will be in the best interest of corporations if companies have written documentation showing that they effectively communicated the substance of the *Upjohn* Warning and the employees and other involved parties understood the ramifications of the investigation.

Conclusion

From start to finish, it is important to make sure that counsel who direct the investigation take additional precautionary measures to safeguard privilege since investigations are increasingly being sought and commenced with both legal and businesses purposes. While courts are willing to uphold privilege despite the mix of legal and business issues, it must be emphasized that the structure of the investigation be primarily focused on the legal issues at hand. Also, corporations that employ in-house counsel to direct internal investigations should strongly consider retaining outside counsel to ensure that a legal purpose is being served. Providing a fresh perspective, outside counsel can assist in-house counsel in directing the investigation and ensure that the legal purposes of the investigation predominate over any business purpose. ■

1. 449 U.S. 383 (1981)
2. *Id.* at 394–95.
3. *Id.* at 389.
4. *Id.* at 390.
5. 756 F.3d 754 (D.C. Cir. 2014), *cert. denied sub nom., U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015).
6. *Id.* at 754.
7. *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014).
8. *Kellogg Brown*, 756 F.3d at 759.
9. *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007).
10. *Id.* at 418 (citing *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036–37 (2d Cir. 1984)).
11. *Id.* at 420.
12. *Id.*
13. *Id.*
14. *Id.* at 420–21.
15. *Id.* at 421.
16. *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543 (S.D.N.Y. Jan 15, 2015) (Furman, J.), ECF No. 531).
17. *Gen. Motors Litig.*, 1:14-md-02543, at 14.
18. *See, e.g., People v. Osorio*, 75 N.Y.2d 80, 84, 550 N.Y.S.2d 612 (1989).
19. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991).
20. *Id.* at 377–78 (citing *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593, 542 N.Y.S.2d 508 (1989)).
21. *Id.* at 378.
22. *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 106–07, 756 N.Y.S.2d 367 (Sup. Ct., N.Y. Co. 2003).
23. *Spectrum*, 78 N.Y.2d at 379.
24. *Id.* at 378.
25. *Id.* at 379.
26. 111 A.D.3d 572, 573, 975 N.Y.S.2d 408 (1st Dep't 2013).
27. *Id.* (emphasis added).
28. *Kellogg Brown*, 756 F.3d 754, 758 (citing 1 Restatement § 72, cmt. c, at 551).

BY DAVID PAUL HOROWITZ

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Timber! *Singletree*

Introduction

Even an occasional reader of this column knows that I have long advocated that a 2008 decision by the Second Department, *Construction by Singletree, Inc. v. Lowe*,[1] was wrongly decided. *Singletree* held that a trial court could preclude an expert's affidavit offered in opposition to a post-note of issue summary judgment motion where the expert utilized in opposing the motion had not been disclosed prior to the filing of the note of issue:

> [I]n declining to consider the affidavits of the purported experts proffered by Lowe, since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter (citations omitted).[2]

Subsequent decisions from the Second Department held that it was an abuse of discretion for a court to consider the expert's affidavit where an excuse was not proffered for the failure to exchange the expert prior to the filing of the note of issue,[3] and a 2011 Second Department case, *Stolarski v. DeSimone*,[4] held that a party moving for summary judgment, as opposed to opposing the motion, was also to be held to the *Singletree* requirement that the expert whose affidavit was to be used on the motion be disclosed pre-note of issue.

Thereafter, in *Rivers v. Birnbaum*,[5] the Second Department appeared to back away from its prior holding in *Singletree*, holding that while post-note of issue expert exchange is but one factor for the court to consider in determining whether or not to consider an expert's affidavit, it nonetheless remained a factor.

An amendment to CPLR 3212(b) was proposed in 2015 as one of a series of measures introduced at the request of the Chief Administrative Judge upon the recommendation of her Advisory Committee on Civil Practice. The amendment was enacted and signed into law, and effective December 11, 2015, *Singletree* and its progeny are overruled, although the change will not apply to cases where a summary judgment motion was pending as of that date.[6]

The Roots of *Singletree*

Prior to 2008, the Second Department had, on occasion, precluded expert affidavits because, *inter alia*, the expert had not been disclosed prior to the filing of the note of issue.[7] In all of those cases, the expert's affidavits were noted to be conclusory in nature and, therefore, not proof in admissible form, thus precluding their consideration separate and distinct from the timing of their service.

The roots of those cases lay in decisions precluding notice witnesses who were not disclosed prior to the filing of the note of issue, as illustrated by *Robinson v. New York City Housing Authority*:[8]

> The IAS court did not abuse its discretion in precluding the testimony of the plaintiff's notice witnesses. At the preliminary conference, plaintiff stated she had no notice witnesses, and it was not until more than a year after a preliminary conference order directing plaintiff to disclose the identities of her witnesses, after she had filed a note of issue, and then only in opposition to a motion for summary judgment, did plaintiff finally disclose that her two sons were her notice witnesses (citations omitted).[9]

Singletree Branches Out to the First Department

In a 2012 case, *Garcia v. New York*,[10] the First Department held that the motion court erred in denying summary judgment based upon the expert's affidavit submitted by plaintiff in opposition to the motion:

> The expert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand

(citations omitted). Were we to consider the expert's affidavit, we would find it lacking in probative value because it is not supported by evidence in the record (citation omitted).[11]

Garcia was cited and followed two years later by the First Department in *DeSimone v. New York*:[12]

> The court providently exercised its discretion in denying plaintiff's cross motion to submit a disclosure of his expert professional engineer, since it was first submitted in opposition to defendants' motions for summary judgment dismissing the complaint, and subsequent to the filing of the note of issue and certificate of readiness (citation omitted).[13]

CPLR 3101(d)(1)(i)

The only statute in New York addressing the issue of expert disclosure timing is CPLR 3101(d)(1)(i), which provides:

> (d) Trial preparation.
> Experts.
> (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.[14]

CPLR 3101(d)(1)(i) makes no mention of the filing of the note of issue *vis à vis* the exchange of experts, and, in fact, the only reference point related to the exchange of experts is where an expert is exchanged "an insufficient period of time before the commencement of trial."

The Advisory Committee explained the reason for the proposed amendment:

> Our Advisory Committee believes that the Singletree/Rivers holdings (a) impose a temporal requirement for noticing expert witnesses that contravenes the provisions of CPLR 3101(d)(1)(i) and, in effect, precludes otherwise admissible expert testimony, and (b) contravenes the longstanding application of CPLR 3101(d)(1)(i) to the noticing of experts for trial in relation to the date set for trial of an action or proceeding.
> Compounding the difficulties practitioners face in navigating the conflicting holding cited *above* are the multitude of different Judicial District, County, and individual judges' rules addressing the timing of expert disclosure, many of which are at odds with CPLR 3101(d)(1)(i). Another factor complicating the timing of expert disclosure is the continuing practice in certain counties to permit routine post-note of issue disclosure.
> Accordingly, this measure would not alter the circumstances in which expert testimony may be offered. Nor would it alter the rules concerning the admissibility of the reports or data on which the testimony may be premised.
> [This measure] is designed to aid in establishing uniformity in practice state-wide, reducing confusion among members of the bench and bar as to the timing of expert disclosure, and making certain that where expert testimony is required or desired in support or opposition to a summary motion, the functional equivalent of a trial, that parties have the same latitude to utilize expert testimony as they do at trial.

This measure is designed to aid in establishing uniformity in practice state-wide, reducing confusion among members of the bench and bar as to the timing of expert disclosure.

The 2015 Amendment

As amended, CPLR 3212(b) now reads (new language in italics):

> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. *Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.* The motion shall be granted if, upon all the papers and proof submitted, the

cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

Conclusion

While *Singletree, et al.* is now only of historical interest (unless you had a motion for summary judgment pending as of the effective date), contentious expert issues abound. Practitioners should be on the lookout for a decision from the Court of Appeals this term in *Rivera v. Montefiore Med. Ctr.*,[15] fully briefed, but not yet calendared, which has the potential to significantly impact expert exchange practice in New York. ■

1. 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008).
2. *Id*. at 863.
3. *King v. Gregruss Management Corp.*, 57 A.D.3d 851, 870 N.Y.S.2d 103 (2d Dep't 2008) ("The Supreme Court erred in denying Jones's cross motion for preclusion. Raymus's expert affidavit should have been rejected since the plaintiff did not identify him in pretrial disclosure between 1996 and 2006, and the defendants were unaware of Raymus until they were served with his affidavit in response to the summary judgment motions, made after the plaintiff filed a note of issue and certificate of readiness.").
4. 83 A.D.3d 1042, 922 N.Y.S.2d 151 (2d Dep't 2011).
5. 102 A.D.3d 26, 953 N.Y.S.2d 232 (2d Dep't 2012).
6. § 2. This act shall take effect immediately and shall apply to all pending cases for which a summary judgment motion is made on or after the date on which it shall have become law and all cases filed on or after such effective date.
7. *Dawson v. Cafiero*, 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dep't 2002) (The plaintiffs served the affidavits after filing the note of issue attesting to the completion of discovery. The Second Department reversed the trial court denial of the motion, but affirmed the preclusion of plaintiff's experts for not exchanging the experts prior to the filing, and for certifying all discovery was complete, and further found that the affidavits failed to raise a triable issue of fact.); *see also DeLeon v. State of New York*, 22 A.D.3d 786, 803 N.Y.S.2d 692 (2d Dep't 2005) ("The expert affidavit proffered by the claimant as the sole evidence to defeat the motion should have been rejected as he did not identify his expert in pretrial disclosure and served the affidavit after the date on which the note of issue was waived [citations omitted]. Moreover, the expert affidavit consisted of mere speculative assertions unsupported by adequate foundational facts and accepted industry standards [citations omitted].").
8. 183 A.D.2d 434, 583 N.Y.S.2d 381 (1st Dep't 1992). Although a First Department case, *Robinson* cited as its authority a 1986 Second Department decision, *Higdon v. Cnty. of Nassau*, 121 A.D.2d 366, 502 N.Y.S.2d 797 (2d Dep't 1986).
9. *Robinson*, 183 A.D.2d at 434–35.
10. 98 A.D.3d 857, 951 N.Y.S.2d 2 (1st Dep't 2012).
11. *Id*. at 858–59.
12. 121 A.D.3d 420, 993 N.Y.S.2d 551 (1st Dep't 2014).
13. *Id*. at 421.
14. CPLR 3101(d)(1)(i).
15. 123 A.D.3d 424, 998 N.YS.2d 321 (1st Dep't 2014).

In Memoriam

Judith Kaye

Starting at top left and moving clockwise: Chief Judge Judith Kaye displaying the ribbons of the various offices of the State Bar presented to her by then-President A. Vincent Buzard at the 2006 Annual Meeting; Judge Kaye with fellow Trailblazer Award winner Shirley Adelson Siegel at the House of Delegates meeting in Cooperstown in June 2015; Judge Kaye swearing in President David P. Miranda at the House of Delegates meeting in Cooperstown in June 2015.

To say that Judith Kaye was a major figure in the history of New York's Court of Appeals is to vastly underrate her contributions to New York state law, and even to New York history. She was the first woman appointed to the Court, of course, and the first woman to serve as chief judge. Yet history will surely define her not only by her gender but by the lasting imprint she left during her years on the Court – years marked by reform, innovation, foresight and strong views on such varied issues as same-sex marriage (for which she advocated in a brilliant dissent in 2006), youth courts, Indian child welfare, and even city sidewalk trees.

Because of Judge Kaye, every eligible New Yorker serves in the jury pool today. Long gone are the 22 exemptions from service that were routinely granted to various professions, including one for lawyers. Because of Judge Kaye, New York's courthouses are no longer the dreary enclaves they were when she arrived in Albany in 1983. Because of Judge Kaye, New York has a Commercial Division that enjoys a national reputation for handling

complex commercial cases. Because of Judge Kaye, New York has a range of special courts to deal with drug abuse, domestic violence, mental health and homelessness. And largely because of Judge Kaye's strong, even passionate, opposition to the death penalty, New York had no executions during her watch.

Judge Kaye's path to the bench had more than its share of twists and turns. Born in Monticello, she earned a B.A. from Barnard College and an LL.B., *cum laude*, from New York University School of Law. Those sterling academic credentials would seem to recommend her to any savvy law firm in New York. But when she applied, she found it wasn't her law school transcripts that got the attention of prospective employers – it was her gender. And doors were closed. So many doors, in fact, that she needed a strong recommendation from one of her professors to finally persuade one employer, Sullivan & Cromwell, to give her a try as a commercial litigator.

Her story might have ended there, with just the singular triumph of having made it in a male-dominated profession, were it not for Gov. Mario Cuomo, who made history of his own by naming her an associate judge (despite her lack of judicial experience) in 1983 and, a decade later, as chief judge. As Judge Joseph Bellacosa, her colleague on the Court for years, observed in a recent *New York State Bar Journal* article, Judge Kaye "immediately and comfortably settled in during that 1983 year . . . Despite having no prior judicial service, she did not miss a beat because of her prodigious preparation and the superlative execution of her work." Prodigious. Superlative. That was her work ethic.

Yet it wasn't all work. Judge Kaye had her human side. She was fastidious about her clothes and appearance—so much that we at NYSBA called her the chief shopper. And she could give a sweeping judicial reform a human touch. As she once told the *New Yorker*, she got the idea for jury reform after her daughter, who was called to duty at the Foley Square Supreme Court, told her it was "a great place to meet guys." And mom's response? "That's when I immediately decided to upgrade the jury pool."

We at NYSBA had a special connection to Judge Kaye. She was a longtime member of the NYSBA *Journal* editorial board and wrote extensively for this publication. She was a welcome fixture at our Annual Meeting, sometimes brightening things up with a new "fashion look," as when she once pieced together all the honorary ribbons bestowed upon her and strung them into a multi-colored necklace. It was a hit. But the one fashion stroke we will always remember is the T-shirt we gave her emblazoned with the words "Special Kaye." It was a play on the cereal ad, of course. It also was 100 percent accurate. ■

From the *Journal* archives

Judge Kaye wrote numerous articles for the NYSBA *Journal* and was a driving force behind issues dedicated to youth courts, juries and Indian law. This is a sampling of her contributions.[1]

My Life as Chief Judge: The Chapter on Juries
Oct. 2006, p. 10

"The jury system is central to the delivery of justice in the New York State courts, where we have close to 10,000 jury trials a year. Jury service, moreover, is the courts' direct link, often our only direct link, with the millions of citizens called to serve as jurors – more than 650,000 a year in New York State alone. Surely, 650,000 positive jury experiences would be a great means of fostering public confidence in the justice system."

Youth Courts: The Power of Positive Peer Pressure
Jan. 2011, p. 10

"So why not youth courts now? Why not take a full-fledged, enthusiastic stab at interrupting the School-to-Prison Pipeline with youth courts in schools, in courts, and in police and probation departments? Why not second chances for deserving offenders to avoid the lifetime scar of arrest and conviction?"

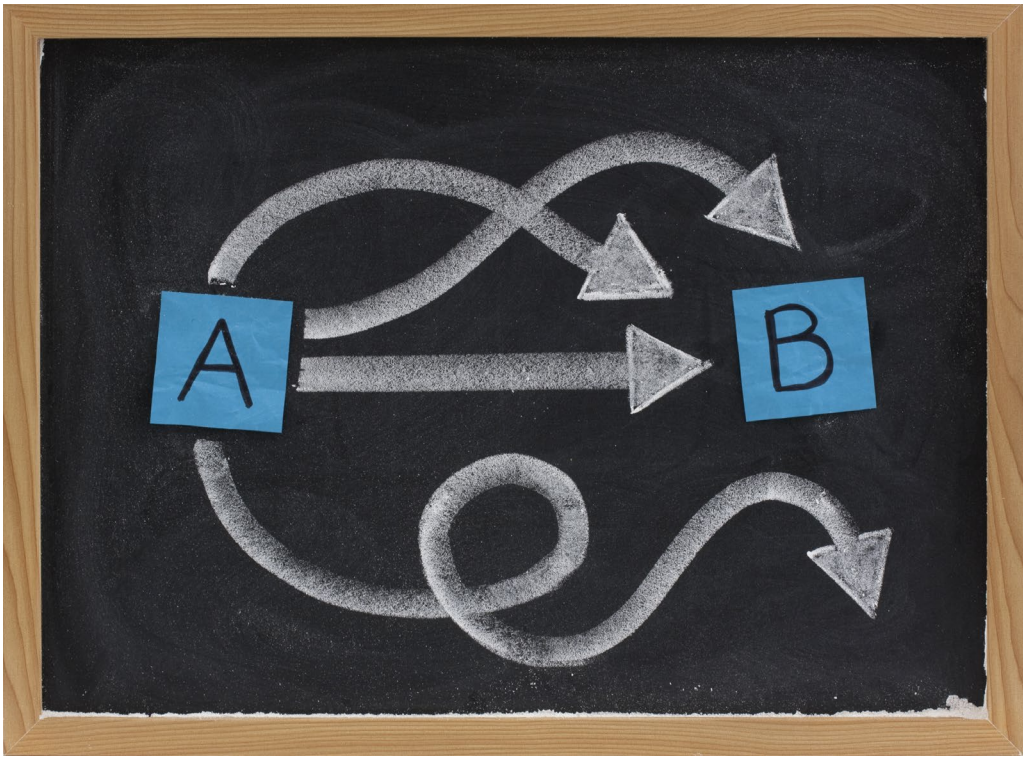
These Are the Days: Lawyering Then and Now
Jul./Aug. 2010, p. 28

"As I learned on Day One, the Court is there to settle and declare the law, to keep it stable, sensible and predictable to be sure, but also to see that it remains fully equal to the demands of a changing, maturing, progressing society. Not an easy task – utterly bedeviling on many occasions."

1. To read more of Judge Kaye's articles, visit www.nysba.org/NYSBAJournal, select "Archives" and "Searchable NYBSA Journal Index by Category."

The Impact of *Ashcroft v. Iqbal* on Securities Litigation

By Glenn Greenberg



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Introduction

Like all civil cases, securities litigation starts with a complaint in which the plaintiff alleges that he or she has or will be hurt by the defendant and details facts to support this claim. The complaint must satisfy pleading rules to avoid dismissal. The motion to dismiss is important to both parties because the plaintiff generally cannot receive a remedy without surviving a motion to dismiss while the motion often represents the defendant's best chance to avoid exposure and expensive litigation costs. Congress and the courts have heightened the pleading standard for securities litigation because the stakes are so high.[1]

The pleading standard for most federal civil litigation is that a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[2] The drafters intended Rule 8 to be read liberally because the merits of the suit were not supposed to be adjudicated until summary judgment.[3]

In cases in which the plaintiff alleges fraud or mistake, Rule 9(b) applies and the plaintiff must, in addition to the Rule 8 requirements, "state with particularity the circumstances constituting fraud or mistake." In securities litigation, the plaintiff must allege the fraud with particularity under Rule 9(b), but may plead the other elements of his or her claim under Rule 8.[4]

Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA) in response to the perception that securities litigation was overly burdensome for defendants. The PSLRA heightened the pleading standard and altered the discovery rules in securities litigation by codifying the Rule 9(b) pleading standard for such cases, increasing the requirements for scienter, and staying discovery until any motion to dismiss was denied.[5]

Bell Atlantic Corp. v. Twombly and *Ashcroft v. Iqbal*, Supreme Court decisions from 2007 and 2009, respectively, effectively heightened the pleading standards under

Rule 8.[6] In *Twombly*, the Court required that the plaintiff show that he was plausibly entitled to relief.[7] In *Iqbal*, the Court granted dismissal of a lawsuit because there was an "obvious alternative explanation" for the alleged offense.[8] In other words, these cases require dismissal not only for claims that are impossible, but also if the plaintiff's allegations are possible but the defendant can give a more likely explanation for the events.[9]

> The plain meaning of *Iqbal* is that a case must be dismissed if any explanation the defendant gives is more likely than the plaintiff's theory.

This article explains the holdings in *Twombly* and *Iqbal* and how the phrase "obvious alternative explanation" should be interpreted. The article also addresses how lower federal courts have interpreted that phrase and summarizes the pleading requirements in securities litigation. Finally, the article explains how the obvious alternative explanation requirement should alter securities litigation.

The Reinterpretation of Rule 8 Requirements

Bell Atlantic v. Twombly

Prior to *Twombly*, the pleading requirements under Rule 8 were summarized in *Conley v. Gibson*: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[10] *Twombly* effectively abrogated the no facts pleading set forth in *Conley*.[11]

In *Twombly*, the plaintiff alleged that telephone companies had conspired to restrain trade in order to inflate charges for local telephone and Internet services. The defendants were alleged to have conspired in two ways: they engaged "'in parallel conduct' in their respective service areas to inhibit the growth of upstart" competitors and made agreements not to compete with each other.[12] This allegation was based on the fact that the companies did not compete with each other and that one company's CEO had said that competing "might be a good way to turn a quick dollar but that doesn't make it right."[13]

The District Court dismissed the case because it determined that the plaintiff had only alleged parallel conduct and therefore had not sufficiently alleged conspiracy. The Court of Appeals reversed because, in its view, "plaintiffs must plead facts that 'include conspiracy among the realm of "plausible" possibilities in order to survive a motion to dismiss,'" and the plaintiff in this case had done so.[14] The Supreme Court reversed and remanded the case with a direction that the case be dismissed on the ground that the parallel activity did not plausibly suggest an agreement because there were other explanations for the parallel actions.[15] "In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an *obvious alternative explanation* . . . . for the noncompetition alleged . . . that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[16] *Twombly* thus created a two-pronged formula to determine whether a complaint was pleaded satisfactorily: the judge was to ignore all conclusory allegations and then determine whether the non-conclusory allegations "plausibly" stated a claim.[17]

Ashcroft v. Iqbal

Due to the terrorist attacks on September 11, 2001, the United States detained hundreds of suspected terrorists. Nearly 200 of the detainees were classified as "high interest."[18] They were "kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort."[19] The plaintiff in *Iqbal* was one of those detainees. He pleaded guilty, served his prison sentence, and was deported to Pakistan. After his release, he sued, among others, the Director of the Federal Bureau of Investigation and the Attorney General on the theory that his First and Fifth Amendment rights were violated because the United States allegedly had a policy of detaining people in harsh confinement based on their race, religion, and national origin and that the Director of the FBI and the Attorney General had "approved" of that policy.[20]

The District Court denied the defendant's motion to dismiss and the Court of Appeals affirmed. The Supreme Court reversed and remanded the case with an order that the case be dismissed against the Director of the FBI and the Attorney General. Using the *Twombly* two-pronged test, the Court first determined that the only non-conclusory allegations against the Director and the Attorney General were that, because of the terrorist attacks, the FBI had detained thousands of Arab Muslim men, many in "highly restrictive" confinement until the Director of the FBI and the Attorney General approved their release.[21] In assessing plausibility, the Court held that "[t]aken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. *But given more likely explanations, they do not plausibly establish this purpose*."[22] The Court addressed only one alternative explanation

and concluded it more likely: the disproportionate number of Arab Muslims detained was because Arab Muslims were responsible for the terrorist attacks and the FBI was searching for those connected to the attacks.[23] The plaintiff's allegations were not plausible because the defendant's explanation was more likely.[24]

The Meaning of the Obvious Alternative Explanation Requirement

The plain meaning of *Iqbal* is that a case must be dismissed if any explanation the defendant gives is more likely than the plaintiff's theory. In *Iqbal*, the Court assessed two explanations – discrimination (the plaintiff's argument) and disparate impact (the only alternative explanation) – and determined that the latter was more likely.[25] The Court held that the more likely explanation was "plausible" and the less likely one "implausible," therefore the case should be dismissed.[26] *Iqbal*'s requirements are binding on the federal courts; therefore, at a minimum, a plaintiff must allege that his or her explanation is the most plausible or most likely one of those brought to the court's attention by one of the parties.[27]

While one could argue that *Iqbal* does not alter the pleading standard articulated in *Twombly*, this ignores the difference between *Twombly* and *Iqbal*. The opinion in *Iqbal* states that the Court looked at the plaintiff's allegation of discrimination and determined that, "given more likely explanations, they do not plausibly establish this purpose."[28] The Court looked at only one alternative explanation.[29] Therefore, the sentence reads "A" is more likely than "B."[30] There is no "substantially" in that sentence.[31] As one circuit court judge acknowledged, "[a]lthough the *Iqbal* opinion used phrases such as 'more likely,' and 'as between,' it should not be read to say that a plaintiff should lose on the pleadings because a defendant had a more plausible alternative explanation. Rather, in light of the alternative explanation, plaintiff needed to 'allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."'"[32] In addition, the Court in *Iqbal* simply compared two explanations and chose the one that it deemed more likely.[33] In *Twombly*, the Court did not merely compare the two explanations and determine which it saw as more likely; it used the alternative explanation to show that, based on history and economics, the plaintiff's allegation was implausible.[34] The Court in *Twombly* showed that the plaintiff's allegation was substantially less likely to the point of being implausible; the Court in *Iqbal* did not.[35]

Another way to interpret *Iqbal* is that the plaintiff's pleadings need to be the most likely explanation among all other explanations, regardless of whether the parties bring it to the court's attention or the court does so on its own. This interpretation of the obvious alternative explanation requirement derives from the first paragraph on plausibility: "[b]ut given more likely explanations, they do not plausibly establish this purpose."[36] The use of plural "explanations" indicates that the Court compared the plaintiff's explanation to all other explanations. However, in *Twombly* and *Iqbal*, each defendant discussed in its brief the only alternative explanation considered by the Court. In each decision that explanation was deemed more likely than the one the plaintiff gave.[37] The general rule is that arguments not made in a brief are excluded. As the Court did not address arguments made outside the briefs, this interpretation of *Iqbal* is likely incorrect.

A third interpretation is that the plaintiff needs to plead all elements of his or her claims by clear and convincing evidence because the Court failed to define what constitutes an "obvious alternative explanation."[38] As a result, one could reasonably define such an explanation as one that is plausible but not as likely as the one the plaintiff proposes. As an obvious alternative explanation trumps the plaintiff's allegation, the plaintiff may have to show that there are no other plausible reasons, even if less likely. However, this interpretation would make the pleading standard higher than the standard for most trials and therefore is likely incorrect.[39]

Interpretation of Obvious Alternative Explanation Requirement by Lower Federal Courts

Circuit and District courts have interpreted the obvious alternative explanation requirement in three ways. The

Third, Fourth, Fifth, and Ninth Circuits have interpreted it in the manner described above.[40] The Sixth and Eighth Circuits interpreted *Iqbal* as requiring more than *Conley* but less than *Iqbal*'s plain meaning.[41] The Seventh and Eleventh Circuits interpreted the phrase as advisory or plus factor.[42] The First, Second, Tenth, and D.C. Circuits have not directly addressed the issue, although the Second Circuit has rejected *Iqbal*'s plain meaning in dictum,[43] but at least one District Court in those circuits has addressed the issue: The Eastern District of New York, the Western District of New York and the District of New Mexico have held in line with the plain meaning of *Iqbal*, and the District of Kansas implied it was doing so as well;[44] the District of Massachusetts rejected the plain meaning;[45] and the District Court of the District of Columbia used the requirement as a plus factor.[46]

Courts are reluctant to address the obvious alternative explanation requirement, likely because if they apply *Iqbal*'s plain meaning, the civil legal system would be disrupted and the result would be significant injustice.[47] Few cases would make it past a motion to dismiss because the plaintiff, without the benefit of discovery, would have to plead facts that support its claim over any and all alternative explanations that the defendant raised, regardless of whether any of the defendant's explanations would be supported by facts that they could prove at trial. The few cases that were not dismissed would invariably settle because the plaintiff would essentially have already proved his or her case in the opposition to the defendant's motion to dismiss. Since these arguments are contrary to the purpose of civil procedure, lawyers have not made them and courts have cited the less revolutionary parts of *Twombly* and *Iqbal*. For example, the Seventh Circuit quoted different parts of the two cases to avoid addressing this argument head-on: "If the allegations give rise to an 'obvious alternative explanation,' *Iqbal*, 129 S.Ct. at 1951; *Twombly*, 550 U.S. at 567, 127 S.Ct. 1955, then the complaint may 'stop[ ] short of the line between possibility and plausibility of "entitle[ment] to relief,"' *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955."[48]

Pleading Requirements in Securities Litigation

PSLRA

As stated, under the PSLRA, the plaintiff in securities litigation must plead sufficient facts to support "a strong inference that the defendant acted with the required state of mind."[49] The Supreme Court interpreted this phrase in *Tellabs, Inc. v. Makor Issues & Rights, Ltd*. to mean that to establish scienter under § 10(b) of the Securities Exchange Act, the plaintiff "must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference."[50]

Under the PSLRA, a plaintiff has "the burden of proving that the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages."[51] In 2005, the Supreme Court interpreted this requirement: "The statute thereby makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss."[52] The pleading standard for loss causation remained under Rule 8 of the Federal Rules of Civil Procedure: "[A] plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."[53]

Rule 9(b) of the Federal Rules of Civil Procedure

Rule 9(b) requires the plaintiff to state with greater specificity the "who, what, where, when, and how" of the fraud.[54] However, Rule 9(b) does not increase the plausibility standard.[55]

> Rule 9(b) should nevertheless still be read in conjunction with Rule 8(a). . . . When alleging fraud in a complaint, it is only necessary to set forth the basic outline of fraud and to indicate who made the misrepresentations and the time and place the misrepresentations were made . . . However, mere conclusory allegations without a description of the underlying fraudulent conduct will not satisfy the requirements of Rule 9(b) and may warrant dismissal.[56]

Rule 8 of the Federal Rules of Civil Procedure

All pleadings must satisfy the Rule 8 pleading standard.[57] Rule 9(b) addresses only particularity, not plausibility. The PSLRA governs the particularity requirements for the alleged fraud or mistake within a securities case and was meant to govern some plausibility aspects as well; all other pleading requirements in securities cases follow Rule 8.[58] However, according to *Iqbal*, the plaintiff must show that its explanation is more likely than any that the defendant proposes; that plausibility pleading standard is more stringent than the PSLRA. Therefore, all plausibility and many particularity issues in securities litigation fall under Rule 8.

The Obvious Alternative Explanation Requirement and Its Effect on Securities Litigation

Interpretation of Obvious Alternative Explanation Requirement in Securities Cases

Only three times have courts directly addressed the obvious alternative explanation requirement in securities cases. The first, in the Ninth Circuit, was *In re Century Aluminum Co. Securities Litigation.* In 2009, "Century Aluminum issued the prospectus supplement in connection with a secondary offering of 24.5 million shares of the company's common stock. When the secondary offering commenced, more than 49 million shares of Century Aluminum common stock were already in the market."[59] The plaintiffs bought stock in late January, 2009. In March 2009, the defendant restated its cash flows from operating activities. The plaintiffs sued under § 11 of the Securities Act of 1933 and claimed that they had bought the stock based on the erroneous January prospectus.

The problem was that the plaintiffs had to plead sufficiently that the stocks they bought came from the pool sold in conjunction with the fraudulent prospectus, not from the stock already in the market, but which pool the plaintiff's stocks came from was unclear. The court dismissed the case because there was an obvious alternative explanation: the stock had come from a pool of previously issued shares.[60]

King County, Wash. v. IKB Deutsche Industriebank AG concerned a mortgage-backed security rated as "Triple-A" even though it contained toxic assets. The security was downgraded during the middle of the credit freeze. The court held that loss causation was satisfactorily pleaded despite the obvious alternative explanation that the credit freeze caused the drop in price. The court acknowledged that this was a reasonable factor for at least part of the drop in price but that dismissal based on that factor alone "would place too much weight on one single factor and would permit S & P and Moody's to blame the asset-backed securities industry when their alleged conduct plausibly caused at least some proportion of plaintiffs' losses."[61]

The third case was *Arkansas Public Employee Retirement System v. GT Solar Int'l, Inc*. GT Solar had issued an IPO only to reveal the next day that its biggest customer had decided to sign a contract with one of its competitors. As a result, the stock fell 24% in one day. Investors sued under §§ 11 and 12(a)(2) of the Securities Act of 1933. They alleged that GT Solar had failed to disclose in its registration or the prospectus accompanying the IPO that there was a substantial likelihood that the company's biggest customer might stop buying its product. GT Solar claimed that the complaint did not "allege what they characterize as 'plausible grounds to infer' that they knew at the time of the IPO what they are accused of failing to disclose: the 'substantial likelihood' that LDK would stop purchasing DSS furnaces from GT Solar."[62] The plaintiff's claims did not rest on scienter, so this argument was irrelevant. However, the court also wrote in dictum,

> At most, then, those cases suggest that if the facts alleged in a complaint could support either an inference of wrongdoing or an "obvious alternative explanation" "then the plausibility standard requires the court to choose the 'obvious alternative explanation.'" . . . The facts alleged in the complaint reasonably support the opposite inference, i.e., that the defendants were aware of such a likelihood. The inference is by no means inescapable, but, as just discussed, *Twombly* and *Iqbal* did not equate "plausible" with "inescapable" or even "likely." Instead, dismissal for failure to state a claim is appropriate only if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct."[63]

This dictum suggests that this district court has a lower standard for an obvious alternative explanation than *Iqbal*'s plain language. However, this decision carries little weight.

A number of courts have noted in their opinions that the defendant argued that there was an obvious alternative explanation for allegations, but then failed to address the argument in their analysis.[64] Similarly, numerous defendants cited the obvious alternative explanation requirement in their filings, but for various reasons the courts did not address the citation.[65] These cases illustrate the courts' reluctance to address the issue.

> The plaintiff in securities litigation must plead sufficient facts to support "a strong inference that the defendant acted with the required state of mind."

How Securities Litigation Should Be Changed by the Obvious Alternative Explanation Requirement

If courts apply *Iqbal* as the Supreme Court has held, and as the Third Circuit, Fourth Circuit, Fifth Circuit, and Ninth Circuit[66] have, then many of the securities litigation pleading standards change. The following analysis shows how the obvious alternative explanation requirement should affect §§ 10(b), 11, and 12(a)(2) cases. In addition, controlling person's liability is addressed.

Section 10(b) of the Securities Exchange Act of 1934 Cases

Section 10(b) of the Securities Exchange Act of 1934 forbids the use or employment of any deceptive devices in connection with the purchase or sale of any security that violates SEC rules and regulations.[67] Rule 10b-5 forbids, among other things, the making of any false or omission of a material fact "necessary in order to make the statements made . . . not misleading."[68] The elements of a lawsuit under § 10(b) of the Securities Exchange Act of 1934 are a material misrepresentation or omission, scienter, a connection with the purchase or sale of a security, reliance, economic loss, and loss causation.[69]

Prior to *Twombly* and *Iqbal*, the PSLRA and Rule 9(b) of the Federal Rules of Civil Procedure had the most stringent requirements for whether there was a material misstatement or omission.[70] Both merely increased the particularity, not plausibility, requirement for this element;[71] therefore, the plausibility standard is still governed by Rule 8.[72] *Iqbal* increased the plausibility standard from the "no facts" *Conley* standard to one where the plaintiff's allegation must be more persuasive than all the explanations the defendant gives under the obvious alternative explanation requirement for materiality. The same argument has been made as to whether there even was misstatement or omission. Materiality may also be problematic in all the relevant sections because the "truth

on the market" theory could be used as the obvious alternative explanation at the pleading stage.[73]

Iqbal did not change significantly the pleading standard for scienter. In *Tellabs*, the Court held that scienter had to be pleaded "*at least as likely as* any plausible opposing inference."[74] *Iqbal* heightens the requirement articulated in *Tellabs* marginally from "as likely as any plausible opposing inference" to "slightly more likely than any plausible opposing inference."

Connection with the purchase or sale of a security is a very loose standard; the SEC interprets the term broadly and the Supreme Court defers to that interpretation so long as it is reasonable.[75] Since the element is so broadly defined and the determination is subject to an objective analysis, *Iqbal* likely has no effect.

"To establish transaction causation or 'reliance' under section 10(b), a plaintiff must 'demonstrate that defendants' conduct caused him to engage in the transaction in question.'"[76] Currently, plaintiffs can establish reliance through the "fraud on the market" theory.[77] Assuming other factors are met, there is a presumption that the plaintiff relied on the integrity of the market price.[78] This presumption applies unless the defendant can show there was no link between the misrepresentation and "the price received (or paid) by the plaintiff," that the market reacted to certain news which dissipated the effects of the misstatements, or that the plaintiff would have divested his or her shares "without relying on the integrity of the market."[79] When the presumption does not apply, the standard is now that the plaintiff's explanation must be more persuasive than all the explanations given by the defendant; when it does not apply, the standard is unchanged.

To show economic loss, the plaintiff needs to demonstrate not just that the price was artificially inflated, but that the price actually dropped after the truth was revealed.[80] This drop is calculated by tracking the mean trading price of the security within 90 days of the disclosure of the material misrepresentation.[81] The showing of economic loss is only a cap on damages.[82] While ultimate damages are subjective and left to trial, the showing of some economic loss is essentially objective. The plausibility requirement in *Iqbal* only addresses the subjective because no obvious alternative explanation can be shown when something is objective. Therefore, *Iqbal* does not alter economic loss.

Loss causation is the requirement that "a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."[83] The plaintiff now needs to show that the casual connection is more likely than all of the defendant's explanations and not merely an indication of such a connection. This change will pose a significant problem for plaintiffs because there almost always are intervening actions that can explain the loss.[84]

Section 11 of the Securities Act of 1933 Cases

"Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement. Under Section 11 of the Securities Act of 1933, '[i]f a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case.'"[85] Section 11 "creates a presumption that 'any person acquiring such security' was legally harmed by the defective registration statement."[86] The presumption does not exist when there is a pre-arranged sale agreement or if it has been more than 12 months since the defective registration statement became available. If the presumption is applicable, the obvious alternative explanation requirement has no effect. If the presumption is inapplicable, the plaintiff must show that its explanation is more likely than all of the defendant's explanations.

As with § 10(b), the material misrepresentation or omission requirement has increased from no facts pleading to requiring that the plaintiff's allegation be more persuasive than all of the defendant's explanations.

Section 12(a)(2) of the Securities Act of 1933 Cases

"Any person who offers or sells a security . . . by means of a prospectus or oral communication" is liable under § 12(a)(2) of the Securities Act of 1933 if that communication "includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission . . . ."[87]

To plead this claim, the plaintiff must allege that the defendant is a statutory seller, the sale was effected by means of a prospectus or oral communication, the communication contained a misstatement or omission, and the misstatement or omission was material.[88] "An individual is a 'statutory seller' – and therefore a potential Section 12(a)(2) defendant – if he: (1) passed title, or other interest in the security, to the buyer for value; or (2) successfully solicited the purchase of a security, motivated at least in part by a desire to serve his own financial interests or those of the securities' owner."[89] The first way that an individual is defined as a statutory seller is objective, therefore the obvious alternative explanation requirement has no impact; the second way is subjective, but the requirement can easily be shown through objective facts. Therefore, while the standard increased from *Conley* to *Iqbal*, the burden does not change significantly.[90]

Whether the sale was altered by means of a prospectus or oral communication is an objective fact; therefore, *Iqbal* leaves the pleading requirement unchanged.

As with § 10(b) suits, whether an oral communication contained a material misstatement or omission is subject to a heightened pleading standard.[91] Generally, there are questions of whether the misstatement or omission was correct, whether it was puffery, whether there were qualifications to the statement, and whether any incorrect information was material.[92]

Finally, there are issues whether the offering was on the public market.[93] While generally not an issue, at the times where it is, the plaintiff would have to plead that the security was more likely than not offered on a public market.

Controlling Persons Liability Under the Securities Act of 1933 and the Securities Exchange Act of 1934

The following is the liability standard for controlling persons under the Securities Act of 1933: "Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."[94]

The Securities Exchange Act of 1934 uses similar language when defining controlling persons and therefore courts have routinely held that the definition of a controlling person is the same.[95] A controlling person is someone with "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[96] Some courts hold that a person must have actual control to be liable; others that indirect control or influence, if the plaintiff actually possesses it, is sufficient.[97] Pleading that someone falls under the controlling person provision could be significantly more difficult, particularly in jurisdictions that require actual control. The plaintiff will have to plead facts that the person exercised enough control to fall under the provision, and if any of the defendant's explanations are more plausible, the plaintiff will be unable to hold that person liable.

The majority of courts view issues of good faith, lack of inducement of the violating act, lack of "reasonable belief," and lack of knowledge as affirmative defenses.[98] A minority of courts require the plaintiff to establish "culpable participation" by the controlling person.[99] A plaintiff will have a much more difficult time in those minority courts because prior to discovery there likely will be insufficient evidence to plead things like bad faith and reasonable belief with greater likelihood than the possible explanations that the defendant could give.

Conclusion

Twombly and *Iqbal* have fundamentally altered the pleading standard for civil cases. The language in *Iqbal* is so strong that plausibility requirements under Rule 8 should be at least equal to the requirements under the PSLRA, and, for many requirements, the standard should be higher. Whether circuit courts will in the long run follow this interpretation is unclear; they currently are split. If they do follow the plain meaning of *Iqbal*, plaintiffs' securities lawyers will have a very difficult time winning cases, because they will need to have won the case before discovery. ■

1. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009); *see generally* 15 U.S.C. § 78u-4.
2. Fed. R. Civ. P. 8(a)(2).
3. *Twombly*, 550 U.S. at 545.
4. *See* 7 No. 3 Sec. Litig. Rep. 1; *see also Iqbal*, 556 U.S. at 686–87.
5. 15 U.S.C. § 78u-4(a)–(b).
6. *See Twombly*, 550 U.S. at 545; *see also Iqbal*, 556 U.S. at 686–87.
7. *Twombly*, 550 U.S. at 563.
8. *Iqbal*, 556 U.S. at 681.
9. *See id.*; *see also Twombly*, 550 U.S. at 563.
10. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see* Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. & Pol'y 61, 63 (2007).
11. *Twombly*, 550 U.S. at 563.
12. *Id.*
13. *Id.* at 550–51, 565.
14. *Id.* at 553.
15. *Id.* at 553, 570.
16. *Id.* at 567–68 (emphasis added).
17. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
18. *Id.* at 667–68.
19. *Id.*
20. *Id.*
21. *Id.* at 681.
22. *Id.* (emphasis added).
23. *Id.* at 682.
24. *See id.* at 681–82.
25. *Id.*
26. *Id.*
27. *See id.* at 686–87.
28. *Id.* at 681.
29. *Id.* at 686–87.
30. *Id.* at 681.
31. *Id.*
32. *McCauley v. City of Chicago*, 671 F.3d 611, 625 (7th Cir. 2011).
33. *Iqbal*, 556 U.S. at 681.
34. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567–69 (2007).
35. *Id.*; *Iqbal*, 556 U.S. at 682.
36. *Iqbal*, 556 U.S. at 681.
37. Brief for Petitioner at 37, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see* Brief for Petitioner at 34–35, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Iqbal*, 556 U.S. at 682 ("[a]s between that 'obvious alternative explanation' for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion").

38. *See, e.g.*, *McCauley v. City of Chicago*, 671 F.3d 611, 625 (7th Cir. 2011).

39. *See* James Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 Tulsa L. Rev. 79, 79–80 (1982).

40. *Santiago v. Warminster Twp.*, 629 F.3d 121, 133 (3d Cir. 2010); *George v. Rehiel*, 738 F.3d 562, 586 (3d Cir. 2013); *Evans v. Chalmers*, 703 F.3d 636, 657 (4th Cir. 2012); *Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 482 F. App'x 759, 765 (4th Cir. 2012); *Jabary v. City of Allen*, 12-41054, 2013 WL 6153241 (5th Cir. 2013); *In re Century Aluminum*, 729 F.3d 1104, 1108 (9th Cir. 2013).

41. *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596–97 (8th Cir. 2009).

42. *McCauley v. City of Chicago*, 671 F.3d 611, 619 (7th Cir. 2011); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010).

43. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121, n.4 (2d Cir. 2013).

44. *Willets Point Indus. & Realty Ass'n v. City of N.Y.*, 2009 WL 4282017 (E.D.N.Y. Nov. 25, 2009); *High Falls Brewing Co., LLC v. Boston Beer Corp.*, 852 F. Supp. 2d 306, 322 (W.D.N.Y. 2011); *Mocek v. City of Albuquerque*, 2013 WL 312881 (D.N.M. 2013); *Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 900 F. Supp. 2d 1222, 1254–55 (D. Kan. 2012).

45. *Chao v. Ballista*, 630 F. Supp. 2d 170, 173 (2009).

46. *Morrow v. United States*, 723 F. Supp. 2d 71, 77 (D.D.C. 2010).

47. One only needs to review the thousands of cases that cite to *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* to recognize how far-reaching such an application may be. Few of these cases address the "obvious alternative explanation" issue.

48. *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

49. 15 U.S.C. § 78u-4(b)(2)(A).

50. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007).

51. 15 U.S.C. § 78u-4(b)(4).

52. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

53. *Id.* at 347.

54. *U.S. ex rel. Costner v. U.S.*, 317 F.3d 883, 888 (8th Cir. 2003).

55. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, n.14 (2007) ("On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)–(c). Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized],' *ibid.*; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.").

56. *In re Barr*, 188 B.R. 565, 570 (1st Cir. 1995); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009) ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8.").

57. *Iqbal*, 556 U.S. at 686–87.

58. 15 U.S.C. § 78u-4(b)(1)–(2).

59. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013).

60. *Id.* ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly.* Here, plaintiffs' allegations remain stuck in 'neutral territory' because they do not tend to exclude the possibility that their shares came from the pool of previously issued shares.").

61. *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 708 F. Supp. 2d 334, 343 (2010).

62. *Arkansas Pub. Emp. Ret. Sys. v. GT Solar Int'l, Inc.*, 2009 WL 3255225 (D.N.H. 2009).

63. *Id.*

64. *See, e.g., Stratte-McClure v. Morgan Stanley*, 784 F. Supp. 2d 373, 387–88 (S.D.N.Y. 2011) (disregarding defendant's argument that there was an obvious alternative explanation for its markdowns in its subprime swap position because prior precedent stated these markdowns were a red flag that the valuations were inaccurate and followed another Southern District of New York decision in viewing that these red flags were sufficient to satisfy the pleading requirements).

65. *See, e.g.*, Plaintiffs' Joint Response and Brief in Opposition to Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint and, in the Alternative, Motion for Leave to Amend, *Troice v. Proskauer Rose LLP*, 2010 WL 377659 (N.D.Tex. 2010) (arguing that the defendant cannot find another obvious alternative explanation other than the one plaintiff posits).

66. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013).

67. 15 U.S.C. § 78j(b).

68. 17 C.F.R. § 240.10b-*5.*

69. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005).

70. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see* Fed. R. Civ. P. 9(b); *see also* 15 U.S.C. § 78u-4(a)–(b).

71. *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009); *see generally* 15 U.S.C. § 78u-4.

72. *Iqbal*, 556 U.S. at 686–87.

73. *See Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 512 (7th Cir. 1989).

74. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007).

75. *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2004).

76. Elizabeth A. Nowicki, *10(b) or Not 10(b)?: Yanking the Security Blanket for Attorneys in Securities Litigation*, Colum. Bus. L. Rev. 637, 644 (2004).

77. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988).

78. *Id.*

79. *Id.* at 248–49.

80. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

81. 15 U.S.C. § 78u-4(e)(3).

82. *See Dura Pharm., Inc.*, 544 U.S. at 347.

83. *Id.*

84. *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 708 F. Supp. 2d 334, 343 (S.D.N.Y. 2010).

85. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983).

86. *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007).

87. 15 U.S.C. § 77l(a)(2).

88. *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 367 (S.D.N.Y. 2011).

89. *Id.*

90. *See id.*

91. *See* Memorandum, *Pub. Emp. Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc.*, 2009 WL 2460186 (S.D.N.Y. 2009); *see also* Memorandum, *Freidus v. ING Grp. N.V.*, 2009 WL 4822177 (S.D.N.Y.).

92. *See* Paul Vizcarrondo, Jr., *Liabilities Under the Federal Securities Laws: Sections 11, 12, 15, and 17 of the Securities Act of 1933 and Sections 10, 18 and 20 of the Securities Exchange Act of 1934*, Wachtell, Lipton, Rosen & Katz (Aug. 2013), www.wlrk.com/docs/OutlineofSecuritiesLawLiabilities2013.pdf, at 11-14.

93. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995).

94. 15 U.S.C. § 77o(a).

95. 189 A.L.R. Fed. 147; *see, e.g.*, *Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 619, n.15 (5th Cir. 1993).

96. 189 A.L.R. Fed. 147.

97. *Id.*; *see, e.g.*, *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1306 (10th Cir. 1998); *compare Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494 (7th Cir. 1986) (requiring direct control for controlling persons' liability), *with McGraw v. Matthaei*, 388 F. Supp. 84, 93 (E.D. Mich. 1972) (allowing for indirect control for controlling persons' liability).

98. *See* 189 A.L.R. Fed. 147; Lewis D. Lowenfels & Alan R. Bromberg, *Controlling Person Liability Under Section 20(a) of the Securities Exchange Act and Section 15 of the Securities Act*, 53 Bus. Law. 1, 20 (1997).

99. Lowenfels & Bromberg, *supra* note 98, at 20.

Revisiting the American Rule

Limitations on the Recovery of Attorney Fees Pursuant to Contractual Indemnification Provisions

By Robert F. Regan

Under the long-standing "American Rule," attorney fees are deemed "incidents of litigation," and a prevailing party cannot recover its legal fees "'except where authorized by statute, agreement or court rule.'"[1] Thus, in the absence of a contractual fee-shifting provision[2] or an applicable statute[3] providing for the recovery of attorney fees, each party to a civil action is generally responsible for its own legal fees.[4]

When contracting parties do intend to override the American Rule and permit the recovery of attorney fees, they generally do so by way of an express fee-shifting provision – not an indemnification clause. As the First Department recognized, it is only through the "ingenuity of attorneys who parse the language of such [indemnification] provisions with an eye to extracting the essence of a right to attorney fees for the winning side" that litigants in disputes between contracting parties have attempted to recover attorney fees based on indemnification provisions.[5] "New York, however, has been *distinctly inhospitable* to such claims."[6]

The Exacting *Hooper* Test

Before New York courts will award attorney fees based on an indemnification provision in disputes between contracting parties (as opposed to claims by third parties), there must be a finding of *unmistakable intent* to waive the American Rule. As explained by the Court of Appeals in *Hooper Associates v. AGS Computers*, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."[7] Thus, a court should not infer a party's intention to waive the benefit of the American Rule "unless the intention to do so is *unmistakably clear* from the language of the promise."[8] "For an indemnification clause to serve as an attorney[ ] fees provision with respect to disputes between the parties to the contract, the provision must *unequivocally* be meant to cover claims between the contracting parties rather than third-party claims."[9]

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In fact, unless the indemnification clause refers *exclusively* to claims between the contracting parties and does not cover third-party claims, it generally cannot serve as a fee-shifting provision in disputes between the contracting parties. It is only when "'the claims covered [by the indemnification provision] refer "exclusively" or "unequivocally" to claims between the parties, [that] a Court may interpret an indemnification agreement to include such claims. If not, then a court must find the agreement lacking evidence of the required intent.'"[10] Accordingly, where the indemnification provision covers both third-party claims *and* claims between the contracting parties, no right to recover attorney fees will be found.[11]

> The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant.

Under this exacting *Hooper* test, it is not enough that the party seeking to recover attorney fees offers a "rational" interpretation of the indemnification provision that would permit the recovery of attorney fees in a dispute between the contracting parties.[12] "The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant."[13] Instead, "the intention to authorize an award of fees to the prevailing party must be *virtually inescapable*."[14]

Hooper Assoc. v. AGS Computers

In *Hooper*, the plaintiff purchaser sued the defendant for breach of contract, breach of warranty and fraud arising from a contract to provide computer equipment and services. The plaintiff also asserted a claim for contractual indemnification and sought to recover the attorney fees incurred in prosecuting its case against the defendant. The indemnification provision at issue in that case provided for indemnification from "any and all claims, damages, liabilities, costs and expenses, *including reasonable counsel fees.*"[15]

Although the plaintiff prevailed on its other causes of action, the Court of Appeals found that the language in the indemnification provision was insufficient to establish the *unmistakable intent* necessary to permit the recovery of attorney fees in a suit between the contracting parties.[16] Despite the express reference to the recovery of "reasonable counsel fees" in the indemnification provision, the Court concluded that it must still "interpret [that] language and determine whether it is limited to attorney fees incurred by plaintiff in actions involving third parties or also includes those incurred in prosecuting a suit against defendant for claims under the contract."[17] Because the indemnification provision in *Hooper* "does not contain language clearly permitting the plaintiff to recover from defendant the attorney[ ] fees incurred in a suit against defendant," and the claims covered by the indemnification provision were not "exclusively or unequivocally referable to claims between the parties themselves," but were also "susceptible to third-party claims," the Court of Appeals reversed the court below and held that "[t]he [indemnification] clause in this agreement does not contain language clearly permitting plaintiff to recover from defendant attorney fees incurred in a suit against defendant."[18]

Gotham Partners v. High River

More recently, in *Gotham Partners, L.P. v. High River Ltd. Partnership*, the First Department held that a similar indemnification provision, which expressly provided for the recovery of "reasonable fees and expenses of counsel," could not be interpreted to permit the recovery of attorney fees in disputes between the contracting parties.[19] In reversing the trial court, the Appellate Division found that the problem with both the plaintiff's argument and the trial court's decision was not that they were "irrational," but that they failed to meet the exacting *Hooper* test.[20] Because the indemnification provision failed to clearly demonstrate the required *unmistakable intent*, the First Department held that the plaintiff was not entitled to recover its attorney fees in an action between the contracting parties.[21]

In reaching its decision, the court in *Gotham Partners* noted that, unlike the indemnification provision in favor of the plaintiff (Section 7.10 of the parties' agreement), the indemnification provision in favor of the defendant (Section 7.12 of that agreement) did constitute "an *unmistakable*, *unequivocal* prevailing party attorney fees provision in favor of [defendant] High River" and, therefore, would permit the recovery of attorney fees by the defendant with respect to claims asserted against the plaintiff.[22] Accordingly, the court concluded that the parties "were well aware of how to frame an enforceable provision creating an entitlement to prevailing party attorney fees."[23] Nevertheless, because Section 7.10 failed to clearly demonstrate such an intent with respect to claims asserted by the plaintiff against the defendant, the First Department held that the plaintiff was not entitled to recover its attorney fees pursuant to that provision in an action for breach of contract against the defendant.[24]

Satisfying the *Hooper* Test

Despite the exacting nature of the *Hooper* test, there are still situations in which courts will find a right to recover attorney fees based on an indemnification provision, even in disputes between contracting parties. Thus, for example, in *Breed, Abbott & Morgan v. Hulko*[25] – which predates both *Hooper* and *Gotham Partners* – the First

Department found that the plaintiff/escrowee could recover attorney fees incurred in successfully defending a suit by one of the other parties to the escrow agreement because the indemnification provision was found to cover claims between the contracting parties *exclusively*. As explained in *Hooper*, "*Breed, Abbott* did not signal any departure from settled rules."[26] In that case, a claim for attorney fees was permitted "on the narrow ground that the intent of the parties was manifest."[27] The Court of Appeals concluded that "if the promise to indemnify *Breed, Abbott* did not extend to legal expenses incurred in defending against an action by one of the parties alleging misconduct by the escrowee which resulted in a determination in favor of the escrowee, it was difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify the escrowee."[28] As in *Hooper*, however, where "the potential exist[s] for third-party actions" for damages, the narrow ground for permitting a claim for attorney fees in *Breed, Abbott* does not exist.[29]

Conclusion

Where parties to a contract truly intend to waive the American Rule and permit the recovery of attorney fees in disputes between the contracting parties, they are wise to include an express fee-shifting provision in their agreement. Litigants engaged in such disputes have, nevertheless, continued to seek to recover attorney fees based on indemnification provisions. As demonstrated by the Appellate Division decisions following *Hooper*, New York courts remain "distinctly inhospitable" to such claims and have strictly applied the *Hooper* test.[30] Under that *unmistakable intent* standard, even a "rational" argument is insufficient to establish a right to recover attorney fees. Rather, the party seeking to recover attorney fees must demonstrate an "*unmistakable intention*" to permit the recovery of attorney fees that is "*virtually inescapable*."[31] Unless the prevailing party can meet this exacting standard, the recovery of attorney fees in disputes between the contracting parties is simply not available. ■

1. *Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 204 (1st Dep't 2010), *lv. denied*, 17 N.Y.3d 713 (2011) (citations omitted).

2. A typical fee-shifting provision reads as follows: "The prevailing party in any dispute arising out of or related to this agreement shall be entitled to an award of its reasonable costs and attorney fees."

3. There are more than 60 federal fee-shifting statutes. *See Marek v. Chesny*, 473 U.S. 1, 43–51 (1985) (Appendix to opinion of Brennan, J., dissenting, listing 63 statutes).

4. *Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989).

5. *Gotham Partners*, 76 A.D.3d at 204.

6. *Id.* (emphasis added).

7. *Hooper*, 74 N.Y.2d at 491.

8. *Id.* at 492 (emphasis added).

9. *Gotham Partners*, 76 A.D.3d at 207 (emphasis in original).

10. *Id.* at 208 (quoting *Sequa Corp. v. Gelmin*, 851 F. Supp. 106, 110–11 (S.D.N.Y. 1994). *See also Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 21 (2d Cir. 1996) (language in broad indemnification provision was not "unmistakably clear" statement of intent to cover an attorney fee award resulting from a claim between the parties for breach of contract).

11. *See, e.g., Sequa Corp.*, 851 F. Supp. at 110–11 (broad indemnification provision did not cover claims for attorney fees in dispute between contracting parties where indemnification provision did not refer "exclusively" or "unequivocally" to claims between contracting parties); *4Kids Entm't Inc. v. Upper Deck Co.*, 797 F. Supp. 2d 236, 252 (S.D.N.Y. 2011) (same).

12. *Gotham Partners*, 76 A.D.3d at 207.

13. *Id.* at 209.

14. *Id.* (emphasis added).

15. The indemnification provision in *Hooper*, 74 N.Y.2d at 490 (emphasis added), provided as follows:

> (A) AGS [Defendant] shall at all times indemnify and hold harmless HLTD [Plaintiff], its successors and assigns and any of its officers, directors, employees representatives, and/or agents, and their heirs, executors, administrators, successors and assigns or each of them against and from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees arising out of:
>
> Any breach by AGS [Defendant] of any express or implied warranty hereunder and any express representation or provision hereof;
>
> The performance of any service to be performed hereunder;
>
> Infringement of the patent rights, copyright or trademark . . . .;
>
> The installation, operation, and maintenance of the system; or
>
> Mechanic's liens for labor and materials.

16. *Id.* at 492.

17. *Id.* at 491.

18. *Id.* at 492.

19. The indemnification provision in *Gotham Partners*, 76 A.D.3d at 204–05 (emphasis added), provided as follows:

> [Defendant] agrees to indemnify and hold [Plaintiff] harmless from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, charges, expenses and disbursements (including reasonable fees and expenses of counsel) which may at any time be imposed on, incurred by or asserted against [Plaintiff], as the result of any action taken by (or failure to act of) [Defendant] following the execution and delivery of this Agreement with respect to, or associated or in connection with, [Hallwood] or [Defendant]'s interests [in Hallwood].

20. *Id.* at 207.

21. *Id.*

22. *Id.* (emphasis added). Section 7.12 of the parties' agreement provided as follows:

> [Gotham] shall . . . be liable with respect to all losses, costs, damages, judgments, suits, charges, expenses and disbursements (including reasonable fees and expenses of counsel) . . . incurred or suffered by [High River] as a result of or arising out of a breach by [Gotham] under this Agreement.

23. *Id.*

24. *Id.*

25. 139 A.D.2d 71 (1st Dep't 1988).

26. Hooper, 74 N.Y.2d at 493.

27. *Id.*

28. *Id.* (internal quotation marks omitted).

29. *Id.* at 493–94.

30. *See, e.g., Wells Fargo Bank, N.A. v. Webster Bus. Credit Corp.*, 113 A.D.3d 513, 516 (1st Dep't), *lv. denied*, 23 N.Y.3d 902 (2014) (Indemnification provision "does not evince an 'unmistakably clear' intention to waive the American Rule against prevailing parties' recovery of attorneys' fees, because it contemplates third-party claims against the lenders, who include defendant."); *214 Wall St. Assoc., LLC v. Med. Arts-Huntington Realty*, 99 A.D.3d 988, 990 (2d Dep't 2012) (American Rule militated against interpretation of agreement that would permit recovery of attorney fees by prevailing party).

31. *Gotham Partners*, 76 A.D.3d at 209 (emphasis added).

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Property Contamination and Its Impact on Commercial Leasing in NYC

By Larry Schnapf

This is the third article discussing environmental laws affecting commercial leasing transactions. The first installment appeared in the May 2015 issue of the Journal *and the second appeared in the January 2016 issue.*

Office of Environmental Remediation Voluntary Cleanup Program (VCP)

The New York City Office of Environmental Remediation (OER) administers a Voluntary Cleanup Program (VCP)[1] that can be used to address minimally contaminated sites such as contaminated fill sites, the "E" program and oil spills that are confined to the property. OER has entered into a Memorandum of Understanding with the New York State Department of Environmental Conservation (NYSDEC) so that NYSDEC will honor cleanups completed by OER under its VCP.

The New York City VCP is a popular tool for moderately contaminated sites because of the OER's streamlined approach that allows sites to complete remediation fairly quickly. It is perhaps the nimblest remedial program in the country. OER staff is particularly responsive to the needs of applicants and will work hard to find a way to accommodate the construction schedule of an applicant.

Sites that are eligible for VCP are those where redevelopment of real property is complicated by the presence or potential presence of detectable levels of contamination.[2] Properties that are remediated through the VCP receive a Notice of Completion,[3] which includes a New York City liability release and a statement from the NYSDEC that it has no further interest and does not plan to take enforcement action or require remediation of the property. Applicants also receive a Green Property Certification that symbolizes the city's confidence that the property is protective of public health and the environment.[4]

In addition, applicants may be able to tap a modest suite of investigation/cleanup grant programs offered by OER that can help plug the funding gap caused by the need to perform remedial actions. Sites enrolled in the VCP are eligible for the Brownfield Incentive Grants (BIG) Program which funds four types of grants including pre-enrollment investigation costs, remediation, technical assistance to non-profit developers of Preferred Community Development Projects, and purchase of pollution liability insurance or cleanup cost cap insurance. BIG grants may also be used for the Hazardous Materials E-Designation and Restrictive Declaration Remediation programs (see below).[5]

OER also recently embarked on a brownfield "jump start" program for affordable housing and certain industrial site expansion projects that were contemplating applying to the NYSDEC Brownfield Cleanup Program (BCP). For qualifying sites, OER will provide upfront refundable grants of up to $125,000 for investigation and $125,000 for site remediation costs. The funds are repaid to the city after the project receives BCP tax credits.

One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing.[6] While the EPA may occasionally enter into a prospective purchaser agreement or issue a comfort letter, the EPA and state environmental agencies do not have the resources to routinely review the thousands of Phase 1 reports generated annually in commercial real estate or financing transactions. Thus, a purchaser will not know if it has qualified for one of these defenses until the purchaser has been sued or a defendant files a counterclaim in a contribution claim filed by the purchaser, and a court issues a final ruling.

To facilitate redevelopment, OER is willing to issue several types of letters. The first, known as Environmental Review and Assessment (ERA) letters, may be used where the presence of contamination may complicate a real estate or financing transaction.[7] OER will issue an ERA letter where it determines that existing conditions at a property are protective of public health. OER does not anticipate issuing a letter where contamination requires further action beyond that contemplated under the transaction to render a property protective for its intended use. To obtain an ERA letter, a party will meet with OER to discuss the nature of the transaction, prior and current site uses and operational history of the property, the proposed development, known site contamination, and how the ERA letter will facilitate the transaction. As part of the process, OER will review available data on the property, including a Phase 1 and all Phase 2 reports, and compare the identified contamination against the state soil cleanup objectives[8] to determine if the existing or proposed property conditions are protective of the property's future use. If as a result of this review OER determines further environmental investigation or remedial action is warranted, OER will consider issuing an ERA letter to identify those additional studies and remedial actions if requested by both parties.

Another type of OER letter is known as an "acceptance letter." This type of letter is particularly useful when a Phase 2 report identifies contaminants above the standards established by the NYSDEC but there are not any completed pathways because of the existence of a building foundation, paved surfaces, etc. OER will review Phase 2 reports and if it agrees that no further action is required, OER will issue a letter indicating it accepts or agrees with the conclusions of the report.

OER will also issue a pre-VCP enrollment "comfort letter." Frequently, when a consultant recommends further sampling or cleanup, lenders may require a borrower to enroll in a voluntary cleanup program prior to the closing and require the borrower to covenant to obtain a "no further action" letter from the appropriate regulatory agency. Unlike other remedial programs, the OER voluntary cleanup program does not accept applicants until after a site has been characterized and documented in a remedial investigation report. Thus, a borrower may not be able to actually enroll in the VCP until after the closing. To provide assurance to a lender, OER will issue a pre-enrollment letter indicating that the borrower is making progress toward acceptance into the VCP. OER interprets this sentence very broadly and will write letters to satisfy the concerns of lenders.

OER has also developed a "standstill letter," which can be used when a seller seeks to sell property but environmental issues have complicated a transaction. In such a case, the seller can investigate the site and develop a generic remedy with OER. The site would then be enrolled in VCP but would be in a "standstill" mode with no requirement to proceed with the remedy. It is hoped the existence of an approved remedy will provide comfort to a prospective purchaser and its lender since the buyer will be able to estimate the cleanup costs. After the purchaser acquires title, it can then implement the pre-approved remedy – provided the proposed reuse is consistent with the approved remedy.

All is not lost if you have learned about the NYCVCP after construction has started or is significantly completed. OER has developed a "look back" track where projects may be able to obtain liability protection if the remedial action conforms to the OER program requirements. However, "look back" applicants will not be eligible for the NYCVCP funding incentives.

The OER VCP may also be used to satisfy requirements of the National Environmental Policy Act (NEPA)[9] or the State Environmental Quality Review Act (SEQRA) for projects being funded by the New York City Department of Housing Preservation and Development (HPD). The federal Department of Housing and Urban Development (HUD) has established regulations implementing NEPA[10] when HUD staff performs environmental reviews and when local governments assume HUD responsibility.[11] In New York City, HPD has assumed responsibility for environmental review that would normally be performed by HUD.

All property proposed for use in HUD programs must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances where the hazard could affect the health and safety of occupants or conflict with the intended use of the property.[12] As a result, developers of affordable projects receiving funding from HUD or HPD often have to perform environmental reviews for the presence of hazardous materials to comply with NEPA.

HPD must have an Environmental Assessment (EA) prepared to identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project.[13] Environmental reviews are generally conducted for new construction, major rehabilitation, leasing, acquisition and change in use under a range of HUD programs. The most common programs for which HPD performs environmental reviews are HUD's HOME Investment Partnership Program (HOME) and the Neighborhood Stabilization Program (NSP). HPD utilizes federal HOME funds to finance the construction of new homes and rehabilitation of existing housing, including vacant and occupied single room occupancy buildings (SROs), small homes (buildings with fewer than 12 units) and multi-family buildings. The reviews must be completed before the release of funds and acquisition of property.

The developer will be required to conduct a Phase 1 review. If Phase 1 identifies Recognized Environmental Conditions (RECs), the developer will have to propose a Phase 2 work plan for approval by the New York City Department of Environmental Protection (DEP). Note that sometimes HUD or HPD may disagree with the Phase 1 findings and require a Phase 2 even if the Phase 1 review did not identify RECs. If the investigation confirms the presence of contamination above applicable levels, the developer will need a remedial action plan (RAP) for review and approval by the DEP.

The existence of an approved RAP enables HPD to issue a Notice of Finding of No Significant Impact (FONSI) certifying that the project will not have a significant impact on the environment and therefore will not require preparation of an Environmental Impact Statement (EIS). HPD will then also issue Notice of Intent to Request a Release of Funds (NOI/RROF). The developer would normally implement the RAP and submit a remedial action report to DEP for final approval.

The DEP approval will simply confirm that the developer has satisfactorily completed the RAP. The certification will not confer any liability protection under CERCLA or the state Environmental Conservation Law (ECL), nor provide contribution protection. Moreover, the HPD funding often does not cover remediation costs, which can create a funding gap for a project that already has very tight margins.

When facing the prospect of implementing a remedial action, developers should consider enrolling the project in the NYC VCP. Developers can enter the VCP even after the DEP has approved a RAP. Oftentimes, all that a developer will have to do is convert the DEP-approved RAP into the template form used by OER. This is because both the DEP and OER follow the NYSDEC remedial program requirements set forth at 6 N.Y.C.R.R. part 375.

New York City E-Designation Program

OER also administers the E-Designation program,[14] which began as a land use program but has morphed into an important source of cleanup obligations in New York City. An E-Designation is a NYC zoning map designation that indicates the presence of an environmental requirement pertaining to potential Hazardous Materials Contamination, Window/Wall Noise Attenuation, or Air Quality impacts on a particular tax lot. The E-Designation is assigned to property lots as part of a zoning action under the City Environmental Quality Review (CEQR) Act. If the CEQR review process indicates that development on a property may be adversely affected by noise, air emissions, or hazardous materials, then the lead agency may assign an E-Designation on the property lot to ensure that the E-Designation requirements are satisfied prior to or during a new development or new use of the property.[15]

A responsible party that fails to respond to a cleanup order "without sufficient cause" may be liable for penalties, possibly as high as three times the cleanup costs incurred by the DEP.

A Hazardous Materials (HazMat) E-Designation may be assigned for a variety of reasons including that the property contained:

- Incinerators;
- Underground and/or above ground storage tanks;
- Active solid waste landfills;
- Permitted hazardous waste management facilities;
- Inactive hazardous waste facilities;
- Suspected hazardous waste sites;
- Hazardous substance spill locations;
- Areas known to contain fill material;
- Petroleum spill locations; and
- Any past use identified in Appendix A to the CEQR Technical Manual.[16]

The Department of Building (DOB) incorporates the E-Designations in its Building Information System (BIS). The DOB examiner cannot issue a building permit for new development, changes of use, enlargements or certain other alterations to existing structures until DOB receives either a Notice to Proceed (NTP) or Notice of No Objection (NNO) from OER. To obtain an NTP from OER for a HazMat E-Designation, the applicant has to submit

a Phase 1 environmental site assessment. If recognized environmental conditions (RECs) are identified, a Phase 2 work plan is also required. After implementing the Phase 2 report, OER will determine if a remedial action plan (RAP) is required. If OER determines that a RAP is not required, OER will issue a notice of no objection to the DOB.[17] OER may issue NNOs for actions that do not raise potential exposure to hazardous materials, or air quality or noise impacts. Indeed, approximately 50% of the E-Designation projects OER reviews result in NNOs. If OER determines a RAP is required, the applicant must submit an acceptable RAP before OER will issue an NTP.

When the applicant wants to obtain a Certificate of Occupancy from DOB, it must obtain a Notice of Satisfaction (NOS) from OER demonstrating that the applicant has complied with OER requirements. To obtain the NOS, the applicant must submit a Remedial Closure Report after completion of the RAP. In issuing an NOS, OER may require the execution of a Declaration of Covenants and Restrictions by the title holder for the tax lot(s) subject to the E-Designation or the Environmental Restrictive Declaration, which shall be recorded against the property prior to the issuance of a NOS.[18] If an applicant wants to remove the E-Designation from the property and not have to record a Declaration of Covenants and Restrictions, it would have to implement a track 1 (unrestricted) cleanup.[19]

Parties can also comply or remove the E-Designation by enrolling the site in the state BCP as well as the NYC VCP. It is important to note that when lots with an E-Designation are merged or subdivided, the E- Designation will apply to all portions of the merged lot or to each subdivided lot. Because remediation done under the E-Designation program is not eligible for the state hazardous waste program fee, developers of sites with HazMat "E" designations should consider enrolling the site in the VCP.[20]

A similar approach is used for Restrictive Declarations (RD) that impose an institutional control against a property to ensure that environmental mitigation or requirements that were imposed as a condition of a land use approval are implemented. The RD runs with the land so that it binds current and future owners to comply with certain investigative and remedial requirements that may be required by OER.

Historically, RDs were used when private applicants who owned or controlled a property sought a rezoning or other action under Section 11-15 of the Zoning Resolution of the City of New York. This proved to be a cumbersome process because all parties with an interest in property, including lenders, had to execute an RD. Moreover, the DEP and a city agency approving the discretionary action had to expend resources reviewing the RD.

In 2012, the City Council adopted an amendment to the Zoning Resolution that authorized lead agencies to assign E-Designations for any actions, including those sought by private applicants, such as rezoning, special permits or variances. The E-Designation can be imposed based on visual or historical documentation for lots not under the ownership or control of the person seeking the zoning amendment or zoning action. When the applicant owns or controls the lots, a Phase 1 may be required.[21] Because of the zoning resolution amendments, RDs will no longer be used to impose environmental conditions on properties. However, owners and developers have to comply with existing RDs.

New York City Hazardous Substance Emergency Response Law (NYC Spill Law)[22]

The NYC Spill Law operates like a local superfund law. The New York City Department of Environmental Protection (DEP) is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs[23] from responsible parties, and to impose a lien on the property subject to the cleanup.[24]

DEP may also issue unilateral orders requiring a responsible party to address a release or threatened release that may present an immediate and substantial danger to the public health or welfare or the environment.[25] A responsible person who has been served with a cleanup order may submit a written request for a hearing within 10 working days of service of such order.[26]

Any responsible person who knows or has reason to know of any release of any hazardous substance that exceeds a reportable quantity must immediately orally notify the DEP and submit a written notice within one week of discovery of the release.[27]

Responsible parties may be jointly and severally liable without regard to fault for all response costs incurred by the DEP or another city agency responding to a release of hazardous substances. A responsible party that fails to respond to a cleanup order "without sufficient cause" may be liable for penalties, possibly as high as three times the cleanup costs incurred by the DEP.[28] In addition, any person who knowingly violates or fails to comply with any order, rule or regulation issued under this law shall be guilty of a misdemeanor and, upon conviction, shall face a fine of not less than $25,000, or imprisonment not to exceed one year, or both, for each violation.[29]

The categories of responsible parties are similar to those under CERCLA but are potentially broader. In general, any current owner, operator, lessee, occupant or tenant other than a residential lessee, occupant or tenant of property at the time there is a release, or a substantial threat of a release, of a hazardous substance from such property into the environment may be liable as a responsible party.[30] In addition, any former owner, operator, lessee, occupant or tenant of the property at the time of disposal of any hazardous substance may be a responsible party.[31]

Responsible parties may assert three statutory affirmative defenses – Act of God, Act of War and the third-party

defense.[32] However, the law lacks innocent purchaser or bona fide prospective purchaser defenses. Regulated financial institutions chartered under state or federal law which received title to the contaminated property through abandonment, foreclosure, a deed in lieu of foreclosure or through a judicial or bankruptcy order will not be deemed to be a responsible party unless (i) the institution willfully, knowingly, recklessly, or negligently caused or substantially contributed to the release or threatened release of hazardous substances, or (ii) the financial institution received title in order to secure the underlying credit extension for the purpose of allowing the responsible party to avoid the provisions of the law.[33] Interestingly, one of the rare enforcement actions that DEP brought under this law was against a foreclosing lender who took control of a defunct borrower's facility to conduct an auction but left behind dozens of drums containing hazardous waste. The bank ended up footing the bill for removing the waste.

The law provides that costs incurred by the DEP or other city agency in performing a response action constitute a "debt" recoverable from each responsible party and authorizes the filing of a cleanup lien against the real property of the responsible party or the parcel that was subject to the response measures.[34] The lien becomes effective when either (i) a statement of account of costs is filed in the office of the City Collector and a notice of potential liability is filed, or (ii) three days after a notice has been mailed by certified and registered mail to the owner of the real property that was a subject of the cleanup action.[35] The amount set forth in the statement of accounts continues to be a lien on the property until it is paid.[36] However, the lien is subordinate to a previously perfected mortgage.[37]

NYC Petroleum and Hazardous Materials Storage Rules

The NYC Fire Code requires owners or operators storing certain quantities of petroleum or hazardous materials to obtain permits and comply with certain design standards. Storage tanks that are not subject to regulation by the NYSDEC under the Petroleum or Chemical Bulk Storage Acts may still be subject to regulation under the Fire Code.

The regulations promulgated by the New York City Fire Department (NYFD) provide that storage tanks that have not been used for more than 30 days but less than one year must undergo temporary closure. For fuel oil tank storage systems with a total capacity of 330 gallons or more, closure must be performed by a licensed person. The owner or operator of the temporarily abandoned tank system or the permit holder must file an affidavit with the NYFD certifying that such system complies with the temporary closure requirements.[38] Owners and operators of temporarily out-of-service tank systems must continue to comply with the fire department's permit and testing requirements as well as the registration, reporting, inspection and testing regulations of the NYSDEC.

Tank systems used for storing gasoline, diesel, fuel oil or other flammable or combustible liquids that have not been used for one year or more must undergo permanent closure. For fuel oil tank systems exceeding 330 gallons, the permanent closure must be performed by licensed individuals. The owner or operator of a permanently out-of-service storage system or the permit holder for the tank system must also file an affidavit with the fire department certifying that the tank system was removed and disposed of, or abandoned in place in compliance with the requirements of the Fire Code.[39] If an environmental site assessment is required by federal or state law or regulations, the owner or operator of the storage system, the permit holder for the system or the person filing the affidavit of compliance must submit a written statement to the NYFD that an environmental site assessment has been performed in accordance with such law and regulations.[40]

The Fire Code prohibits the discharge of hazardous material unless permitted under federal or state law. The fire commissioner must be notified of discharges of hazardous materials that exceed the applicable reportable quantity for that substance.[41] The owner of a facility or other person responsible for a discharge will be required to undertake all actions necessary to remediate the discharge. When deemed necessary by the commissioner, cleanup may be initiated by the department or other city agency. Costs associated with such cleanup shall be borne by the owner or other person responsible for the discharge. The department will give the owner or other person written notice of cleanup costs and an opportunity to be heard. Payment of these costs shall be recoverable in any manner authorized by law, rule or regulation. Failure to pay costs will result in a lien placed on the premises pursuant to the provisions of Fire Code 117.4.[42]

NYC Asbestos Law

Federal, state and local asbestos regulations can impose significant and unexpected costs and delays for building renovation and demolition projects. Owners and tenants conducting renovation or demolition projects that are likely to disturb asbestos-containing materials are responsible for notifying regulatory agencies and ensuring that asbestos abatement activities performed by their agent or contractor comply with certain asbestos notifications and work practice requirements.

Beginning in the 1970s, the EPA banned the use of many forms of asbestos in building materials. As a result, many building owners, tenants and lenders mistakenly believe that newer buildings do not contain any asbestos-containing materials (ACM). Contrary to this popular misconception, there are a number of building materials in use today that may still contain asbestos. The most common types of asbestos-containing building materials

include vinyl-asbestos tile, roofing felt, roofing coatings, caulking putties, construction mastics, textured coatings, asbestos-cement shingle, corrugated sheet, asbestos-cement flat sheet, pipeline wrap, millboard, asbestos-cement pipe, and asbestos-cement. As a result, it is still important for parties contemplating building renovation or demolitions, and their lenders, not to assume a building does not have ACM based on its construction date but to assess the presence and condition of suspect ACM. Building owners and tenants performing renovation should consider inserting requirements into their construction contracts requiring contractors and architects to use asbestos-free material.

It should be noted that ACM is considered a "non-scope item" in the standard phase ASTM E1527-13 environmental site assessment (Phase 1 ESA) that is customarily used in real estate transactions. This means that the presence of ACM will not be evaluated as part of the Phase 1 ESA unless the party hiring the environmental consultant specifically requests that ACM be included as part of the scope of services.

The asbestos regulations adopted by the DEP are stricter than the federal requirements and can apply to smaller projects that are not subject to the federal asbestos requirements.[43]

The DEP asbestos rules define an "asbestos project" as any work performed in a building or structure or in connection with the replacement or repair of equipment, pipes, or electrical equipment not located in a building or structure that will disturb more than 25 linear feet or more than 10 square feet of asbestos-containing materials. A large asbestos project is defined as one that will disturb 260 linear feet or 160 square feet.[44]

Prior to the start of alteration, renovation, demolition, or even plumbing work, the building owner or tenant is responsible for having an asbestos survey performed by a DEP-certified asbestos investigator to determine if asbestos-containing material may be disturbed during the course of the work.[45]

If after a survey is performed, the DEP-certified asbestos investigator determines that the building (or the portion affected by the work) is free of asbestos-containing material or the amount of ACM to be abated constitutes a minor project, the ACP-5 Form is filed with the DEP.[46] Where the work to be performed constitutes an asbestos project, an asbestos project notification (ACP-7 Form) shall be submitted to DEP at least one week before the work is scheduled to commence.[47] It is important to note that the DEP asbestos notification obligation is separate and different from the federal asbestos notification requirement, which is 10 days. If the start date changes, both the federal and NYC rules require a new notification be submitted.

1. 43 Rules of the City of New York §§ 1401 *et seq*. (RCNY).
2. 43 RCNY § 1402(uu).
3. 43 RCNY § 1408.
4. 43 RCNY §§ 1428–1434. More information about the NYC VCP is available at http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/vcp.shtml.
5. 43 RCNY §§ 1415–1423. More information about the BIG program is available at http://www.nyc.gov/html/oer/html/brownfield-incentive-grants/grant-types.shtml.
6. *See* Larry Schnapf, *Environmental Laws Affecting Commercial Leasing Transactions – The Federal Law,* N.Y. St. B.J. (May 2015) p. 38.
7. 43 RCNY § 1450.
8. 6 N.Y.C.R.R. § 375-6.8.
9. 42 U.S.C. §§ 4321 *et seq*.
10. 24 C.F.R. pt. 50.
11. 24 C.F.R. pt. 58.
12. *See* 24 C.F.R. pts. 50.3(i) and 58.5(i)(2).
13. 24 C.F.R. 58.40(b).
14. 15 RCNY §§ 24-02 *et seq*. The "E" rules are authorized by § 1403 of the New York City Charter and § 11-15 of the Zoning Resolution of the City of New York.
15. The "E" requirements for individual properties are available at http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml.
16. 15 RCNY § 24-04.
17. 15 RCNY § 24-06.
18. 15 RCNY § 24-07.
19. 15 RCNY § 24-08.
20. Information about NYC sites qualifying for the hazardous waste program fee is available at http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/hazardous-waste.shtml.
21. 15 RCNY § 24-04.
22. 15 RCNY §§ 24-600 *et seq*.
23. 15 RCNY § 24-604.
24. 15 RCNY § 24-605.
25. 15 RCNY § 24-608.
26. 15 RCNY § 11-05.
27. 15 RCNY § 11-03.
28. 15 RCNY § 24-610(c).
29. 15 RCNY § 24-610(d).
30. 15 RCNY § 24-603(g)(1).
31. 15 RCNY § 24-603(g)(3).
32. 15 RCNY § 24-604.
33. 15 RCNY § 24-603(g)(1).
34. 15 RCNY § 24-605.
35. 15 RCNY § 24-605 (c).
36. 15 RCNY § 24-605(g).
37. 15 RCNY § 24-605 (h).
38. 3 RCNY § 3404-01(c).
39. 3 RCNY § 3404-01(d).
40. 3 RCNY § 3404-01(d)(3).
41. New York City Fire Code 2703.3.1 (FC).
42. FC 2703.3.1.4.
43. The federal renovation and demolition rules apply to projects that are likely to disturb 260 linear feet, 160 square feet or 35 cubic feet of ACM.
44. 15 RCNY § 1-02.
45. 15 RCNY § 1-23.
46. 15 RCNY § 1-23(c).
47. 15 RCNY § 1-25.

What They Don't Teach You in Law School

Advice for Newly Admitted Attorneys

By Deborah Beth Medows

Congratulations on beginning your law career! When I mentor law students, I am often surprised at the gulf between what is taught in law school and the skills necessary to succeed early on in a legal career. Below are some tips that might help you on your journey ahead.

Be patient. The mastery of law is not always intuitive and it will take time to become a legal expert. Don't be afraid to ask questions. Be patient with yourself as you learn. Realize that law can require a degree of specialization and professional exposure to different types of legal issues, which take time to develop. There is much to learn at the beginning of a legal career as the practice of law is both substantive and stylistic. Not all attorneys will handle cases or write alike, so develop your own style of lawyering that is authentically yours.

Learn from everyone. Everyone has something to teach and it's important to cultivate mentors. Your boss might be the guru of some esoteric legal provision. Your coworker could be great at explaining how to draft briefs. Your assistant may be incredibly tech savvy. Learn from the person who is the best teacher.

Get your finances in order. After years of college and law school, you may face heavy debt. Look into federal loan repayment plans. Figure out how to save for retirement. Allocate your paycheck responsibly, rather than spending it all on frivolous things. Although you are newly admitted, your retirement date will be there before you know it and you need to plan ahead now to be prepared.

Strategize for CLE credit. CLEs can be expensive for new graduates. See if your job offers CLE credit. Look into local bar associations for discounted programs. Local law schools may also offer free or very reasonably priced CLE credits. The key is to plan out the credits in advance and give yourself plenty of time to find affordable CLE classes.

Get out there. Whether looking for your first job, trying to develop a client base, or simply meeting other like-minded professionals, be active in your bar associations or community groups. You won't meet anyone on your couch, and people can't see how brilliant you are if they never meet you. Additionally, do not limit your network to lawyers. You never know whom the people you encounter may know, and opportunities grow exponentially with the more people that you meet.

Be kind. It is a small world, especially in the legal community. Always treat everyone you encounter with respect. Not only is this the right thing to do and it will make your mother proud, but people have incredibly long memories when they are mistreated, and behaving badly will sabotage your career. Make sure to support others when they need professional guidance by giving encouraging career advice or by connecting them with others who can help them with their job search. Consider it good career karma – although law can be a competitive profession, it is not a zero-sum game, and you can succeed while empowering others to accomplish their goals.

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Address your problems. Even if you have the potential to be the greatest lawyer in the world, if you don't take care of yourself your issues will impair you from doing your job and you won't be able to help others effectively. Your physical and mental health are important. Take care of your body, exercise, and eat as healthily as possible, and you will find that you will be happier and your work will likely improve. If you have a drug or alcohol issue or depression, seek help. Your life means more to you and your loved ones than you know. No one is perfect and when you are facing an illness, there is no shame in getting the help that you need. You are only human.

Don't stress more than necessary. The beginning of a legal career can be stressful. Try not to obsess about your work during nights and weekends. You deserve a break during your free time. Almost nothing is more unwanted at a dinner party than someone who complains all the time about his or her work. Instead, focus on things outside of the office. Take the time to reconnect with your friends and family, and really listen to them, which you might not have had a chance to do during law school. (They put up with you when you were taking the bar exam, so they must really love you.) Don't stress about legal actions that you may have to make at work. Being a professional means making choices. Stick with the choices you make, and have the confidence once you are outside of the office to know that you did your work to the best of your ability and take pride in that. Thinking about work all the time after you have already completed those tasks will make you an unhappy and less productive employee.

Have a life outside of work. To be an attorney, you probably worked your head off during law school and college. Lawyers tend to be people who love to win, and newly admitted attorneys tend to be aggressive and are known for their devotion and long hours in the office. When it comes to creating the work/life balance that is best for you, always remember that you are so much more than your job. You may be a parent, a sibling, an athlete, a friend, or a volunteer at your religious or civic organization. Your boss is never going to sweetly ask you to tie his or her shoe, give you a hug, and tell you that you are the best parent in the world. He or she will likely never ask you to be her maid of honor or give the best man toast at his wedding. When your parent is dying, your boss probably won't be the one holding your hand and giving you tissues and chocolate. If you are working nights and weekends at the expense of spending time with your family or going out to meet someone to create a family, ask yourself how much that after-tax bonus that you are killing yourself for is really worth, compared to the time that you could spend with people you truly care about. Prioritize your life while doing the best job you can professionally. Spending too much time at work, after a certain point, not only cuts into your personal and family life, but it has diminishing returns. You will be more productive when you take the time to recharge your proverbial batteries. You have one life to live – use it wisely.

Take your work seriously but not yourself. You worked hard in law school and you should be proud of all your achievements. Maybe your job isn't exactly your dream job at this point in your career and you are looking to find a position that better suits your skills. Or perhaps you are fortunate to be at a job that you find rewarding. In either case, remember that you are not your job and your work does not define you. Be diligent in your work, but don't take yourself too seriously. Both arrogance and desperation can be off-putting, and neither will help you advance professionally. If fortune has been on your side, do not be arrogant; the most successful people out there are generally humble because they do not need to prove anything. If you are not where you want to be (and as a newly admitted attorney, don't worry about that because it is completely understandable), know that success does not always happen overnight and continue to take the steps that you need to be where you want to be.

> You won't meet anyone on your couch, and people can't see how brilliant you are if they never meet you.

Mistakes are not the end of the world (if handled appropriately). Everyone has made a mistake in his or her life. We've all been there – the only difference is the seriousness of the mistakes and what steps are taken to address them. You will not be the first newly admitted attorney to make a mistake, nor the last. When this happens, apologize sincerely to whomever you may have wronged, be honest about it by addressing it immediately, take steps to make sure that it will not happen again, forgive yourself, and consider it a learning experience**.** Don't resort to inaction because of the fear of making a mistake; not making a decision is a decision in itself and can be the wrong course of action.

Keep your options open. So many lawyers are miserable and end up leaving the profession. As a recent law school graduate, realize that there are many variations of law. If you do not like the type of law that you are in, before leaving the profession entirely consider working in a different practice area or specialty, which might be a better fit.

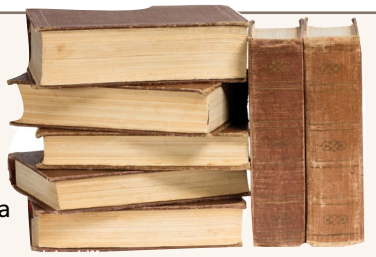
Technology is not always your friend. Our generation is the first one to grow up with a heavy reliance upon computer technology, but comfort and safety are not always synonymous. Technology can be helpful only if used properly. Remember that angry emails will live on forever and can be widely and instantaneously forwarded to people you may not want to read them;

don't write anything inappropriate that can embarrass yourself or your employer. Use judgment with regard to social media. If you wouldn't want your grandmother to see pictures or read certain posts, or you wouldn't want to make certain information public, chances are that whatever you want to share does not belong on the Internet.

Be honest. As my professor at Boston University School of Law, Brian J. Foley, used to say, "your name is the one on your bar card." You may feel pressured by a boss or client to act in a certain way, but ultimately, your license and reputation are your own and you need to protect them. Nothing is more valuable than your reputation, which is painstaking to build and can be ruined in a moment. Although you may face certain temptations in your career, lying and stealing are just not worth the cost of your reputation, as well as all the time and money that you have spent to become an attorney.

Stay positive and enjoy yourself. We have so much for which we can be grateful. In an often too cynical profession, sometimes we need to contemplate the bigger picture and realize that as lawyers we have the ability to protect legal rights and uphold justice. What a wondrous responsibility! Additionally, so many creative people are in this field. Get to know your fellow lawyers and you might enjoy spending time with them. Finally, relax – everything will work out. Life is too short to worry. You spent so much time preparing to become an attorney, now enjoy the adventure. ■

"Moments in History" is an occasional sidebar in the Journal, which features people and events in legal history.



Moments in History

The First Law School

Centuries before the first Western law school opened at the University of Bologna (c. 1088) and the first American law school welcomed students in Litchfield, Connecticut (1784), legal education flourished at the law school of Berytus (c. 250) in the Roman province of Syria (today, Beirut, Lebanon).

The course of study at Berytus lasted five years, and graduates had no difficulty finding employment. Students attended lectures on the four books of Gaius's Institutes and on compiled works relating to dowries, guardianships, wills and legacies. After publication of Justinian's Code in 533, the curriculum changed considerably to include the first four books of Justinian's Digest.

Berytus attracted students from more than 20 provinces, until a massive earthquake in 551 destroyed the school. It reopened in another location 25 miles south of Berytus, but never regained its earlier prominence.

From *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* by Michael H. Roffer.

Ten Myths About Tax Opinions

And Why They Are More Valuable Than You Think

By Robert W. Wood

Tax opinions are widely misunderstood. A tax opinion may be about a financial product or transaction, even as part of the promotional materials. An opinion may be about a transaction or issue peculiar to the taxpayer who commissions it. Some tax lawyers write many, others none. Some accountants also write them.

A good tax opinion discusses the facts, legal arguments, and pertinent authorities in favor of as well as against the tax position in question. One portion of the opinion is conclusory: "it is our opinion that . . ." Nonetheless, the vast majority of the opinion should analyze the facts and the law in detail and present an evenhanded assessment.

Surprisingly, many clients and tax advisers have trouble saying exactly why one should get a tax opinion or how to use it. The answer may depend on the type of opinion rendered and the type of matter. However, these ten myths about tax opinions may help clear up some common misconceptions.

1. Tax Opinions Bind the IRS

Obviously, they do not. Yet this still generates confusion. A tax opinion usually will expressly say that it does not bind the IRS or any other tax agency. If you want a binding commitment from the taxing authority in question, you must get a ruling.

Getting a ruling is a separate subject with its own set of rules and myths. Unfortunately, if the tax issue is plain vanilla in character, it may not be possible to get a ruling. Simple or easy queries are sometimes labeled as "comfort rulings," something the IRS generally will not issue.

Conversely, if the tax issue is unique or difficult, it may be outside the realm of rulings on the other extreme. Many taxpayers feel that the middle ground – where you *can* get a ruling from the IRS – is only where you do not really need one.

2. Tax Opinions Are About Penalty Protection

Not in large part. It is true that the most commonly stated reason to get a tax opinion is to avoid penalties. Just about everyone in the tax business says this at one time or another. One reason may be those annoying legends slapped on everything – "you can't rely on this email for penalty protection."

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Fortunately, that legend is no longer required.[1] But I do not believe most tax opinions are written primarily for purposes of penalty protection. Depending on the standard of the opinion (reasonable basis, substantial authority, or more likely than not), there are varying degrees of protection from an assertion of penalties. Clients want an opinion that is as strong as possible.

While one of the reasons is penalty protection, no client wants or expects the claimed tax position to fail. If all the opinion accomplishes is saving penalties, it does not seem unfair to say that the opinion has mostly failed. Clients want to have their tax position upheld. At the very least, they want to be able to compromise the matter on an acceptable basis.

Many people use the "penalty protection" label as an abbreviation but mean much more. They might really mean:

> A tax opinion gives you a measure of penalty protection, so that even if it turns out that your [tax deduction, capital gains position, etc.] is attacked by the IRS and defeated, the IRS should not be able to add penalties as well. If things go badly, you would thus pay the taxes and interest, but (hopefully) no penalties.

Most clients expect far more than just penalty protection. Besides, the focus on penalties diverts attention from what opinions should really be about.

3. A Good Tax Opinion Is Strong and Assertive

Yes and no. Clients want their tax lawyer to be an advocate, and they want their case stated as strongly as can be justified. Some tax lawyers prefer to write opinions in a one-sided rather than balanced fashion. Clients may *really* like an opinion that is one-sided (in their favor). Indeed, an opinion that argues both sides can be perceived by the client as wishy-washy.

Clients may like conclusory or short form opinions because they are mercifully short. On the other hand, clients may prefer to have all the risks laid out before them. Even if they do not prefer it, I believe clients are better off with a fully informed statement of the facts and the law. In fact, the only argument against this would be disclosure of the opinion, a subject addressed below.

4. A Good Opinion Should Not Argue Both Sides

Actually, it should. A client should want a tax opinion that thoroughly documents and develops the case and its legal theories. The opinion's bottom line may be that there is substantial authority (or some other level of confidence) for the position, but for the opinion's bottom-line conclusion to have meaning, it should be accompanied by a thorough examination of the relevant authorities.

An argument can be made that it is safer from a disclosure perspective to refrain from laying out the government's case too well, a subject to which I turn below. But how can an assertive opinion really be helpful if it is one-sided and just says what the client wants to hear? To me, an opinion must develop and document the reasons against the tax position as well as the reasons for it.

5. The Assumptions Can Be About Anything and Do Not Have to Be Reasonable

Not really. For many years, the Treasury Regulations contained rules stating that tax opinions could not be based upon unreasonable assumptions about the facts or the law, or unreasonably rely on representations, statements, findings or agreements. The rules were recently changed, but it is still true that the assumptions should be stated and should be reasonable and realistic.

An opinion should not take into account the likelihood of an audit or settlement. Plus, an opinion should consider all relevant legal authorities and relate the law to the facts. When the IRS evaluates a practitioner's advice, the IRS applies a "reasonableness" standard. There is a heightened standard of care if the practitioner knows or should know that the written advice will be used to promote, market or recommend a course of action that has a significant purpose of avoiding or evading tax.

A practitioner can rely on the advice of another person if, in light of the facts and circumstances, that reliance is reasonable and made in good faith. But reliance is not reasonable if the practitioner knows or reasonably should know that: (1) the opinion of the other person should not be relied upon; (2) the other person is not competent or lacks the necessary qualifications to provide the advice; or (3) the other person has a conflict of interest.

6. There Will Be Time to Get an Opinion if I Get Audited

No. This remains a common misconception. There is rarely time to get a good and thoughtful opinion at the audit stage. And even if there were, it would hardly be the same as one done before the transaction or before filing the tax return.

Besides, if the opinion is to have any value at all for purposes of penalty protection – there is that canard again – it must be done before the tax return is filed. If the client files a tax return claiming the particular position in question without a legal opinion, it is possible to do all this work later, when and if the tax position is contested. Clients commonly ask why writing the opinion later when and if the IRS audits is not a good way of handling it. Here are several reasons.

First, if the return position precedes the opinion, the reasonable cause defense may not apply. After all, a taxpayer must first *receive* tax advice in order to claim good faith reliance on it.[2] Of course, "tax advice" is broadly defined to include any communication containing the advisor's conclusion, and that includes verbal advice.[3]

However, it may be risky to file the return before a written opinion is issued. The timing and content of verbal advice can be challenging to prove if it is not well

documented.[4] At a minimum, the "opinion" may shift and change until it is nailed down in writing.

Second, if the tax position has been attacked, it is unlikely that anyone at that point will take a reasoned or balanced view of both sides of the equation. Understandably, at that stage all writing will be geared toward advocacy.

Third, in developing the opinion and assessing both the positive and negative about the position and how it might be attacked, the nuances about reporting and disclosure should be explored then, not later. The nuances of whether and how to disclose the tax position must be considered *before* the return is filed.

7. There Is No Advantage in Writing an Opinion Early

No, this one could not be further from the truth. Not only should an opinion be done before the tax return is filed, the opinion should be done in parallel with the event or transaction. That is the best way to help shape the transaction or issue.

There are often adjustments that can be made in the position, the investment or transaction. The tax opinion may be prepared pre-transaction or it may be prepared post-transaction but before the filing of the return. Pre-transaction (or at least pre-closing) is always best.

Often, some aspect of the transaction can be profitably tweaked and made better because the spadework of the opinion is being done while it can have maximum benefit. The opinion thus becomes part of the shaping of the transaction itself. Even when the transaction is closing or closed at the time the opinion is being written, it is not uncommon for additional documentation to be solicited and provided as part of the opinion due diligence.

Certificates, declarations, and other such documents may be helpful to the strength and scope of the opinion. They can often shore up documentation and plug perceived holes. Of course, such documents are likely to be far more compelling if prepared contemporaneously with the closing, or at the latest, at tax return time when the transaction is being reported.

Certificates, declarations and the like are rarely effective if prepared several years later during (or in the face of) an audit. But they can often be quite helpful if prepared at the time of the closing or in connection with an opinion written before returns are filed.

8. An Opinion Should Not Be Drafted With Potential Disclosure in Mind

A legal opinion is a sensitive document. It is usually prepared by a lawyer for a client and thus subject to attorney-client privilege. It is worth asking who should receive it and to whom it should be disclosed, both then and later. Certainly, the client will receive it.

But be careful whom you copy, since that simple act may waive the privilege. In addition, watch out for the implied waiver doctrine. Lawyers and their clients should bear in mind that invoking reliance on counsel as a defense to penalties can constitute an implied waiver of attorney-client privilege.[5]

If the proponents of the "it's all about the penalties" mantra are to be believed, then wouldn't they be willing to hand over the legal opinion to the IRS in order to achieve penalty protection? I suspect this practice is rare (I for one have never done it). I return to one of my important principles, which is that clients don't merely want penalty protection, they want to win.

Putting that aside, would one ever want to hand the IRS a veritable roadmap of all of the authorities and all of the arguments, both good and bad? If the opinion is thorough, it may well make arguments the IRS might not discover, might not choose to make, or might not make with the skill or thoroughness of the opinion. In short, a thorough and balanced opinion could be quite damning.

If penalty protection is the real goal, however, the prudent course is to assume that the opinion will ultimately wind up in the hands of the IRS. But keep in mind that unless the "I want penalty protection" white flag is raised, the courts have not proven to be liberal in granting the IRS access to tax opinions.

The most famous instances of disclosure have occurred in tax shelter cases, where it often seems that the rules are different. Given the nature of tax shelters and the way in which opinions are intended to thwart penalties, special considerations seem to apply. The more egregious the shelter, the more a court may be willing to bend the concept of privilege to give the IRS access to the opinion.

Yet even there, privilege doctrines may be upheld. For example, in *Long Term Capital v. United States*,[6] the taxpayer was not required to disclose the opinion to the IRS (at least initially), even though the attorney-client privilege was waived with respect to portions of it. After reviewing the opinion *in camera*, the court concluded that it was prepared in anticipation of litigation. Accordingly, the entire opinion was protected by the work product doctrine.[7] This result is all the more surprising when one notes that the case was a shelter case, and a pretty bad one at that. Of course, once the penalty protection issue was front and center, the taxpayer eventually had to hand the opinion to the IRS.[8]

9. An Opinion Should Be Given to the Return Preparer

Actually, I say you should rarely do this. In cases where the accountants who will prepare the return have not been brought within attorney-client privilege (as by a lawyer using a *Kovel*[9] letter to engage the accountants directly), I usually do not recommend providing the full opinion letter to the accountants. Doing so might itself vitiate the privilege and allow the IRS to obtain the opinion.

Furthermore, it is possible that the accountants might turn over their files to the IRS, thus disclosing the opinion (intentionally or not).[10] If the accountants do not have the opinion, they cannot disclose it. Since opinions are often commissioned because the accountants are concerned about a return position and need outside advice, it may sound self-defeating not to provide the accountant with the full opinion.

But I answer by suggesting that the accountant can be provided with a short summary letter that:

1. Notes that the lawyer was engaged by the client to render a tax opinion on a particular issue;
2. Recites that the opinion is protected by attorney-client privilege, which is not waived by the short summary;[11]
3. Notes that the accountant is the return preparer for the client and that the opinion concludes that there is substantial authority (or other standard) for the return position;
4. Instructs the return preparer to rely upon the lawyer for this return position;
5. Instructs the return preparer to disclose the item (if appropriate) and suggests exactly how to do it; and
6. If desired, requests the accountant to send the lawyer a draft of the return so the lawyer can verify these points *before* the return is filed.

In my experience, return preparers generally prefer such clarity to the kind of voluminous arguments and authorities generally presented in the full opinion letter. The summary letter is conclusory and directive by nature, not discursive.

Nevertheless, here again one must consider the waiver question. In my short summary letters, I give the encapsulated opinion, noting that the large opinion is protected by attorney-client privilege, and that the privilege is not waived. There is little risk that the accountant receiving the short letter will assert that it waives the privilege and that he or she is entitled to the full opinion. But could the IRS assert that the short letter operates to waive the privilege on the full opinion?

While this assertion could be made, it seems unlikely it should be successful. If cases such as *Long Term Capital* are any indication, the worst that could happen is that the IRS could succeed in getting the particular portions of the full opinion that are summarized or quoted in the short letter.[12] Of course, that is the express purpose of the short letter. Indeed, it is written, if not with the knowledge that it will be disclosed, then at least with the awareness that the accountant recipient might (wittingly or not) end up disclosing it.

10. An Opinion Is Not Helpful in a Controversy

Wrong again. Actually, opinions are really helpful, usually not as a whole but as a resource for cutting and pasting. For the small percentage of tax cases that ultimately end up in controversy, whatever form the controversy takes, and whether the lawyer becomes involved at the audit stage, in appeals or in court, there will be deadlines.

As there is rarely enough time to do everything you want to do; to be able to open the file and withdraw a thorough legal opinion is a luxury. It can often spell the difference between a good and a bad result, or at least between an outstanding and a middling one. Legal opinions (if thorough and balanced) are not appropriate to simply hand over to the IRS.

However, they can be excellent documents from which to cut and paste when writing as an advocate. If a client has 30 days to respond to an Information Document Request or a notice about why a particular position was claimed, that may be enough to do a thorough job. But with busy schedules, it may not.

Moreover, the client may not tell you about a notice (or may not hire you) until there is only a week left to respond. Whatever the dynamics, having a thorough and thoughtful legal opinion can prove invaluable, even if one never provides its full text to anyone but the client.

Conclusion

Despite these comments, tax opinions may always be viewed as all about penalty protection. If any tax opinion is all about the penalties, then it is surely those of the shelter variety. The more sanguine variety of tax opinion (which I hope and believe is a far larger category) can be viewed quite differently.

Even for those of us who may occasionally use shorthand to describe the benefits of a tax opinion, I suggest that the tax opinion deserves a more complete job description than it often receives. ■

1. *See* T.D. 9668 (June 9, 2014).
2. *See Long Term Capital Holdings v. U.S.*, 330 F. Supp. 2d 122, 206–07 (D. Conn. 2004), *aff'd*, 150 Fed. Appx. 40 2005 (2d Cir. 2005); *Cordes Fin. Corp v. Comm'r*, T.C. Memo 1997-162, *aff'd without pub. opinion*, 162 F.3d 1172 (10th Cir. 1998).
3. Regs. § 1.6664-4(b), (c).
4. *See, e.g., Long Term Capital Holdings*, 330 F. Supp. 2d at 207.
5. *See, e.g., Evergreen Trading, LLC v. U.S.*, 80 Fed. Cl. 122 (2007) (requiring production of tax opinion unless taxpayer disavowed reliance on counsel as a defense to accuracy penalties); *Johnston v. Comm'r*, 119 T.C. 27 (2002).
6. 91 A.F.T.R. 2d 1139, 2003 U.S. Dist. LEXIS 7826 at *32–34 (D. Conn. 2003).
7. *Id*.
8. *See Long Term Capital Holdings*, 330 F. Supp. 2d at 206–07.
9. *See Kovel v. U.S.*, 296 F.2d 918, 919 (2d Cir. 1961).
10. *See, e.g., Bradley v. Comm'r*, 209 Fed. Appx. 40 (2d Cir. 2006) (attorney-client privilege waived where taxpayer "had disclosed those documents to his accountant, who subsequently disclosed the documents to the IRS during an audit").
11. *But see Long Term Capital Holdings*, 91 A.F.T.R. 2d 1139, 2003 U.S. Dist. LEXIS 7826 at *31 (in which the court held that disclosure to an accountant of the opinion's conclusion waived the attorney-client privilege to the limited portion of the opinion that reflected what was disclosed).
12. *See also In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987) (holding that "extrajudicial disclosure of an attorney-client communication – one not subsequently used by the client in a judicial proceeding to his adversary's prejudice – does not waive the privilege as to the undisclosed portions of the communication").

Riding the Learning Curve as a New Appellate Division Judge

By David B. Saxe

With a large number of vacancies existing in my court, the Appellate Division, First Department, and in the other Appellate Departments around the state, I thought that I might offer some limited guidance to those who will be designated to fill those vacancies. At the same time, this advice may shed some practical light for appellate practitioners. I will use my own court as a template for the following suggestions, which may hold true to some degree throughout the state.

Be a Manager

To be a successful appellate judge you need to be able to manage your case inventory effectively. As you sit on more and more panels, you will build up a sizable inventory of cases, with work to be done by you or other judges on the panel. This state of affairs will result whenever there is disagreement among the judges on a panel on the outcome of a case, and different judges are assigned responsibility for preparing writings on each side of the case. "Inventory" is something of a euphemism; "backlog" might be more apt. The briefs and records in the held appeals will sit on a table or cabinet in your chambers gathering dust until the anticipated writing is produced and circulated. It may fall to you to respond to that writing. But even when you are not the judge required to pre-

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pare a further writing, you will be required to cast a vote when all the competing writings are completed.

It is a recurrent problem at our court, and probably at most intermediate appellate courts, that work not disposed of quickly becomes forgotten in the intervening time between when the appeal is heard and when a writing is finally prepared. Do you have to keep reading and rereading the briefs, records and memoranda on these appeals every time you receive drafts of writings in these backlogged cases, while simultaneously making your way through new appeals each week? Obviously not, but you will probably need to create a system of recall where salient notes about that appeal and the positions of your colleagues may be quickly retrieved to refresh your recollection. Computer-based entries may offer a quick way of retrieving important notes about the appeal that may be useful when you receive a writing from a colleague after a long delay.

Participate in oral argument only when you really have something to say or ask – but prepare carefully so that you can make a real contribution.

Be Selective

Be selective about what you decide to turn into a signed writing. If the case is ordinary and the issues not especially troublesome, it may be better to produce a memorandum decision for the entire bench rather than a signed opinion. If you issue a full, signed writing on a run-of-the-mill subject containing a discussion of a not too interesting or not too legally important issue, you will damage the reputation you hope to build as a serious legal thinker and writer.

Agree – or Dissent

It's nice to have consensus, especially if that can be brought about in a collegial fashion. But, an intermediate appellate court should be a place where the legal issues in a case can be thrashed out in clear opposing writings. The prevailing notion in our trial court that virtually everything should and can be settled is not, nor should it be, a mantra for our appellate undertaking. And, getting along is not necessarily a desired state in the context of our legal writings. Feel free to abandon your mates and dissent if you feel strongly about a position and can support it with sound reasoning. Don't mind comments such as, "Are you becoming the great dissenter?"

Avoid Concurrences

Avoid concurrences unless they advance a legal position or theory not set out by the majority. For the most part, they are vanity writings. I acknowledge that I have authored my share of concurring opinions, but as a rule I have tried to use them to advance what I viewed as important points warranting consideration. For example, in *Marsh v. Smyth*,[1] the trial court had relied on *Frye* to preclude the testimony of the plaintiff's proposed expert witnesses. My colleagues reversed and remanded for a new trial with only a brief explanation that the trial court "went beyond the limited role of a *Frye* hearing," and that "[t]he experts' testimony, and the supporting medical literature, satisfied the *Frye* standard."[2] I agreed with that result, but strongly thought that discussion was necessary about whether, and how, the *Frye* standard should be applied where the experts' opinions involved theories that were not of a type that would prompt studies and articles. My assessment that a more expansive discussion would be useful was justified when a Second Department decision cited my concurrence in ruling that to satisfy *Frye*, the studies offered to support the expert's theory of causation need not exactly parallel the facts of the litigation: "It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert."[3]

Your Vote Is Sacred

Your vote on a case is sacred! Suppose a colleague circulates a writing and lobbies you for your vote. You agree. Then weeks later a stronger, more cogent and convincing writing is circulated in opposition. It goes without saying that you are not obligated to fulfill your original promise. In fact, you can change your vote just before the weekly conference when a vote is taken on the appeal or even change your mind after the vote when the conference is over. Of course, as a matter of protocol, it might be politic to alert your confrere that you will no longer be going along with the original position you took.

Pay Attention

Pay careful attention to the standard of review applicable to the appeal at hand. For instance, this court has been reversed for making findings of fact based on our own view of the evidence, because we failed to employ the correct standard, by which we must leave findings undisturbed unless "the court's conclusions could not be reached under any fair interpretation of the evidence."[4]

Bench Memo – Only if Needed

Use the bench memo carefully and sparingly. They are, more often than not, well done and their recommendations have been carefully vetted. But you have been placed here to exercise independent judgment. So use

the bench memo as a jumping off point toward a more detailed analysis by making your own examination of pertinent parts of the record and the briefs. Look at the recommendation with a critical eye.

Make a Real Contribution

Participate in oral argument only when you really have something to say or ask – but prepare carefully so that you can make a real contribution. If you are on the bench with a colleague who tends to use up argument time with numerous questions, and you have concerns of your own, let that colleague go on for a question or two and then simply jump in, get the attention of counsel, and ask your question.

Be Professional

Treat appellate counsel professionally. Often, especially with assigned counsel, they are dealt a hand that they must carry out regardless of whether the appeal is meritorious. Just because their client happens to be a miscreant or they don't have a winning argument does not mean that they should be treated in a less than respectful manner. ■

1. 12 A.D.3d 307, 308–13 (1st Dep't 2004) (Saxe, J. concurring).
2. *Id*. at 307–08.
3. *Zito v. Zabarsky*, 28 A.D.3d 42, 44 (2d Dep't 2006).
4. *409-411 Sixth Street, LLC v. Mogi*, 22 N.Y.3d 875, 876 (2013), *rev'g* 100 A.D.3d 112 (2012).

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The Use of Biomechanical Engineers in Motor Vehicle Accident Trials

By Debra Silber

In theory, a biomechanical expert in a motor vehicle accident case takes the available information about the accident and, using physics and engineering principles, his or her understanding of human anatomy and physiology, relevant scientific studies, and safety and manufacturing information about the vehicles, determines whether the forces generated in the accident were sufficient to cause the alleged injuries. With enough information, the motion of the occupants inside the vehicles can be ascertained, and it is this sudden and unexpected motion that can cause the occupants to either impact the interior of the vehicle or to move in a way that exceeds the natural physiological range of motion of human beings, either of which can cause injuries. This process is known as the expert's "theory of causation."

The analysis employed involves a type of accident reconstruction, which must determine, among other facts, the weight of the vehicles and their respective speeds. From this information, the amount of energy that is transferred to each vehicle by the impact can be calculated, which is sometimes referred to as the "first accident." Then, the expert presents a calculation of the force sustained by the occupants of the vehicles, known as the "second accident." These are only the most basic principles. There are many other factors which must be considered, such as whether the road is wet, if the person is wearing a seatbelt, the age, height and weight of the occupant, the occupant's location in the vehicle and his or her seating position, the model of the car, the height of the head rest, if there are airbags and if they deployed, how "crashworthy" the vehicles are, the points of impact on the vehicles, whether both vehicles are moving or if one is stopped, and if so, in park or neutral, if the vehicle impacts any stationary objects before coming to rest, and the interior design of the vehicles.

The "trend is to allow expert opinion testimony reconstructing motor vehicle accidents from physical evidence, provided the expert witness is sufficiently qualified in the particular field and has before him or her enough physical evidence to provide the witness with the important variables involved."[1] In order to reach any conclusions which are scientifically sound and

trustworthy, the expert must have sufficient information to base his or her opinion on. This is the issue that needs a judge's scrutiny. Whether this is described as a "*Frye* inquiry,"[2] or what has been described as the "*Parker* component," referring to *Parker v. Mobil Oil*,[3] the issue is whether the witness' methodology was "appropriately employed."[4]

Some biomechanical engineers retained to testify are unwilling to admit they cannot form a trustworthy conclusion from the information given to them. Nonetheless, they use deductive reasoning, extrapolation and inference, and report their conclusions as based on sound science. Unfortunately, with what appears to be a good deal of hocus-pocus and the use of complicated (and intimidating) mathematical formulas, they can sometimes fool a judge and jury. It is the judge's role to preclude testimony that will not be useful to the jury, which includes testimony that is misleading, inaccurate, or irrelevant.

A review of the published decisions in New York that involve the admissibility of testimony from biomechanical engineers in motor vehicle trials indicates that judges have, after holding a hearing, often concluded that the principles and procedures employed by the witness are not sufficiently established to have gained general acceptance in the scientific community (*Frye*), when it would probably be more accurate to say that the court concluded that it found too great of an analytical gap between the data and the witness' opinion (foundation).[5] The analysis for the court, described as the court's "gate-keeping function" under *Frye*, is often defined as having several "prongs." As applicable herein, the only issue or prong for the court to review is whether the expert's reasoning or methodology is relevant to the facts at issue, that is, whether the expert can demonstrate a proper foundation for his or her testimony.

The expert's testimony must be precluded when the expert does not have enough information to form a proper opinion, but attempts to offer one anyway, which testimony would not be relevant. An expert's opinion not based on accurate facts is worthless.[6] For example, if it is clear that the proffered biomechanical engineer had looked up crash test information or specifications for the wrong vehicle, or had not examined the vehicles or seen photos of the vehicles after the accident, did not know the height and weight of the allegedly injured party and where in the vehicle he or she was seated,[7] or did not have other pertinent information regarding the accident, he or she could not properly conclude that the plaintiff could not have been injured in the accident at issue.

If, for example, the expert is unaware that the plaintiff's truck hit a stationary object, such as a lamppost, after contacting the other vehicle, all of his calculations would be not merely unreliable, but useless. Where the expert was unaware of a plaintiff's prior injuries, which could make him or her more susceptible to a new injury, the expert's conclusions were found to be unreliable.[8] This was also the case where the expert testified that damage to a seatbelt was caused by a prior accident without providing any basis for this conclusion.[9] Thus, when an expert has insufficient information upon which to base an opinion, his or her testimony is properly precluded.[10]

It is the judge's role to preclude testimony that will not be useful to the jury.

It must be noted that the Court of Appeals has opined that this analysis is not really a *Frye* inquiry, but an "admissibility question applied to all evidence – whether there is a proper foundation – to determine whether the accepted methods were appropriately employed in a particular case."[11] In *Cornell v. 360 W. 51st St. Realty*,[12] the court explained that "a court may exclude the expert's opinion if 'there is simply too great an analytical gap between the data and the opinion proffered.'" In addition, the Court in *Cornell* described *Parker* as having "clarified rules for the foundation necessary to admit expert evidence."

In New Jersey, a *Daubert*[13] state which uses the Federal Rules of Evidence in its state courts, biomechanical engineers may testify if they lay a proper foundation. This analysis is also applicable in New York despite New York being a *Frye* state. In *Hisenaj v. Kuehner*,[14] the Supreme Court of New Jersey concluded that the proposed expert, who based his opinion on the findings in 17 different biomechanical engineering studies of persons involved in similar low-impact collisions, which involved humans and not cadavers or crash test dummies,[15] should have been permitted to testify, and therefore reversed the intermediate appellate court, finding that the trial court's decision to allow the testimony was not an abuse of discretion. The court explained that "the biomechanical engineer applies concepts of mechanics to explain the physiological effects of [outside] force acting upon a living being, and specifically how that force likely would affect the normal functions of [that being] or [its] organs." The hearing, the court states, is "to determine admissibility, not credibility."[16]

The Appellate Division, Second Department has instructed "where the tendered scientific deduction has been deemed generally accepted as reliable, there remains a separate inquiry applied to all evidence. This inquiry is 'whether there is a proper foundation – to determine whether the accepted methods were appropriately employed in a particular case.'"[17] There is no longer any question that a biomechanical engineer with sufficient information may apply the procedures of

the witness' profession to generate an opinion as to the forces which impacted the plaintiff. The judge, however, must ascertain that the expert has obtained sufficient and reliable information, the foundation, upon which to base his or her conclusion.

When a biomechanical engineer is called to testify, *Frye* is satisfied in a motor vehicle case, as the science is not "novel" and has been held to be relevant, but the witness must establish "that the processes and methods employed in arriving at his or her opinions are methods or processes deemed reliable in the biomechanical engineering community. This is usually accomplished by establishing that the methods or processes used by the engineer in formulating his or her opinion have been extensively tested under proper testing conditions and that the tests and the results have been published and peer reviewed."[18]

Unfortunately, in New York, counsel proffering an expert can be seriously hamstrung by the state of the law concerning the admissibility of scientific studies, peer reviewed or otherwise. In the federal courts and in the 41 states that have adopted the Federal Rules of Evidence, such as New Jersey, learned treatises and scientific studies are inadmissible. But in New York, they are considered hearsay on the direct examination of an expert witness, but may be used on cross-examination for the purpose of impeachment.[19] However, even on cross-examination, the substance of the treatise or study may only be put before the jury if the expert witness first agrees that the material is "authoritative" on the subject. Even if admitted into evidence during the cross-examination of a witness, the jury must be told that the study is not offered as proof of the information therein.[20] Thus, in New York, a party may not introduce treatises or articles or studies into evidence or read from them during the direct examination of an expert. Nor may an expert testify about his or her research of the scientific literature on direct examination. As a result of this evidentiary rule in New York, a biomechanical engineer is unable to testify about the studies which support his conclusion on the "theory of causation." This is precisely why the *Frye* hearing (or foundation hearing) is so important. It is only at the hearing, held outside the jury's presence, that the expert may present the studies he or she has relied on and which support the conclusions he or she intends to present to the jury. Without this information, which enables the judge to determine whether the witness has a proper basis for his or her conclusions on the "theory of causation" concerning the plaintiff's claimed injuries, only the expert's analysis of the "first accident," that is, the contact between the vehicles, can be admitted, as that testimony is based on the witness' own calculations, while the "theory of causation" testimony concerning the "second accident," the contact between the vehicle and the plaintiff, must be precluded if not based on reliable, peer-reviewed studies.[21]

It should be noted that only one New York appellate decision regarding biomechanical engineers has, to date, upheld a trial court decision which precluded a biomechanical engineer from testifying without first holding a hearing outside of the jury's presence.[22] All four Appellate Departments have affirmed trial court judges who have permitted biomechanical engineers to testify, provided the testimony had a proper foundation.[23]

In New York, a party may not introduce treatises or articles or studies into evidence or read from them during the direct examination of an expert.

The published New York trial court decisions which concern motions *in limine* seeking to preclude a biomechanical engineer witness from testifying at trial are almost equally divided between those that after a hearing find the witness' testimony on the issue of causation admissible and those that find it not admissible.[24] One jurist opined that there was no basis to preclude on the grounds that it is "junk science," as biomechanical engineers are generally accepted, without making the appropriate inquiry as to the foundation for the testimony.[25] To be clear, while in a motor vehicle accident case there is no doubt that the testimony of a biomechanical engineer is based on scientific principles or procedures which have been sufficiently established to have gained general acceptance in the particular field, one of the prongs of a *Frye* inquiry, the court still must make a determination that the processes and methods employed by the expert in formulating his or her opinion adhered to accepted standards of reliability within the field, a different "prong" of a *Frye* inquiry.

On the point of whether a scientific theory is generally accepted, the findings of New York trial courts should be consistent. Indeed, "a party proffering expert testimony may demonstrate reliability by pointing to existing judicial decisions that announce that particular evidence or testimony is generally accepted in the scientific community."[26] As all four Appellate Departments in New York have found biomechanical engineers to be proper witnesses in motor vehicle accident cases, this issue should be deemed decided in New York.

Some courts have precluded the testimony of a biomechanical engineer regarding the cause of a party's injuries while permitting testimony about the forces involved in the collision and allowing the expert to speak in general about the types of injuries those forces could cause.[27] The courts that follow this reasoning do not permit

the expert witness to opine as to whether the accident caused or did not cause the plaintiff's specific injuries.[28] On the other hand, where the biomechanical engineer was also a medical doctor, the witness was permitted to testify whether "there was an injury mechanism present in the rear impact in a sufficient magnitude of force as well as an appropriate direction of force so as to cause the plaintiff's injuries as alleged."[29]

In Phillip Good's article, *Refuting the Testimony of Biomechanical Experts: A Guide for Personal Injury Attorneys*,[30] he lists the information that, in his opinion, must be provided by a biomechanical engineer at a hearing, and indicates that if it is not, the witness' conclusions should be considered unreliable and suspect. This includes:

1. Was the population in the study relied upon by the expert relevant to the case? Mr. Good points out that the participants in the studies must not only be live humans, and not cadavers or crash test dummies, but they must be of similar age, sex and pre-accident physical condition as the plaintiff. He cites studies that show that women are more likely to suffer whiplash and are more severely affected by rear-end collisions than men, and have post-accident symptoms for a longer period of time than male motor vehicle accident victims. Therefore, for example, a study which only includes healthy young men is not applicable to an accident involving two older women.
2. How large is the sample in the study? A study of only a handful of people is not reliable, but sometimes the studies cited only include a small sample. According to Mr. Good, the failure to state how many participants were in the study makes the study unreliable.
3. The forces involved in the accident must be calculated and the information relied on and calculations used must be disclosed at the hearing.
4. Other factors. Additional factors to consider are: the make and model of the vehicles, how and where the plaintiff was sitting in the vehicle, whether there was a lap belt, a lap and shoulder belt, or no seatbelt, the direction of the impact, and the velocity of the impact.
5. Mr. Good concludes that, in addition to the above, the guidelines of the Society of Automotive Engineers (SAE) must be followed, or the "testimony is suspect." He points out that these guidelines are updated regularly. In particular, he cites SAE J885 ("Human Tolerance to Impact Conditions as Related to Motor Vehicle Design") and SAE J1460/2 ("Human Mechanical Impact Response Characteristics"). All of the society's papers can be purchased online at SAE.org. Mr. Good's article also cites a number of scientific studies concerning humans in motor vehicle accidents.

Additionally, it is very helpful if the expert witness is able to inspect the vehicle, instead of just looking at pictures. This information is useful in determining the speed involved in the collision. Of course, it is important that the vehicle be unaltered between the time of the accident and the expert's inspection, which requires the chain of custody to be proven. If there is too much time between the accident and the inspection, the validity of the inspection suffers. If the vehicle was damaged in the tow, if the "jaws of life" were used to remove the injured people, if the car was repaired before the inspection, or was in another accident, this information must be provided to the expert. It is also important that the expert know the condition of the road surface at the time of the accident.[31] If the road was resurfaced before the site inspection, it affects the reliability of the expert's conclusions.[32]

It is not merely that the absence of sufficient information upon which to form an opinion renders the expert's opinion suspect, and therefore useless in assisting the trier of the facts, but that the absence of sufficient information upon which to form an opinion should result in the preclusion of that opinion from being put before the jury at all. In this author's opinion, a hearing is necessary in every instance when a party in a motor vehicle accident case wants to call a biomechanical engineer to testify and the adverse party requests a hearing. This is because the basis for his or her opinion cannot be properly vetted before a jury under New York's rules of evidence. Of course, if the adverse party does not make a motion to preclude *in limine*, it is waived.[33]

Conclusion

When a party proffers the testimony of a biomechanical engineer in a motor vehicle trial on the issue of damages, if the adverse party moves *in limine* to preclude the testimony, a hearing must be held. Following the hearing, the court may permit the testimony as to the first accident, that is, between the vehicles, or may permit the testimony as to both the first accident and the second accident, that is, between the vehicle and the plaintiff's body. Even if the court permits testimony as to the "second accident," the judge may preclude the witness from testifying as to whether the accident could have caused the claimed injuries on the grounds that the witness is not a doctor, and may only allow the witness to testify as to the forces involved in the collision and allow the expert to speak in general about the types of injuries those forces could cause.[34] Whether a biomechanical engineer who is not a medical doctor may testify that the plaintiff's alleged injuries were not caused by the accident is still an unresolved issue in New York courts. The Court of Appeals has not issued any guidelines on this issue. ■

1. Matthew Bender & Co., Scientific Evidence § 27.10(a), The Admissibility of Accident Reconstruction Testimony.
2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
3. 7 N.Y.3d 434 (2006).

4. *Id*. at 447. *See* Michael J. Hutter, *Toxic Mold Case: Experts, Gate Keeping, Admissibility*, N.Y.L.J., June 6, 2014.

5. *See Cornell v. 360 W. 51st St. Realty LLC*, 22 N.Y.3d 762 (2014), *citing General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

6. *Caton v. Doug Urban Constr. Co.*, 65 N.Y.2d 909 (1985).

7. *Withrow v. Spears*, 967 F. Supp. 2d 982 (U.S.D.C. N.D. Del. 2013).

8. *Wellman v. Norfolk & Western Ry.*, 98 F. Supp. 2d 919 (U.S.D.C. S.D. Ohio 2000).

9. *Id*.

10. *See, e.g., White v. Grocery Haulers, Inc.*, 2014 N.Y. Misc. LEXIS 738 (Sup. Ct., N.Y. Co. 2014).

11. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), *citing People v. Wesley*, 83 N.Y.2d 417 (1994).

12. 22 N.Y.3d 762 (2014).

13. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993). This holding has been codified in Federal Rule 702.

14. 194 N.J. 6 (2008).

15. In *Suanez v. Egeland*, 353 N.J. Super. 191 (App. Div. 2002), a witness who based his opinion on studies involving cadavers was precluded from testifying.

16. *Hisenaj*, 194 N.J. at 24.

17. *Ratner v. McNeil-PPC, Inc.*, 91 A.D.3d 63 (2d Dep't 2011).

18. Robert Glick and Sean O'Loughlin, *The Rise of Biomechanical Experts at Trial*, N.Y. St. B.J., Nov/Dec 2010 at p. 49.

19. CPLR 4515 allows experts to testify as to opinions without specifying the data/studies upon which it is based, leaving that inquiry for cross-examination. Of course, the data/studies must be reliable.

20. *See* PJI 1:90.2 and the cases cited in the commentary thereto, and *see* Eric Dinnocenzo, *I Don't Need Your Authority – The Use of Learned Treatises in New York State Courts*, N.Y. St. B.J., June 2010, at p. 9. In his article, Mr. Dinnocenzo notes that New York law "has slowly inched toward the federal rule, though its roots still remain firmly in the 19th Century."

21. *See, e.g., White v. Grocery Haulers, supra* note 10.

22. *See, e.g., Abramson v. Pick Quick Foods*, 56 A.D.3d 702 (2d Dep't 2008). The one published decision, *Vargas v. Sabri*, 115 A.D.3d 505 (1st Dep't 2014), upheld a trial court's denial of a *Frye* hearing. However, the plaintiff opposed the expert on the grounds he did not have a medical license. It thus seems the party who moved to preclude didn't raise a sufficient issue for the court to direct a hearing.

23. *Shifrel v. Singh*, 61 A.D.3d 401 (1st Dep't 2009) (biomechanical engineer permitted to testify that it was unlikely that plaintiff's left shoulder impacted the steering wheel); *Valentine v. Grossman*, 283 A.D.2d 571 (2d Dep't 2001) (biomechanical engineer should have been allowed to testify that the force in the accident was insufficient to cause a herniated disc); *Cocca v. Conway*, 283 A.D.2d 787 (3d Dep't 2001), *lv. denied*, 96 N.Y.2d 721 (2001) (witness allowed to testify that the impact between the vehicles did not have enough force to cause the injuries claimed by the plaintiff); *Martell v. Chrysler Corp.*, 186 A.D.2d 1059 (4th Dep't 1992) (plaintiff properly permitted to call biomechanical engineer to testify in products liability action). *See also* Richard M. Sands, *Using Biomechanical Science in Labor Law and Premises Cases*, N.Y.L.J. Nov. 3, 2010.

24. *Shifrel*, 61 A.D.3d 401; *Gaona-Garcia v. Gould*, 31 Misc. 3d 1237A (Sup. Ct., Bronx Co. 2011). *See also Santos v. Nicolos*, 24 Misc. 3d 999 (Sup. Ct., Bronx Co. 2009); *Clemente v. Blumenberg*, 183 Misc. 2d 923 (Sup. Ct., Richmond Co. 1999).

25. *Martell v. K & K Auto and Towing Corp.*, 2013 N.Y. Slip Op. 31950(U) (Sup. Ct., Queens Co.).

26. *Hisenaj v. Kuehner*, 194 N.J. 6, 17 (2008).

27. *Smelser v. Norfolk S. Ry Co.*, 105 F.3d 299 (6th Cir. 1997); *Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d 1343 (U.S.D.C. M.D. Ga. 2007); *Berner v. Carnival Corp.*, 632 F. Supp. 2d 1208 (U.S.D.C. S.D. Fla. 2009).

28. *Kelham v. CSX Transp. Inc.*, 2015 U.S. Dist. LEXIS 93669 (U.S.D.C. N.D. Ind.).

29. *Harden v. Haven*, 2014 Fla. Cir. LEXIS 815 (Circuit Ct. of 18th Jud. Dist., Brevard Co.).

30. statcourse.com (2009) (available as an e-book on Amazon.com).

31. *Rose v. Truck Ctrs., Inc.*, 611 F. Supp. 2d 745, 751 (N.D. Ohio 2009).

32. *Knox v. Simmons*, 838 S.W.2d 21 (Mo. Ct. App. 1992).

33. *Cocca v. Conway*, 283 A.D.2d 787 (3d Dep't 2001), *lv. denied*, 96 N.Y.2d 721 (2001).

34. *Neat v. Pfeffer*, 2013 N.Y. Misc. LEXIS 4185 (Sup. Ct., N.Y. Co.).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

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

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

Sincerely,

#mediaphobic

Dear #mediaphobic:

Your question on social media ethics and attorney advertising in the social media context is a timely one, which implicates several of the New York Rules of Professional Conduct (NYRPC). The Commercial and Federal Litigation Section of the New York State Bar Association recently updated its "Social Media Ethics Guidelines" on June 9, 2015. *See* James M. Wicks, Mark A. Berman & Ignatius A. Grande, NYSBA Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association, at 5 (2015). And while the NYRPC do not yet have a mandate requiring New York lawyers to be technologically adept, the American Bar Association recently updated its Model Rules of Professional Conduct to include a mandate that an attorney has a professional responsibility to be competent and up to date on the benefits and risks associated with relevant technology. *See* Joel Stashenko, *State Bar Updates Guidelines on Use of Social Media*, N.Y.L.J. (June 19, 2015), http://www.newyorklawjournal.com/id=1202729712423/State-Bar-Updates-Guidelines-on-Use-of-Social-Media.

Our Forum has previously addressed "What Constitutes Attorney Advertising?" in the New York State Bar Association *Journal*, Vol. 85, No. 7 (September 2013). However, this Forum discusses how the rules on attorney advertising come into play in the context of social media.

With respect to your first question, whether the attorney advertising rules apply in the social media context and whether those rules are more relaxed when it comes to social media, this depends on how you are using social media. If an attorney is on social media only for personal use, this type of profile and/or activity will not be subject to the NYRPC. However, an attorney may have a so-called "hybrid" account that is a combination of both personal and professional information. In this case, a hybrid account may need to comply with attorney advertising rules if the primary purpose of the account is to advertise an attorney's professional services. *See* Wicks et al., *supra*, at 5.

The question of a hybrid account is particularly relevant with respect to attorneys' LinkedIn profiles. The New York County Lawyers' Association (NYCLA) recently issued an opinion interpreting how attorney advertising rules apply to LinkedIn. According to NYCLA, a LinkedIn profile that contains only biographical information, such as only a listing of an attorney's education and current and past employment, would not constitute attorney advertising. N.Y. County Lawyers' Ass'n Ethics Op. 748 (2015). However, a LinkedIn profile that contains information such as an attorney's practice areas, skills, endorsements and/or recommendations from colleagues or clients would constitute attorney advertising and require the appropriate disclaimers. *See id*.

Interestingly, a December 2015 ethics opinion from the New York City Bar Association's Committee on Professional Ethics reached a different conclusion about LinkedIn profiles. According to the opinion, an attorney's individual LinkedIn profile only constitutes attorney advertising if it meets all five of the following criteria: (1) it is a communication made by or on behalf of the lawyer; (2) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (3) the LinkedIn content relates to the legal services offered by the lawyer; (4) the LinkedIn content is intended to be viewed by potential new clients; and (5) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. N.Y. City Bar Ass'n Formal Opinion 2015-7: Application of Attorney Advertising Rules to LinkedIn (Dec. 2015).

Another important overarching consideration for an attorney using social media is that a social media post, whether it be on Facebook,

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

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Twitter, LinkedIn, or YouTube, has no geographic boundaries, and, as a result, it may be subject to the ethics rules not only in the state that the attorney is licensed to practice in, but also, potentially, in other jurisdictions where the recipient of the communication is located. *See* Christina Vassiliou Harvey, Mac R. McCoy, and Brook Sneath, *10 Tips for Avoiding Ethical Lapses When Using Social Media*, Business Law Today, January 2014, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html. This Forum, however, will focus solely on the NYRPC.

Turning now to the specific NYRPC that may apply, the first rule that an attorney using social media should keep in mind is Rule 1.1: Competence. Rule 1.1(a) reminds us that: "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." According to the ABA Committee on Ethics and Professional Responsibility, "it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network." *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014). A lawyer using social media has a duty to understand the basics of each social media network that either the lawyer or his client is using. Wicks et al., *supra*, at 3.

Rule 1.1(b) of the NYRPC adds that "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." While ultimately it is each lawyer's individual responsibility to develop competence with social media platforms, if a lawyer knows that he lacks competence in this area, he should consult with others who have knowledge, including perhaps professionals in the field of electronic discovery. *Id.*

The issue of competence is so important that the American Bar Association has updated its Model Rules of Professional Conduct Rule 1.1 on this very issue. The rule tells us that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *Comment on Rule 1.1*, American Bar Association Center for Professional Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html. "Relevant technology" applies to social media.

Rule 7.1 of the NYRPC is the comprehensive rule on attorney advertising and includes detailed provisions on how an attorney can advertise without running afoul of the rules. According to Rule 7.1(f), an online ad must be labeled Attorney Advertising "on the first page, or on the home page in the case of a website." According to Rule 7.1(e)(3), any ad with statements about a lawyer's services must include the disclaimer: "Prior results do not guarantee a similar outcome."

Rule 1.0(a) of the NYRPC defines "Advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

It is important to emphasize that an attorney has an ethical responsibility to include a disclaimer per Rule 7.1(f) when using all forms of social media. Twitter may pose a particular challenge to practitioners since an individual tweet is limited to 140 characters and therefore including the language "Attorney Advertising" may be difficult. However, this should not be used as an excuse for noncompliance with Rule 7.1(f). Wicks et al., *supra*, at 6.

Rule 7.1(k) states that all ads "shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year." Rule 1.0(c) defines computer-accessed communication as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or linked related thereto."

A social media post that qualifies as an advertisement would be considered a computer-accessed communication, and therefore would only need to be retained for one year. Wicks et al., *supra*, at 7.

Rule 7.4(a)–(c) of the NYRPC prohibits an attorney from identifying himself or herself as a "specialist" or "specializ[ing] in a particular field of law" unless the attorney is certified as a specialist in a particular area of law or law practice by a private organization or appropriate jurisdiction. This rule applies to social media. In particular, the topic of specialization is relevant to LinkedIn where an attorney fills out biographical information under headings like "Experience" and "Skills." According to NYCLA, an attorney categorizing his practice area(s) and/or experience under these headings does not violate NYRPC 7.4 as long as the attorney omits the word "specialist." N.Y. County Lawyers' Ass'n Ethics Op. 748 (2015).

LinkedIn also raises other ethical questions because of the endorsement and recommendation features of the site. According to NYCLA, every attorney with a LinkedIn profile should be responsible for monitoring it and making sure any endorsements and recommendations are truthful, not misleading, and are based on actual knowledge pursuant to Rule 7.1. *Id*.

We turn now to your question whether an attorney is permitted to take pictures in a courtroom and later tweet about what he or she observed during a trial or a court proceeding. Practitioners should keep in mind that each court and judge has its own specific policies governing the use of electronic devices in the courtroom, and that the rules governing technology use in the courtroom will vary significantly from state to state and even from one trial to the next. Reporters Committee for Freedom of the Press, *Be aware tweeting allowed in some courtrooms but not others*, Poynter (May 28, 2014), http://www.poynter.org/2014/tweeting-allowed-from-some-courtrooms-but-not-others/253548/. Various arguments, both in favor of and against the use of technology in the courtroom, have been advanced. On the one hand, judges who do not allow communication devices, like smartphones, are of the view that technology disrupts judicial order and can interfere with fact-finding and the parties' right to a fair trial. On the other hand, judges who are pro-technology view these advances as a way for the public to have immediate access to the judicial system, promoting greater public understanding, trust and confidence in our courts. *See* Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 Am. J. Trial Advoc. 573, 583-85 (2013) and Richard M. Goehler, Monica L. Dias, David Bralow, *The Legal Case for Twitter in the Courtroom*, Comm. Law., April 2010, at 14.

While there has been a decent amount of discourse about the implications of jurors and journalists tweeting from the courtroom, there has been much less discussion about lawyers who tweet. However, in December 2015, a partner at the law firm of Barnes & Thornburg in Chicago was sanctioned for tweeting evidence during a high-profile financial crimes trial in the United States District Court for the Northern District of Illinois. The partner was writing about the trial on his law firm blog and without thinking about the court's rules – specifically a sign outside the courtroom stating "no photography" – he took pictures using his cell phone and posted nine tweets with pictures from inside the courtroom. Lisa Needham, *You Probably Should Not Live-Tweet a Trial You Are Watching*, Lawyerist.com (December 10, 2015), https://lawyerist.com/95941/95941/. The partner was sanctioned for his tweets by an Illinois federal judge, including being ordered to donate $5,000 to the Chicago Bar Foundation within 30 days, attend a continuing legal education seminar addressing the use of social media and its implications for lawyers, and dedicate at least 50 hours in 2016 to community service. Kali Hays, *Barnes & Thornburg Atty Sanctioned For Tweeting Evidence*, Law360 (Dec. 10, 2015), http://www.law360.com/articles/736468/barnes-thornburg-atty-sanctioned-for-tweeting-evidence.

Separate and apart from the judge's rules, if an attorney is tweeting for marketing purposes, then it is likely that the rules for attorney advertising discussed above will apply. One additional rule not previously discussed is Rule 7.3(a), which prohibits an attorney from engaging in a solicitation "by real-time or interactive computer accessed communication." Rule 7.3(b) defines solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain."

An attorney who is tweeting pictures or observations from a courtroom or trial proceeding should also be extra cautious about protecting client confidences – whether it be a former, current or prospective client under the relevant professional rules. Rule 1.6 of the NYRPC governs Confidentiality of Information, Rule 1.9(c) holds that a lawyer is generally prohibited from using or revealing the confidential information of a former client and NYRPC 1.18(b) holds that a lawyer is prohibited from using or revealing the confidential information of a prospective client.

In sum, with all of the technological advances that lawyers now have access to at their fingertips, it is a wise decision for every attorney to stop and think before he or she posts, blogs, shares, likes, or tweets.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am the lead attorney on a big and important case for the litigation group at my firm, which is currently short-staffed. When I received an email from our managing clerk that our opposition papers to our adversary's motion to dismiss would be due in one week, I started to panic!

Not only was my mother recently hospitalized, but the senior associate on the case (and his wife) just had a baby and he was going to be out of the office for the next week. With so many personal and professional commitments, I had just completely overlooked this looming deadline.

Out of desperation, I called my adversary. I calmly and politely explained the situation and asked for a 30-day extension of time to draft our opposition. My adversary did not seem sympathetic at all and told me he would consult with his client and get back to me. Within the hour, my adversary called me back and told me that his client wanted to aggressively pursue this case and was tired of what he perceived as constant delays and postponements. In short, my adversary informed me that his client wanted a "take no prisoners" approach in the case and was instructed by his cli-

Continued on Page 60

two or more contracting parties are involved.[21]

For individuals, the person's name should be followed by the term "an individual."[22] This shows that the party isn't an entity. Include the party's address to distinguish it from others with the same name.[23] *Example:* "Jaime Harper ('Buyer'), an individual, 9002 Aldridge Way, Albany, New York." If the party isn't an individual but an entity, use the entity's official legal name as specified in the entity's organizational document.[24] State the entity's name, the type of entity, and the jurisdiction of the organization (such as the place of incorporation). Including what jurisdiction the party is under is another way to distinguish a party from another one with the same name.[25] *Example:* "This Asset Purchase Agreement (this 'Agreement'), dated August 10, 2013, is made between Goldilocks Corporation, a Delaware corporation (the 'Buyer'), and Three Bears, LLC, a New York limited liability company (the 'Seller' and, collectively with the Buyer, the 'Parties')."[26] Pay attention to punctuation, or its absence, when naming the parties, especially in the case of entities.[27] If a limited-liability company's articles of organization state that the company's name is "Apex Property, LLC," write it in the same way, comma for comma.[28] Don't rewrite it as "Apex Property L.L.C."

Recitals

Contract drafters often begin with a statement regarding background, known as "Recitals." Recitals give context.[29] They describe the contract's background and explain why the parties are entering into it.[30] To avoid ambiguities, the parties' reasons for entering into the contract should be clear and consistent with the contract's language.[31] The recitals are meant as general evidence of the parties' intent for entering into the contract. They don't include specific information about what the parties agree to. Don't include substantive provisions, such as those addressing the parties' rights or obligations.[32] Recitals don't provide rights or remedies, so they're not enforceable.[33] Save substantive provisions for the body of the contract.[34] Although recitals aren't necessary to create an enforceable contract, they can help if a dispute arises about the contract's purpose.[35]

> Using the correct prepositions with regard to time will ensure a clear contract.

Practitioners usually introduce recitals with the word "whereas."[36] But "whereas" is legalese; it adds no meaning to recitals.[37] Instead of using "whereas," number each recital and introduce them with a word such as "Background" or "Premises."[38] *Example:* "1. Background. The Parties desire to amend the Loan Agreement to extend the maturity date of the Loan to June 16, 2015."[39] Immediately following the recitals, the drafter should add a "lead-in," or "words of agreement" language, to explain what the parties agree to. For short and simple contracts, you don't need recitals.[40]

Words of Agreement

Words of agreement, or "lead-ins," are transitional phrases that follow a recital and precede the body of a contract.[41] It establishes the parties' agreement to the contract's terms. Lengthy lead-ins confuse. Keep them simple.[42]

This section often recites the consideration. Consider this language: "'[I]n consideration of the following terms, covenants, conditions, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged. . . .'"[43] If no consideration exists under a contract, the mentioned language won't save the contract: the language has no legal effect.[44] Thus, this part of the contract can be omitted. A simple sentence stating the parties' mutual agreement suffices. Leaving out the words of consideration will "shorten the lead-in and improve readability."[45] The contemporary way of expressing words of agreement is this clause: "Accordingly, the parties agree as follows: . . . ."[46] This makes it clear that the words of agreement aren't the parties' substantive agreements but merely the lead-in to the body of the contract and the parties' general intent to enter into the contract.

Definitions

Defined terms are used when words or lengthy phrases are either ascribed a special meaning or repeatedly referred to in the contract. There's no need to define a term that'll be used only once in the document, unless it would make the provision significantly easier to understand.[47] Defined terms may be presented in two ways: (a) through a separate section for definitions or (b) embedded in the text of a contract provision, otherwise known as on-site.[48] The convention when initially defining a term is to capitalize the first letter of each word and to put the letters in quotation marks.[49] Many drafters also underline or put the term in bold so that it can be located easily. To signify that you're using a previously defined term, capitalize the first letters of each word.[50]

The term can be defined on-site if the contract is short, informal, or has few defined terms. *Example:* "Landlord shall lease to Tenant the building located in Four West 4th St., Syracuse, New York (the 'Premises')." If you're defining on-site, make sure which text a definition relates to. Proper placement is important for on-site definitions.

Sophisticated commercial transactions, on the other hand, will likely use a separate definitions section.[51] A definitions section will "achieve clarity without repetition."[52] When using a definitions section, list the defined terms in alphabetical order for the reader's convenience.[53]

It's also common for contracts to use a mixed approach, defining some terms on-site and some terms in a definition section.[54] In this case, it might

be easier to have an index of defined terms at the end of the contract to help readers find their way.[55]

Defined terms should provide relevant legal definitions for any term not obvious to the reader. It'll reduce the risk of referring to the same thing in a different way.[56] It'll also make the contract clear about what the parties intended.[57] For instance, a contract might provide that "the parties shall use *reasonable efforts* to perform this agreement timely." When a later provision provides that "the seller shall use *best efforts*," this inconsistency suggests that the intended meaning of *reasonable efforts* is different from *best efforts*.[58] This implies that *best efforts* is a higher standard than *reasonable efforts*.[59] Be consistent and precise in using a defined term.

Use your word processor's "find" or "search" functions to test whether you've used a definition consistently and whether the defined term is capitalized wherever it appears in the document.[60] Definitions should be a word or phrase that's both informative and concise.[61] Don't simply use the words "includes" and "shall" to define a term.[62] Also, don't define a defined term in another term's definition. An example of what not to do: "'Payment Period' means each calendar year in the five-year term that begins on January 1, 2013 and ends on December 31, 2018 (the 'Term')."[63] But it's acceptable to use other already defined terms within a definition.[64] It's also acceptable to use the lowercase term as part of a definition.[65]

On the other hand, it's unnecessary to define a term that has a settled definition when you're using it for its standard meaning.[66] But don't assume that the term is standardized. Terms can be defined to include concepts that aren't customarily included in a given word or phrase.

Action Sections

The action sections state the parties' main obligations and provide the following: (1) the parties' agreement to perform the main subject matter of the contract; (2) the duty to pay financial consideration, if any; (3) the term of the contract, if any; (4) the closing date, if any; and (5) the list of closing deliveries, if any.[67]

• *Subject-Matter Performance*

A subject-matter-performance provision provides for the contract parties' covenants that each will perform the contract's main subject matter. They're usually reciprocal, executory covenants given in exchange for the other's covenant and establish the agreement's primary consideration.[68] *Example:* Subject to the provisions of the Agreement, Seller shall sell all its shares of ABC Co. to the Buyer, and Buyer shall buy all of Seller's ABC Co.'s shares."

• *Consideration*

The payment provision provides for the contract's financial consideration.[69] The financial consideration can be cash, royalty, any monetary equivalent, or other fees. When drafting this provision, state who is paying what to whom, when, why, and how.[70] Calculate the amounts that can be calculated instead of including a mathematical formula.

• *Term*

Term provisions note when contracts begin and end.[71] A term provision applies when a period of time will govern the parties' relationship, such as in lease, licensing, and supply agreements. Some contracts, such as acquisitions, are one-time deals with no term and which terminate when the transaction is consummated.

References to time are important contractual aspects that are often points of contention in litigation. References to time can be used to reference the date of something, to specify the beginning or end of a time period, or to apportion a quantity per unit of time.[72] To avoid confusion, be clear about the time, and don't use the word "within" when referenced to a time period. "Within" creates ambiguity.[73] "Within" makes it unclear whether the referenced date is included or excluded.[74] Use the word "including" to clarify whether the date referenced counts. Using the correct prepositions with regard to time will ensure a clear contract. To signify the beginning of a term, use "from," "after," "starting," or "commencing," followed by the date.[75] When identifying the end of a term, use "until," "to," or "through" followed by the date and the time.[76] *Example:* "Term. Unless terminated earlier in accordance with the terms of this Agreement, this Agreement shall commence on April 1, 2010, and shall continue until and including May 31, 2013."[77] Additionally, include a time-of-day reference and be conscious of time zones.[78] A strong time reference might read: "This shall be performed by 5:00 p.m. Buffalo, New York time." This way, there's no confusion on what "EST" might mean or whether "5:00" means the morning or the afternoon.

• *Closing-Related Provisions*

Not all contracts have closing conditions. They're generally seen in acquisitions and financings when there's a time gap between the signing date and closing date. Thus, "[w]hen a transaction has a closing, the agreement will include a closing date provision and closing deliveries provisions."[79] The closing-date provision will state the date, time, and place of closing. Although some contracts provide for a specific closing date, a "rolling closing dates" provision allows the parties jointly to postpone the closing date to a later date.[80] This gives the parties flexibility if the documentation isn't ready by the closing date.

A closing-deliveries provision will specify conditions that must be fulfilled or waived before a party must close on the transaction.[81] It'll also specify each party's covenants about how it'll deliver its performance at closing. For instance, the seller promises to execute and deliver the conveyed documents, while the buyer promises to deliver the purchase price. Both are examples of closing-related provisions.

• *Covenants Not-to-Compete (in an Employment Context)*

In the covenants not-to-compete field, myriad state statutes are straightfor-

ward in telling you what you can and can't do in writing a covenant not-to-compete clause into your contract.[82] These statutes differ from state to state.[83] In California, for example, covenants not-to-compete are strictly prohibited; they are *void ab initio*. In other words, any contract that restrains "anyone" (businesses included) "from engaging in a lawful profession, trade, or business

Using different language to refer to the same thing is a mistake.

of any kind is to that extent void."[84] To get around this rule, the drafter should focus on drafting anti-solicitation and confidentiality provisions into the contract. By contrast, there's no specific statutory law in New York on covenants not-to-compete.[85] If your client wants to put a covenant not-to-compete clause into the contract in New York, the best way to ensure that you're following the proper jurisdictional standards is to do a thorough search of the case law.[86]

In the next issue of the *Journal*, the *Legal Writer* continues with representations and warranties, covenants and rights, conditions, discretionary authority, and declarations. ■

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14. Stark, *supra* note 2, at 69.
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16. Jacobson, *supra* note 8, at 89.
17. Kenneth A. Adams, A Manual of Style for Contract Drafting 18 (3d ed. 2013).
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19. Stark, *supra* note 2, at 75.
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22. Sjostrom, *supra* note 1, at 3.
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26. Adapted from Vincent R. Martorana, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider, PPT slide 16 (N.Y. St. B. Ass'n, CLE, Feb. 2015) (Martorana I).
27. Sjostrom, *supra* note 1, at 3.
28. *Id.*
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30. James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C.L. Rev. 153, 157 (1999).
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32. Stark, *supra* note 2, at 82.
33. *Id.* at 48.
34. Sjostrom, *supra* note 1, at 5.
35. Stark, *supra* note 2, at 81 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).
36. Jacobson, *supra* note 8, at 91.
37. *Id.*
38. *Id.*; Scott J. Burnham, Drafting and Analyzing Contracts 224 (3d ed. 2003).
39. Vincent R. Martorana, Supplemental Outline, The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics 4 (N.Y. St. B. Ass'n, CLE, June 2015) (Martorana II).
40. Sjostrom, *supra* note 1, at 5.
41. *Id.*
42. Vincent R. Martorana, Supplemental Outline, Fundamental Concepts in Drafting Contracts: What Most Attorneys Fail to Consider 4 (N.Y. St. B. Ass'n, CLE, Feb., 2015) (Martorana III).
43. Sjostrom, *supra* note 1, at 6.
44. *Id.*
45. *Id.*
46. Stark, *supra* note 2, at 85.
47. *Id.* at 101.
48. McGregor & Adams, *supra* note 3, at 302; Jacobson, *supra* note 8, at 94.
49. Stark, *supra* note 2, at 101.
50. *Id.* at 102.
51. *See id.* at 286.
52. Burnham, *supra* note 38, at 226.
53. Stark, *supra* note 2, at 110.
54. Sjostrom, *supra* note 1, at 42.
55. Kenneth A. Adams, Legal Usage in Drafting Corporate Agreements 82 (2001).
56. Sjostrom, *supra* note 1, at 41.
57. *Id.*
58. *See* Burnham, *supra* note 38, at 227.
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60. *Id.* at 231; Stark, *supra* note 2, at 100.
61. Sjostrom, *supra* note 1, at 41.
62. Martorana III, *supra* note 42, at 7.
63. Adapted from Stark, *supra* note 2, at 104.
64. Martorana II, *supra* note 39, at 18.
65. *Id.*
66. *Id.* at 105.
67. *Id.* at 49.
68. *See* Stark, *supra* note 2, at 117–18.
69. *Id.* at 119.
70. *Id.* at 120.
71. Sjostrom, *supra* note 1, at 19.
72. Martorana III, *supra* note 42, at 22.
73. *Id.*
74. Martorana I, *supra* note 26, PPT slide 122.
75. Adapted from *id.* at 118.
76. *Id.* at 119.
77. Sjostrom, *supra* note 1, at 19.
78. Martorana III, *supra* note 42, at 22.
79. Stark, *supra* note 2, at 51.
80. *Id.* at 130.
81. *Id.*
82. Scott J. Burnham, *Transactional Skills Training: Contract Drafting — Beyond the Basics*, 2009 Transactions: Tenn. J. Bus. L. 253, 271 (2009).
83. *Id.*
84. Cal. Bus. & Prof. Code § 16600.
85. Burnham, *supra* note 82, at 275.
86. *Id.*

Attorney Professionalism Forum
Continued from Page 57

ent to not grant any requests to extend deadlines or courtesies. Although I tried to reason with opposing counsel and explain that an extension of time is a basic courtesy and would not prejudice his client, he responded that his client was "sick and tired of lawyers being nice to each other," and the extension was denied.

Is my adversary's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
A.M. Civil

CLASSIFIED NOTICES

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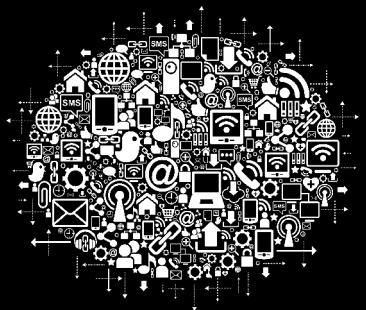

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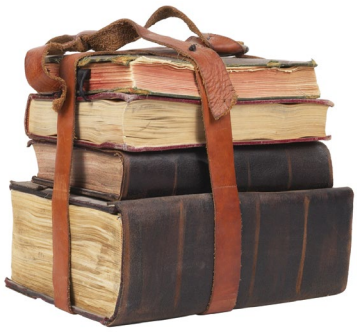

Making Offers No One Can Refuse: Effective Contract Drafting — Part 2

In the last issue, the *Legal Writer* introduced this five-part series on effective contract drafting. The *Legal Writer* discussed the planning and negotiating process in drafting a contract. In this issue, we discuss the different parts of a contract.

Parts of a Contract

Many contracts have the same basic provisions regardless of the subject matter or complexity.[1] This column describes the provisions you'll most commonly find in a contract. We discuss how some provisions create liability for the parties and offer tips on how to spot and draft contract language to reduce liability and minimize risk.

The primary parts of an agreement are the cover page and table of contents; titles and headings; introduction/preamble; recitals; and words of agreement, definitions, and action sections.

Cover Page and Table of Contents

Lengthy contracts normally include a cover page and table of contents.[2] The cover page is a separate page that states the title of the contract, the name of the contracting parties, and the date of the agreement.[3] The table of contents lists the headings, subheadings, schedules, and exhibits, together with their corresponding page numbers, to help the reader find the contract's provisions.[4]

Titles and Headings

The title of the contract expresses the contract's subject.[5] Put the title on the cover page. Or, to save paper, center the title at the top of the contract's first page. The first letters of each word in the title are usually capitalized to make them conspicuous and the contract easy to identify.[6] Include a few words to express what the contract is about. The title shouldn't be too generic. Help the reader understand what the contract is about.[7] *Examples:* "Lease Agreement for Commercial Space at 689 Main Street, Yonkers, New York"; "Real-Estate Contract for Sale of 295 Elmwood Lane, Ithaca, New York"; and "Rental Agreement for Apartment 2G, Located at 3015 Plandome Road, Manhasset, New York."[8]

It's also important to include headings. Headings help structure the contract and ease readability.[9] Don't be over- or under-inclusive.[10] Headings should be clear and concise. They should reflect the information in the related sections.[11] If the headings don't reflect that information, there might be an issue interpreting the underlying section.

Introduction/Preamble

The main function of the introduction, also known as the preamble, is to identify concisely the names of the parties and the legal action they're taking.[12] Avoid "Know All Men By These Presents" or "This Agreement is entered into. . . ." Not only are they archaic, passive-voice expressions, but they "force[] the reader to plow through several words to find out who the parties are."[13]

The date in the introduction shouldn't be a future date. If you intend to make the provisions effective on a future date, use the signing date in the introduction and list an effective-date provision in the body of the contract.[14] The contract will be in force on the signing date, but the provisions will be effective only on the effective date.[15]

When identifying the parties involved in the transaction, use their full legal names as well as their proper short forms.[16] There's no benefit or purpose to enumerating the parties.[17] To make party names easily identifiable, type them out in all-capital letters.[18] The short forms usually capitalize the first letter of each word and identify the parties' roles, such as "Buyer" or "Seller." Once you introduce these short forms, use them throughout the contract. If you use short forms for the parties, continue using the same identification throughout the agreement. Don't use two short forms for one party, such as "'Goldilocks Co.' or the 'Company.'" Just be consistent and pick a short-form reference that won't confuse a reader.

Headings help structure the contract and ease readability.

Be careful when choosing similarly spelled generic names for the parties. For instance, the difference between "licensor" and "licensee" is a matter of the "or" and "ee" on the endings.[19] If both these names were used to identify the parties to a contract, it would be easy to overlook a typographical error that results in "licensor" instead of "licensee."[20] Some drafters use "between" in the introductory statement when referring to the contracting parties' relationship, even when

CONTINUED ON PAGE 58

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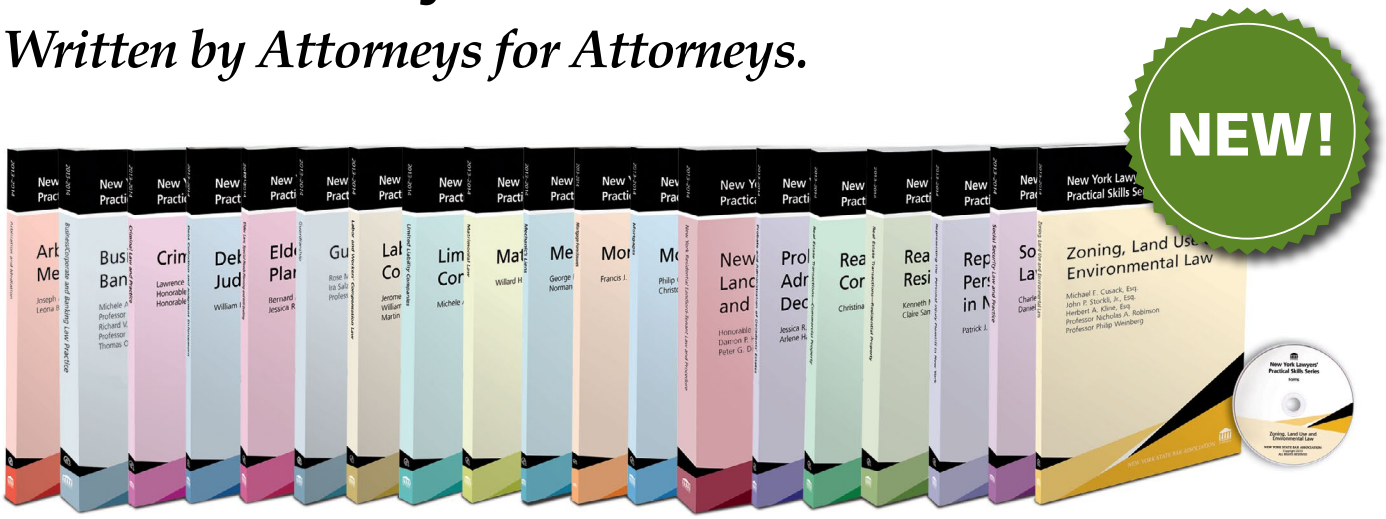

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