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The Alter Ego Article Doctrine in New York

By Edward P. Yankelunas

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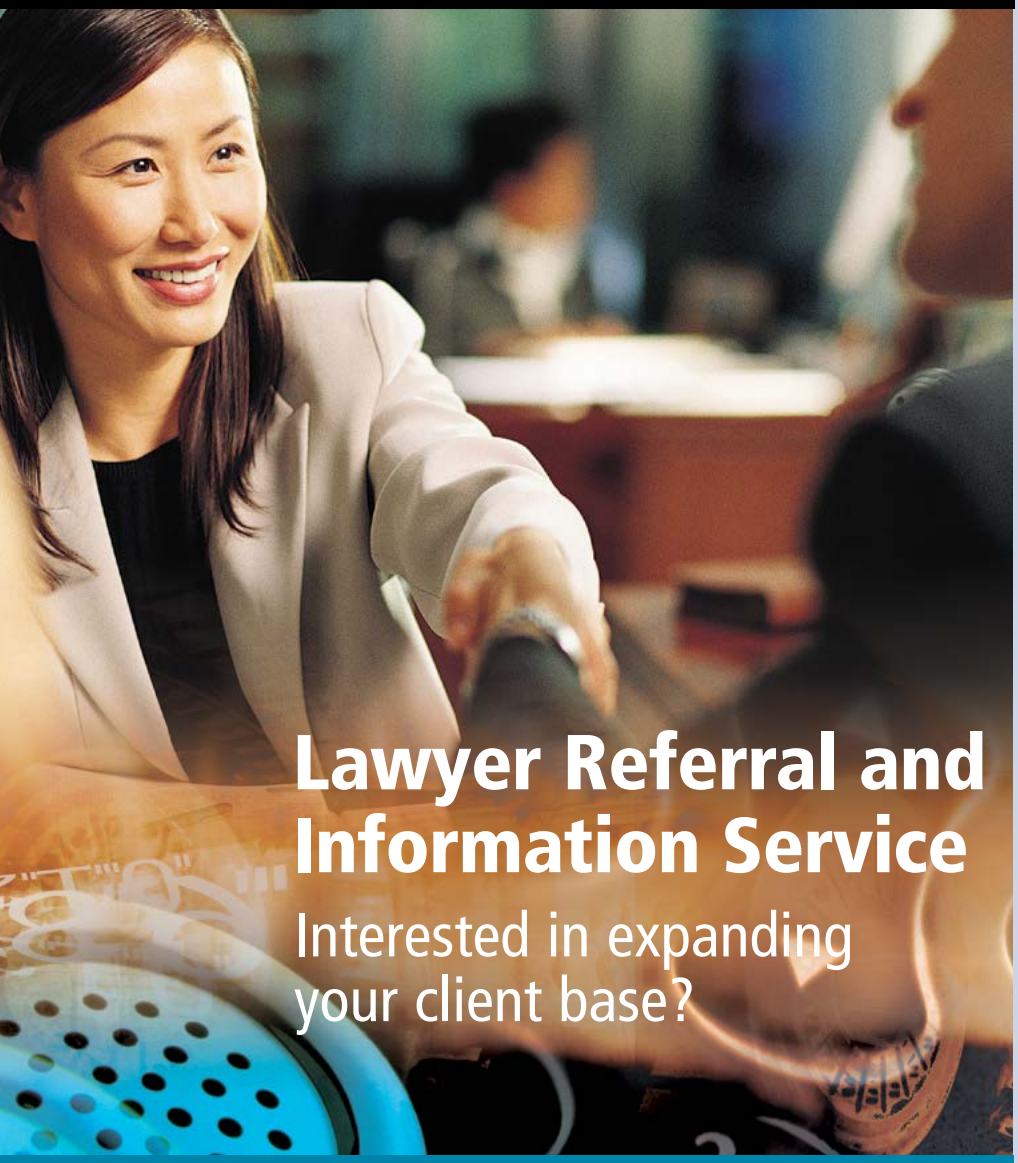

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GLENN LAU-KEE

The Magna Carta and the Endurance of Liberty

Eight hundred years ago, in a meadow called Runnymede, on the banks of the River Thames, King John and a handful of English aristocrats drafted the Magna Carta – a compromise agreement meant to stave off violent rebellion. The Magna Carta, as a peace treaty, failed. The charter lasted only 10 weeks.

Much of the charter – its words printed in Latin on a single sheet of sheepskin parchment – addresses matters that are provincial, and several chapters reflect the prejudices of its times.

This original charter was quickly annulled, yet, the Magna Carta was reissued and reconfirmed dozens of times by regents and kings. In the early 17th century, Sir Edward Coke resurrected the charter and reinterpreted it to stand, strongly, for the concept of habeas corpus. For generations since, the Magna Carta has endured as a symbol of liberty.

- No man, no matter how powerful, including the King of England, stands above the rule of law.
- The powers and privileges of those who govern must be clearly defined and limited.
- A free man cannot be deprived of life, liberty or property except by lawful judgment of his equals or by the law of the land.
- Laws must be reasonable and fairly executed.
- Punishment for violations of the law must be proportional to the seriousness of the crime.

These radical ideas and the very concept that a written document could serve as a framework for government and preserve this liberty have lodged firmly in the minds, and in the spirit, of the generation of engaged citizens – revolutionaries – who founded our country. Despite the distance of years and miles and the wide expanse of an ocean, its concepts took root on American soil.

More than 500 years after the Magna Carta was first written, colonists seized on its principles of due process and liberty under law to throw off the oppression of the King. They created a U.S. Constitution and Bill of Rights imbued with the concepts of due process and liberty introduced in the Magna Carta. The Magna Carta had become a symbol and a beacon, illuminating a path toward a new form of government.

One generation of Americans drafted the framework of our government – liberty under the rule of law. It is for each new generation to make these values heard and understood. Even felt.

Outside the marble halls of our courtrooms and our capitol buildings, the past year has been marked by mounting cries of outrage and distrust in our system of justice. On the streets of our cities and in tweets and posts gone viral on social media, voices are sounding that something is amiss with our criminal justice system. This season is one period, of many, in our nation's history in which the fabric of our national framework is being tested.

Several weeks ago, Supreme Court Justices Stephen Breyer and Anthony Kennedy added their voices and testified before a House appropriations subcommittee about serious problems with the criminal justice system. "In many respects, I think it's broken," Justice Breyer said. The two justices spoke of the overuse of solitary confinement, criticized mandatory minimums as a "terrible idea," and called for a deep examination of the U.S. system of massive incarceration – one, they said, which is not working and is not humane.

Is it inevitable that the symbol and meaning of the Magna Carta – cast in bronze, etched in granite – will continue to endure for the next 800 years?

Are the documents that forged our nation strong enough to continue to guide and protect our country's future?

"I often wonder whether we do not rest our hopes too much upon consti-

Glenn Lau-Kee can be reached at glau-kee@nysba.org.

tutions, upon laws and upon courts." Many will recognize these words as those of Judge Learned Hand.

"These are false hopes," he continued, "believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

Judge Hand spoke these words before a crowd of 1.5 million in Central Park, just weeks before the D-Day invasion when 150,000 American troops landed on the beaches of Normandy, willing to risk everything to restore liberty to Europe.

Today, almost as troubling as the public cries of loss of confidence in our criminal justice system is the silence of disengagement of so many in our society. Citizens voice outrage, but feel so disempowered, so disconnected, that they do not register to vote and do not participate in shaping our future. Our state's voter participation has been in serious decline for more than a decade. In the past three elections, New York State ranked 47th in average voter turnout. Our last presidential election brought only 53% of eligible voters to the polls.

Cuts in the humanities and in civics education in the public school system have left many students with only a superficial and limited understanding of their own government. Increasingly, with an eroding foundation of knowledge, the public's understanding of the judiciary and of attorneys is pieced together from snippets of hyperbolized, inaccurate media portrayals.

We are in danger of the public losing touch with our country's founding values. Without continuous and purposeful efforts to reengage the public, the spirit of liberty that shone so brightly during the dawn hours on Normandy beach will not survive.

One generation drafted a framework of fairness and due process for our country.

It is up to each generation to make these values our country's living reality and to ensure the public trust.

At the New York State Bar Association, we are trying to do our part by advocating for a commitment to keep the teaching of civics education strong and meaningful. We will continue to advocate for changes to the state's voting laws to modernize our system and make it easier for people to register and vote. Together with the courts, the state Legislature, and the Executive, we will continue to advocate for changes in the criminal justice system that will make our system fairer and more efficient, and help prevent the tragedy of a wrongful conviction. Just as the American colonists watched as England rededicated itself to the Magna Carta's values of due process and liberty, the eyes of the world, on every continent, are watching our country at this moment.

We ask for the public's support. We ask for their confidence. It is not an overstatement to say that our justice system – even the future of our country – depends on this support and confidence. We need to breathe the knowledge and meaning of our country's founding principles into the streets, the school buildings, and into the forums where people are trying to make themselves heard.

There is much we can do. There is much we *must* do to ensure that the Magna Carta, as a symbol of liberty under the law, continues to guide the course of our country. Not just words etched in marble, but as a concept that lives in the spirit of our people. ■

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May 5 New York City (live & webcast)
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Retirement, Annuity and Life Insurance Benefit Planning
May 6 Albany
May 14 White Plains
May 20 Buffalo
May 29 New York City (live & webcast)
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The Freedom of Information and the Open Meetings Laws
(9:00 a.m. – 12:00 p.m.; live & webcast)
May 7 Albany

Insurance Coverage Update 2015
May 8 New York City; Syracuse
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May 29 Albany

Divorce Anniversaries II: Valuation and Executive Compensation
(9:00 a.m. – 1:35 p.m.)
May 8 Westchester
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David Paul Horowitz's 2015 CPLR Update
(5:30 p.m. – 9:10 p.m.; live & webcast)
May 13 New York City

DWI on Trial – Big Apple XV
(live & webcast)
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Starting a Solo Practice in New York
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May 14 New York City

What Lawyers Need to Know in the Social Media Age
(3:00 p.m. – 6:00 p.m.; live & webcast)
May 20 New York City

High Frequency Trading: Recent Developments in Enforcement and Regulation
(9:00 a.m. – 12:00 p.m.; live & webcast)
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Best Practices in Setting Up and Maintaining Client Relationships
(1:00 p.m. – 4:35 p.m.; live & webcast)
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The Tangled Web of Planning for Digital Assets
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June 4 Albany

Automobile Litigation Update
June 4 Buffalo; Long Island
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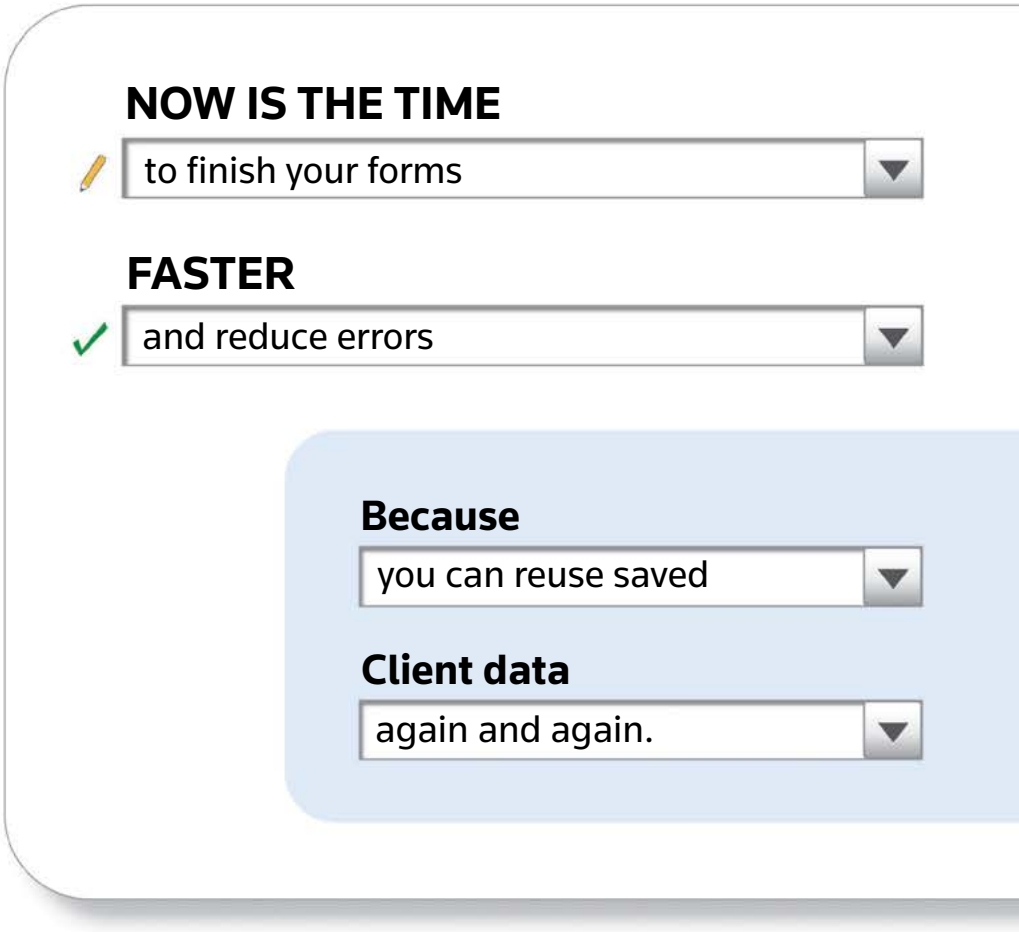

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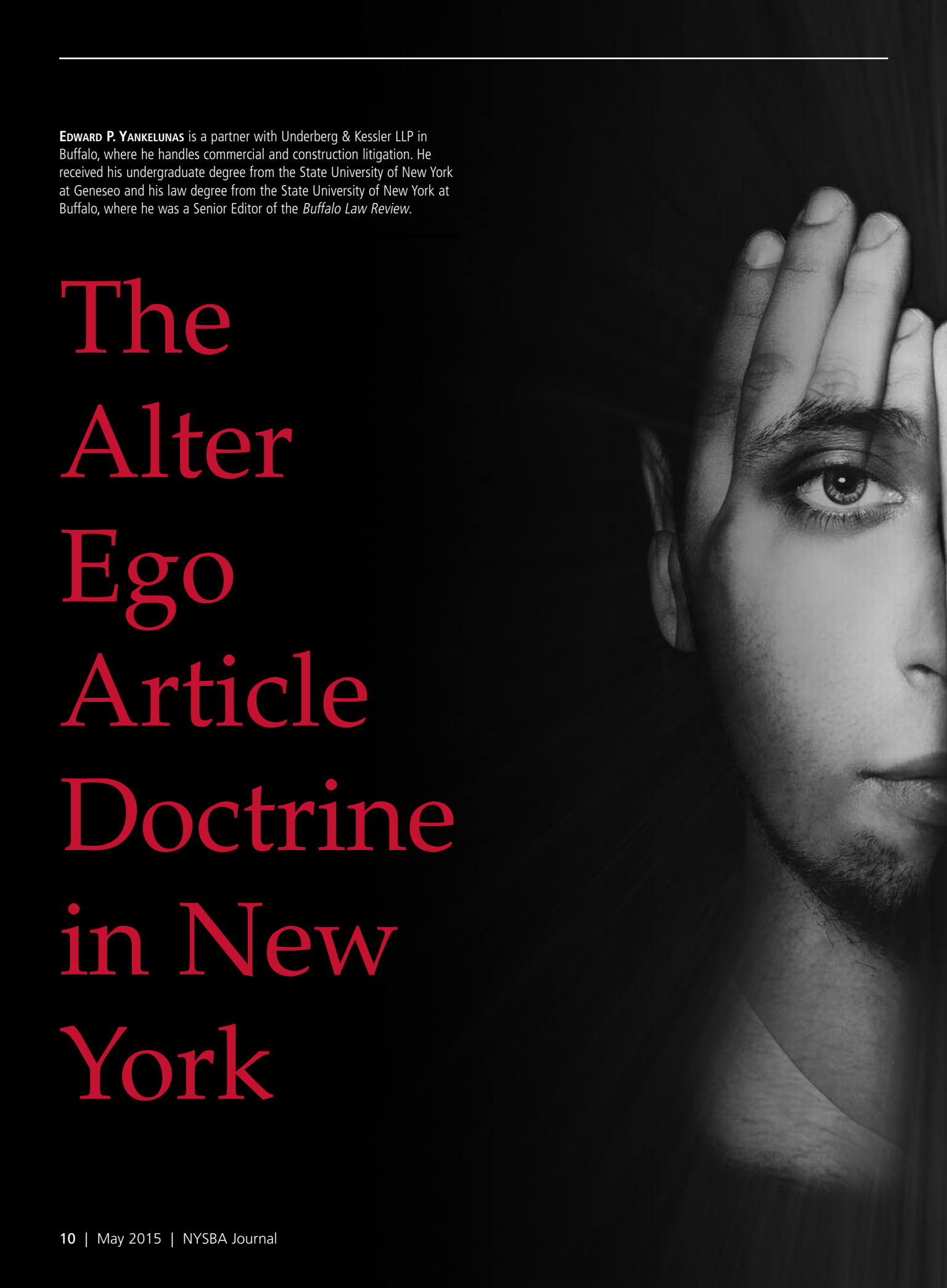
Edward P. Yankelunas is a partner with Underberg & Kessler LLP in Buffalo, where he handles commercial and construction litigation. He received his undergraduate degree from the State University of New York at Geneseo and his law degree from the State University of New York at Buffalo, where he was a Senior Editor of the *Buffalo Law Review*.

The Alter Ego Article Doctrine in New York



By Edward P. Yankelunas

For many generations, the corporation has been a key feature of the American enterprise system. By treating the corporation as a distinct entity separate and apart from its owner, the law has encouraged the innovation, entrepreneurship and industry that were the underpinnings of America's Industrial Revolution. Along with perpetual existence and transferability of ownership, the law permits a business to be incorporated for the very purpose of allowing the business owner to escape personal liability. Thus, ordinarily, the separate personalities of corporations and their owners "cannot be disregarded."[1] However, when the privilege to operate a business in the corporate form is abused, New York courts have disregarded the separate legal existence of the corporation and its owner and have pierced the corporate veil to hold business owners liable for the conduct and debts of the corporation.

Piercing the Veil Between the Corporation and Its Owner

As reflected by Judge Benjamin Cardozo's 1926 opinion in *Berkey v. Third Avenue Railway Co.*,[2] "general rules of agency" were then considered the basis for imposing personal liability on business owners for the "perversion of the privilege to do business in a corporate form."[3] Under that analysis, "whenever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts 'upon the principle of *respondeat superior* applicable even where the agent is a natural person.'"[4] Over time, the instrumentality rule developed in New York as the most "practical and effectively applicable theory for breaking down corporate immunity where equity requires . . . to circumvent fraud or other legal wrong."[5] Under the instrumentality rule, the issue is whether the business owner has completely dominated the business and used the corporation as an instrumentality to do the owner's personal business. If that question is answered in the affirmative and the owner's conduct has harmed a third party – typically a creditor – the court may conclude that the corporation is the owner's alter ego, that neither the corporation nor the business owner has a separate personality, and may hold the owner responsible for the acts and debts of the corporation. As the Third Department aptly stated in *Rohmer Associates v. Rohmer*, where a "corporate entity has been so dominated by an individual . . . and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result."[6] That reasoning has been applied in New York to pierce the veil of limited liability companies.[7] Notably, as the New York Court of Appeals emphasized in *Morris v. State Department of Taxation & Finance*, "[w]hile complete domination of the corporation is the key to piercing the corporate veil, especially when

the owners use the corporation as a mere device to further their personal rather than corporate business . . . such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward [a third party] is required."[8]

Such action presupposes that the dominated corporate entity has an underlying obligation or liability to the party asking the court to pierce the corporate veil. A request for such a ruling is not an independent cause of action.[9] Moreover, although preponderance of the evidence is the applicable standard of proof – not clear and convincing evidence[10] – due to the long-standing reluctance of New York courts to disregard the corporate form, the party asking the court to use the court's equitable powers to pierce the corporate veil bears a "heavy burden"[11] of showing the requisite domination and resulting inequitable consequences. That showing should include demonstrating a "causal relationship" between misuse of the corporate form and harm suffered by the party asking the court to pierce the veil.[12]

An evaluation of a claim that the corporate form should be disregarded under the alter ego doctrine is a case-specific analysis that is "equitable in nature" and dependent on the "attendant facts and equities."[13] No one factor is dispositive. The following factors are typically relied upon by the courts in New York to hold a business owner responsible for the debts and conduct of the entity dominated by the owner:[14]

- The owner shuttles funds in and out of personal and corporate bank accounts.
- The owner uses corporate funds and property for personal purposes and obligations.
- The corporation or limited liability company (LLC) is under-capitalized.
- There is a lack of corporate formalities (i.e., issuance of stock, election of directors, keeping corporate records, etc.).
- Common office space and telephone numbers are used by the corporation or LLC and the individual business owner.
- There is an overlap in ownership, officers, directors and personnel.

Proof of Fraud Is Relevant, but Not Essential

Significantly, it is not necessary to plead or prove fraud in order to pierce the corporate veil in New York. In fact, as the U.S. Court of Appeals for the Second Circuit ruled in *Passalacqua Builders, Inc. v. Resnick Developers South Inc. et al.*, it would be error for a court to instruct a jury "that plaintiffs were required to prove fraud" to pierce the corporate veil, stressing that "New York law . . . permits the corporate form to be disregarded where excessive control alone causes the complained of loss."[15] According to the court, the "critical question is whether the corporation is [a] 'shell' being used by the [business owners] to advance their own purely personal rather than corporate ends."[16]

Nevertheless, even if not essential, proof of fraud is certainly relevant.[17] Indeed, being able to show fraud can only help the party seeking to pierce the corporate veil because facts demonstrating fraud will increase the likelihood that the court will use its equitable powers to disregard the corporate form. Such showings would include the classic "indicia of fraud" – that is, the transfer of corporate funds between family members initiated by the dominating business owner, the owner retaining control of the funds after the transfer and the lack of consideration for the transfer.[18] For example, in *Colonial Surety Co. v. Lakeview Advisors, LLC*, the judgment debtor formed a limited liability company of which he was the manager and sole principal. In affirming the "reverse-piercing" of the LLC, the Fourth Department noted that the debtor not only used the LLC's funds for personal expenses but also used the LLC's funds to "make payments to his wife in lieu of his salary."[19]

Another fraud-based argument that has persuaded New York courts to pierce the corporate veil is "constructive fraud," which consists of the transfer of corporate assets without consideration in order to put assets beyond the reach of creditors. In *EAC of New York v. Capri 400, Inc.*,[20] the petitioner in that CPLR Article 52 proceeding sought to enforce a judgment against a corporation that had sold a restaurant business to the petitioner. The contract provided that the corporate seller hold a mortgage for $350,000 on the real estate involved in the transaction. However, at closing the mortgage was executed in favor of the corporation's owner, who then kept most of the sale proceeds, allegedly in payment of a loan owed to him by the corporation. The owner also claimed that he was entitled to a "dividend distribution" from the corporation in the amount of $346,000, which justified the assignment to him of the $350,000 mortgage. When the petitioner sought to pierce the corporate veil and enforce its judgment against the corporation's owner, the owner conceded his domination of the corporation. This turned the court's attention to whether the owner utilized his domination and control to perpetrate a "fraud or wrong against petitioners which resulted in their injury." Holding that the owner had engaged in a "constructive fraud" that injured the petitioner, the Third Department said:

> Here, the wrongful act consisted of a fraudulent transfer of corporate assets by [the owner], as director and officer of the corporations, to himself, as an individual. Even without proof of intent to defraud, constructive fraud may be shown where the debtor transfers assets without fair consideration and the debtor becomes insolvent. . . . [The owner's] transfer of all corporate assets – namely the mortgage – from [the corporation] to himself cannot be considered a conveyance in good faith, as it rendered the corporation insolvent at the expense of [the corporation's] creditors, namely petitioners.[21]

Piercing the Veil Between Corporations

The alter ego doctrine has also been applied in New York to pierce the veil between corporations when affiliate or subsidiary corporations are used by a dominating parent corporation to engage in wrongful conduct. As stated by the U.S. District Court for the Southern District of New York in *Trabucco v. Intesa Sanpaolo, S.p.A*,

> [u]nder New York Law, one corporation is considered to be mere alter ego when it "has been so dominated by . . . another corporation . . . and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own." . . . Then, the dominating corporation will be held liable for the actions of its subsidiary . . . Alter ego cases typically involve the determination of "which corporate parties may be cast in damages for the breach" of a contract. . . . In this analysis, control is the key.[22]

the policyholder-plaintiffs alleged that after obtaining approval from the New York State Superintendent of Insurance to restructure an insurance corporation and its related subsidiaries and affiliates, the corporate parent allegedly stripped approximately $5 billion in cash and securities from the subsidiary insurance company for no consideration in violation of the N.Y. Debtor and Creditor Law and the parent's common law duties. Concluding that the policyholders' "complaint adequately states a claim for abuse of the corporate form that may support a declaration piercing the corporate veil of the [subsidiary insurance company]," the Court of Appeals reinstated the policyholders' claims that the parent "abused its control of its wholly-owned subsidiary . . . by causing it to engage in harmful transactions that now shield billions of dollars in assets from plaintiffs and expose them to significant liability."[26]

Constructive fraud consists of the transfer of corporate assets without consideration in order to put assets beyond the reach of creditors.

The following are factors considered by the courts in New York in determining whether the alter ego doctrine should be used to pierce the veil between corporate entities.[23] Again, no one factor is dispositive and "all need not be present to support a finding of alter ego status":[24]

- the absence of corporate formalities such as issuance of stock, election of directors, etc.;
- inadequate capitalization;
- whether funds are put in and taken out of the corporation for personal rather than corporate purposes;
- overlap in ownership, officers, directors and personnel;
- common office space, address and telephone number for the corporate entities;
- the amount of business discretion displayed by the allegedly dominated corporation;
- whether the related corporations deal with the dominated corporation at arm's-length;
- whether the corporations are treated as independent profit centers;
- the payment or guarantee of debts of the dominated corporation by other corporations in the corporate group;
- whether the dominating corporation in question uses property owned by the dominated corporation as if it were its own.

The N.Y. Court of Appeals was called upon to pierce the veil between corporations in *ABM AMRO Bank N.V. v. MBIA Inc.*,[25] a case resulting from the deterioration of the world financial markets that began in 2007. There,

Likewise, in *Last Time Beverage Corp. v. F&V Distribution Co., LLC,* the plaintiff-judgment creditor obtained a judgment against a limited liability company (LLC) relative to various soft drink distribution agreements. It sought to pierce the LLC's corporate veil to hold a related corporation responsible for the judgment on the grounds that the LLC and the corporation were controlled by the same owner. The proof presented to the court showed that the LLC and the alter ego corporation had overlapping ownership, officers and personnel, that both entities used the same office space, that the LLC was undercapitalized without a "substantial loan" from the related corporation, and that both entities failed to observe corporate record-keeping formalities. The Second Department upheld the ruling of a referee that the LLC and the corporation were "jointly and severally liable" under the agreements at issue and that the LLC and the corporation "were alter egos of [their owner] and, accordingly, of one another."[27]

Similarly, in *N.Y. District Council of Carpenters Pension Fund v. Perimeter Interiors Inc.*, a union asserted a claim for ERISA contributions. Both the corporation that employed union carpenters and a related non-union corporation were dominated by the same individual owner. The non-union corporation never signed the relevant union collective bargaining agreement (CBA). The court noted the existence of evidence satisfying certain of the corporation-to-corporation alter ego factors listed above, such as common employees and commingled funds. As for wrongful conduct, the court found the business owner secretly used the non-union corporation to receive and distribute wages covered by the CBA for which ERISA

contributions were payable. After finding that both the union and non-union corporations were "alter egos of one another," the court concluded that the non-union corporation was just as obligated as the union corporation under the CBA to pay the required contributions.[28]

Reverse Piercing

Courts traditionally pierce the corporate veil to hold a controlling shareholder personally liable for a corporate debt. However, where the business entity and its controlling owner are alter egos, under the reverse-piercing doctrine the "piercing flows in the opposite direction and makes the corporation liable for the debt of the [owner]."[29] As long as the required showing is made, "[t]he direction of the piercing [traditional or reverse] is immaterial."[30] "In both situations there is a disregard of the corporate form, and the controlling shareholders [or business owners] are treated as alter egos of the corporation and vice versa."[31] In effect, since the business owner and the corporation are alter egos, they are merely two sides of the same coin.

Reverse-piercing has also been applied between corporations to hold a subsidiary liable for the debts of its parent. While applying veil piercing in that context may not be common or traditional, as Judge Learned Hand wrote in 1929 in *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, "it would be too much to say that a subsidiary can never be liable for a transaction done in the name of a parent."[32] Under recent cases applying New York law, the courts have held that a creditor may "reach the subsidiary through its parent, or in other words, to collapse . . . the parent, into . . . the subsidiary."[33] Guided by the same "rules that govern straight veil piercing," using reverse piercing a court may "hold a subsidiary liable for the debts of its parent."[34]

The court's description of reverse piercing among corporate entities in *Miramax Film Corp. v. Abraham et al.* is instructive. Noting that reverse piercing the veil of a dominated business entity to impose liability on the dominating entity may be "rare" but "appropriate in cases where the alter ego is being used as a 'screen' for the dominating entity," the U.S. District Court for the Southern District of New York stated:

> If it is found that a shell corporation was used by a dominating entity as a means to commit a fraud or other wrongful act against a plaintiff, then the legal fiction of corporate separateness vanishes, and the dominating entity and the shell corporation are deemed a single unit. This would render the assets of the dominating entity and the shell corporation to be deemed one and the same.[35]

Put another way, since the dominating parent corporation and the dominated subsidiary are alter egos of each other, and since piercing between alter egos flows in both directions, the subsidiary is liable for the debts and conduct of the parent, just as the parent is held liable for the debts and conduct of the subsidiary.

Substance Over Form

Moreover, in reviewing a request to pierce the corporate veil under the alter ego theory, New York courts will not place form over substance.[36] The accounting treatment of a transaction is not dispositive. A court will not permit accounting mechanisms to trump the facts and to be improperly used to shield assets from creditors, or to otherwise engage in wrongful conduct. Rather, the focus is not on the accounting treatment of a transaction, but on the reality of the actual conduct of the dominating business owner or corporation, and whether the conduct is fraudulent or inequitable and has caused harm.

Consider the following example: A judgment debtor is the owner of a business that he controls; the owner uses funds deposited in the corporate bank account for purely personal purposes and transfers corporate funds from that bank account to his wife for no consideration. In opposing the judgment creditor's claim that the corporation and the owner are merely alter egos, the business owner relies on financial statements and tax returns showing that his use of corporate funds for personal purposes, as well as the transfer of corporate funds to his wife, are treated as distributions of corporate earnings to the owner. Further assume, however, that in order to evade his judgment creditor, the owner never takes possession of the alleged corporate distributions by depositing the funds in his personal bank account. Focusing on the reality that the owner never had possession of the alleged distributions of income, which enabled him to evade his personal judgment creditor, a New York court will likely reject the judgment debtor's accounting explanation and hold that the owner and corporation are alter egos of each other and will pierce the veil of the corporation to prevent the owner from using the corporation to frustrate the rights of the judgment creditor.

Conclusion

With a certain literary flair, the U.S. Court of Appeals for the Second Circuit stated in *Brunswick Corp. v. Waxman* that the law in New York relative to piercing the corporate veil "is hardly as clear as a mountain lake in springtime."[37] One reason for this statement is that equity is not an exact science. Considered "impossible to define completely," equity has been described as a means to ameliorate "harsh or otherwise undesirable effects resulting from a strict application of any particular rule of law."[38] In the context of corporations, a strict application of the law would leave a court without the ability to fashion a remedy when the corporate form is used to evade a judgment or some other obligation, or is otherwise abused at the expense of a third party. Fortunately, however, settled notions of equity provide New York courts with the power to pierce the corporate veil in order to strike the proper balance between the laudable policy behind the legal fiction of the separate identity of a corporation and its owner, and the "need to protect those who deal with the corporation."[39] Although the burden of convincing a court to pierce the corporate veil is heavy, if that burden

is satisfied by the "attendant facts and equities," New York courts have not hesitated to disregard the fiction of corporate separateness in order to achieve a fair and just result. ■

1. *Port Chester Elec. Constr. Corp. v. Atlas et al.*, 40 N.Y.2d 652, 656 (1976).
2. 244 N.Y. 84, 95 (1926).
3. *Id.*
4. *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966) (quoting *Rapid Tr. Subway Constr. Co. v. City of N.Y.*, 259 N.Y. 472, 488 (1932)).
5. *Lowendahl v. Baltimore & Ohio R.R. Co.*, 247 A.D. 144, 156 (1st Dep't), *aff'd*, 272 N.Y. 360 (1936); *see also Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978), *aff'd*, 599 F.2d 34 (2d Cir. 1979).
6. 36 A.D.3d 990, 991 (3d Dep't 2007).
7. *Last Time Beverage Corp. v. F&V Distrib. Co., LLC*, 98 A.D.3d 947 (2d Dep't 2012); *Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d 1073 (2d Dep't 2012); *Colonial Sur. Co. v. Lakeview Advisors, LLC*, 93 A.D.3d 1253 (4th Dep't 2012).
8. 82 N.Y.2d 135, 141–42 (1993).
9. *First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors*, 871 F. Supp. 2d 103, 124 (E.D.N.Y. 2012); *Robinson v. Day*, 103 A.D.3d 584, 588 (1st Dep't 2013).
10. *Rotella v. Derner*, 283 A.D.2d 1026 (4th Dep't 2001).
11. *TNS Holdings Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998).
12. *Giordano v. Thompson*, 438 F. Supp. 2d 35, 48 (E.D.N.Y. 2005).
13. *Morris v. State of N.Y. Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).
14. *Miramax Film Corp. v. Abraham, et al.*, 2003 U.S. Dist. LEXIS 21346 at *22–23 (S.D.N.Y. 2003); *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1017 (2d Dep't 2007); *John John, LLC v. Exit 63 Dev., LLC*, 35 A.D.3d 540, 541 (2d Dep't 2006).
15. 933 F.2d 131, 141 (2d Cir. 1991).
16. *Id.* at 138.
17. *Julien J. Studley, Inc. v. Lefrak*, 48 N.Y.2d 954 (1979); *Rotella*, 283 A.D.2d 1026.
18. *FDIC v. Conte*, 204 A.D.2d 845, 846 (3d Dep't 1994).
19. 93 A.D.3d 1253, 1255 (4th Dep't 2012).
20. 49 A.D.3d 1006 (3d Dep't 2008).
21. *Id.* at 1007 (internal citations omitted).
22. 695 F. Supp. 2d 98, 107 (S.D.N.Y. 2010).
23. *Passalacqua Builders, Inc.*, 933 F.2d at 139.
24. *N.Y. Dist. Council of Carpenters Pension Fund v. Perimeter Interiors, Inc.*, 657 F. Supp. 2d 410, 421 (S.D.N.Y. 2009) (quoting *C.E.K. Indus. Mech. Contractors, Inc. v. N.L.R.B.*, 921 F.2d 350, 354 (1st Cir. 1990)).
25. 17 N.Y.3d 208 (2011).
26. *Id.* at 229.
27. 98 A.D.3d 947, 950–51 (2d Dep't 2012).
28. 657 F. Supp. 2d 410, 421–22 (S.D.N.Y. 2009).
29. *Sweeney, Cohn, Stahl & Vaccaro v. Kane*, 6 A.D.3d 72, 75 (2d Dep't 2004).
30. *State of N.Y. v. Easton*, 169 Misc. 2d 282, 290 (Sup. Ct., Albany Co. 1995).
31. *Sweeney, Cohn, Stahl & Vaccaro*, 6 A.D.3d at 76.
32. 31 F.2d 265, 267 (2d Cir. 1929).
33. *Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 320 (S.D.N.Y. 1999).
34. *Id.* at 321.
35. 2003 WL 22832384, *10 (S.D.N.Y. Nov. 25, 2003) (citations omitted).
36. *Wajilam Exports (Singapore) PTE. LTD v. ATL Shipping Ltd. et al.*, 475 F. Supp. 2d 275, 282 (S.D.N.Y. 2006); *Vebeliunas v. Babitt*, 2002 U.S. Dist. LEXIS 1271, *29 (S.D.N.Y. 2002).
37. 599 F.2d 34, 35 (2d Cir. 1979).
38. 55 N.Y. Jur. 2d, Equity, § 1, p. 423 (1986).
39. *Passalacqua Builders, Inc.*, 933 F.2d at 139.

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"That's No Excuse"

Introduction

Last issue's column discussed the rules governing witnesses's ability to make changes to their deposition transcript, and concluded with a recap of reasons that courts have approved to explain changes to the testimony. This issue's column discusses cases where courts have rejected the reasons proffered to explain changes to deposition testimony.

"I Was Nervous"

In *Ashford v. Tannenhauser*,[1] the plaintiff was injured in a fall from a ladder and testified at his deposition

> that he used a straight, 10-foot-tall aluminum ladder to gain access to the shelf, which was 12 to 15 feet above the ground. He further indicated that the feet of the ladder were equipped with rubber pads, and that there was no problem with either the feet or the pads. Before ascending the ladder, he made sure that the rubber pads were flat on the ground, and that the ladder was stable and safe. The injured plaintiff further testified that he climbed to the top of the ladder and that it "walked out [or] slid out from under [him]" as he prepared to place his left foot on the shelf. According to the injured plaintiff, his employer, North Shore Plumbing Supply, Inc. (hereinafter North Shore), was the owner of the ladder. The injured plaintiff had "no idea" why the ladder slid out from under him.[2]

Thereafter, the plaintiff served an errata sheet that "radically changed much of his earlier testimony."[3] When the defendant moved for summary judgment, the trial court considered, *inter alia*, the errata sheet, and denied the motion. The Second Department reversed:

> In his post-deposition errata sheet, the injured plaintiff radically changed much of his earlier testimony, with the vague explanation that he had been "nervous" during his deposition. CPLR 3116(a) provides that a "deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of reasons given by the witness for making them." Since the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall. In the absence of the proposed alterations, the injured plaintiff's deposition testimony was insufficient to raise a triable issue of fact with respect to the defectiveness or inadequacy of the ladder so as to warrant the denial of summary judgment.[4]

Ashford Followed in the Second Department

Citing *Ashford*, in 2014 the Second Department, in *S.E.M. Security Systems, Inc. v. Earl Lorence Enterprises*,[5] held:

> [U]pon reargument, the Supreme Court properly adhered to its determination granting the plaintiff's application to strike an errata sheet attached to the transcript of the deposition of the defendant [], since the defendant did not provide adequate reasons for the proposed changes to his deposition testimony.[6]

Unfortunately, the *S.E.M.* court did not set forth the reasons proffered for the deposition changes.

The most recent Second Department case citing *Ashford* is *Horn v. 197 5th Avenue Corp.*,[7] which reversed a trial court's denial of summary judgment on a record that included the changes made by the plaintiff to her deposition transcript, holding that "the plaintiff failed to provide an adequate reason for the numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony."[8]

Given the facts in *Horn*, it is an uphill struggle to argue that the deponent's changes to the deposition transcript should have been given credence by the trial court:

> The plaintiff commenced this action against the defendants to recover damages for injuries she sustained when she allegedly

tripped and fell over a sidewalk cellar door adjacent to the defendants' property at 197 Fifth Avenue in Brooklyn. However, at her deposition, the plaintiff repeatedly testified in great detail that she tripped and fell at 140 Fifth Avenue, a location which was approximately two to three blocks away and on the other side of the street from the defendants' property. The plaintiff thoroughly described the route she took and the direction and distance she traveled that brought her to the site of her accident, as well as the name and address of the business at 140 Fifth Avenue where she fell. Moreover, she testified that she confirmed the address of the location by visiting the site of her accident a few days later, at which time she wrote down the address, and she circled on a photograph of the cellar door at 140 Fifth Avenue the spot on which she claimed to have tripped.

Notwithstanding the detailed, consistent, and emphatic nature of the plaintiff's deposition testimony regarding the location of her accident, she subsequently executed an errata sheet containing numerous substantive "corrections" which conflicted with various portions of her testimony and which sought to establish that she actually fell at 197 Fifth Avenue, not 140 Fifth Avenue. The only reason proffered for these changes was that, prior to her deposition, she was shown photographs of 140 Fifth Avenue that mistakenly had been taken by an investigator hired by her attorney, and that she thereafter premised her testimony on her accident having occurred at the location depicted in those photographs. The defendants Li Xing Hellen Weng and Sun Luck Restaurant, Inc., moved, and the defendant 197 5th Avenue Corp. separately moved, to strike the errata sheet and for summary judgment dismissing the complaint insofar as asserted against each of them.[9]

Third Department Cites *Ashford*, but Follows *Cillo*

In *Lieblich v. Saint Peter's Hospital of the City of Albany*,[10] the defendants appealed from a trial court order that denied the plaintiff's motion to strike the errata sheet submitted by a nurse employed by the defendant hospital, but granted the branch of the motion requesting a further deposition of the witness based upon the changes made to her transcript:

> [A]lthough Hassel appears to have been deposed without incident, an issue subsequently arose regarding the errata sheet to her deposition, wherein Hassel made several substantive changes to the testimony given during the course of her deposition.[11]
>
> * * *
>
> [W]ith respect to the issue of the errata sheet, CPLR 3116(a) provides, in relevant part, that "any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." Here, although there is no question that Hassel made significant, substantive amendments to her examination before trial testimony, "a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor." Based upon our review of Hassel's errata sheet and the notations contained upon the relevant pages of her deposition testimony, we are satisfied that an appropriate statement of the reasons for such changes was provided. Accordingly, Supreme Court did not abuse its discretion in refusing to strike the errata sheet. That said, Supreme Court also appropriately determined that, given the magnitude of Hassel's changes, plaintiff was entitled to conduct a further deposition of her.[12]

Unfortunately, *Lieblich* also fails to set forth the reasons offered by the deponent for her deposition changes. As authority for its holding permitting the deposition changes, the Third Department cited a First Department decision, *Cillo v. Resjefal Corp.*,[13] which permitted "substantive" changes that were accompanied by a statement of the reason for the changes:

> Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor. Plaintiffs' amended errata sheets are accompanied by such a statement. The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial.[14]

The Third Department cited *Ashford*, but after the signal "compare."

An Issue of Credibility

Cillo's determination that the deposition changes "should be left for trial" was followed by the Second Department in two cases decided before *Ashford*.

The first case citing *Cillo* was *Williams v. O & Y Concord 60 Broad Street Co.*:[15]

> We further note that the conflict between the original deposition testimony of the appellant's president and the correction sheet raises an issue of credibility which may not be resolved on a motion for summary judgment.[16]

The same holding is found in *Surdo v. Albany Collision Supply, Inc*.[17]

The First Department also cited *Cillo* in *Marcano v. Calvary Hospital:*[18]

> The existing record presents a triable issue as to whether any spoliation of evidence actually occurred, and that issue should be submitted to the jury at trial (*see* PJI 1:77, 1:77.1 [2004]). In this regard, we note that, if Evelyn's correction of his deposition testi-

mony is credited, it follows that no spoliation occurred, since a tape not showing any part of the subject incident would not constitute "matter material and necessary in the prosecution or defense of [this] action." It is for the jury to determine, after being appropriately instructed, whether Evelyn's correction of his testimony (which does not appear to be patently false) is credible, and, if the correction is found not credible, to determine the inferences to be drawn from that finding. While the point is not determinative, we note that whether the incident would have been captured from the camera's vantage point is a matter that apparently could have been ascertained by an inspection of the premises, which plaintiffs apparently did not seek. Finally, under the circumstances, we deem it appropriate to exercise our discretion to excuse any brief untimeliness in the correction of Evelyn's testimony, or in the submission of the statement of reasons for such correction.[19]

Conclusion

Ashford and *Cillo* represent two distinct approaches to the admissibility of deposition corrections that, ultimately, hinge on the court's role in assessing credibility.

Next issue's column will discuss this tension as well as another common scenario where courts make what are, for all intents and purposes, credibility determinations. ■

1. 108 A.D.3d 735 (2d Dep't 2013).
2. *Id.* at 735–36.
3. *Id.* at 736.
4. *Id.* at 736–37 (citations omitted).
5. 120 A.D.3d 1211, 1215 (2d Dep't 2014).
6. *Id.* at 1215 (citation omitted).
7. 123 A.D.3d 768 (2d Dep't 2014).
8. *Id.* at 770.
9. *Id.* at 769–70.
10. 112 A.D.3d 1202 (3d Dep't 2013).
11. *Id.* at 1203.
12. *Id.* at 1205–06 (citations omitted).
13. 295 A.D.2d 257 (1st Dep't 2002). *Cillo* was discussed in the last issue's column.
14. *Id.* at 257 (citations omitted)
15. 304 A.D.2d 570 (2d Dep't 2003).
16. *Id.* at 571 (citations omitted).
17. 8 A.D.3d 655 (2d Dep't 2004) ("In any event, the conflict between Salmieri's original deposition testimony and his correction raised an issue of credibility which could not be resolved on a motion for summary judgment (citations omitted).").
18. 13 A.D.3d 109 (1st Dep't 2004).
19. *Id.* at 110–11 (citations omitted).

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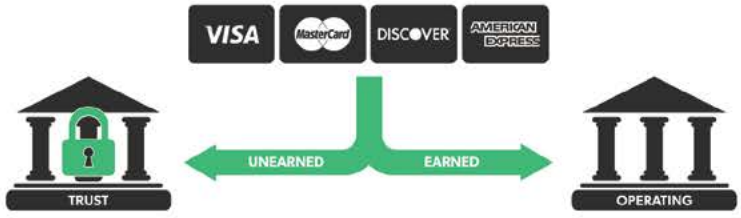

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Judiciary Law Criminal Contempt: Why All the Confusion?

By John J. Brunetti

In a 2014 opinion, the N.Y. Court of Appeals observed: "This appeal illustrates the confusion attendant to the proper legal characterization of a contempt determination under our Judiciary Law. That confusion is compounded when, as in the case before us, a defendant is also prosecuted for criminal contempt under the Penal Law. The opinions of the City Court and County Court, as well as the arguments propounded by the People and defendant, illustrate the challenges faced by those seeking to bring coherence to this area of the law." This article will set forth the rules applicable to criminal contempt under the N.Y. Judiciary Law and conclude with a discussion of how a 2014 Court of Appeals decision has changed the criminal contempt landscape.

The Two Different Types of Judiciary Law Contempt

There are two types of Judiciary Law contempt: criminal contempt under § 750 of the Judiciary Law and civil contempt under § 753 of the Judiciary Law.

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Conduct Constituting Judiciary Law Criminal Contempt

In *People v. Sweat*,[1] the Court noted:

> [A] court may hold a person in criminal contempt for "[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority"; "[b]reach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings"; "[w]ilful disobedience to its lawful mandate"; "[r]esistance wilfully offered to its lawful mandate"; "[c]ontumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory"; "[p]ublication of a false, or grossly inaccurate report of its proceedings [except] a court [cannot] punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein"; or "[w]ilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law . . . or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury or subpoenaed witness service."[2]

Punishment for Criminal Contempt

Jail

Punishment for criminal contempt may not exceed imprisonment for 30 days (three months for violation of an order of priotection under the N.Y. Criminal Procedure Law).[3] Consider the anomaly: Under Judiciary Law § 774(1), a court may order that a civil contemnor be imprisoned for up to six months (willfulness not required) while a criminal contemnor (willfulness required) may only be jailed for 30 days. That is why the First Department once termed the civil contempt penalty provision to be "aberrant and extraordinary" so as to require that it be interpreted "to bring it into conformity with the rest of the contempt statute."[4]

Good Time on Jail Term

The allowance of one-third time off for good behavior for a person found to have engaged in contumacious conduct will apply, unless there is a purgation clause in the mandate of commitment.[5]

Fine

The maximum fine permitted is $1,000.[6]

Other Penalties

Community service may not be ordered under Judiciary Law § 751.[7]

The Three Main Differences Between Criminal and Civil Contempt

Rationale for Court's Exercise of Contempt Powers

The Court of Appeals once explained the distinction between civil and criminal contempt as follows:

> Although the same act may be punishable as both a civil and a criminal contempt, the two types of contempt serve separate and distinct purposes. A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both. A criminal contempt, on the other hand, involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates.[8]

Limitation on Civil Contempt/No Limitation on Criminal Contempt

Civil contempt is limited to civil actions or proceedings: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a *right or remedy of a party to a civil action or special proceeding*, pending in the court may be defeated, impaired, impeded, or prejudiced."[9]

Civil contempt proceedings are initiated not to punish, but to compensate the prevailing civil party or to coerce compliance with the order/judgment won by the prevailing civil party.[10] Civil contempt is litigant-initiated,[11] and there is no discretion – a court's order of refusal to grant a civil contempt motion may be appealed and reversed.[12]

Criminal contempt is not limited to criminal cases. The term "criminal contempt" is misleading because a finding of criminal contempt under the Judiciary Law may be entered in any criminal or civil action or proceeding. Criminal contempt is judge-initiated (although a party may request that the court initiate it). The judge has the discretion to institute the proceeding. That makes sense since its purpose is to vindicate the authority of the court and engender respect for its orders, not to provide a remedy to a litigant as is the case with civil contempt.

Willfulness Required for Criminal Contempt, Not Civil Contempt

Criminal contempt requires proof of willful disobedience of a lawful mandate while civil contempt requires merely disobedience of a lawful mandate. Despite some case law suggesting that civil contempt requires a *lesser* degree of willfulness, even at the Court of Appeals level,[13] the law is clear that "'willful' disobedience is a criminal contempt, while a mere disobedience, by which the right of a party to an action is defeated or hindered, is treated otherwise"[14] and "the mere act of disobedience, regardless of its motive, is sufficient" for civil contempt.[15]

All Courts, Including Justice Courts, Have Contempt Powers

Contempt powers may be exercised by all courts of record defined in Judiciary Law § 2, plus all city,[16] district[17] and justice courts.[18]

The Collateral Bar Rule

The collateral bar rule applies to criminal contempt under the Judiciary Law. The rule states:

> [A]n order of the court must be obeyed, no matter how erroneous it may be, so long as the court is possessed of jurisdiction and its order is not void on its face. This requirement of obedience to the lawful mandate of the court obtains even though it is afterwards held that the order was erroneous or improvidently made or granted by the court under misapprehension or mistake.[19]

Said another way, it is not up to a citizen to determine the validity of the court's order and then decide to disobey it. This rule is intended to foster respect for orders of the court so as to encourage appeals from invalid orders rather than outright defiance of them. Nevertheless, the rule has exceptions.

The rule does not apply where there are no adequate or other appropriate review procedures available to challenge the order. Nor does the rule apply where a person is required by the order to irretrievably surrender a constitutional right. For example, the validity of a court's order directing a witness to answer a question which the witness claims would incriminate him may be challenged in the contempt proceeding.

Whether the collateral bar rule applies to Penal Law contempt prosecutions is an unsettled question. Two Appellate Division opinions suggest that it may,[20] while one Court of Appeals decision suggests that the validity of an order may be challenged via a motion to dismiss after a criminal contempt prosecution has been instituted.[21]

Jeopardy Consequences of a Judiciary Law Criminal Contempt Adjudication

Notwithstanding all of the non-criminal attributes of Judiciary Law criminal contempt, and despite a Penal Law provision to the contrary,[22] U.S. Supreme Court and Court of Appeals case law hold that, to the extent the Penal Law purports to allow prosecution and punishment after punishment for the same conduct has been imposed pursuant to the Judiciary Law, it is violative of double jeopardy.[23] Double jeopardy bars such a subsequent prosecution, unless there is a defect in the Judiciary Law contempt proceeding resulting in a vacatur of the adjudication.[24] Also note that a criminal contempt adjudication that is not followed by the actual imposition of punishment will not bar a subsequent Penal Law prosecution.[25]

Requirements for a Valid Adjudication When Criminal Contempt Is Violation of Lawful Mandate

Lawful Mandate Defined

Older cases reason that since a mandate is defined in the General Construction Law § 28-a as a "writ, process or other written direction," there can be no contempt unless the court's lawful mandate is in writing.[26] More recent Court of Appeals precedent indicates otherwise.

In *Brostoff v. Berkman*,[27] decided in 1992, the Court upheld the criminal contempt adjudication of an assistant district attorney (ADA) who refused to obey the order of a judge presiding at a calendar call, when the judge ordered him to leave the well area of the courtroom. The Court upheld the adjudication of summary contempt because the ADA "willfully refused to exit the well area after an explicit and unambiguous judicial order to do so (Judiciary Law § 750[A][3], [4])." This makes sense because it allows the court to issue a valid verbal order directing a witness to answer a particular question and to punish a juror for concealment in responding to questions by the prosecutor.[28]

Lawful Mandate – One Not Void on Its Face

As noted earlier, in *State of New York v. Congress of Racial Equality*, the court stated that if a court has jurisdiction and its order is not void on its face, then the order must be obeyed; obedience is required, whatever the ultimate outcome.[29]

Lawful Mandate Must Be Clear and Unambiguous

In order to support a criminal or civil contempt finding, the order alleged to have been violated must be clear and unambiguous.[30] In attempting to address the issue of degrees of contempt, the Fourth Department once observed that "[w]here the terms of the order are vague or indefinite with respect to whether a particular action was required or prohibited, a finding of willful disobedience is, of course, less likely."[31] That assertion is misleading because, if an order is vague, it will never be a basis for civil or criminal contempt since the Court of Appeals requires a clear and unequivocal order in civil as well as criminal contempt.[32]

Service of the Mandate Alleged to Have Been Violated

Except for those cases where a verbal mandate is authorized because it is issued in the courtroom, the contemnor must be properly served with the mandate, which usually means, in accordance with CPLR 308, whether the mandate be a subpoena or other court order. Note, however, that there is a 1905 Court of Appeals case[33] and a 2006 Third Department case that both suggest that actual knowledge of the existence and contents of the mandate may be sufficient to support a criminal contempt adjudication in unique circumstances.[34]

The Two Methods of Adjudication for Criminal Contempt

The statute provides that criminal contempt "committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a

reasonable time to make a defense."[35] Thus, there are two different procedures pursuant to which an adjudication of criminal contempt may be made:

1. Summary.
2. After notice with hearing.

Case Law Requirements for a Valid Criminal Contempt Adjudication on Notice With a Hearing

Personal Jurisdiction

When the alleged contumacious conduct does not occur within the immediate view and presence of the court, the mandated procedure is to notify the putative contemnor.[36] The criminal contempt statute does not provide any type of procedure to satisfy the notice requirement, but case law does: "Where a court commences a criminal contempt proceeding against an alleged contemnor based on his willful disobedience of the court's lawful mandate, the failure to personally serve the alleged contemnor with notice of the proceeding is a jurisdictional defect."[37] Service pursuant to CPLR 308(2) (suitable age plus mail) is sufficient.[38] Service by regular mail[39] and by fax[40] are both insufficient.

Bail Orders

There does not appear to be any authority under which a person may be held in lieu of bail with or without a purge clause prior to a hearing on a charge of criminal contempt under § 750(A) of the Judiciary Law held pursuant to § 751 of the Judiciary Law.

Procedural Rights of the Contemnor – Criminal Contempt

In 1970 the Fourth Department said the following and it appears to still be good law: "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself. . . . Due process of law requires that the accused should be advised of the charges against him and have a reasonable opportunity to meet them by way of defense or explanation with the assistance of counsel and the right to call witnesses. . . . We also recognize as fundamental in a proceeding of this nature the right to be confronted by the accuser and to cross-examine him."[41] The First and Second Departments rules require similar procedures.[42]

Disqualification of Judge

In criminal contempt cases, the judge initiates the proceeding, but since name-calling and disruption in the court's presence is punishable summarily, the circumstances where recusal may be required are usually limited to criminal contempt on notice cases.[43] In such case, it may be difficult for the accused to demonstrate grounds for recusal since any "pre-hearing comments [will be viewed as] based on facts learned through [the court's] adjudicatory functions and [will not] reflect bias against [the accused] but rather a reasonable view of the nature of the case" and since the court ordinarily is able "to reach its decision based solely on the evidence presented at the hearing."[44]

The Need for a Hearing/Conducting the Hearing

A person accused of criminal contempt enjoys procedural rights akin to those of a Penal Law criminal defendant. Therefore, entry of a default judgment in a criminal contempt case would not be permissible. There must always be a hearing in a criminal contempt proceeding on notice unless the contemnor waives a hearing. Also, since a criminal contempt proceeding is initiated *sua sponte*, there is no moving party to subpoena witnesses and ask questions. If the contempt was based entirely on out-of-court conduct, the court must proceed with caution to avoid acting in a prosecutorial role[45] or recuse itself.

Case Law Requirements for Valid Summary Criminal Contempt Adjudication

Introduction

By its terms, the criminal contempt statute allows the extreme measure of summary adjudication without notice or hearing whenever the offending conduct is committed in the immediate view and presence of the court.[46] Yet, there are additional "laws" established by appellate rulings and Appellate Division rules based upon them.[47] Taken together, the statute and case law establish five necessary components to any valid summary criminal contempt adjudication:

1. conduct violating Judiciary Law § 750(A) – usually disruption or refusal to testify, but sometimes disobedience of mandate;
2. in the immediate view and presence of the court;
3. after a warning wherever possible;
4. under circumstances which made resort to summary adjudication necessary; and
5. an opportunity for the contemnor to speak in mitigation.

A Violation of Judiciary Law § 750

The three most common types of contempt where the summary power may properly be resorted to are: (1) disorderly, contemptuous, or insolent behavior directly tending to interrupt its proceedings, or to impair the respect due to its authority; (2) willful violation of a lawful mandate; and (3) contumacious and unlawful refusal to be sworn as a witness or, after being sworn, to answer any legal and proper interrogatory.

The "Immediate View and Presence" Requirement

Section 751(1) grants the court the power to punish contempt summarily for any violation of § 750(A) of the Judiciary Law. Thus, in some respects, the words "in its immediate view and presence" contained in subdivision

(1) of § 750(A) are superfluous because any conduct proscribed by § 750(A) in its seven subdivisions, if committed in the immediate view and presence of the court, may be punished summarily in accordance with § 751 of the Judiciary Law.[48]

The Necessity for an Immediate Adjudication

The rationale for empowering a court to resort to such an extreme sanction as summary adjudication is "the need for the preservation of the immediate order in the courtroom which justifies the summary procedure – one so summary that the right and need for an evidentiary hearing, counsel, opportunity for adjournment, reference to another judge, and the like, are not allowable because it would be entirely frustrative of the maintenance of order."[49] Therefore, while the statute reads as though a court may always hold a person in summary criminal contempt and impose immediate punishment for contumacious conduct occurring in its immediate view and presence, case law requires an "immediate problem of order" which justifies dispensing with

> Civil contempt proceedings are initiated not to punish, but to compensate the prevailing civil party or to coerce compliance.

"more relaxed proceedings . . . , including if appropriate, referral to another judge for determination."[50] Thus, the use of summary power has been found improper both where the judge adjudicated an attorney for contempt, but waited until end of trial to impose punishment,[51] and where the judge adjudicated a witness in contempt for taking the stand while wearing a T-shirt which read: "If assholes could fly this place would be an airport."[52]

However, case law should not be read to mean that a trial need be ongoing in order to make the use of the summary power necessary. The use of the summary power has been approved when a court was in the midst of a calendar call involving numerous cases[53] and when a lawyer refused to vacate the well of the courtroom.[54]

There is one 2006 First Department case which upheld the court's summary contempt adjudication of a prospective juror the day after the contemptuous behavior, and imposition of punishment 16 days later.[55] The case is *sui generis* and should be relied upon with caution for the reasons discussed in the endnote.[56]

A Warning Whenever Possible

Another judicial overlay upon the statutory law of criminal contempt is that, whenever possible, the contemnor be "advised that he [is] in peril of being adjudged in contempt, to offer any reason in law or fact why that judgment should not be pronounced."[57] The warning also supports a conclusion of willfulness if the contempt persists thereafter.

When it comes to the use of profanity, however, a warning is not required where there is "'flagrant and offensive' misbehavior so as to obviate the need for any warning that the conduct is deemed contumacious."[58]

Opportunity to Speak in Mitigation Before Punishment Is Imposed

Whether the contempt be punished summarily or on notice with hearing, the court may not impose punishment unless it first provides the contemnor an opportunity to make a statement in his defense or in extenuation of his conduct.[59]

The Statutory Requirement of a Mandate of Commitment

Whether the contempt be punished summarily or on notice with hearing, the next required step for a valid criminal contempt adjudication is preparation and execution of a mandate of commitment. Judiciary Law § 752 provides that when a person is committed for criminal contempt in accordance with § 751 for violating a provision of § 750, the "particular circumstances of his offense must be set forth in the mandate of commitment." "It is well settled that no review may be had of a contempt citation which has not been reduced to writing."[60] Note that the fact that the contemnor was warned, where required, must be recited in the mandate. If the warning recitation is omitted, the mandate is defective.[61] A failure to execute a full and complete mandate of commitment requires that the contempt adjudication be reversed as defective and dismissed if challenged.[62]

Purgation of Judiciary Law Criminal Contempt

Purgation of criminal contempts is within the discretion of the judge. Thus, when a court reporter cited for contempt prepared the transcript that the judge had ordered her to prepare, but only in response to having been served with an order to show cause, she was still properly found in contempt. The Appellate Division stated, "there is no right, as such, to a 'purge order.' Rather, whether a contempt should go unpunished, and, if so, on what conditions, is a matter entirely within the discretion of the court."[63] In the situation where a witness has refused to testify and has been properly found in summary criminal contempt, but the proceeding at which he refused is still ongoing, the opportunity to purge the contempt may be granted.[64] On the other hand, a contemnor who, for example, is punished for disrupting a court proceeding may be less likely to be offered an opportunity to purge for two reasons: (1) the damage has been done; and (2) if the judge did things

correctly, the contemnor has already enjoyed the opportunity to speak in mitigation.

Appellate Review of Judiciary Law Criminal Contempt Adjudications

Summary Adjudications – Criminal Contempt

For summary adjudication in the immediate view and presence of the court, Article 78[65] and Habeas Corpus[66] are proper remedies.

Non-Summary Criminal Contempt

Remedies include Habeas and Article 78, but also, depending upon the case, direct appeal with the same caption.[67]

How a 2014 Court of Appeals Decision Changed the Criminal Contempt Landscape

As has been repeated *ad nauseum* in this article, criminal contempt is set forth in §§ 750, 751 and 752 of the Judiciary Law. Civil contempt begins at § 753, is expressly limited by statute to civil cases and its purpose is remedial, i.e., to assist the party either in reaping the benefit of an order it has won or in making its case. The Court of Appeals ruling in *People v. Sweat*[68] has changed all that.

Mr. Sweat was charged in city court with Criminal Contempt in the Second Degree, under Penal Law § 215.50(4), for refusing to testify in his brother's county court trial. He argued that county court's finding that he was in contempt of court and his remand to jail for the remainder of the trial constituted a punishment for the same act and barred his subsequent punishment under double jeopardy case law, discussed earlier. The Court of Appeals rejected his claim because it found that he was never "punished."[69] The Court was correct and could have left it at that, but went on to change the criminal contempt landscape by recognizing a new procedure ("conditional contempt") and a new rationale for criminal contempt ("remediation"), neither of which had theretofore found any place in Judiciary Law criminal contempt jurisprudence. The Court did so, citing civil contempt statutes in what could only have been a criminal contempt case since the contempt did not arise in a civil case.

The Court's Reliance on Civil Contempt Statutes – *With Comments*

The Court: "The Judiciary Law permits a court to punish for 'criminal' or 'civil' contempt in a summary proceeding (see Judiciary Law §§ 754, 755)."[70] *Section 754 expressly provides that §§ 750, 751 and 752 do not apply to civil contempt. Section 755 only applies in civil contempt. Section 751 is the statute that authorizes summary punishment in criminal contempt cases.*

The Court: "For a court to summarily punish contempt, our Judiciary Law requires issuance of an order 'stating the facts which constitute the offense' and 'plainly and specifically prescribing the punishment to be inflicted' (Judiciary Law § 755)."[71] *Section 755 is (or at least used to be) limited to contempt arising in civil cases.*

The Court: The intermediate appellate court's conclusion that punishment was "tantamount to time served . . . is at odds with the language of the Judiciary Law, which states that the order must set forth the punishment 'plainly and specifically' (Judiciary Law § 755)."[72] *Section 755 is (or at least used to be) limited to contempt arising in civil cases. The requirement of a mandate of commitment for criminal contempt is found in § 752 – the criminal contempt statute.*

> Criminal contempt requires proof of willful disobedience of a lawful mandate.

The Court: "To find a punitive sentence under section 755 where none was imposed we would also have to ignore the record, which indicates that the judge did not order defendant's confinement as punishment for defendant's contempt."[73] *It would have been impossible for the Court to have found a punitive sentence under § 755 because § 755 is a remedial statute limited to civil cases.*

The Court: "The absence of compliance with this central requirement of section 755 [order setting forth punishment] supports our conclusion that County Court did not summarily adjudicate and punitively sentence defendant in criminal contempt under the Judiciary Law."[74] *Section 755 is (or at least used to be) limited to contempt arising in civil cases. The requirement of a mandate of commitment for criminal contempt is found in § 752 – the criminal contempt statute.*

The Court's Addition to the Rationale for Criminal Contempt – *With Comments*

The Court: "The court's statements to defendant, his counsel and the People establish that 'the character and purpose' of the contempt determination, and defendant's confinement during the course of his brother's criminal trial, was remedial."[75] *The rationale for the use of criminal contempt is to vindicate the court's authority and engender respect for its orders, not to coerce obedience to them or provide a remedy to a litigant. When a court uses contempt to provide a remedy, it is using civil contempt, yet civil contempt was not available in the criminal case on trial because civil contempt is limited by statute to civil cases.*

The Court's Creation of a New Procedure

By citing civil contempt statutes and by finding civil contempt's rationale (remediation) applicable to a criminal

case, the Court recognized a new procedure previously unknown to New York criminal contempt jurisprudence: subjecting a recalcitrant witness-contemnor to "[c]onditional imprisonment [] for the remedial purpose of compelling [the witness'] testimony."

Hindsight is 20/20. Nevertheless, it is worth noting that when Mr. Sweat balked at testifying, the prosecutor said, "We'll ask that [Mr. Sweat] be cited for civil contempt and confined until he agrees to testify or until the end of the proceeding, and also we'll charge him with criminal contempt for refusing to be sworn and testify." Civil contempt was then limited to civil proceedings, so the request should have been rejected, and, since there was no doctrine of "conditional imprisonment" at the time, there was no legal authority that supported the prosecutor's request or the court's order that accommodated it. The only contempt available was criminal contempt, and the only rationale for its exercise would have been to vindicate the court's authority and engender respect for its orders – not provide a remedy to one of the parties. The trial judge could have punished the contemnor with a jail term of up to 30 days and allowed purgation under the then-existing state of the law.[76] Instead, the course chosen has resulted in a new procedure and new rationale for the use of criminal contempt. This was a surprising development since it has been Court of Appeals's contempt doctrine since 1886 that common law power to punish criminal contempt was superseded and intentionally restricted by enactment of the first criminal contempt statute.[77] The legislative goal of the first statute was confinement of the court's power within "definite and fixed rules,"[78] which may not be "extended in the least degree beyond the limits which have been imposed by statute."[79] *Sweat* has changed all that. ■

1. 24 N.Y.3d 348 (2014).
2. *Id.* at 354 (citations omitted). *See* N.Y. Judiciary Law § 750(A)(1)–(7) (Jud. Law).
3. Jud. Law § 751.
4. *N.A. Dev. Co. v. Jones*, 99 A.D.2d 238 (1st Dep't 1984).
5. Correction Law § 804-a.
6. Jud. Law § 751.
7. *Data-Track Account Serv. Inc. v. Lee*, 17 A.D.3d 1115, 1117 (4th Dep't 2005).
8. *Dep't of Envtl. Prot. of City of N.Y. v. Dep't of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 (1987).
9. Jud. Law § 753(A) (emphasis added).
10. *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983).
11. *See Eaton v. Eaton*, 46 A.D.3d 1432 (4th Dep't 2007), where a court was said to have issued a civil contempt citation *sua sponte* resulting in a 30-day sentence without a purgation clause, which tends to indicate that it was really a criminal contempt.
12. *Sibersky v. Winters*, 42 A.D.3d 402 (1st Dep't 2007).
13. *Dep't of Envtl. Prot. of City of N.Y.*, 70 N.Y.2d at 240 ("To be found guilty of Criminal Contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a Civil Contempt proceeding").
14. *People ex rel. Negus v. Dwyer*, 90 N.Y. 402 (1882).
15. *Jim Walter Doors v. Greenberg*, 151 A.D.2d 550, 551 (2d Dep't 1989) (cited with approval in *Inc. Vill. of Plandome Manor v. Ioannou*, 54 A.D.3d 365 (2d Dep't 2008)).
16. Uniform City Court Act § 2005.
17. Uniform District Court Act § 2005.
18. Uniform Justice Court Act §§ 210, 2005.
19. *State of N.Y. v. Congress of Racial Equality (C.O.R.E.)*, 92 A.D.2d 815, 817 (1st Dep't 1983).
20. *People v. Shampine*, 31 A.D.3d 1163 (4th Dep't 2006) (Defendant failed to preserve contention that order was invalid because "he did not object to the order of protection . . . when it was issued"); *People v. Malone*, 3 A.D.3d 795, 797 (3d Dep't 2004) ("Individuals are not free to disregard a court order they believe is misguided or mistaken, but must instead move in the issuing court for modification or vacatur of the allegedly erroneous order.").
21. *People v. Konieczny*, 2 N.Y.3d 569, 577 (2004) ("As a facially valid judicial mandate, the order of protection was entitled to the presumption of regularity for purposes of fulfilling the pleading requirements, although the presumption could have been rebutted had defendant challenged the basis of the order in a pretrial motion or at trial.").
22. Penal Law § 215.54.
23. *People v. Mena*, 38 N.Y.2d 850 (1976).
24. *People v. Yaghoubi*, 10 Misc. 3d 406 (2005).
25. *People v. Sweat*, 24 N.Y.3d 348 (2014).
26. *People ex rel. Donnelly v. Miller*, 213 A.D. 88, 88 (1st Dep't 1925) ("A person cannot be guilty of criminal or civil contempt of court . . . unless he willfully violates a lawful mandate of the court, and it is not contempt if the only mandate or direction of the court violated is an oral one, for a mandate as defined in section 28-a of the General Construction Law comprehends only a written direction or order of the court, a judge or person acting as judicial officer.").
27. 79 N.Y.2d 938, 940 (1992).
28. *People v. Campbell*, 284 A.D.2d 173 (1st Dep't), *lv. denied*, 96 N.Y.2d 721 (2001).
29. 92 A.D.2d 815 (1st Dep't 1983).
30. *Spector v. Allen*, 281 N.Y. 251, 260 (1939).
31. *Hicks v. Russi*, 254 A.D.2d 801 (4th Dep't 1998).
32. *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994) ("To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed.").
33. *People ex rel. Stearns v. Marr*, 181 N.Y. 463, 471 (1905) ("While there is a distinction in the nature of civil and criminal contempts, there is but slight difference in the procedure to punish and no requirement peculiar to either as to the personal service of the order, as distinguished from the actual knowledge of its existence and contents, however acquired.").
34. *N.Y. State Troopers, Inc. v. N.Y. State Police*, 29 A.D.3d 68, 70 (3d Dep't 2006) ("Since court orders must be obeyed as a matter of public policy and personal service of an order is not a prerequisite to holding a person in contempt where he or she has actual knowledge of the order (*see Vill. of St. Johnsville v. Triumpho*, 220 A.D.2d 847, 848 (1995), *lv. denied*, 87 N.Y.2d 809 (1996); *City Sch. Dist. of City of Schenectady v. Schenectady Fed'n of Teachers*, 49 A.D.2d 395, 397, 398 (3d Dep't), *lv. denied*, 38 N.Y.2d 707, *appeal dismissed*, 38 N.Y.2d 826 (1975)), it is of no consequence that the past court orders here may not have been properly served and the Troopers have so far avoided contempt proceedings.").
35. Jud. Law § 751(1).
36. *Id.*
37. *Caiola v. Allcity Ins., Co.*, 305 A.D.2d 350, 351 (2d Dep't 2003); *In re Minter*, 132 A.D.2d 701 (2d Dep't 1987); *see also In re Grand Jury Subpoena Duces Tecum Served Upon Morano's of Fifth Ave., Inc.*, 144 A.D.2d 252 (1st Dep't 1988); *People v. Balt*, 34 A.D.2d 932, 933 (1st Dep't 1970).
38. *Dep't of Hous. v. City of N.Y. v. 24 W. 132 Equities*, 137 Misc. 2d 459 (App. Term 1987), *aff'd*, 150 A.D.2d 181 (1st Dep't 1989).
39. *In re Minter*, 132 A.D.2d at 703; *Caiola*, 305 A.D.2d 350.
40. *Caiola*, 305 A.D.2d 350.

41. *State Univ. of N.Y. v. Denton*, 35 A.D.2d 176 (4th Dep't 1970). For an excellent discussion of this issue see *Kuriansky v. Azam*, 151 Misc. 2d 176 (Sup. Ct., Kings Co. 1991).

42. First Department Rule 604.2(b); Second Department Rule 701.3.

43. *Katz v. Murtagh*, 28 N.Y.2d 234 (1971) (even if there is no immediacy for judge to deal with contempt, purported contempt must be of such personal character as to indicate *virtual impossibility of detached evaluation of* event before judge in whose presence contempt occurred is required to refer contempt proceeding to another judge).

44. *People v. Campbell*, 284 A.D.2d 173 (1st Dep't), *lv. denied*, 96 N.Y.2d 721 (2001).

45. *See Stampfler v. Snow*, 290 A.D.2d 595 (3d Dep't 2002).

46. Jud. Law § 751(1).

47. *See* 22 N.Y.C.R.R. § 604.2 (First Department) and 22 N.Y.C.R.R. § 701.2 (Second Department).

48. *Kunstler v. Galligan*, 168 A.D.2d 146 (1st Dep't), *aff'd*, 79 N.Y.2d 775 (1991); *Gold v. Menna*, 25 N.Y.2d 475, 483 (1969), *rev'd on other grounds sub nom. Menna v. N.Y.*, 423 U.S. 61 (1975).

49. *Katz*, 28 N.Y.2d at 238.

50. *Id.* at 239.

51. *Breitbart v. Galligan*, 135 A.D.2d 323 (1st Dep't 1988).

52. *Doyle v. Aison*, 216 A.D.2d 634 (3d Dep't 1995).

53. *Kunstler*, 168 A.D.2d at 150.

54. *Brostoff v. Berkman*, 79 N.Y.2d 938 (1992).

55. *Caruso v. Wetzel*, 33 A.D.3d 161 (1st Dep't 2006).

56. *Id*. The Court is citing federal cases instead of its own precedents: In *Breitbart*, 135 A.D.2d 323, the First Department found the use of summary power improper where the judge adjudicated an attorney in contempt during the trial, but waited until end of trial to impose punishment. In *Caruso*, 33 A.D.3d 161, the First Department found the use of summary power proper where the judge did not even adjudicate the juror in contempt until the day following the contemptuous conduct. In *Breitbart*, the First Department said that its summary contempt rules codified a U.S. Supreme Court case which said that "the court must act instantly" to preserve order in summary cases and further observed that "deferral of imposition of sanctions until the end of the trial indicates an absence of the type of immediacy required for summary contempt adjudication." The First Department neither required instant action nor deemed deferral of [the contempt adjudication itself to] indicate[] an absence of the type of immediacy required for summary contempt adjudication. The new rule announced in *Caruso* is that if contemptuous behavior occurs in the court's immediate view and presence, the delay of the proceedings (already interrupted by the contemptuous conduct) associated with summary adjudication is a basis to defer "prompt" adjudication and the need to restore and maintain order need not be demonstrated because there will be no proceeding which requires restoration of order when the contempt proceeding is convened the next day.

57. *Katz v. Murtagh*, 28 N.Y.2d at 238; *see also Brunetti v. Gary*, 300 A.D.2d 583 (2d Dep't 2002).

58. *Roajas v. Recant*, 249 A.D.2d 95, 95 (1st Dep't 1998) (citations omitted).

59. *In re Rotwein*, 291 N.Y. 116, 124 (1943); *see also* 22 N.Y.C.R.R. § 604.2(a)(3).

60. *Traynor v. Lange*, 178 A.D.2d 481, 481 (2d Dep't 1991) (citations omitted).

61. *Pronti v. Allen*, 13 A.D.3d 1034 (3d Dep't 2004).

62. *Pawoloski v. City of Schenectady*, 217 N.Y. 117 (1916); *In re Rotwein*, 291 N.Y. at 119 (citing *In re Douglas*, 269 N.Y. 144, 147 (1935)).

63. *People v. Williamson*, 136 A.D.2d 497, 498 (1st Dep't 1988) (citations omitted).

64. *Additional Jan. 1979 Grand Jury of Albany Supreme Court v. Doe* , 84 A.D.2d 588 (3d Dep't 1981).

65. Jud. Law §§ 752 (criminal), 755 (civil). *Kelly v. Kelly*, 34 A.D.3d 809 (2d Dep't 2006).

66. *People ex rel. Constantino v. Lorey*, 28 A.D.3d 1041 (3d Dep't 2006).

67. *See, e.g., Clark v. Zwack*, 40 A.D.3d 1224, 1226 (3d Dep't 2007) ("Initially, we note that petitioner is correct that a direct appeal from Family Court's order is permissible here inasmuch as he was not punished summarily.").

68. *People v. Sweat*, 24 N.Y.3d 348 (2014).

69. *Id.* at 359 ("Upon the record before us, we conclude that County Court did not summarily adjudicate and impose a punitive sentence upon defendant for criminal contempt under the Judiciary Law. County Court's statements and conduct, as well as its lack of compliance with applicable sections of the law, persuade us that it did not impose punishment for criminal contempt under any statutory authority to do so.").

70. *Id.* at 354–55.

71. *Id.* at 359.

72. *Id*.

73. *Id.* at 360.

74. *Id.*

75. *Id.* at 359.

76. *See Additional Jan. 1979 Grand Jury of Albany Supreme Court*, 84 A.D.2d 588.

77. *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886) ("Necessarily the common law power was very broad and vested large discretion in the courts. These became in some instances both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer. When the Revised Statutes were enacted an evident effort was made to codify the law of contempt and *bring it within definite and fixed rules*." (emphasis added)).

78. *People ex rel. Munsell*, 101 N.Y. at 249.

79. *Rutherford v. Holmes*, 5 Hun 317, 319 (N.Y. Sup. Ct. Gen. Term 1875), *aff'd*, 66 N.Y. 368 (1876).

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Disability Determinations, Judicial Authority and CPLR Article 78

Part I

By Chet Lukaszewski

The Issue

Under the current interpretation by the courts of the judicial authority possessed by judges in Article 78 proceedings, under N.Y. Civil Practice Law and Rules Article 78 (CPLR), municipal retirement systems and pension funds have the ability to continually deny sick and injured civil servants disability retirement pensions, for years on end, possibly in perpetuity, by continually finding an applicant not to be disabled, even if the finding is repeatedly deemed to be unlawful by the courts. This is because the courts have held that New York state judges do not possess the power in an Article 78 proceeding to find a disability where a pension agency's medical board has not, and have established that a judge can only remand for reconsideration an application found to be improperly denied.

This interpretation has created a gap in judicial authority that allows for lengthy and costly denial cycles to which injured municipal workers can fall victim through no fault of their own, and can result in their not obtaining a pension to which they are entitled, where the courts are powerless to bring about an equitable resolution. Specifically, injured workers can be denied a disability pension based upon a finding that they are not disabled. They can then bring a court challenge, and if they are successful therein and secure a judicial remand of their application to their pension agency, the pension agency is free to again deny the application, leaving another court challenge as the only recourse.

A fair and rational consideration of the issue, and the relevant laws, leads to the conclusion that this gap in judicial authority is without sound basis in reason or in law, and should be closed, in the interest of protecting the rights of New York's civil service workers, and to prevent any agency from being immune from the courts' powers of equitable relief. In light of the language of CPLR Article 78, and the power of judges to find disability in comparable proceedings like Social Security Disability and Workers' Compensation matters, there appears to be no justification to prohibit state court judges from finding

a disability to exist in Article 78 proceedings involving disability pensions for municipal workers. In the interest of substantial justice, the Legislature should clarify or amend CPLR Article 78 as to this issue, or the courts should revisit and revise their position on the issue.

Civil Service Disability Pensions

Civil service employees, such as police officers, firefighters, sanitation workers, teachers, highway repairers, train mechanics, and hundreds of other professions where one's employer is a government entity, elect to enter said professions knowing they will face earnings limitations and the strict guidelines and restrictions that accompany city, state, and other municipal employment. These employees accept these parameters, in large part, based upon the pension benefits and protections that such jobs offer, including a disability retirement pension should they become incapable of performing the full-duty requirements of their job title prior to retirement. Disability pensions vary based upon job title and pension tier, and not all municipal employees are eligible for the same benefits and protections, but most are eligible for some form of a disability retirement pension after performing 10 years of service. High attrition positions, like police and fire personnel, are generally afforded more lucrative pension benefits, compared to less dangerous, "non-uniformed" occupations. Some jobs offer greater disability pension benefits for disabilities that result from line-of-duty injuries, including most uniformed job titles such as EMTs and corrections officers.

Certainly, not all applicants for disability pensions are deserving of the same, and thus many are properly denied benefits. Moreover, many deserving applicants are approved without issue. However, the courts regularly find application denials to be unlawful, evidencing that not all deserving disability pension applicants are approved by their pension agencies. The question that is most perplexing is, why not allow a judge in an Article 78 proceeding to determine that a worker has in fact demonstrated he or she is permanently disabled from performing the full-duty requirements of the worker's job title? Said power would seemingly be in keeping with the language of CPLR Article 78, and in line with the authority possessed by judges in analogous disability determinations, and would prevent the deny-court challenge-remand cycle. If workers want to challenge a disability pension denial judicially, the only legal recourse is an Article 78 proceeding. Workers taking this route usually must retain private counsel, if they are financially able, as normally it is not a legal issue that municipal unions or union law firms assist with. Alternatively, a financially strapped worker could try to bring the proceeding pro se, but this is a daunting task for all the usual reasons, made additionally difficult by the 120-day statute of limitations that applies in these cases. The court costs associated with an Article 78 proceeding are several hundred dollars at a minimum, based upon Index number and RJI (request for judicial intervention) fees, and normally run over $1,000 when all costs, such as copying, printing, binding, and process service, are tallied. Firms that handle these cases on a regular basis normally charge between $5,000 and $10,000 per "Article 78." Sadly, some disabled workers cannot afford an attorney and are incapable of proceeding pro se, based on their injuries, lack of intellectual and legal abilities, or both. As a result, they either do not challenge their pension denials or have to stop challenging them. These workers never obtain the disability retirement pension that they ought to have received.

Judicial Relief Through Article 78

An Article 78 proceeding is the form of judicial relief one is limited to when challenging the determination of an administrative board or body,[1] such as a retirement system or pension fund. It is deemed to be a "Special Proceeding," where, generally, a judge evaluates the decision at issue based only upon the administrative record that was before the determining entity, as well as the legal arguments set forth by the parties. In the case of a disability pension denial, the administrative record, which is the case's evidentiary record, is generally purely documentary, comprised primarily of relevant medical records and the pension agency's medical board's written denial(s). Agency medical boards generally comprise three physicians. There is no legal requirement that any of those doctors are specialists in the area of medicine upon which the application is based, and much of the time they are not.[2] Usually in an Article 78 proceeding there are no witnesses or trial. Judges are provided the power, under CPLR 7804, to hold a trial to resolve a specific point of fact that is unclear from the record; however, this very rarely occurs. A disability pension Article 78 proceeding is normally comprised of a petition, an answer, memorandums of law from both parties, and a reply memorandum by the petitioner. In some cases, an oral argument is presented, where only the attorneys (or a pro se litigant) appear before the judge, but there is no legal requirement for this. All evidence and arguments are limited to the facts and evidence that were before the determining body, and nothing new can be added during the Article 78 proceeding. For example, if a worker was claiming a disabling cardiac condition but was denied the pension based upon a no-disability finding, and thereafter suffered a heart attack, the heart attack could not be introduced into the case, because it would be outside the administrative record, as it was not before the pension agency when its decision was rendered. Judgments in Article 78 cases are normally set forth in written decisions and orders that are handed down several months after the submission of all papers to the court or after an oral argument, if one is held.

When the determination being challenged in an Article 78 proceeding is the denial of a disability pension

application based upon a finding of "no disability," the Court of Appeals has established that the only relief that can be sought is for the denial to be reversed, and for the application to be remanded to the pension agency for re-evaluation.[3] Judges cannot find a disability for full duty to exist, regardless of how overwhelming they feel the facts and evidence may be. This limitation seems to be in contrast with the fact that in a disability pension Article 78 proceeding where the issue is the cause of a recognized disability, the court does have the power to award the pension.[4]

For example: A pension agency's medical board found that a nurse was disabled due to a neck condition, but ultimately concluded that the condition was the result of a congenital anomaly as opposed to a line-of-duty accident, and denied the application. In this case, the court would have the power to award the pension, because it has the power to determine "causation" when a disability has been found. Specifically, the law states that the court may set aside a pension denial when it can "conclude as a matter of law" that the disability was the natural and proximate result of a service-related accident, and award the pension sought.[5]

Legal fees are rarely awarded to a successful litigant in a disability pension case. One would have to show bad faith, a very high burden that is not reached by the factors that are generally the basis for a court's overturning of a pension denial. Reversals and remands in disability pension cases are usually based upon a court finding that evidence has seemingly not been properly considered, key facts have been disregarded, a medical board's conclusion appears to be irrational, or a determination has not been adequately explained.

When analyzing this topic, something that must be considered is that prospective litigants are injured municipal workers who may no longer be capable of working, so the money needed to pursue a case is often not readily available. Such workers have often run out of sick time and can even be "off payroll," and thus without income. Many have even been terminated under the provisions of the N.Y. Civil Service Law, which allows for a municipal employee who is medically incapable of returning to work, generally for one year, to be terminated.[6] However, said termination does not entitle the employee to a disability pension, as the pension agency is a separate entity from the employer, and pension agencies are not bound by the medical decisions of any other institution, such as city or state doctors who determine employment capability (i.e., full duty, light duty, sick leave), or New York State Workers' Compensation doctors and judges, or even the Social Security Administration (SSA), and its Administrative Law Judges (ALJ).

Even if all of those entities find a worker to be disabled, the pension agency can determine whether that person is fit for full duty. Regularly, municipal workers are approved for Social Security Disability (SSD) benefits by a SSA ALJ, where the standard is whether one is disabled for any job in the national economy;[7] yet they are denied disability pensions based upon a finding by their pension agency that they are not permanently disabled for their former job title. A municipal pension fund or retirement system will generally be represented in an Article 78 proceeding by city or state attorneys, such as the New York City Corporation Counsel's Office or the State Attorney General's Office. Time and litigation funding are not issues for pension agencies. Because a judge will not have the power to find disability and award the pension sought, the cycle of litigation could go on forever, but it causes almost no harm or prejudice to a pension agency.

A Few Cases

The NYPD Officer and 9/11

An example of this legal gap and the litigation cycle it creates can be seen in the case of former NYPD officer Michael Mazziotti, a hero who saved hundreds of lives on September 11, 2001. Mazziotti, who was emotionally and psychologically scarred as a result of 9/11, was found not to be disabled for police work and was denied a disability pension. Mazziotti had to endure the time and expense of bringing two Article 78 proceedings, both of which he was successful in.

The specific facts of Mazziotti's case should be considered in evaluating the disability pension legal gap. Officer Mazziotti was in 1 World Trade Center on September 11, 2001, when the first plane hit Tower 2. He and his partner evacuated the 20th through 29th floors and were descending an interior staircase when the second plane hit Tower 1 and sent debris and soot down through the stairwell, which shook as a result of the impact and explosion. The two officers then provided aid to the injured on the ground floor and escorted civilians from the building to a triage that they helped set up in the Millennium Hotel. Mazziotti then entered 2 World Trade Center three times to assist in evacuation efforts and narrowly escaped the building's collapse. His police car was crushed by the falling towers. Mazziotti was caught up in the soot and debris cloud while he rushed with 20 evacuees to a refuge on Vesey Street. All told, he spent almost 200 hours at the World Trade Center site doing rescue, recovery and cleanup work. Mazziotti received commendations for his heroism on 9/11, in addition to the numerous awards and citations he received during his 32-year career in law enforcement.

After retiring in 2002, he began showing signs of post-traumatic stress disorder (PTSD) and other psychological problems, for which he first sought treatment in 2003; he began consistent treatment in 2005. In support of his 9/11-WTC disability pension application, filed in September 2006, under the "WTC Presumption Law," the only disability pension for which one can apply for in retirement, Mazziotti submitted an abundance of evidence from a number of doctors with whom he had long-standing treatment relationships. Among the

evidence were numerous psychological diagnostic tests that demonstrated his PTSD, as well as major depression and panic disorder. He also submitted his SSD benefits approval, which was based on his 9/11-WTC psychological disorders. Nevertheless, the pension fund's medical board found him not disabled for full-duty police work on four separate occasions during the four-year application process, and ultimately denied the application in March 2010. Full-duty police work requires responding to emergency and disaster situations, handling and operating a firearm in emergency situations, viewing and investigating crimes and occurrences such as murders, rapes, and other violent situations involving harm as well as death, the ability to quickly process and retain information, the capability to make life and death decisions while under extraordinary pressure, and an almost limitless array of other mentally and emotionally demanding tasks.

The court in *Mazziotti v. Kelly*[8] found that the pension fund had ignored extensive credible evidence and had offered no explanation or reasoning for its denial; the court concluded that the denial did not reflect that all relevant facts and evidence were considered. The court did the only thing it had the power to do – remand the matter to the pension fund for a legally sufficient review in keeping with its decision. However, on remand, Mazziotti was once again denied based upon a no-disability finding. Thereafter, in 2013 in *Mazziotti v. Kelly*,[9] the court found, again, that the fund's denial was arbitrary and capricious and was not based on substantial credible evidence, and concluded once again that extensive credible evidence had been ignored and that no explanation or reasoning for the denial had been set forth. Again, the court did the only thing it had the power to do and remanded the matter to the fund. Finally, in September 2013, despite no new evidence, the fund acknowledged that Mazziotti was disabled for police work due to his 9/11-WTC psychological issues. However, the fund awarded the pension as of that date, and not retroactive to the date of the application, or even the first denial, which was deemed to be unlawful in March 2010, or the second denial, which was deemed to be unlawful in January 2012.

Mazziotti brought an Article 78 proceeding challenging the refusal to award his pension retroactively, arguing that the eventual disability finding was, essentially, based upon the exact evidence present throughout the application process, and which in fact was present before and after the second court remand, following which his pension was finally approved. But the court ruled against him in 2014 in *Mazziotti v. Kelly*,[10] in large part based on the rule that prohibits a judge from finding disability where a medical board has not.

Consider the fact that the pension fund had the power to continue to deny Mazziotti for the rest of his life, and the courts would have been powerless to prevent it. Consider that for seven years Mazziotti was forced to undergo the financial burden of fighting for his disability pension, while being retired on a much less valuable service retirement pension. He easily could have become financially unable to continue the fight. Also, despite the fact that the courts showed him to be in the right, he will never recoup his attorney fees and litigation costs. Consider also the grim realities that he could have passed away during the years he was fighting for his pension or, worse yet, could have been consumed by the stress of the denials and the monetary strain, been overcome by his PTSD and taken his own life. It seems that the inequities and hardships that Mazziotti faced could have been drastically reduced, if not nearly avoided altogether, had the court the power to find him to be disabled.

> The only relief that can be sought is for the denial to be reversed, and for the application to be remanded to the pension agency for re-evaluation.

Paramedic's Fight for Disability Pension

In *Mendez v. New York City Employees' Retirement System*,[11] the court reversed a no-disability finding and disability pension denial by the retirement system, and remanded the application to the system. In this case, the petitioner, Eric Mendez, a paramedic for the Fire Department City of New York (FDNY), underwent spinal fusion surgery in his lower back as a result of a line-of-duty injury, sustained while lifting a stretcher into an ambulance. Full paramedic duty includes entering and exiting ambulances at a rapid pace; ascending and descending stairs in emergency situations while carrying equipment weighing more than 40 pounds; transporting patients on a stretcher (usually down one or more flights of stairs) who might weigh 300 or more pounds; kneeling to administer medical treatment; bending over patients for various purposes, including intubation and administering CPR; restraining individuals who are emotionally disturbed or experiencing spasms or seizures; and many more physically demanding tasks.

Mendez's doctors advocated to their fullest as to his inability to perform full emergency medical services (EMS) duty based on his condition and the surgery, citing factors such as pain, limited range of motion, and the risk for re-injury. However, on judicial remand, Mendez was

again found by the retirement system not to be disabled. He could not afford to bring a second court challenge.

Mendez had informed the system's medical board of his post-injury and post-surgical symptoms and limitations, including being caused such great pain by the simple act of lifting a cooler at a backyard barbecue that he was forced to go to the emergency room. The system was made aware that upon information and belief, no other EMT or paramedic had ever been hired and/or assigned to full "field" duty having undergone a lumbar fusion. The FDNY's doctors deemed Mendez to be permanently disabled for full EMS duty, and he was terminated for a medical inability to return to work. He was found by multiple wholly independent New York State Workers' Compensation Medical Examiners to have a disability that precluded his lifting of more than 40 pounds. He was even found to be unfit for any job in the national economy due to his spinal condition, and was thereby approved by the SSA for SSD. Yet the retirement system found him not to be permanently disabled for full duty.[12]

Multiple Surgeries – Still Not 'Disabled'

In *Schmoll v. Kelly*,[13] the court reversed a no-disability finding and disability pension denial by the NYPD's pension fund and remanded the application to the fund. In that case, the petitioner, Officer Helmut Schmoll, suffered an October 2008 line-of-duty right knee injury, which led to two surgeries, as well as numerous injections, and resulted in his suffering from permanent osteoarthritis, crepitus, patellar chondromalacia, patellofemoral crunch, synovial effusion, and atrophy, as was demonstrated by MRIs and physical clinical testing, including a positive McMurray's and Apley's grind test.

Schmoll suffered from pain, and strength and range-of-motion loss and limitations, as well as buckling issues, and will likely require a total knee replacement in the near future. He also developed residual left knee issues as a result of overcompensation, which will also require surgery. His condition resulted in his being kept on restricted duty by NYPD doctors for the final five years of his career. Full-duty police work entails chasing down and apprehending criminals, using hand-to-hand combat, subduing emotionally disturbed individuals, carrying weighty equipment as well as injured persons, climbing fences, breaking down doors, and a limitless array of other physically demanding tasks.

Nevertheless, the pension fund's medical board repeatedly found Schmoll's right knee to be essentially problem-free and saw no disability for full duty. It is noteworthy that during the application process, Schmoll required a second knee surgery, despite suffering no re-injury and working only on light duty, just six months after a no disability finding by the medical board. However, on judicial remand, Schmoll was again found not to be disabled by the pension fund, and, if he can afford to, will likely have no other choice but to re-enter the "no-disability" litigation cycle.[14]

Conclusion

Action by the New York State Legislature or courts is needed at this time in regard to this issue. The Legislature should clarify or amend CPLR Article 78 as to the issue, or the courts must revisit and revise their current position. The gap in judicial authority that exists under CPLR Article 78 in civil service disability pension matters, which prohibits New York judges from finding a disability to exist, must be closed. Part II of this article will continue the discussion, focusing on the law. ■

1. CPLR art. 78 (7801–7806).
2. *Christian v. N.Y. City Emps.' Ret. Sys.*, 83 A.D.2d 507 (1st Dep't 1981).
3. *Borenstein v. N.Y. City Emps.' Ret. Sys.*, 88 N.Y.2d 756 (1996).
4. *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 (1997).
5. *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347 (1983).
6. N.Y. Civil Service Law § 71.
7. 42 U.S.C. §§ 401–433; 20 C.F.R. § 404.1520.
8. Index No. 108795/10 (Sup. Ct., N.Y. Co. May 2, 2011).
9. Index No. 102285/12 (Sup. Ct., N.Y. Co. Jan. 25, 2013).
10. Index No. 101666/13 (Sup. Ct., N.Y. Co. May 1, 2014).
11. Civil Index No. 11735/12 (Sup. Ct., Kings Co. Jan. 16, 2013).
12. As of the writing of this article, Mendez has selected a process known as Final Medical Review which is offered by the New York City Employees' Retirement System, but not by all municipal pension agencies, whereby his case will be considered by three new doctors employed by the retirement system who will render a final determination that cannot be judicially challenged, as one forfeits said right by selecting this process. (Information published with Mendez's consent.)
13. Index No. 101124/13 (Sup. Ct., N.Y. Co. May 30, 2014).
14. As of the writing of this article, Officer Schmoll's case had not yet again been denied in final by the Police Pension Fund but seemingly will be in the near future. (Information published with Schmoll's consent.).

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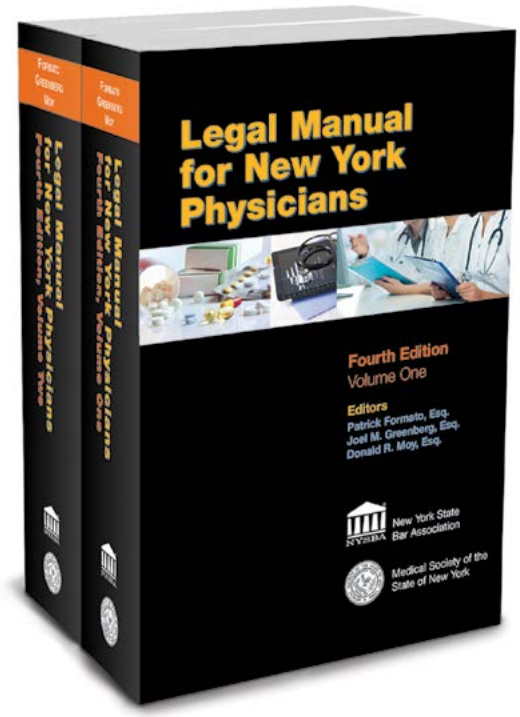

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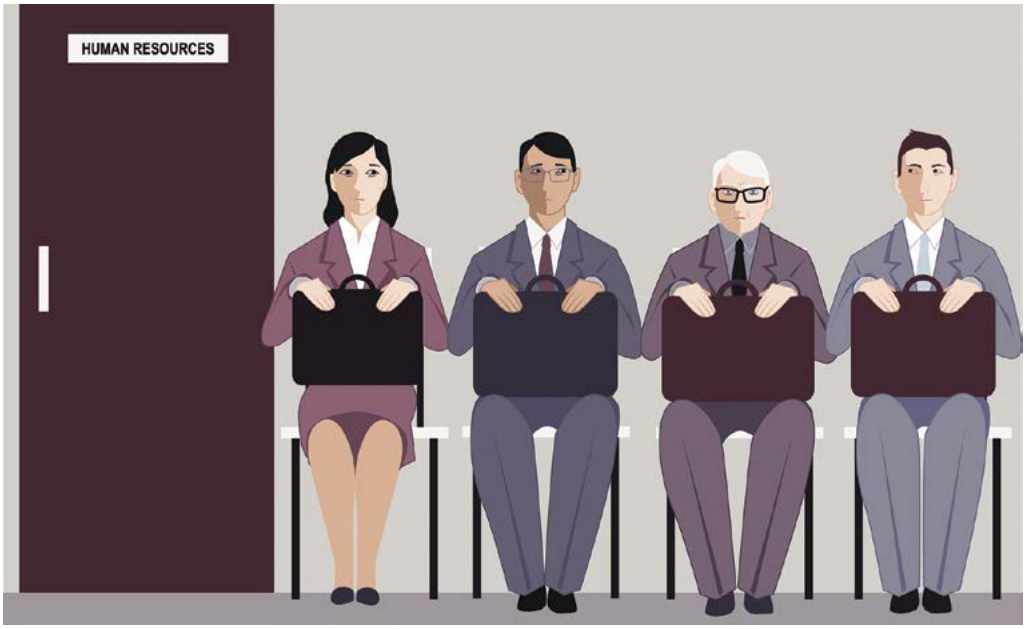

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The Conflicting Legal Standards for Mixed-Motive Employment Discrimination Claims

A Comparison of the ADEA and Title VII

By Harvey S. Mars

When it comes to statutory construction and interpretation, language means everything. As one would expect, statutes that contain variant language are interpreted and applied by courts differently even if their objectives, such as the eradication of employment discrimination, are identical. There are a great many federal, state, and local laws that prohibit employment discrimination on the basis of statutorily protected classifications – such as gender, race, color, disability, national origin, religion, and age. Nonetheless, the legal standards these anti-discrimination statutes require a plaintiff to satisfy in order to prove an employment discrimination claim can, and often do, differ. This is due to a variety of factors. Federal laws provide basic legal protections that states and localities are free to statutorily enhance. However, occasions do occur when federal statutes with similar or even identical language are interpreted differently. Nothing illustrates this more aptly than the legal standards that now apply to "mixed-motive" employment discrimination claims under the Age Discrimination in Employment Act (ADEA),[1] which prohibits employment discrimination of individuals 40 years of age or older, and Title VII of the Civil Rights Act of 1964, as amended (Title VII),[2] which prohibits employment discrimination on the basis of race, national origin, gender, and religion.

Title VII and the ADEA

Courts now utilize different standards to ascertain whether legally sufficient mixed-motive discrimination claims have been established under these laws. A mixed-motive Title VII claim may be successfully litigated if the plaintiff can show

that discrimination was a "motivating" or "substantial" factor in the employer's decision to take an adverse employment action against her or him. However, a mixed-motive employment discrimination claim under the ADEA can only succeed if the litigant proves that age was the "but-for" or only cause of the adverse decision. This distinction is confounding because the language contained in these two laws largely parallels one another. How and why did the courts come to interpret these two very similar statutes so differently? The objective of this article is to trace the origin of how different legal standards developed for Title VII and the ADEA, offer observations as to why this occurred, and then propose ways this may be remedied.

The *McDonnell Douglas* Framework

Before doing so, however, it is necessary to understand what a mixed-motive employment discrimination claim actually is. The United States Supreme Court has developed two approaches under Title VII by which a litigant may prove disparate treatment (intentional) employment discrimination. The first approach is for the plaintiff to follow a burden-shifting analysis articulated in the Court's decision in *McDonnell Douglas Corp. v. Green*.[3] Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case (initial case) of discrimination. To set forth a prima facie case, plaintiffs must show (1) they are a member of a protected class, (2) they were qualified for the job, (3) they suffered an adverse employment action, and (4) such adverse employment action arose under circumstances giving rise to an inference of discrimination.[4] If a plaintiff is able to establish a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the alleged adverse employment action. The burden then shifts back to the plaintiff to demonstrate that the employer's articulated reason was merely a pretext masking a discriminatory motive. This burden-shifting approach is utilized in the vast majority of employment discrimination claims[5] and is employed when a litigant is asserting that discrimination was the actual cause of an unfavorable employment action to which he or she was subjected. Suits employing this analysis are known as "single motive" cases.[6]

Price Waterhouse v. Hopkins

In 1989, the Supreme Court considered another line of discrimination claims in which both an impermissible discriminatory motive as well as a lawful motive played some role in the disputed employment action. That action, *Price Waterhouse v. Hopkins*,[7] held that when a plaintiff in a Title VII case proves that gender (or any other characteristic or classification protected under that statute) played a motivating role in an unfavorable employment decision, the employer may avoid liability only by proving as an affirmative defense that it would have taken the same action had the impermissible consideration of gender not played a role.

This approach was presented as an alternative to *McDonnell Douglas*'s rather cumbersome and overly analytical burden-shifting analysis. After all, a multitude of considerations often play a role in employment determinations. To believe that a single motive to the exclusion of all others underlies any particular employment decision is overly simplistic and ignores reality.[8] The *Price Waterhouse* Court developed a framework that took into consideration how employers actually make employment decisions.

It should be highlighted that while the Court's majority agreed that an employer could assert an affirmative defense that it would have taken the same action even in the absence of impermissible considerations, it was divided on the question of when the burden would shift to require the employer to prove that defense. Justice Sandra Day O'Connor wrote a concurring opinion, concluding that the affirmative defense would only need to be asserted when a plaintiff demonstrated by "direct evidence that an illegitimate criterion was a substantial factor in the decision."[9] According to her view, if a plaintiff was incapable of presenting direct evidence, the suit should fail.

Civil Rights Act of 1991

Prior to 2003, Justice O'Connor's concurring opinion – that direct evidence was required for a plaintiff to establish liability in a mixed-motive action – was followed by many circuit courts in this country, since there was no majority ruling on that issue in *Price Waterhouse*.[10] However, in 1991, Congress passed the Civil Rights Act of 1991 (Civil Rights Act), to codify the *Price Waterhouse* mixed-motive ruling as well as to clarify the employer's burden in defending such actions, since the Court's decision failed to do so. It is the enactment of this amendment to Title VII and its subsequent interpretation that inadvertently resulted in the development of conflicting legal standards for Title VII and the ADEA.

The Civil Rights Act provides, in pertinent part, that an unlawful employment practice is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[11] This statute further provides that if a plaintiff proves a violation of this provision, the employer can then assert an affirmative defense that it would have taken the same action even in the absence of the illegal motivating factor.[12] The establishment of this affirmative defense will then restrict the plaintiff's possible remedies.

As a result of enactment of the Civil Rights Act, the Supreme Court held, in *Desert Palace, Inc. v. Costa*,[13] that Congress had now codified a new evidentiary standard for Title VII cases, one that did not require the plaintiff to present direct evidence that discriminatory motive was a substantial impetus for the employment decision. Even Justice O'Connor, whose concurrence created the need for a statutory amendment in the first place, acknowledged that the Civil Rights Act had created a new standard that the

Court was obliged to follow.[14] The Civil Rights Act liberalized the process by which a litigant could prove a Title VII discrimination claim, and it was heralded as a huge step forward toward the eradication of civil rights violations against employees. Ironically, however, it also spelled the demise of mixed-motive federal age discrimination claims.

Other than the Civil Rights Act amendments to Title VII, Title VII and the ADEA contain comparable language. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual's age."[15] Title VII has nearly identical language: "It shall be unlawful employment practice for an employer to fail or refuse to hire or discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."[16] In *Price Waterhouse*, the Court held that the words "because of" simply meant that gender (or any other statutorily protected category) must not be involved in the employment decision. Thus, to prove a mixed-motive discrimination claim, one need only prove that membership in a protected category was a motivating factor in the adverse employment decision.[17]

Due to the fact that these laws had comparable language, under long-standing judicial precedent they were interpreted in the same way. The Supreme Court has held that since the relevant language in the two statutes is identical, its interpretation of Title VII's language applies "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[18] Hence, as a result of *Price Waterhouse,* the Supreme Court plurality's mixed-motive analysis was applied by the courts to ADEA claims as well.[19] Litigants could prove that they had been discriminated against by their employers on the basis of their age if they could demonstrate that age played a motivating role in the discriminatory action.

Gross v. FBL Financial Services, Inc.

However, all that changed in 2009, when the Court rendered its decision in *Gross v. FBL Financial Services, Inc*.[20] In this case, the Court was originally tasked with rendering a determination on whether an age discrimination plaintiff needed to present direct evidence of the employer's impermissible motive in order to prove her or his case, as the O'Connor concurrence in *Price Waterhouse* suggested. This remained an open issue under the ADEA since the Civil Rights Act addressed only Title VII claims. Rather than answering this question, however, the Court, with Justice Clarence Thomas writing the majority opinion, inexplicably went much further and ruled that the mixed-motive concept simply did not apply in ADEA cases and, hence, a mixed-motive jury instruction was entirely improper.

Unlike the Court in *Price Waterhouse*, the *Gross* Court construed the ADEA's language extremely narrowly. Justice Thomas held that the statute's words "because of" meant that in order to prove a claim of age discrimination, the plaintiff had to demonstrate that age was the exclusive cause of the adverse employment action. Age had to be the "reason" for the decision. Contrary to its *Price Waterhouse* ruling, the Court held that ordinary usage of the words "because of" meant that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[21]

As suggested earlier, the enactment of the Civil Rights Act opened the door to this ruling. In its opinion, the Court correctly noted that the Civil Rights Act language, which codified the mixed-motive standard, applied only to claims of employment discrimination based upon Title VII protected categories: gender, race, religion, national origin, and color. Age was not included within its purview.[22] Thus, the Court ruled that its analysis could only be based upon the actual language contained in the ADEA, clearly holding that, for all intents and purposes, the Civil Rights Act had totally nullified *Price Waterhouse.*

One can't help but wonder what truly motivated this ruling. Are age discrimination claimants any less entitled to utilize the more liberal mixed-motive analysis than Title VII claimants are? Is ageism any less invidious than racism? Even more perplexing is Congress' failure to include within the Civil Rights Act any mention of the ADEA or age discrimination claims. Was its failure to include age a conscious choice or was it simply an oversight?[23] Did Congress believe that based upon already existing case law *Price Waterhouse* would continue in full force and effect for age discrimination claims? An examination of the legislative history of the Civil Rights Act may be instructive in this regard but that is beyond the scope of this article. One can surmise, however, that the failure of the *Gross* Court to refer to the legislative history of that statute in its decision may mean that there is none. It is possible that age discrimination was never considered by Congress when it was developing the statute.

Regardless, it is clear that the Court that decided *Gross* was far more conservative and employer-friendly than the one that determined *Price Waterhouse*. In fact, the *Gross* Court questioned not only the soundness of the *Price Waterhouse* decision but also whether, given the problems associated with the shifting burdens created under the mixed-motive analysis, if presented anew with the question it would still make the same ruling it had in *Price Waterhouse*.[24] It is obvious that it would not.

In this author's estimation the dissenting opinion in *Gross* is the correct one and the one that should have prevailed.[25] There, the dissenting Justices noted that *Price Waterhouse* was not directly overruled by the Civil Rights Act and that based upon the fact that Title VII and the ADEA contained comparable language, under applicable precedent, the mixed-motive analytical framework still

should exist for age discrimination claims. It makes no sense legally or morally to have different approaches for these claims. Unfortunately, the *Gross* dissent is not the law of the land.

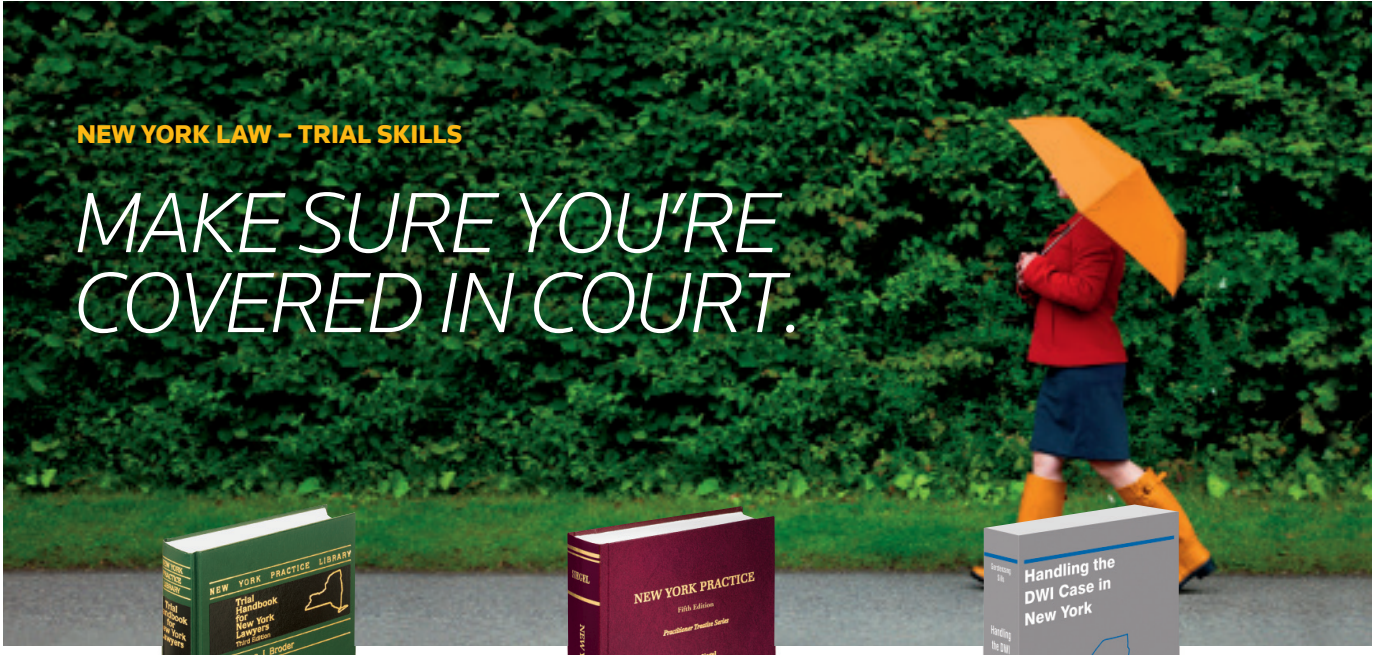
New York City Human Rights Law

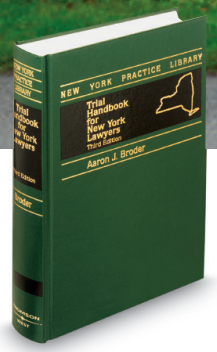
The question remains: What may an age discrimination plaintiff do to prosecute his or her claim given this unfavorable legal landscape? The short answer is that, at least in New York, age discrimination claims under the New York City Human Rights Law (NYCHRL)[26] must be construed independently and more liberally than its state and federal counterparts. In 2005, the New York City Council passed the Restoration Act, which amended the NYCHRL to require a liberal construction of that law "for the accomplishment of the [NYCHRL's] uniquely broad and remedial purposes . . . regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL] have been so construed."[27] Given that a more liberal construction of this law is required, it is clear that mixed-motive analysis may still exist under its terms. It is obvious that age-based employment discrimination claims should be pursued under this statute in state court, rather than in federal court.[28]

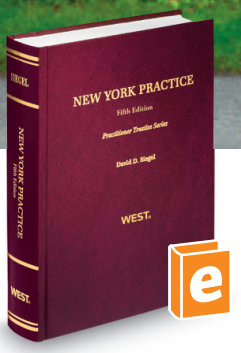
The fact that age discrimination claims brought under the New York City Administrative Code are entitled to an independent legal analysis distinct from that employed under the ADEA and the New York State Human Rights Law was recently made clear by the United States Court of Appeals for the Second Circuit in *Velazco v. Columbus Citizens Foundation*.[29] There, the Second Circuit reversed a district court summary judgment ruling dismissing both an ADEA claim and a NYCHRL age discrimination claim on the grounds that the plaintiff had failed to present evidence that age was the "but-for" cause of the adverse employment action. The court remanded the NYCHRL claim back to the district court, which had decided to exercise pendent jurisdiction, for consideration of that claim in light of the Restoration Act.

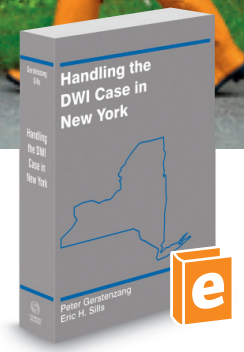
Ultimately, the correction of this legal dichotomy rests in the hands of Congress. Congress must enact legislation comparable to the Civil Rights Act specifically for the ADEA so that claimants can pursue federal age discrimination claims based upon a mixed rather than a single-motive theory.[30] It should be noted that this goal is not unachievable. In 2009, Congress enacted the Lilly Ledbetter Fair Pay Act, correcting the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[31] which held that the plaintiff's Equal Pay Act claim was time barred because the discriminatory acts she had complained of (pay inequity) occurred more than 180 days prior to her filing a complaint with the Equal Employment Opportunity Commission. Given the huge inequity here in the standards applied to ADEA and Title VII employment discrimination claims, similar corrective legislative action is warranted and necessary. Whether and when that will occur remains to be seen. ■

1. 29 U.S.C. § 623.
2. 42 U.S.C. §§ 2000e *et seq.*
3. 411 U.S. 792 (1973).
4. *Id.* at 802–03.
5. The *McDonnell Douglas* burden-shifting analysis has been applied to ADEA cases, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), as well as cases under the Americans with Disabilities Act, *Doe v. Bd. of Educ. of Fallsburgh Cent. Sch. Dist.*, 63 Fed. App'x 46 (2d Cir. 2003).
6. *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003); *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002).
7. 490 U.S. 228 (1988).
8. *Dare*, 267 F. Supp. 2d at 991–92. The *Dare* court stated in *dicta*: "The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on the basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational." *Id.* at 990.
9. *Price Waterhouse*, 490 U.S. at 276.
10. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).
11. 42 U.S.C. § 2000e-2 (emphasis added).
12. *Id.*
13. 539 U.S. 90.
14. Thus, she concurred with the Court's ruling that the district court did not abuse its discretion by permitting a mixed-motive jury instruction in the absence of direct evidence that discrimination had played a substantial role in the challenged employment decision. *Id.* at 101.
15. 29 U.S.C. § 623(a)(1) (emphasis added).
16. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).
17. *Price Waterhouse*, 490 U.S. 228.
18. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575 (1978)).
19. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004); *Equal Emp't Opportunity Comm'n v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160 (4th Cir. 2004).
20. 557 U.S. 167 (2009).
21. *Id.* at 176.
22. *Id.* at 174. Justice Thomas wrote: "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add [the Civil Rights Act], even though it contemporaneously amended the ADEA in several ways." *Id.*
23. Justice Thomas also held that "[w]hen Congress amends one statutory provision, but not another it is presumed to have acted intentionally." *Id.*
24. *Id.* at 181–82.
25. As in many important Supreme Court decisions, the Court's approach is often decided by one vote. Such was the case in *Gross*, where Justice Kennedy's vote was the deciding one based upon the known political proclivities of that bench.
26. N.Y.C. Admin. Code §§ 8-101 *et seq.*
27. *See* Restoration Act § 7.
28. The same cannot be said for age discrimination claims brought under New York State Human Rights statutes, which parallel federal analysis. *D'Annunzio v. Ayken, Inc.*, 25 F. Supp. 3d 281, 293 (E.D.N.Y. 2014).
29. 2015 WL 613035 (2d Cir. Jan. 14, 2015).
30. Legislative reparation is also needed for the anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a), whose language was not modified by the Civil Rights Act either. As a result of *Gross*, the Supreme Court recently held in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), that the "but-for" legal standard also applies to Title VII retaliation claims. Like ADEA claims, Title VII retaliation suits should be permitted the benefit of mixed-motive analysis.
31. 550 U.S. 618 (2007).









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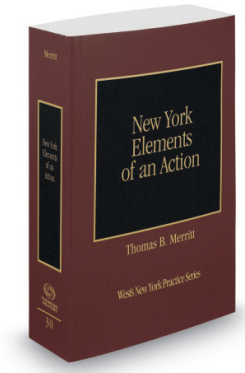

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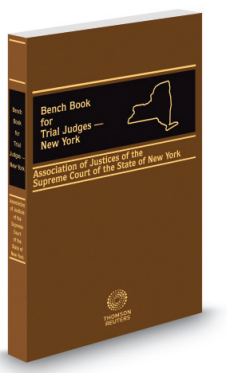

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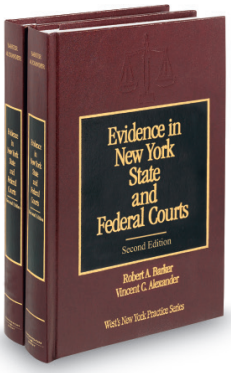

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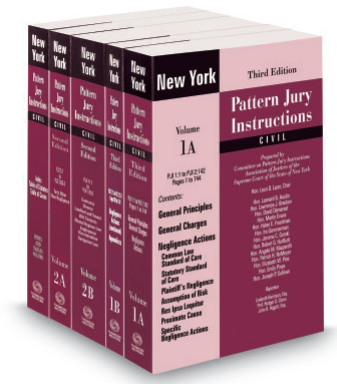

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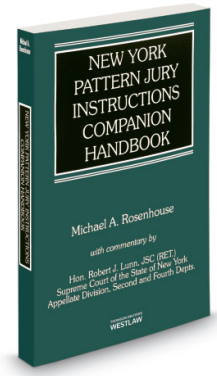

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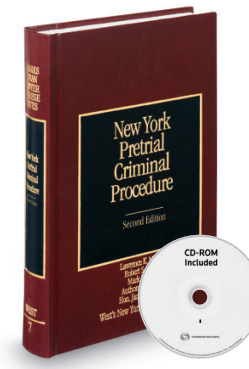

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Property Contamination and Leasing: The Federal Law

By Larry Schnapf

Prior to the enactment of modern environmental laws, liability for contamination in commercial leasing transactions was governed solely by contract and tort principles. In the absence of an express agreement or misrepresentation, the tenant was expected to make its own careful examination of the conditions of the property and the vendor or landlord would not be liable for any existing harm or defects.[1] Tenants were traditionally liable for harm caused to persons or property and for dangerous conditions or nuisances created without the landlord's knowledge or acquiescence.[2]

The general rule was that the lessor would not be liable to the lessee or others for harm for dangerous conditions existing at the time of the transfer[3] or created after the lessee took possession of the property.[4] Over time, the courts crafted a number of exceptions to this principle. One exception was that a landlord could be subject to liability if it knew, or had reason to know, of a condition that posed an unreasonable risk of physical harm to persons, the lessor had reason to believe that the lessee would not discover the dangerous condition, and the lessor concealed or failed to disclose this condition to a lessee or sublessee.[5]

Another exception was that a lessor may be held liable for tenant activities that constitute a nuisance, such as environmental contamination, if the lessor consented to such action or knew that the tenant's operations would likely release contaminants and the landlord failed to take precautions to prevent such damage.[6]

Modern formulations link liability of lessors and lessees to a failure to exercise reasonable care and incorporate concepts of comparative negligence. A lessor has a duty to exercise reasonable care for any risks that are created by the lessor and a duty to disclose any latent dangerous condition that the landlord knows, or should know, is unknown to the lessee.[7] This includes disclosure of dangerous latent conditions that were not created by the lessor.[8] The obligation hinges on whether the lessee appreciates the danger posed by the condition and not simply if the dangerous condition is open or obvious. The lessor's duty is not cut off by a lessee's failure to exercise reasonable care to discover dangerous conditions.[9]

In New York, landlords and tenants have been held liable for contamination under common-law principles such as strict liability, nuisance, trespass and negligence. Owners who have failed to abate contamination caused by their tenants have been found liable for creating or maintaining a nuisance.[10] While some states allow transferees to bring a nuisance action against its transferor on the grounds that "the creator of a nuisance remains liable even after alienating his property," New York courts have held that a nuisance action can only be maintained between adjoining landowners and is not a proper claim in a suit between successive landowners, or operators of the same property.[11]

New York has a three-year statute of limitations for claims for personal injury and damage claims relating to exposure to hazardous substances. The clock starts on the date the injuries are discovered or should have been discovered by a reasonably diligent party.[12]

The Federal Law

Numerous federal environmental laws can impose liability on owners or operators of contaminated property. One of the principal laws of concern is the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[13]

CERCLA liability is probably the most significant environmental law for commercial leasing transactions, as it applies to the release of hazardous substances.[14] The federal Environmental Protection Agency (EPA) is authorized to perform cleanups in cases of release of hazardous substances[15] and seek reimbursement of its costs from four categories of potentially responsible parties (PRPs) who may be strictly, jointly and retroactively liable for cleanup costs.[16] Private parties who incur cleanup costs may also seek reimbursement from PRPs.[17] Indeed, because the New York State Superfund law does not expressly authorize the New York State Department of Environmental Conservation (NYSDEC) to recover its cleanup costs, NYSDEC customarily uses CERCLA to seek cost recovery.

Liability for Property Owners and Tenants Under CERCLA

The types of CERCLA PRPs that may be liable include current and past owners and operators of contaminated property. The liability for past owners or operators under CERCLA is not necessarily congruent with the liability of current owners or operators. Parties that currently hold title or possession of contaminated property may be liable for historic contamination that occurred prior to the time the owner acquired title or the operator came into possession of the property.[18] However, past owners or operators are only liable if they owned or occupied the property "at the time of disposal" of the hazardous substances.[19]

Current landlords may be considered CERCLA owners based on their ownership of property, even if the owner did not place the hazardous waste on the site or cause the release.[20] Furthermore, a current passive landlord or sublessor does not have to exercise any control over the disposal activity to be liable as a CERCLA owner.[21]

Tenants may be liable as an owner if they had sufficient indicia of ownership, or as an operator, based on their control of a property. When deciding if a tenant should be considered a "*de facto* owner," courts will examine rights and obligations of the tenant under a lease to see if effective control of the property had been handed over to the tenant. Some factors courts have considered include:

- If there is a long-term lease, where the lessor cannot direct how the property is used;
- If the lessee can sublet without permission of the owner;
- Whether the lessee is responsible for paying all costs, including taxes, assessments and operation and maintenance costs; and
- Whether the lessee is responsible for making any and all structural changes and other repairs.

The leading case in New York for determining liability of tenants and subtenants is *Commander Oil v. Barlo Equipment Corp.*,[22] where the plaintiff initially leased one parcel to the defendant, Barlo Equipment Corp. (Barlo), in 1964, and a second parcel to Pasley Solvents & Chemicals, Inc. (Pasley), in 1969. Barlo used its parcel for office and warehouse space, while Pasley operated a solvent repackaging and reclamation business on its leasehold. In 1972, the plaintiff consolidated the leases so that Barlo was the lessee for both parcels and was sublessor for the Pasley lot. Under the new lease, Barlo was responsible for basic maintenance and payment of taxes on both lots.

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In 1981, contamination was discovered on the Pasley parcel. Eventually, the plaintiff entered into a consent order with the EPA to implement a cleanup and sought contribution from Barlo for the costs incurred at the former Pasley lot on the theory that Barlo was a CERCLA owner. The plaintiff did not proceed against Barlo under an "operator" theory because Barlo never conducted operations at the Pasley parcel. The district court granted summary judgment to the plaintiff, ruling that Barlo was a CERCLA owner by virtue of its "authority and control" over the Pasley lot.[23] After a bench trial, the district court ruled that although Pasley was responsible for all of the response costs associated with its lot, the costs had to be allocated between the plaintiff and Barlo since Pasley was "financially irresponsible."

On appeal, Barlo argued that CERCLA owner liability was restricted to owners of record, while Commander Oil urged a more expansive definition that relied primarily on the right to control property, whether the right is possessory or is a recorded property interest. The Second Circuit acknowledged that most district courts have held that site control is a sufficient indicator to find lessees or sublessors liable as CERCLA owners. However, the appeals court also noted that the circuit precedent provided that CERCLA "owner" and "operator" liability should be treated separately, and suggested that relying solely on a site control analysis could essentially make all operators into owners and thereby render most operator language superfluous.

Tenants may be liable as an owner if they had sufficient indicia of ownership, or as an operator, based on their control of a property.

The court recognized that while the typical lessee should not be held liable as an owner, there might be circumstances when liability would be appropriate.[24] However, the court emphasized that in reaching such a conclusion, the critical analysis was the relationship between the owner and the tenant/sublessor, and not the lessee/sublessor's relationship with its sublessee.

Turning to the lease, the court concluded that Barlo did not possess sufficient attributes of ownership over the Pasley lot based, in part, on the following:

- Barlo was limited to using its parcel and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder."
- Barlo was required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event.

- The lease required Barlo to obtain written approval from Commander Oil to sublet the property, and prohibited subletting to any entity that had "any connection with the fuel, fuel oil or oil business."
- Barlo was prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

The court acknowledged that Barlo possessed some attributes of ownership with respect to the Pasley lot; however, when viewed in totality, the Second Circuit held that Barlo lacked most of the rights that come with ownership and reversed the district court ruling.

In *Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC*,[25] a federal district court found there was a genuine dispute of material facts as to whether a managing agent of a shopping center was a CERCLA operator of a tenant dry cleaning business. The agent did not maintain an office or have personnel at the site, nor did it have keys to any leased space or have the power to evict tenants. The managing agent said its principal responsibilities were to attempt to rent space to tenants approved by the owner, collect rent, maintain the common areas of the center, pay bills in a timely manner, and send excess revenues to the owner.

The owner pointed to language in the management services agreement that the agent was to obtain all necessary government approvals and perform such acts necessary to ensure that the owner was in compliance with all laws. The court noted that the managing agent sent the dry cleaner a certified letter advising of certain environmental reporting requirements, requesting copies of the documentation that the dry cleaner was required to provide to the EPA or an explanation as to why the dry cleaner was exempt from providing such documentation. The court said that this correspondence, combined with the other evidence of record indicating that the managing agent generally was responsible for managing and maintaining the shopping center and performing all acts necessary to effect compliance with laws, rules, ordinances, statutes, and regulations, was sufficient to create a genuine issue as to whether the agent managed the operations of the dry cleaner specifically related to pollution, and it therefore met the definition of a former "operator."

Defenses

Third-Party Defense

CERCLA originally contained three affirmative defenses to liability: act of God, act of war, and the third-party defense. From a practical standpoint, the third-party defense was the only viable defense available to property owners or operators. To establish that defense, the owner or operator would have to show that the disposal or release was:

- *solely* caused by a party,
- with whom it had no direct or indirect *contractual relationship*,
- the defendant exercised *due care* with respect to the hazardous substances, and
- took *precautions* against foreseeable actions or omissions of third parties.[26]

Most courts broadly construed the phrase "*in connection with a contractual relationship, existing directly or indirectly*" to encompass virtually all forms of real estate conveyances. As a result, lessors of property that was contaminated by a current or former tenant could not successfully assert the third-party defense on the grounds that a lease constituted a "contractual relationship" with the responsible party (i.e., lessee).

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The concept that the mere existence of a lease can preclude an owner from asserting a third-party defense when the contamination is solely caused by a tenant is rather harsh, especially in the case of truly absentee landlords with so-called "triple-net leases" or long-term ground leases.

The good news is that the Second Circuit has adopted an expansive view of the third-party defense so that it is a viable defense for owners or operators in New York. The federal courts in New York generally take a narrow view of the phrase "contractual relationship" and have held that the existence of a "contractual relationship" does not bar an owner or operator from invoking the defense.[27] Instead, a party will be precluded from asserting the defense only if there is some relationship between the disposal or release that caused the contamination and the contract, or a relationship which allows the landlord to exert some form of control over such activities.[28]

Perhaps the seminal case on third-party defense is *New York v. Lashins Arcade*,[29] where a current owner of a shopping center was able to successfully invoke the third-party defense because it did not have a contractual relationship with a former dry cleaner tenant who had discharged hazardous substances into the ground 15 years prior to acquisition.

Assuming that a prospective purchaser or tenant could overcome the "contractual relationship" hurdle, it would still have to establish that it satisfied the third prong of the test to exercise due care in dealing with the hazardous substances, and the fourth prong, which requires

taking precautions against the foreseeable actions or omissions of third parties. The property owner in *Lashins Arcade* established that it had exercised due care, such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic, inserting use restrictions into leases, and it performed periodic inspections to assure compliance with this obligation. In contrast, a bank that had subleased its space to a dry cleaner was unable to assert the third-party defense because it had failed to assess environmental threats after discovery that disposal practices would be part its due care analysis.[30]

Innocent Landowner Defense

Because the third-party defense was largely unavailable to purchasers or tenants of contaminated property, Congress enacted the innocent purchaser defense in 1986. Under this defense, a purchaser (or tenant) who "did not know or had no reason to know" of contamination would not be liable as a CERCLA owner or operator.[31] To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "all appropriate inquiries . . . into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[32]

Since it relies on an affirmative defense, the innocent purchaser has the burden of establishing that it satisfied the elements of the defense. Not surprisingly, most courts narrowly construed the innocent purchaser defense. If a purchaser did not discover contamination before taking title, but contamination was subsequently discovered, courts generally concluded that the purchaser did not conduct an adequate inquiry and, therefore, could not avail itself of the defense.

Further complicating matters, CERCLA did not establish specific requirements for what constituted an appropriate inquiry. As part of the 2002 amendments, the EPA was required to promulgate an All Appropriate Inquiries (AAI) rule. The AAI rule became effective on November 1, 2006.[33]

Bona Fide Prospective Purchaser (BFPP) Defense

The principal drawback of the innocent purchaser defense is that a purchaser or tenant cannot know, or have reason to know, that the property was contaminated. To incentivize redevelopment of contaminated properties, Congress added the BFPP to CERCLA as part of the 2002 amendments.[34] This defense allows a landowner or tenant to knowingly acquire or lease contaminated property after January 11, 2002 without incurring liability for remediation, if it can establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility.[35]
- The purchaser is not a potentially responsible party or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP.[36]
- The purchaser conducted "all appropriate inquiries" into the past use and ownership of the site.[37]

After taking title, a purchaser also must comply with a number of "continuing obligations" to maintain its BFPP status.

Contiguous Property Owner (CPO) Defense

Congress also added the CPO[38] defense in 2002. This defense provides liability protection to a person owning or leasing property that has been contaminated by a contiguous or adjacent property.

A person seeking to qualify for the CPO defense must comply with the same pre- and post-acquisition obligations as a BFPP. However, while the BFPP can knowingly acquire contaminated property, a CPO must not know or have reason to know of the contamination after it has completed its pre-acquisition AAI investigation. If an owner cannot qualify for the CPO defense, it may still be able to qualify for the BFPP defense.

Innocent Seller's Defense

An innocent purchaser who then becomes a seller can assert this defense if it discloses the existence of hazardous substances that may have occurred after taking title and if it complied with the "due care" and "precautionary" prongs of the third-party defense.[39]

CERCLA Secured Creditor Exemption

Lenders who without participating in the management of a facility hold indicia of ownership to protect a security interest in the facility are also exempt from liability.[40] However, banks that have foreclosed on property or have been overly involved in the management of a borrower's operation have been held liable as owners or operators of the property.

Contractual and Equitable Defenses

While the statutory defenses are the only ones available to defendants in government cost recovery actions, traditional equitable defenses are available to defendants in private party cost recovery actions or contribution actions such as laches, release, waiver, or unclean hands to reduce liability in private cost recovery actions. Defendants may also raise procedural defenses to government cost recovery actions such as response costs were not consistent with the National Contingency Plan[41] and the remedy was not cost-effective.

CERCLA Liens

CERCLA provides the EPA with two types of statutory liens. The EPA may impose a non-priority lien on property where it has performed response actions. The lien

becomes effective when the EPA incurs response costs or notifies the owner of the property of its potential liability, whichever comes later. The lien is subject to the rights of holders of previously perfected security interests.[42]

The EPA may also file a windfall lien when it has performed a response action at a site owned or operated by a BFPP and the response actions have increased the fair market value of the property above the fair market value that existed before the response action was initiated.[43] The windfall lien is to be measured by the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. The lien will arise at the time the EPA incurs its costs and shall continue until the lien is satisfied by sale or other means, or the EPA recovers all of its response costs incurred at the property. In lieu of the EPA imposing a windfall lien on the property, the BFPP may agree to grant the EPA a lien on any other property that the BFPP owns or provide some other assurance of payment in the amount of the unrecovered response costs that is satisfactory to the EPA.

Resource Conservation and Recovery Act (RCRA)[44]

Under this law, owners or operators of facilities that treat, store or dispose of hazardous waste must comply with certain operating standards and may also be required to undertake corrective action to clean up contamination caused by hazardous or solid wastes. The federal government may also issue a corrective action order to an owner or operator of a Treatment, Storage and Disposal Facility or generators of hazardous waste subject to RCRA.[45] The government may also issue orders for injunctive relief to address hazardous waste posing an "imminent and substantial endangerment" to public health and the environment.[46]

RCRA also imposes a full range of regulatory requirements on owners and operators of Underground Storage Tanks that are used to store petroleum or hazardous substances.[47] Some parts of the UST program are administered by the NYSDEC in lieu of EPA enforcement.[48]

Unlike CERCLA, private parties are not entitled to recover their cleanup costs. Private parties may seek injunctive relief to compel persons who contributed to the past or present handling, storage, treatment, transportation or disposal of hazardous waste that is posing an "imminent and substantial endangerment" to public health and the environment.[49] Indeed, this provision is becoming a powerful litigation tool particularly for sites contaminated by gas stations[50] and the notorious dry cleaners. ■

1. This concept has sometimes been referred to as "caveat lessee."

2. *State of N.Y. v. Monarch Chems.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982).

3. Restatement of the Law, Second, Torts, § 356.

4. Restatement of the Law, Second, Torts, § 355.

5. Restatement of the Law, Second, Torts, § 358.

6. *Monarch Chems.*, 90 A.D.2d 907.

7. Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm, § 53.

8. *Id*. comment (e).

9. Consistent with modern notions of comparative responsibility, such failure would constitute negligence and either reduce the recovery of a lessee or subject the lessee to liability to third parties who are harmed by the dangerous condition. *Id*.

10. *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564 (1977); *Monarch Chems.*, 90 A.D.2d 907; *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

11. *Nashua Corp. v. Norton Co.*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997).

12. CPLR 214-c; *Jensen v. General Elec. Co.*, 82 N.Y.2d 77 (1993); *Aiken v. General Elec. Co*, 57 A.D.3d 1070, 869 N.Y.S.2d 263 (3d Dep't 2008); *Atkins v. Exxon Mobil Corp.*, 9 A.D.3d 758, 780 N.Y.S.2d 666 (3d Dep't 2004).

13. 42 U.S.C. §§ 9601 *et seq*.

14. Petroleum is excluded from the definition of hazardous substances. 42 U.S.C. § 9601(14). Because of the so-called petroleum exclusion, neither EPA nor private parties may seek reimbursement of costs incurred to remediate contamination from leaking gasoline underground storage tanks (USTs). *White Plains Hous. Auth. v. Getty Props. Corp.*, 2014 U.S. Dist. LEXIS 174308 (S.D.N.Y. Dec. 16, 2014). However, the petroleum exclusion does not apply to contaminants added to petroleum during normal use, such as waste oil. *City of N.Y. v. Exxon Corp.*, 766 F. Supp. 177, 186 (S.D.N.Y. 1991).

15. 42 U.S.C. § 9604.

16. 42 U.S.C. § 9607(a).

17. Innocent parties may seek 100% recovery of their costs (known as cost recovery actions) under 42 U.S.C. § 9607(a)(4)(B) while PRPs may file contribution actions under 42 U.S.C. § 9613(f)(1) if they incur costs that exceed their allocated share of the liability.

18. 42 U.S.C. § 9607(a)(1).

19. 42 U.S.C. § 9607(a)(2).

20. *Shore Realty Corp.*, 759 F.2d 1032.

21. *Bedford Affiliates v. Manheimer*, 1997 U.S. Dist. LEXIS 23903 (E.D.N.Y. Aug. 6, 1997); *United States v. A & N Cleaners & Launderers*, 788 F. Supp. 1317 (S.D.N.Y. 1992).

22. 215 F.3d 321 (2d Cir. 2000).

23. For support of its holding that Barlo was a CERCLA owner, the district court relied on *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237 (S.D.N.Y. 1999) and *A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317. These cases interpreted the term "owner" to extend beyond the fee or record owner to anyone possessing the requisite degree of control over the property.

24. The court provided three rare instances where the lessee did not have a typical lease but instead may have obtained a priority of ownership rights: (i) sale-leaseback arrangements, if the lessee actually retains most rights of ownership with respect to the new record owner; (ii) extremely long-term leases where, according to the terms of the lease, the lessee retains so many of the indicia of ownership that he is the de facto owner; and (iii) where a lessee/sublessor has impermissibly exploited more rights than originally leased.

25. 2009 U.S. Dist. LEXIS 90483 (N.D. Ga. Oct. 30, 2009).

26. 42 U.S.C. § 9607(b)(3) (emphasis added).

27. *But see U.S. v. Occidental Chemical Corp.*, 965 F. Supp. 408 (W.D.N.Y. 1997) (a deed can serve as an indirect contractual relationship that can prevent a property owner from asserting the third party defense).

28. *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85 (2d Cir. 1992). *But see A & N Cleaners & Launderers, Inc.*, where a bank that was sublessor who maintained complete control and responsibility for property where a release occurred was deemed to be an owner for CERCLA purposes.

29. 91 F.3d. 353 (2d Cir. 1996). Compare *Lashins* conduct to the purchaser/owner in *Idylwoods Assoc. v. Mader Capital Inc.*, 956 F. Supp. 410 (W.D.N.Y. 1997).

30. *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229 (S.D.N.Y. 1994).
31. 42 U.S.C. § 9601(35)(A).
32. 42 U.S.C. § 9601(35)(B)(i)(I).
33. 40 C.F.R. § 312.
34. 42 U.S.C. § 9607(r).
35. 42 U.S.C. § 9601(40)(A).
36. 42 U.S.C. § 9601(40)(H).
37. 42 U.S.C. § 9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. § 312.
38. 42 U.S.C. § 9607(q).
39. *Westwood Pharms. v. Nat'l Fuel Gas Distrib.*, 964 F.2d 85 (2d Cir. 1992).
40. 42 U.S.C. § 9601(20)(A).
41. 40 C.F.R. § 300.
42. 42 U.S.C. § 9607(l).
43. 42 U.S.C. § 9607(r).
44. 40 C.F.R. pts. 239–282.
45. 42 U.S.C. § 6928(h).
46. 42 U.S.C. § 6973.
47. 42 U.S.C. §§ 6991–6991m.
48. A discussion of New York state law is beyond the scope of this article.
49. 42 U.S.C. § 6972(a)(1)(B).
50. Because petroleum is excluded from the CERCLA definition of hazardous substances, RCRA § 7002 is often the only federal remedy available to owners or operators of property contaminated with petroleum.

The Curious Case of the Full Payment Check

By Sandra J. Mullings

Jack and Jill make a contract for the sale by Jack of 5,000 pails to Jill at a price of $1 per pail. After the pails are delivered, Jill, in good faith, claims that 1,000 of the pails are completely defective and, therefore, Jill only owes Jack $4,000. Jack contends that none of the pails are defective, or, if so, the defects occurred after risk of loss passed to Jill and, therefore, Jill owes Jack the full contract price of $5,000. After the parties argue back and forth for several weeks, Jill sends Jack a letter in which she clearly explains that she is enclosing a check for $4,100 in full settlement of the amounts owed under the contract and on the check she has conspicuously written "in full payment of contract for pails." Jack receives the letter, endorses and cashes the check, but above the endorsement writes "received under protest, without prejudice and with full reservation of rights."

Does Jack's acceptance of the check, despite his notations, discharge Jill's obligation under the contract and preclude Jack from collecting the remaining $900 he claims is due? In at least 48 states, the answer would be yes, Jack has entered into an accord and satisfaction and Jill's debt is discharged.[1] But as of this writing, New York stands nearly alone in the view that, because of the language of reservation that Jack wrote before cashing the check, he has avoided an accord and satisfaction and can still sue to try to recover the additional amount he claims is due. That anomaly is an interesting study of apparently unanticipated results from the enactment of the Uniform Commercial Code (UCC or Code), differing legislative histories, differing judicial interpretations of the statute and where the equities lie, and eventual changes to the UCC, which the New York Legislature has failed to adopt.

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Accord and Satisfaction

Prior to the enactment of the UCC, Jack and Jill's situation would be governed by the common law of accord and satisfaction. The obligation owed by Jill would be considered an unliquidated obligation, i.e., an obligation subject to a good-faith dispute or uncertainty about the existence or amount of the debt. In almost all states, if Jill offered Jack an amount less than he claimed was due, and clearly indicated that it was offered in full satisfaction of her obligation, Jack had two choices. He could refuse to accept the payment and thus pursue his rights to seek the entire $5,000. Alternatively, he could accept the payment, for instance by cashing or depositing the check, and in doing so, would be deemed to have accepted it on the terms offered by Jill, in full satisfaction of her obligation, regardless of any language of reservation Jack put on the check. In accepting the payment, Jack would simultaneously be entering into an accord, an agreement to accept a different performance of their agreement, and a satisfaction, the receipt of the performance of that agreement. That accord and satisfaction discharged Jill's obligation and precluded Jack from recovering anything further from Jill.[2]

Did the UCC Change the Law of Accord and Satisfaction?

The UCC was enacted, in whole or in part, by every state, including New York, which adopted it in 1964. As originally promulgated and adopted by the states, the UCC included § 1-207, which provided: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner

demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." Eventually, litigation raised the question of whether such a reservation of rights applied to an accord and satisfaction. That is, could creditors reserve their rights, and thereby avoid an accord and satisfaction, by, for instance, writing language on a check such as "without prejudice" or "under protest"? The judicial response was varied and reflected the competing considerations at issue, as well as a dearth of guidance from either the official comments to the UCC or the legislative history of most states. The issue was also the subject of discussion and of conflicting views among commentators and scholars.[3]

Some courts concluded that § 1-207 had changed the law regarding accord and satisfaction. In a few cases, there was little analysis.[4] However, in other cases, the court considered the views of commentators in concluding that UCC § 1-207 allowed the reservation of rights when a payment was offered in full satisfaction.[5] Other courts expressly considered the equities involved in the full payment check scenario and concluded that the section was enacted "in response to a perceived injustice" to creditors who inadvertently found that a debt had been discharged,[6] or that allowing a reservation of rights against an accord and satisfaction would "discourage tactical gamesmanship between litigants, [would] balance the power between negotiating parties appropriately, and [would] leave untouched the debtor's option of negotiating an effective accord and satisfaction."[7]

The majority of courts, however, did not interpret § 1-207 as altering the common law rules.[8] The decision of the Supreme Court of Wisconsin in *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*[9] illustrates a number of factors that led to such conclusions. The court found that neither the official comments to the UCC nor the Wisconsin legislative history suggested that UCC § 1-207 should be applied to full payment checks[10] and noted that some commentators had concluded that the official comments suggested that the section "was intended to apply to ongoing contracts, not to full payment checks that terminate the contractual arrangement."[11]

In addition, an earlier draft of the UCC had contained a § 3-802(3), which was ultimately not adopted, and which provided that obtaining payment of a full payment check would discharge the underlying obligation unless the payee "establishes that the original obligor has taken unconscionable advantage in the circumstances."[12] In the court's view, the existence of this subsection specifically dealing with full payment checks indicated that § 1-207 was not intended to apply to an accord and satisfaction.[13]

The court also concluded that allowing acceptance of a full payment check to constitute an accord and satisfaction served "sound public policy," by allowing informal resolution of disputes without litigation.[14] Considering the equities, the court stated that

> [t]he interests of fairness dictate that a creditor who cashes a check offered in full payment should be bound by the terms of the offer. . . . [A]llowing the creditor to keep the money disregarding the debtor's conditions seems unfair and violative of the obligation of good faith which the UCC makes applicable to every contract or duty.[15]

Other courts also noted the language of what was then § 1-103, to the effect that "principles of law and equity are not to be displaced unless done so explicitly," and found no such explicit indication in § 1-207 or the comments.[16] Moreover, several courts concluded that even if § 1-207 could be read to alter the common law rules regarding accord and satisfaction, it did not do so when the underlying transaction was not a transaction covered under the UCC, such as a sale of goods, even when the offered full payment was made by a negotiable instrument, such as a check, which was the subject of Article 3 of the UCC.[17]

New York's Interpretation of UCC § 1-207

As the issue of the effect of UCC § 1-207 began to be litigated in New York, several courts concluded that the section allowed a creditor to avoid an accord and satisfaction. An important factor was a specific piece of New York legislative history. With respect to UCC § 1-207, the 1961 Report of the State of New York Commission on Uniform State Laws noted:

> This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment, performance, etc., without losing his rights to demand the remainder of the goods, to set-off a failure of quality, or to sue for the balance of the payment, so long as he explicitly reserves his rights. . . . The Code rule would permit, in Code-covered transactions, the acceptance of a part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the performance or payment.[18]

This language, which is less ambiguous than the official comments and seems to speak specifically to offers of full payment, was sufficient for courts to find an alteration of the common law rules.[19] However there was disagreement as to whether § 1-207 applied when the underlying transaction was not a "Code-covered" transaction. For instance, the First Department allowed the avoidance of an accord and satisfaction where the underlying contract involved the use of premises for a party,[20] but the Second Department did not apply the section in cases involving construction contracts[21] and a sale of real property.[22]

The question of the effect of UCC § 1-207 finally reached the Court of Appeals in 1985. In *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc.*,[23] the Court unequivocally held that a creditor could reserve its rights on a negotiable instrument and thereby avoid an accord

and satisfaction, thus establishing New York law on the issue. The underlying contract involved an oral agreement for services to repair a leaking roof. The plaintiff's initial bill for $1,241 and a revised bill for $1,080 were disputed by the defendant. The defendant sent a check for $500 on which was written, "'This check is accepted in full payment, settlement, satisfaction, release and discharge of any and all claims and/or demands of whatsoever kind and nature.'"[24] The plaintiff, however, added the words "Under Protest" prior to its endorsement of the check.[25] The plaintiff sued to recover the additional $580 it claimed was due. Thus, the questions of whether UCC § 1-207 allowed a creditor to avoid an accord and satisfaction and whether it applied when the underlying transaction was a non-Code transaction were perfectly teed up.

Revisions to the UCC

In *Horn Waterproofing*, the Court of Appeals suggested that, in view of the stated purpose of the Code to make the law uniform among the states, the National Conference of Commissioners "should give serious thought to a clarifying revision" of § 1-207.[33] That clarifying revision came a few years later, in 1990. The 1990 revision of the UCC put the original language of § 1-207 in a subsection (1) and added a subsection (2), which provided that "[s]ubsection (1) does not apply to an accord and satisfaction."[34] Thus the revision clearly adopted the majority view, rather than the view adopted by New York. (In a subsequent revision of Article 1, sections were renumbered and what had been § 1-207 became § 1-308.) In addition, Article 3 was revised to deal explicitly with an attempted accord and satisfaction by negotiable instrument by adding a new § 3-311, entitled "Accord and Satisfaction by Use of Instrument."[35] That section provides that a claim is discharged if a negotiable instrument was tendered with a conspicuous indication that it was offered in full satisfaction, the claim was unliquidated or subject to a bona fide dispute, and the claimant obtained payment of the instrument.[36] Two exceptions are provided. First, the claim will not be discharged if the claimant is an organization and, within a reasonable time before the instrument was tendered, the claimant had sent a conspicuous statement that required that communications about disputed debts, including full payment instruments, be sent to a particular person, office or place and the instrument or communication was not so received.[37] (A typical credit card agreement will contain such a provision.) Second, whether or not the claimant is an organization, the claim will not be discharged if, within 90 days, the claimant tenders repayment of the instrument.[38]

> UCC § 1-207 was enacted "in response to a perceived injustice" to creditors who inadvertently found that a debt had been discharged.

The Court discussed the divergent views among scholars and among the courts that had considered the issues,[26] as well as the policy favoring settlement of contract disputes underlying the traditional doctrine of accord and satisfaction.[27] However, the Court also indicated that "conflicting considerations of policy and fairness are implicated" when a creditor is presented with a full payment check.[28] While acknowledging the debtor's expectation that if the check is not returned, the dispute is resolved, the Court noted the "cruel dilemma" faced by the good-faith creditor who had to either "surrender the partial payment or forfeit its right to the remainder."[29] UCC § 1-207, the Court concluded, changed the common law, resulting in a "fairer rule."[30] The Court found that the language of the section could be read to make that change and that this view was buttressed by the discussion in the Report of the New York Commission on Uniform State Laws, which "unmistakably addresse[d] the common law doctrine and note[d] that the section permits a reservation of rights upon acceptance of partial payment where an accord and satisfaction might otherwise have resulted."[31] The Court also found that the placement of the section in Article 1 indicated an intent that the section apply to any commercial "Code-covered" transaction. The Court held that such "Code-covered" transactions included any attempted settlement by negotiable instrument, such as a check, because such instruments are regulated under Article 3 of the UCC.[32] Thus, although the underlying contract in *Horn Waterproofing* was one for services, not covered by any of the substantive articles of the Code, the use of a check made § 1-207 applicable.

As of this writing, 49 states have enacted either the revised § 1-207 or the later renumbered § 1-308, indicating that the section does not apply to an accord and satisfaction, as well as a version of § 3-311 regarding accord and satisfaction by negotiable instrument.[39] New York, however, did not enact these changes. Thus New York courts continued to follow *Horn Waterproofing* and applied UCC § 1-207 in determining whether an accord and satisfaction had occurred, including in cases where the underlying contract or dispute was not a transaction covered by a provision of the Code. For instance, New York courts have applied UCC § 1-207 when the proffered

full payment check was for lost luggage,[40] rescission of a life insurance policy,[41] and tort damages.[42]

New York Enacts Changes to the UCC

Although there were revisions to Articles 1 and 3, as well as to other articles, in 1990 and thereafter, for several decades New York did not enact these changes, despite urging from several quarters. For instance, in 2010, the New York City Bar Association issued a report urging that New York enact changes to Article 1.[43] In recommending adoption of those revisions, however, the Association did not take a position on whether the reservation of rights should be eliminated, but merely suggested possible routes for amendment, depending on whether the Legislature chose to change existing law on accord and satisfaction or to preserve it.[44]

It was only in 2014 that the Legislature passed and the governor signed a bill that made significant revisions to Articles 1 and 7 and conforming amendments to other articles.[45] However, with respect to accord and satisfaction, although New York has now enacted a renumbered § 1-308, New York's version does not contain a subsection with the language that indicates that the section does not apply to accord and satisfaction. Nor has New York enacted a version of § 3-311, expressly dealing with accord and satisfaction by negotiable instrument. Thus, New York's law still remains as set forth in *Horn Waterproofing*, allowing their creditors to reserve rights and avoid an accord and satisfaction. New York, then, stands alone in interpreting the reservation of rights language in Article 1 to apply to an attempted accord and satisfaction.[46]

Despite New York's apparent intransigence on this issue, the recent legislation, whether advertently or not, appears to limit the application of what is now § 1-308 when the underlying transaction is not a "Code-covered" transaction in the sense that the transaction, such as a sale of goods, specifically falls under an article of the UCC. In adopting revisions to Article 1, New York did enact § 1-102, which states that Article 1 "applies to a transaction to the extent that it is governed by another article of [the UCC]." Thus the conclusion in *Horn Waterproofing*, that the nature of the underlying transaction is irrelevant when the attempted accord and satisfaction is made by an Article 3 covered negotiable instrument, may no longer be valid.[47] Accordingly, avoidance of an accord and satisfaction by full payment check will likely be held to apply in only a limited group of cases.

The use of the full payment check may also be further limited as the use of checks wanes. In a 1978 article, a commentator made the prescient observation that if the checking system were "eventually replaced by a system of electronic transfers, the use of the full-payment check as a convenient method for effecting informal settlements [might] be a casualty."[48] It is unlikely that he could have predicted the full panoply of how funds now move. While checks have certainly not disappeared, there is now a generation that may never have written a check to pay an obligation and possibly may never do so, and thus will never face the issue of the ramifications of a full payment check.[49] ■

1. As explained below, Oregon law on this issue is not clear. *See infra* note 46.
2. *See, e.g.*, *Schnell v. Perlmon*, 238 N.Y. 362 (1924); *Wilmeth v. Lee*, 316 P.2d 614 (Okla. 1957); *Boohaker v. Trott*, 145 So. 2d 179 (Ala. 1962); *Graffam v. Geronda*, 304 A.2d 76 (Me. 1973). *But see Atkins v. Boatwright*, 132 S.E.2d 450 (Va. 1963).
3. The opposing authorities are discussed in *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc.*, 66 N.Y.2d 321, n.1 (1985). *See also* Paula G. Walter, *The Rise and Fall of U.C.C. Section 1-207 and the Full Payment Check – Checkmate?*, 21 Loyola L.A. L. Rev. 81 (1987).
4. *See, e.g.*, *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 167 S.E.2d 85 (N.C. App. 1969).
5. *See, e.g.*, *Scholl v. Tallman*, 247 N.W.2d 490 (S.D. 1976).
6. *AFC Interiors v. DiCello*, 544 N.E.2d 869, 871 (Oh. 1989).
7. *Frangiosa v. Kapoukranidis*, 627 A.2d 351, 354 (Vt. 1993).
8. *See, e.g.*, *Chancellor, Inc. v. Hamilton Appliance Co., Inc.*, 418 A.2d 1326 (Dist. Ct. N.J. 1980); *Hixson v. Cox*, 633 S.W.2d 330 (Ct. App. Tex. 1982); *Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.*, 341 N.W.2d 655 (Wisc. 1984); *Stultz Elec. Works v. Marine Hydraulic Eng'g Co.*, 484 A.2d 1008 (Me. 1984); *Anderson v. Rosebrook*, 737 P.2d 417 (Colo. 1987); *John Grier Constr. Co. v. Jones Welding & Repair, Inc.*, 383 S.E.2d 719 (Va. 1989).
9. 341 N.W.2d 655.
10. *Id*. at 659–61.
11. *Id*. at 660–61 (citing William D. Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 Comm. L.J. 329, 331 (1969)).
12. *Flambeau*, 341 N.W.2d at 661.
13. *Id*. at 662.
14. *Id*. at 663.
15. *Id*.
16. *Stultz Elec. Works*, 484 A.2d at 1011; *see also John Grier Constr. Co.*, 383 S.E.2d at 722.
17. *See, e.g.*, *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979) (tort claim from automobile accident).
18. *Cont'l Info. Sys. Corp. v. Mut. Life Ins. Co. of N.Y.*, 77 A.D.2d 316, 319 (4th Dep't 1980) (citing New York Anns. to Official Comment, McKinney's Cons. Laws of NY, Book 62½, Uniform Commercial Code § 1-207, p. 65).
19. *See, e.g.*, *Braun v. C.E.P.C. Distribs., Inc.*, 77 A.D.2d 358 (1st Dep't 1980).
20. *Ayer v. Sky Club, Inc.*, 70 A.D.2d 863 (1st Dep't 1979).
21. *Manfredi Constr. Corp. v. Green Fan Co.*, 87 A.D.2d 611 (2d Dep't 1982); *Geelan Mech. Corp. v. Dember Constr. Corp.*, 97 A.D.2d 810 (2d Dep't 1983).
22. *Gimby v. Frost*, 84 A.D.2d 806 (2d Dep't 1981).
23. 66 N.Y.2d 321 (1985).
24. *Id*. at 322.
25. *Id*.
26. *Id*. at 323–25.
27. *Id*. at 324–25.
28. *Id*. at 325.
29. *Id*. at 326–27.
30. *Id*. at 327.
31. *Id*. at 328–29.
32. *Id*. at 329–31.
33. *Id*. at 331, n.11.
34. Revised UCC § 1-207 (1990).
35. Revised UCC § 3-311 (1990).
36. Revised UCC § 3-311(a), (b) (1990).
37. Revised UCC § 3-311(c)(1) (1990). The exception will not apply if the person who tendered the instrument can prove that prior to the collection of the instrument, the claimant or an agent who had direct responsibility knew that the instrument was tendered in full satisfaction of the claim. Revised UCC § 3-311(d) (1990).

38. Revised UCC § 3-311(c)(2) (1990) This exception will not apply if the claimant organization had sent a statement complying with subsection (c)(1).

39. Ala. Code §§ 7-1-308, 7-3-311; Alaska Stat. §§ 45.01.308, 45.03.311; Ariz. Rev. Stat. Ann. §§ 47-1308, 47-3311; Ark. Code Ann. §§ 4-1-308, 4-3-311; Cal. Com. Code §§ 1308, 3311; Colo. Rev. Stat. Ann. §§ 4-1-308, 4-3-311; Conn. Gen. Stat. Ann. §§ 42A-1-308, 42A-3-311; Del. Code Ann. tit. 6 §§ 1-308, 3-311; Fla. Stat. Ann. §§ 671.207, 673.3111; Ga. Code Ann. §§ 11-1-207, 11-3-311; Haw. Rev. Stat. §§ 490:1-308, 490:3-311; Idaho Code Ann. §§ 28-1-308, 28-3-310; 810 Ill. Comp. Stat. §§ 5/1–308, 5/3–311; Ind. Code §§ 26-1-1-207, 26-1-3.1-311; Iowa Code. §§ 554.1308, 554.3311; Kan. Stat. Ann. §§ 84-1-308, 84-3-311; Ky. Rev. Stat. Ann. §§ 355.1-308, 355.3-311; La. Rev. Stat. Ann. §§ 10:1-308, 10:3-311; Me. Rev. Stat., tit. 11, §§ 1-1308, 3-1311; Md. Code. Ann., Com. Law §§ 1-308, 3-311; Mass. Gen. Laws Ann., ch. 106 §§ 1-308, 3-311; Mich. Comp. Laws Ann. §§ 440.1308, 440.3311; Minn. Stat. Ann. §§ 336.1-308, 336.3-311; Miss. Code. Ann. §§ 75-1-308, 75-3-311; Mo. Ann. Stat. §§ 400.1-207, 400.3-311; Mont. Code. Ann. §§ 30-1-207, 30-3-311; Neb. Rev. Stat. U.C.C. §§ 1-308, 3-311; Nev. Rev. Stat. Ann. §§ 104.1308, 104.3311; N.H. Rev. Stat. Ann. §§ 382-A:1-308, 382-A:3-311; N.J. Stat. Ann. §§ 12A:1-308, 12A:3-311; N.M. Stat. Ann. §§ 55-1-308, 55-3-311; N.C. Gen. Stat. Ann. §§ 25-1-308, 25-3-311; N.D. Cent. Code Ann. §§ 41-01-22, 41-03-37; Ohio Rev. Code Ann. §§ 1301.308, 1303.40; Okla. Stat. Ann. tit. 12A, §§ 1-308, 3-311; Or. Rev. Stat. Ann. §§ 71.3080, 73.0311; 13 Pa. Cons. Stat. Ann. §§ 1308, 3311; R.I. Gen. Laws Ann. §§ 6A-1-308, 6A-3-311; S.C. Code Ann. §§ 36-1-308, 36-3-311; S.D. Codified Laws §§ 57A-1-308, 57A-3-311; Tenn. Code Ann. §§ 47-1-308, 47-3-311; Tex. Bus. & Com. Code Ann. §§ 1.308, 3.311; Utah Code Ann. §§ 70A-1a-308, 70A-3-311; Vt. Stat. Ann. tit. 9A, §§ 1-308, 3-311; Va. Code Ann. §§ 8.1A-308, 8.3A-311; Wash. Rev. Code Ann. §§ 62A.1-308, 62A.3-311; W. Va. Code Ann. §§ 46-1-308, 46-3-311; Wis. Stat. Ann. §§ 401.308, 403.311; Wyo. Stat. Ann. §§ 34.1-1-207, 34.1-3-311.

40. *Kodak v. Am. Airlines*, 9 Misc. 3d 107 (App. Term, 2d Dep't 2005).

41. *Masi v. Equitable Variable Life Ins. Co.*, 178 A.D.2d 515 (2d Dep't 1991).

42. *Goode v. Ronquillo*, 1 Misc. 3d 905(A) (Dist. Ct., Nassau Co. 2003) (insurer's check for damage to automobile); *Church Mut. Ins. Co. v. Kleingardner*, 2 Misc. 3d 676 (Sup. Ct., Oswego Co. 2003) (insurer's check for arbitration award in automobile accident case); *DeVerna v. Kinney Sys., Inc.*, 142 Misc. 2d 271 (Civ. Ct., N.Y. Co. 1989), *aff'd*, 146 Misc. 2d 276 (App. Term 1st Dep't 1990) (parking garage's check for property damages to automobile); *McCreedy v. Lopera*, 130 Misc. 2d 292 (Dist. Ct., Suffolk Co. 1985) (tortfeasor's check for property damages to automobile). *But see Clarke v. Yvans*, 140 Misc. 2d 129 (Civ. Ct., Queens Co. 1988) (UCC § 1-207 does not apply to acceptance of insurer's check for property damage to automobile).

43. New York City Bar Association, Second Report on Revised Article 1 of the Uniform Commercial Code, Committee on Commercial Law and Uniform Statutes, July 2010 (2010 NYC Bar Association Report). In an earlier report, the NYC Bar Association did not take a position on enactment because of disagreement among the members of the Committee about certain provisions. The Association of the Bar of the City of New York, Committee on Uniform State Laws, Report on Revised Article 1 of the Uniform Commercial Code (April 2004) at 30.

44. 2010 NYC Bar Association Report at A35-36.

45. A9933/S7816, signed by Governor Cuomo on Dec. 17, 2014.

46. The status of this issue under Oregon law is unclear. Or. Rev. Stat. Ann. § 71.3080 does provide that the subsection on reservation of rights does not apply to an accord and satisfaction. However, in 1997, the earlier version of § 3-311 was repealed and Or. Rev. Stat. Ann. § 73.0311 now provides that a full payment check will not be an accord and satisfaction "unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation." This appears to be a departure from earlier Oregon case law, which allowed an accord and satisfaction to occur by a full payment check when it was clear that the debtor had offered the check in full satisfaction. *See, e.g., Les Schwab Tire Ctrs. of Oregon, Inc. v. Ivory Ranch Inc.*, 664 P.2d 419 (1983). No reported cases discussing the revised § 73.0311 were found.

47. 2010 NYC Bar Association Report at n. 5.

48. Albert J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 Colum. L. Rev. 48, n. 42 (1978).

49. Indeed, in recent years when I teach my undergraduate students the New York rules regarding full payment checks, the lesson begins with an image of both sides of a cancelled check, something most of them have never seen, and without which they have a difficult time understanding how one would prove what either party had written on a check.

BY PETER SIVIGLIA

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Contractual Foreplay: Letters of Intent vs. Term Sheets

A letter of intent is a document signed by prospective parties to a proposed transaction summarizing the basic terms of the deal they are contemplating, such as a merger, an acquisition or a joint venture.

Typically, because they address a transaction in the making, letters of intent are intended to be non-binding instruments, and to that end they contain language proclaiming that they are not contracts and that they do not create any legal or binding obligations on the part of any of the signatories. A partial exception to the non-binding proclamation would be the preservation of obligations with respect to confidentiality provisions that the letter of intent might contain.

That a letter of intent is not a binding agreement makes sense because it merely records a preliminary understanding of what the participants hope to accomplish. It provides guidance for negotiation, which, if all goes well, will eventually produce the details for a formal contract to consummate the deal. And further, the letter of intent, itself, will often precede completion of essential due diligence.

Yet, despite their non-binding declarations, letters of intent often provide the foundation for litigation when negotiations go awry. During the latter part of the past century, "when I wore a younger man's clothes,"[1] my law firm was retained to handle a claim based on a letter of intent which clearly stated that it did not create any legally binding obligations. And in 1985 a jury awarded damages of $10.5 billion against Texaco for interfering with an "agreement" between Pennzoil and Getty Oil which, according to press releases issued by both Texaco and Getty, was merely an agreement in principle subject to the signing of a definitive agreement. That $10.5 billion judgment forced Texaco to seek protection in bankruptcy.

In the final analysis, these supposedly harmless little creatures possess the power to inflict a great deal of unintentional harm. Because they are *signed* documents containing some terms of a deal – albeit inchoate – courts may find sufficient detail in the document to support the creation of a binding agreement. Further, claims under a letter of intent often include a count based on an alleged failure to act or negotiate in good faith, because, at least in New York, contracts governed by New York law include an *implied covenant* to act in good faith. In fact – *horribile dictu* – contrary to the express statement that the letter of intent does not create a binding agreement, letters of intent will sometimes include an express statement that the parties negotiate in good faith, surely an imprudent addition for two reasons: (1) the statement, itself, is tantamount to admitting that the "non-binding" letter of intent is, in fact, a binding contract, and (2) as all attorneys know, hell hath no fury like a party scorned.

So, when presented with a proposed transaction that requires preliminary delineation of the parties' objectives, what form of letter of intent do I recommend? Well, following is the only form of letter of intent that I have allowed a client to sign:

That's right! I never allow a client to sign a letter of intent. Instead, we create an unsigned preliminary term sheet or outline to provide the basis for discussion and negotiation. If the negotiation results in an agreement in principle, we will then produce a final, refined, and unsigned term sheet that will serve as a template for the definitive agreement. And – *mirabile dictu* – attorneys for the other parties to the proposed transaction have never objected to this procedure. Even more important, this procedure has never produced litigation, even when the contemplated transaction failed.[2]

The sidebar to this article contains a sample term sheet for the acquisition of a business and its assets. As an added precaution, attorneys may wish to accompany the term sheet with a cover note along the following lines:

The enclosed outline does not constitute an agreement and it does not create any obligations. Anyone may renegotiate any of the provisions set forth in the outline or terminate negotiations at any time for any reason whatsoever, and no one will have any obligation or liability to anyone else by reason of any such renegotiation or termination regardless of the reason.

Finally, as noted at the outset of this article, if confidential information will be disclosed, then a confidentiality agreement must be signed before discussions begin.[3] ■

1. From "Piano Man" by Billy Joel.

2. A review of *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating* (Lawyer's Cooperative Publishing (1993), West Group rev. ed. 1997) stated: "[The] recommendation . . . to avoid letters of intent at all costs is sound." *New York Law Journal*, May 24, 1994.

3. For a sample confidentiality agreement, please see § 11:2 of *Commercial Agreements*.

Sample Term Sheet for Acquisition of a Business and Its Assets

Preliminary Outline of Terms

1. Description of Transaction.

Purchase of the business and inventory of [Seller] by [Buyer]. The business of Seller is the purchase and sale of the kinds of goods listed in EXHIBIT A.

2. Format.

The signing of the contract and the consummation of the sale will take place simultaneously: i.e., at the same time the contract is signed, the initial installment of the purchase price will be paid and the assets will be transferred to Buyer.

3. Seller. _____, a _____ corporation
   Address: _____
   _____
   Tel:_____
   Fax: _____
   E-mail: _____

4. Buyer. _____, a _____ corporation
   Address:_____
   _____
   Tel:_____
   Fax: _____
   E-mail: _____

5. Assets to be Purchased.
   a. Seller's business, inventory, supplier and customer lists, and supplier and customer contracts. The supplier and the customer lists will include names, addresses, telephone and fax numbers, persons to contact, and, in the case of customers, the types and volumes of products purchased during the last year. The supplier lists will include types and volumes of products supplied during the last year and the supplier's standard terms.
   Prior to closing, Seller will furnish Buyer with the foregoing information other than names, addresses, telephone and fax numbers and persons to contact under an appropriate confidentiality agreement.
   Seller will retain sufficient inventory to fill orders outstanding at the time of closing.
   b. Identification and assignment of all customer and supplier contracts and any consents required for the assignments.
   Seller to fill and to be entitled to payment for any customer orders made prior to closing. Seller to identify these at the closing.
   Buyer to be liable only for orders made after the closing and for unfilled orders placed with suppliers prior to closing.

6. Delivery of Inventory. Buyer will take delivery of the inventory at the time of closing and begin removing inventory from Seller's premises immediately following the closing. Removal will be completed within one week. All inventory remaining on Seller's premises will be clearly marked as being owned by the Buyer with Seller having no interest therein. There will be no charge to Buyer for the inventory remaining on Seller's premises pending removal.

7. Price: $_____ plus the price of the inventory as determined by Seller and Buyer on the day of or the day prior to the closing based on prices of Seller's suppliers current at that time.

8. Payment: $_____ at closing by bank check or certified check with the balance payable in 12 equal monthly installments commencing one month after closing with interest at the rate of _____% per annum. Each installment will include payment of accrued interest.

9. Security for Deferred Portion of Purchase Price.
Buyer's inventory accounts receivable.

10. Basic Warranties.
   a. Buyer and Seller.
   i. Usual corporate warranties: existence and good standing; power to enter into transaction; due authorization and execution of agreements; binding effect and enforceability of agreements; no violation of other agreements or corporate documents.
   ii. Usual warranties as to financial statements.
   b. Seller and Seller's Shareholders.
   i. As to Inventory: Sole ownership; no liens, encumbrances, or other rights; no litigation or claims pending or threatened; good condition (the warranty with respect to condition to remain in effect for a period of 45 days).
   ii. As to Customers and Suppliers: Customer and supplier lists complete and accurate; no omissions; no pending or threatened litigation or claims. Seller has not made and will not make any other sale or disposition of these lists or of any of the information contained therein.
   iii. As to Contracts: In full force and effect; no default; no pending or threatened litigation or claims; enforceable in accordance with their terms.
   iv. Sales: Seller's sales to the customers listed on the customer list were $_____ for calendar year 2____; $_____ for calendar year 2_____, and $_____ from January 1 of the current year through the end of [specify month].
   v. Taxes: Seller has paid all taxes owed by it.

11. Non-compete.
For two years following the closing, Seller and its shareholders will not, directly or indirectly, work for, assist, or invest in or provide financing or credit to any individual, corporation, partnership or other entity engaging in competitive activities in [geographical area]. Buyer will have the right to injunctive relief.

12. Further Assistance.
For a period of six months following the closing, Seller and its shareholders will, without charge, assist Buyer in transferring the business to Buyer and securing the customers and suppliers for the Buyer. This assistance will include, but not be limited to, introductions and attending meetings with the Buyer and customers and suppliers.

13. Name Change.
Within 30 days after the closing, Seller will change its name to "_____". Seller and its shareholders will not use any name similar to [Seller's name].

14. Compliance.
   a. Any applicable bulk sales and bulk transfer laws, including those under relevant tax laws.

NOTE: Simultaneous closing (item 2 above) means that any required notices to creditors and to the tax authorities will be sent at or prior to signing the contract of sale. Provision may have to be made to escrow payments of the purchase price (item 8 above) depending on the notice requirements.

15. Certificates of Resolutions, Incumbency and Corporate Documents for Buyer and Seller.
   a. Buyer: approval by its directors.
   b. Seller: approval by its shareholders and directors.[1]

NOTE: Lawyers often will require an opinion of counsel to the other party. Thus, conspicuous by its absence is that requirement. The client should rely only on the opinion of its own counsel, not on the opinion of anyone else. That is the only opinion on which the client can rely with confidence. Since opinion letters should deal only with matters of law – not facts such as the warranties of a party – the client's lawyer should be able to give any required opinion.[2]

16. Pre-closing.
   a. Lien searches.
   b. Determine whether any portion of the sale is subject to sales tax.
   c. Supplier and customer consents to assignment of contracts.
   d. Specify any other due diligence.

* * *

EXHIBIT A
[List of Goods]

1. Generally, a sale by a corporation of all or substantially all of its assets requires shareholder approval.
2. Regarding opinion letters, see Chapter 13 and § 13:1 of Siviglia, Commercial Agreements.

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1. Generally, a sale by a corporation of all or substantially all of its assets requires shareholder approval.

2. Regarding opinion letters, see Chapter 13 and § 13:1 of Siviglia, *Commercial Agreements*.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work as an assistant general counsel for MegaCorp, the largest manufacturer of widgets in the United States. We began growing concerned that our competitors are slowly chipping away at our market share, which may cause MegaCorp to lose its place as the largest manufacturer in the widget industry. Therefore, the company's executives decided to purchase the fourth and fifth largest widget manufacturers, thereby eliminating its top competitors. Because of these potential acquisitions, MegaCorp has begun to face scrutiny from antitrust regulators. In addition, the company has been advised that the due diligence reviews of the company's records by these antitrust regulators have uncovered a potential issue concerning improper waste disposal at one of the company's manufacturing facilities, which has been referred for further investigation by the Environmental Protection Agency. I, of course, have been tasked by the company's general counsel to handle MegaCorp's compliance with federal and state environmental laws and regulations.

What are my ethical obligations pertaining to this particular situation? Specifically, if federal regulators attempt to interview me as part of their investigation concerning the waste disposal matter, do I have to comply with their interview request? And if I do submit to an interview, what I can disclose? Finally, if the company is ever sued by the government as a result of the investigation, and I am subpoenaed to testify at trial, what am I allowed to disclose?

Sincerely,

Quentin Questioned

Dear Quentin Questioned:

A recent ethics opinion issued by the NYSBA Committee on Professional Ethics (the Committee) addressed a situation close to what you have described. The Committee, in Opinion 1045, found that in-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client where the facts to be disclosed by the lawyer will not constitute confidential information. N.Y. State Bar Op. 1045. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule. *Id.*

The pertinent section of the advocate-witness rule (officially referred to as Rule 3.7(a) of the New York Rules of Professional Conduct (the Rules)) states:

> A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.

The term "tribunal" is defined in Rule 1.0(w) to include

> a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

One has to remember that application of the advocate-witness rule is often very fact-driven. As further explained in Comment [4] to Rule 3.7 (which specifically relates to paragraph (a)(3)),

> a balancing is required among the interests of the client, of the tribunal, and of the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rule 1.7, 1.9 and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

As an initial matter, if federal regulators from the Environmental Protection Agency (the EPA) attempt to interview you as part of their investigation of a waste disposal matter, we expect that you would in all likelihood comply with the request and that you would engage

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

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counsel to be present for the interview. Noncompliance may raise issues under Rule 1.1(c)(2) which states that "[a] lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules."

Next, if you consent to the investigatory interview, the question arises whether you are permitted to discuss the contents of the company's records concerning the waste disposal issue and what (if any) confidentiality issues may arise. As we have noted many times before, Rule 1.6 prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). "Confidential information consists of information gained during the representation of a client that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential." N.Y. State Bar Op. 1045.

Since the information concerning your company's waste disposal practices is likely to be embarrassing or detrimental to MegaCorp, or if your superiors request that you not disclose this information in the interview, then you may not voluntarily disclose it without the company's informed consent.

As to the interview forum, even though the interview is with an administrative agency (in this case, the EPA), at this stage, the EPA is exercising its investigative functions, rather than acting in an "adjudicative capacity." *See, e.g.*, N.Y. State Bar Op. 1045. Consequently, the advocate-witness rule would not apply at this stage of the game. That being said, if the EPA determines to bring a formal complaint against the company following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if you are "likely" to be a witness on a significant issue of fact (such as your knowledge of the company's waste disposal practices), Rule 3.7(c) will come into play, and you would not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. *See* N.Y. State Bar Op. 1045 ("lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated" (internal citation omitted)).

If the agency determines to bring charges against MegaCorp and you are subpoenaed to testify at trial, you will then need to determine if you are likely to be a witness on a significant issue of fact. This requires, among other things, evaluating other available testimony. *Id.* In *MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), the court (in making its analysis under the former Code of Professional Responsibility) held that "[a]n additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." The court found in *MacArthur* that an independent lawyer would likely call the other lawyer, "both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary." N.Y. State Bar Op. 1045 (quoting *MacArthur*, 524 F. Supp. at 1209) (internal citation omitted).

If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The Rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. *Id*.

If you are subpoenaed to testify in an EPA proceeding brought against MegaCorp, you cannot overlook your obligations not to disclose confidential information under Rule 1.6 unless one of the conditions previously discussed above is satisfied.

Forcing an attorney off a case is never an easy decision. It is a matter that must be carefully analyzed. Professor Roy Simon points out that before an attorney-witness should be taken off of a case, it is necessary to determine if he or she has acquired distinctive value in that particular matter. *See* Simon's New York Rules of Professional Conduct Annotated at 1106 (2014 ed.). Indeed, we agree with Professor Simon's analysis that a lawyer has distinctive value in a particular case only if "[t]he lawyer has spent a lot of time on the litigation itself or the events giving rise to the litigation, and the client . . . would suffer undue delay finding a new lawyer or waiting for the new lawyer to learn the facts." *Id.* Therefore, before assessing what your distinctive value might be, we must know how long you were involved with the waste disposal matter, and what burden MegaCorp might suffer if you were off the case. As we pointed out at the outset of this Forum, a determination under the advocate-witness rule is often fact-specific, and these questions concerning what your distinctive value might be fall within this premise.

So, in the end, what are you permitted to do if you could not give testimony in the EPA proceeding? You could still participate in the case outside the courtroom by, for example, directing outside counsel. *See* N.Y. State Bar Op. 1045 citing Rule 3.7(a) (lawyer shall not act as advocate before a tribunal); ABA Inf. Op. 89-1529 (1989). Although this may not be an ideal position, it is better than being completely walled off from participating in the matter if, in fact, the EPA chooses to pursue charges against MegaCorp, and will allow you to continue to act in some capacity to protect MegaCorp in defending any charges brought by the EPA.

Knowledge of the advocate-witness rule is critical for in-house counsel. It could mean the difference for an inside lawyer either being in the middle of

the action or left behind and unable to fully assist his or her company.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a mid-level associate at a prominent New York law firm. Two years ago, I served as the foreperson of the jury in a medical malpractice trial in Manhattan Supreme Court. After the conclusion of the trial, we returned a verdict in favor of the defendant. I recall that as everyone was filing out of court, the plaintiff's counsel (Peter Perturbed) approached me and began to speak in a harsh manner as to his and his client's dissatisfaction with the verdict. We then walked in different directions out of court and I wrote Peter's behavior off as just sour grapes from another obnoxious lawyer.

Last month, the partner in charge of my department came into my office and said he received a long-winded email from Peter that accused me of lying during the voir dire process prior to trial and being unfairly biased towards his client. As much as I know that my superiors honestly believe that I would not act in the manner claimed by Peter, I am deeply disturbed by the scurrilous accusations made against me and I am concerned that it could damage my professional reputation in other avenues of the legal community.

My question to the Forum: Could Peter be subject to discipline if I report him, and if so, what level of punishment could he receive?

Sincerely,

Heather Harassed

Your burden in moving for a directed verdict is that your adversary hasn't made out its prima facie case.[18]

Not moving for a directed verdict means that you believe, or are conceding, that the jury must resolve an issue of fact.[19]

On a motion for a directed verdict, a court must consider "the facts adduced at trial in the light most favorable to the non-moving party and the non-moving party is entitled to every favorable inference that may be properly drawn from those facts."[20]

In granting a directed verdict during a jury trial, a judge must be "convinced that the jury could not find for the other party by any rational process; when, in support of the party against whom it proposes to order judgment, the court can find 'no evidence and no substantial inferences.'"[21] A judge will likely grant your motion for a directed verdict "when reasonable minds reacting to the evidence could not differ and would have to conclude just one way."[22] In deciding a motion for a directed verdict, "[t]he court must accept as true all of the evidence offered by the [non-moving] party against whom the motion for judgment aims, and must even resolve in that [non-moving] party's favor all questions relating to the credibility of witnesses."[23]

The court may not grant a motion for a directed verdict if "question[s] of fact and credibility [exist] for the jury."[24] The "proper procedure . . . [is] to reserve decision on the motion and submit the case to the jury."[25]

In a bench trial, a judge "must view the evidence in its most favorable light for the non-moving party."[26]

In a jury or bench trial, a judge deciding a motion for a directed verdict may not weigh the evidence.[27]

A court may grant a motion for a directed verdict on "parts of a [party's] claim that ha[ve] not been supported by evidence adduced at trial."[28] The court may, thus, grant your motion for a directed verdict if the plaintiff has failed to prove its damages for its past lost wages but deny your motion if the plaintiff proved its damages for past medical expenses.[29]

Generally, issues such as whether a party was negligent or whether an act was foreseeable — "subject of varying inferences"[30] — are for a fact finder to resolve. A jury need not decide every negligence action; the evidence a party presents at trial is key: "[I]t is just as much error to submit a case to the jury where no question of fact is involved as it is to deny a litigant his right to a determination by the jury where a question of fact has been presented."[31]

Although proximate cause is a question for the fact finder, "when only one conclusion may be drawn from the established facts, the question of legal cause may be decided [by the court] as a matter of law."[32]

You "do[] not waive trial by jury or the right to present further evidence" if the court denies your motion.[33] At one time, moving for a directed verdict was "deemed a concession that no fact issue existed. This meant that even if the motion was denied, the moving by its mere making was held to waive all further right to trial by jury. That is no longer the case."[34]

If issues of comparative fault exist, "presentation of all evidence must be completed before a directed verdict for plaintiff is proper."[35]

Move for a directed verdict if the plaintiff sought punitive damages in its complaint but doesn't prove punitive damages at trial.[36]

A court may reserve ruling on a motion for a directed verdict until after the jury has returned a verdict.[37] If a court grants a motion for a directed verdict after a jury returns the verdict and the court is reversed on appeal, the jury's verdict may be reinstated.[38] A new trial isn't necessary.[39] If the court grants a directed verdict before a jury returns the verdict and the court is reversed on appeal, "there is no jury verdict to reinstate and no alternative [exists for the appellate court] but to order a new trial."[40]

A trial court commits error if a jury can't reach a verdict (hung jury) and the court grants a directed verdict for the defendant.[41]

In opposing a motion for a directed verdict, explain that you've made out your prima facie case. Demonstrate to the court that issues of fact exist for the fact finder to decide. Point out all the issues of fact. You should also apply the standard, set forth above, to your case: After taking the facts in the light most favorable to you (the non-moving party), the court must make every favorable inference in your favor. Explain the facts in the light most favorable to you. Point out the favorable inference the court must draw. If any credibility issues exist, remind the court that the fact finder must assess those credibility issues.

A court that grants a directed verdict under CPLR 4401 is a decision on the merits. Res judicata applies.[42]

Motion for a Continuance

A court may order a continuance, or a trial adjournment, "at any time during [a] trial, on [a] motion of any party . . . 'in the interest of justice on such terms as may be just.'"[43]

Move for a continuance to adjourn the trial for a "brief period."[44] A party moves for a continuance when it is "presenting evidence . . . [and] a witness or other item of evidence is temporarily unavailable, and the party is unable to go forward."[45] A continuance might be appropriate if a witness, or a party, doesn't appear in time, can't appear for a few days or is temporarily ill.[46] A continuance might also be appropriate if a party's "[c]ounsel has withdrawn or been discharged."[47]

Practitioners usually move orally for a continuance.

Make an offer of proof: If you're moving for a continuance because a witness is unavailable, tell the court what the witness will say.[48] Explain why the witness's testimony is important to your case.[49] Also explain how you've been diligent in attempting to produce the witness timely.[50]

A court has discretion in deciding a motion for a continuance. The court "'must indulge in a balanced consideration of all relevant factors.'"[51] A court

will consider (1) the length of the continuance you're seeking; (2) the materiality of the evidence you're seeking to procure; (3) whether your request for a continuance is designed merely to delay the trial; and (4) whether your need for the continuance was caused by your lack of diligence.[52] Courts will grant a motion for a continuance to give a party the opportunity to obtain material evidence and to prevent miscarriages of justice.[53]

A court that refuses to adjourn a trial "when it is reasonable to do so will meet appellate censure."

The court's "'discretion is limited and narrowly construed when the . . . continuance requested is brief and made with a showing of movant's diligence and good faith to secure the attendance of a crucial witness.'"[54] The length of the continuance is within the court's discretion.[55]

If the court denies your motion for a continuance — and the basis for your motion was that you wanted to secure a witness — "be absolutely certain that . . . no other evidence [exists that] you can present before resting."[56] If another witness exists, call that witness to testify.[57]

A court that refuses to adjourn a trial "when it is reasonable to do so will meet appellate censure."[58]

Your poor trial preparation isn't a good ground for moving for a continuance.[59]

Consider whether to oppose your adversary's motion for a continuance. If your adversary's request is reasonable and the court will likely grant the request, you might want to consent to the continuance.[60] In deciding whether to oppose your adversary's motion, consider that you might also need a continuance during the trial (if you haven't yet presented your case) and likewise you'd want your adversary to consent to your request.[61] But if your client will be prejudiced by a continuance, oppose the motion.[62] Explain how your client will be prejudiced if the court were to grant a continuance.[63] If your adversary seeks a lengthy continuance, explain how the delay will prejudice your client. If your adversary seeks a continuance to secure evidence, explain how that evidence isn't material. If your adversary's motion for a continuance is designed merely to delay the trial, explain the circumstances to the court. Also, tell the court about your adversary's lack of diligence, if any exists.

Motion to Strike

Move to strike when you want the court to "remove evidence from the record."[64] Practitioners usually move orally to strike.

Move to strike if your adversary asked an improper question but you didn't respond quickly enough with an objection and the witness already answered the question.[65]

Move to strike if your adversary asked a proper question but the witness's answer was unresponsive or "contained inadmissible [information] or material."[66]

Move to strike when a witness's answer to a question "initially appeared proper, but later was shown to have been improper."[67]

Move to strike if the court admits a witness's testimony subject to connection but your adversary never connects that witness's testimony.[68]

Move to strike when a witness testifies on direct examination but is unavailable for cross-examination.[69]

Move to strike when a witness's testimony goes beyond the pleadings.[70]

Move to strike when a witness's testimony is "incredible as a matter of law."[71]

Move to strike "as soon as possible after the improper[] . . . testimony becomes evident" to you.[72]

Move to strike an expert's opinion "based on facts not in evidence."[73]

Move to strike your adversary's question.[74] Move to strike a witness's answer. Move to strike a witness' testimony in its entirety, or move to strike only a portion.

Consider whether you'll oppose the motion to strike. Sometimes the court will rule so quickly on a motion to strike that you don't even have an opportunity to oppose the motion.[75] You won't want to oppose a motion that's "well founded," such as when a witness's answer to a question is "blatant hearsay."[76] If your adversary seeks to strike evidence that's important to you, oppose the motion.

In opposing a motion to strike, argue that the evidence is proper.[77] Argue that striking the evidence from the record would prejudice your client. Ask the court for an opportunity to "lay further foundation for the evidence."[78] You might want to move for a "short continuance to obtain further evidence or witnesses."[79] If you need the evidence to prove your prima facie case, explain that to the court.[80] Explain "what steps you would take, if the court allowed, [for the court] to render the evidence admissible."[81]

Make sure that all your grounds in opposing the motion to strike are on the record. Preserve the record for an appeal.

A court that grants your motion to strike will give a curative instruction to the jury. It will tell the jury to disregard the evidence that was stricken and not consider it during deliberations.[82] If the court doesn't give a curative instruction to the jury on its own, ask the court to give one.[83] A court's striking of the evidence and giving a curative instruction "may adequately serve the purpose."[84]

A court's curative instruction to a jury to disregard improper evidence might not be enough. Asking a jury to disregard what it has seen or heard is like trying to "'unring a bell.'"[85] Move for a mistrial if the evidence is highly prejudicial to your client.[86] Consider moving for a mistrial even if the court strikes the evidence from the record and gives a curative instruction.[87] Moving for a mistrial will preserve your objection for the record on appeal.

If the court grants your motion to strike evidence from the record, consider moving for a directed verdict: "If the testimony was the only vehicle for [your adversary in] proving a critical element of the prima facie case, and that testimony is stricken, a critical hole is left in [your adversary's] case. This could occur if critical testimony turns out to lack foundation."[88]

Motion to Reopen the Case

A party with the burden of proof must introduce all evidence in its case before resting. To offer additional evidence after you've rested, move to reopen. A court might allow you to "reopen and cure defects that have inadvertently occurred in the evidence."[89]

Move to reopen "immediately when the situation presents itself."[90] Move before the court rules on the relevant issue. If you wait too long to move, a court will likely deny your motion.[91]

Practitioners move to reopen orally. If it's a bench trial, you might have time to prepare motion papers and a memorandum of law to explain why the court should grant your motion. Jury trials pose a greater urgency.[92] During a jury trial, you might not have the time to prepare motion papers or a memorandum of law because a "jury [will be] waiting."[93] If you move to reopen your case during a jury trial, tell the court that you'll prepare a memorandum of law, if the court wants one.[94] A court has the "discretion to allow a party to reopen, but that discretion 'should be sparingly exercised.'"[95]

A court will consider the following factors in deciding a motion to reopen:[96] (1) whether the court has already ruled on the relevant issue; (2) whether the movant disclosed the nature of the omitted evidence; (3) whether the evidence that the movant seeks to introduce is "newly discovered or whether there was no way for the party to anticipate that it should have put on the evidence in its case in chief";[97] (4) whether the opposing party will be prejudiced if the court grants the motion to reopen; and (5) whether the trial will be delayed if the court grants the motion to reopen.

Move to reopen your case if your adversary moves for a directed verdict on the basis that you've failed to make out a prima facie case.[98] Absent prejudice, a court might grant your motion.[99]

If your adversary prepared motion papers, consider submitting opposition papers, including a memorandum of law. Even if your adversary moved to reopen orally, ask the court for permission to submit written opposition papers and a memorandum of law. Consider whether you need to move for a continuance to research the issue and prepare opposition papers.

In opposing a motion to reopen, explain how your client will be prejudiced if the court were to reopen the case. Merely arguing that "allowing your opponent to reopen will deprive you of a victory is not sufficient prejudice."[100] Argue that your adversary hasn't disclosed the nature of the omitted evidence.[101] Argue that the court has already ruled on the relevant issue.[102] Argue that the evidence your adversary seeks to introduce isn't newly discovered. Argue that your adversary should've anticipated introducing the evidence in its case in chief. Argue that reopening the case will delay the trial.

In the next issue of the *Journal*, the *Legal Writer* will continue with trial motions and discuss post-trial motions. ■

1. Aaron J. Broder, Trial Handbook for New York Lawyers § 27.3, at 513 (3d ed. 1996).
2. *Id.* § 27.3, at 514.
3. *Id.*
4. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook, § 36:04, at 36-3 (2010).
5. *Id.* § 36:04, at 36-3.
6. *Id.* § 36:43, at 36-10.
7. *Id.* § 36:110, at 36-16.
8. Broder, *supra* note 1, § 27.2, at 152 (Supp. 2014).
9. CPLR 4401.
10. Birnbaum et al., *supra* note 4, § 35:30, at 35-6.
11. *Id.* § 35:32, at 35-6.
12. David D. Siegel, New York Practice § 402, at 705 (5th ed. 2011).
13. Birnbaum et al., *supra* note 4, § 35:30, at 35-6.
14. *Id.* § 35:32, at 35-7.
15. Broder, *supra* note 1, § 28.3, at 521.
16. Siegel, *supra* note 12, § 402, at 702.
17. *Id.* § 402, at 704.
18. Birnbaum et al., *supra* note 4, § 35:40, at 35-7.
19. Broder, *supra* note 1, § 28.1, at 517–18.
20. Birnbaum et al., *supra* note 4, § 35:41, at 35-7.
21. Siegel, *supra* note 12, § 402, at 704.
22. *Id.*
23. *Id.*; Birnbaum et al., *supra* note 4, § 35:41, at 35-7.
24. Broder, *supra* note 1, § 2.3, at 26.
25. *Id.* § 2.3, at 27.
26. Birnbaum et al., *supra* note 4, § 35:42, at 35-7, 35-8.
27. Broder, *supra* note 1, § 28.2, at 518.
28. Birnbaum et al., *supra* note 4, § 35:33, at 35-7 (citing *Thomas v. 14 Rollins St. Realty Corp.*, 25 A.D.3d 317, 318, 807 N.Y.S.2d 56, 58 (1st Dep't 2006)).
29. Birnbaum et al., *supra* note 4, § 35:33, at 35-7.
30. Broder, *supra* note 1, § 28.3, at 521 (citing *Muhaymin v. Negron*, 86 A.D.2d 836, 838, 447 N.Y.S.2d 457, 459 (1st Dep't 1982)).
31. *Id.* § 28.5, at 526 (citing *Conroy v. Saratoga Springs Auth.*, 259 A.D. 365, 368, 19 N.Y.S.2d 538, 541 (3d Dep't 1940), *aff'd*, 284 N.Y. 723, 723, 31 N.E.2d 197, 197 (1940)).
32. *Id.* § 28.3, at 522.
33. Siegel, *supra* note 12, § 402, at 704.
34. *Id.*
35. Birnbaum et al., *supra* note 4, § 35:31, at 35-6.
36. *Id.* § 35:62, at 35-10.
37. *Id.* § 35:51, at 35-8.
38. *Id.*
39. *Id.*
40. *Id.* § 35:50, at 35-8.
41. *Id.* § 35:51, at 35-8.
42. Siegel, *supra* note 12, § 402, at 705 (noting that a "dismissal against a plaintiff before the close of the plaintiff's evidence [under CPLR 5013] is not on the merits"; thus, res judicata doesn't apply unless the court exercises its discretion to "give res judicata effect").
43. Birnbaum et al., *supra* note 4, § 37:21, at 37-6 (quoting CPLR 4402).
44. *Id.* § 37:20, at 37-5.
45. *Id.*
46. Siegel, *supra* note 12, § 403, at 706.
47. Birnbaum et al., *supra* note 4, § 37:20, at 37-6.
48. *Id.* § 37:22, at 37-6.
49. *Id.*
50. *Id.*
51. *Id.* § 37:24, at 37-6 (quoting *Cuevas v. Cuevas*, 110 A.D.2d 873, 877, 488 N.Y.S.2d 725, 728 (2d Dep't 1985)).
52. *Id.* (citing *Balogh v. H.R.B. Caterers Inc.*, 88 A.D.2d 136, 141, 452 N.Y.S.2d 220, 224–25 (2d Dep't 1982)).

53. *Id.* § 37:25, at 37-6 (citing *Balogh*, 88 A.D.2d at 141, 452 N.Y.S.2d at 225).

54. *Id.* (quoting *Halloran v. Spina Floor Covering, Inc.*, 185 A.D.2d 149, 149, 586 N.Y.S.2d 786, 787 (1st Dep't 1992)).

55. *Id.* § 37:26, at 37-7 (citing *Bruce v. Hosp. for Special Surgery*, 34 A.D.2d 963, 964, 312 N.Y.S.2d 765, 766 (2d Dep't 1970)).

56. *Id.* § 37:25, at 37-7 (citing *Brown v. Data Commc'n, Inc.*, 236 A.D.2d 499, 499, 653 N.Y.S.2d 693, 694 (2d Dep't 1997)).

57. *Id.*

58. Siegel, *supra* note 12, § 403, at 706.

59. Birnbaum et al., *supra* note 4, § 37:29, at 37-10.

60. *Id.* § 37:23, at 37-6.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* § 37:40, at 37-12.

65. *Id.* § 37:41, at 37-13.

66. *Id.*

67. *Id.* (citing *People v. Rawlings*, 220 A.D.2d 541, 541–42, 632 N.Y.S.2d 206, 207 (2d Dep't 1995), *appeal after new trial*, 220 A.D.2d 541, 632 N.Y.S.2d 206 (2d Dep't 1995), *lv. denied*, 87 N.Y.2d 1024, 644 N.Y.S.2d 157, 666 N.E.2d 1071 (1996)).

68. *Id.*

69. *Id.* (citing *Notrica v. North Hills Holding Corp., LLC*, 43 A.D.3d 1119, 1120, 842 N.Y.S.2d 577, 577 (2d Dep't 2007); § 37:11, at 37-17 (citing *Diocese of Buffalo, N.Y. v. McCarthy*, 91 A.D.2d 213, 220 (4th Dep't), *lv. denied*, 59 N.Y.2d 605, 605, 466 N.Y.S.2d 1025, 1025, 453 N.E.2d 550, 550 (1983)).

70. *Id.* § 37:41, at 37-13.

71. *Id.* § 37:42, at 37-14.

72. *Id.*

73. *Id.* § 37:49, at 37-17.

74. *Id.* § 37:50, at 37-17.

75. *Id.* § 37:43, at 37-14.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* § 37:40, at 37-12.

83. *Id.* § 37:44, at 37-14.

84. *Id.* § 37:45, at 37-14.

85. *Id.* (quoting *People v. Griffin*, 242 A.D.2d 70, 73, 671 N.Y.S.2d 34, 36 (1st Dep't 1998), *appeal dismissed*, 93 N.Y.2d 955, 955, 694 N.Y.S.2d 345, 345, 716 N.E.2d 181, 181 (1999)).

86. *Id.* § 37:46, at 37-15.

87. *Id.* § 37:46, at 37-16.

88. *Id.* § 37:47, at 37-14.

89. *Id.* § 37:01, at 37-3.

90. *Id.* § 37:02, at 37-3.

91. *Id.* § 37:06, at 37-4.

92. *Id.* § 37:02, at 37-3.

93. *Id.*

94. *Id.*

95. *Id.* § 37:04, at 37-3 (quoting *King v. Burkowski*, 155 A.D.2d 285, 286, 547 N.Y.S.2d 48, 49 (1st Dep't 1989)).

96. *Id.* § 37:05, at 37-3, 37-4.

97. *Id.*

98. *Id.* § 37:01, at 37-3.

99. Broder, *supra* note 1, § 2.4, at 29 (citing *Iulio v. Ford Motor Co.*, 31 A.D.2d 820, 821, 298 N.Y.S.2d 33, 34 (2d Dep't 1969) (holding that court improvidently denied motion to reopen case)).

100. Birnbaum et al., *supra* note 4, § 37:03, at 37-3.

101. *Id.* § 37:05, at 37-3 (citing *Oregon Leopold Day Care Ctr. Ass'n, Inc. v. Di Marco Constr. Corp.*, 104 A.D.2d 719, 719, 480 N.Y.S.2d 661, 662 (4th Dep't 1984) ("[P]laintiff neither identified the witness nor the curative proof the witness would supply.").

102. *Id.* ("Special Term properly denied plaintiff's motion to reopen the case because plaintiff moved to only [sic] after the court ruled on defendant's motion for judgment.").

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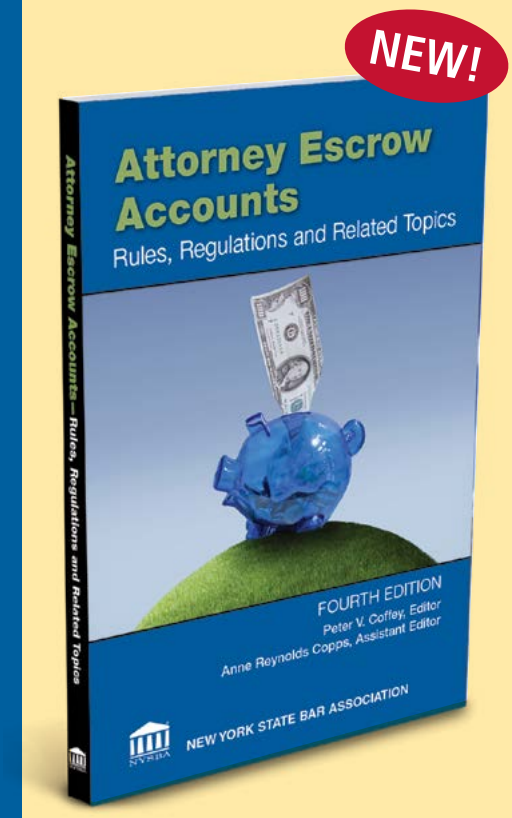

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLI — In Limine, Trial, and Post-Trial Motions Continued

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed motions in limine and trial motions, including motions to dismiss, motions based on admissions, and motions for a mistrial. In this issue, we'll continue to discuss trial motions. In the next issue, we will continue with trial motions and discuss post-trial motions.

Trial Motions Continued

Motion for a Mistrial

If you "deliberate[ly] . . . convey the idea to the jury" during voir dire, opening statement, trial, or closing statement that the defendant has liability insurance, a court will likely grant your adversary's motion for a mistrial.[1] But "[w]hen the fact of insurance or the existence of an insurer is properly or legitimately in the case," you have no grounds for a mistrial.[2] If a witness volunteers information that the defendant has insurance, a court might not declare a mistrial if it's an "isolated, unexpected, inadvertent statement . . . [and the court] promptly . . . [gives the jury] curative instructions."[3]

Instead of declaring a mistrial, "[c]ourts prefer to correct errors that could otherwise be grounds for a mistrial whenever possible, and a frequent vehicle to accomplish this is the 'curative instruction.'"[4] Courts can cure an error by instructing juries to disregard it.[5]

If a jury returns an inconsistent verdict, a court may declare a mistrial "or require the jury to further consider its answers and verdict."[6]

A court order granting a mistrial before a jury has returned its verdict isn't appealable.[7]

An appellate court will be precluded from reviewing the jury's verdict if you didn't move for a mistrial at trial and you later appealed the jury's verdict "based on the jury's alleged [misconduct, such as] nonverbal postures, facial expressions, attitudes, and comments."[8]

For more information on mistrial motions, consult the *Legal Writer*'s previous column in this series.

Motion for a Directed Verdict (Motion for a Judgment as a Matter of Law)

Although practitioners call it a motion for a directed verdict, it's referred to under CPLR 4401 as a motion for judgment as a matter of law.

Move for a directed verdict "[a]fter the close of the evidence presented by an opposing party with respect to such cause of action or issue."[9] After a party with the burden to go forward "(normally the plaintiff, except if only counterclaims are being tried) has completed its case, the opposing party may move for a directed verdict."[10] The CPLR doesn't require a party to "move 'immediately after,' [a party completes its case] or otherwise state that the motion must be made no[] later than a given point in the trial."[11]

Requiring "each party [to] await the conclusion of the other's case before moving for judgment is designed to afford all parties a day in court."[12] A court's grant of a directed verdict will be premature if the court grants the motion "before the close of a party's evidence."[13]

A court order granting a mistrial before a jury has returned its verdict isn't appealable.

You may reserve your motion for a directed verdict at the close of your adversary's evidence: "[I]t is obviously safer, not to mention more polite, to request the court's permission to reserve making the motion."[14]

Your motion for a directed verdict after the court charges the jury will be timely if you've reserved your right to move for a directed verdict and the court agreed.[15]

You may move for a directed verdict in a bench trial or jury trial. Practitioners usually move orally for a directed verdict.

Specify the grounds that form the basis of your motion for a directed verdict.[16] A motion for a directed verdict mustn't be based on "anything as flighty as indecisive statements in jury openings; it is based on the evidence itself."[17]

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