NEW YORK STATE BAR ASSOCIATION

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CONTENTS

NOVEMBER/DECEMBER 2012

RESEARCHING JURORS ON THE INTERNET—

Ethical Implications

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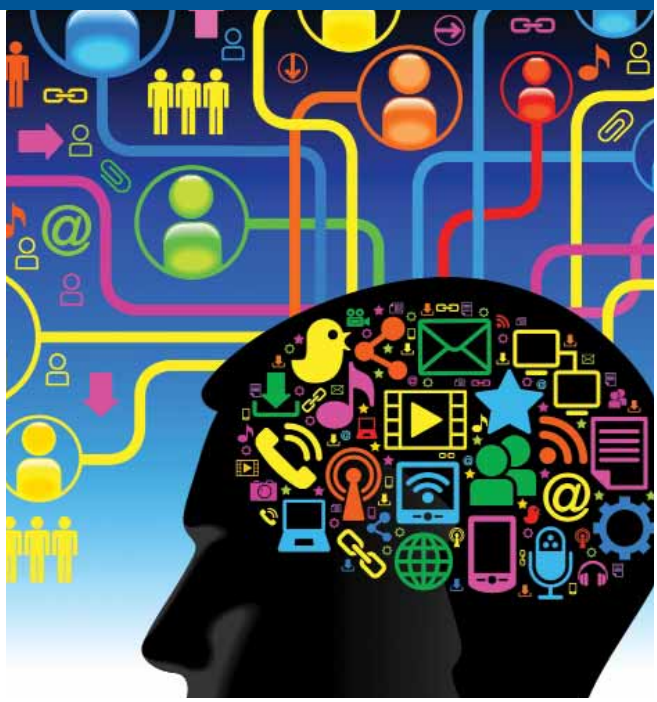
10



DEPARTMENTS

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Creating Partnerships for Justice

Every year, millions of people in New York State are forced to navigate the justice system alone because they are unable to afford to hire an attorney. They often face complicated matters involving housing, health care, sustenance, safety and other basic life essentials, without the benefit of legal counsel. This fall at the State Bar, we have had some great opportunities to reaffirm our association's commitment to enhancing access to justice for people in need by advocating for appropriate public funding for civil legal services, promoting our members' pro bono activities and engaging in creative partnerships with state agencies and the state court system. We are incredibly proud of our members' efforts to assist low-income individuals and families, and we recognize that, together, pro bono service and appropriate government support can make an enormous difference in the lives of millions of New Yorkers and have a positive impact on our justice system.

Legal Assistance Partnership Conference

In September, we hosted the 2012 Legal Assistance Partnership Conference, a biennial event sponsored by the Committee on Legal Aid for providers of civil legal services to the poor. The three-day conference featured timely and practical CLE programs focused on the legal needs of vulnerable populations including people with disabilities, veterans, victims of domestic violence, immigrants and low-income individuals and families. The conference also provides a rare opportunity for more than 400 civil legal service providers from across the state to come together to discuss their work. In light of persistent economic instability and reductions in government funding for legal services, it is more important than ever that providers have access to high-quality, affordable educational programs. We are grateful for the critical work performed by civil legal service providers and we believe this conference serves as an invaluable resource for them.

During the Partnership Conference, the Committee on Legal Aid presented the 2012 Denison Ray Awards to Ian Feldman (director of Legal Services, Mental Health Project, Urban Justice Center), Michael Hanley (senior staff attorney, Empire Justice Center), Richard S. Hobish (founding executive director, Pro Bono Partnership) and the New York Legal Assistance Group of New York City. The Committee also posthumously recognized Michael Rothenberg, the founder of New York Lawyers for the Public Interest who served as its executive director from 2001 to 2012. We were honored to be joined by Chief Judge Jonathan Lippman, who provided the evening's keynote address. The Committee on Legal Aid also presented Chief Judge Lippman with an award in recognition of his advocacy for quality legal services for the poor.

Legal Services Initiative Partnership

We are also proud to be involved in a new partnership with the Office of Court Administration and the New York State Office for the Aging, established to examine and address the unmet need for civil legal services among senior citizens and New Yorkers with disabilities. Too many older residents and people with disabilities face complicated bureaucracies and legal processes without the guidance of an attorney. Some need help planning for their financial future, while others may need assistance remaining in their homes or obtaining life's basic essentials. In many cases, legal services are available, but people are unaware of their existence or how to access them. It is our hope that this legal services initiative will empower older residents and people with disabilities, by helping them to identify the legal issues in their lives and connecting them with the legal counsel they need.

We kicked off the legal services initiative in September with a free CLE webinar that introduced the partnership and The Elder Preparedness Self Assessment Tool (TEPSAT), a questionnaire designed to help older New Yorkers and their loved ones identify the issues they may face as they age and establish a practical plan for the future. TEPSAT is the first in a variety of resources that will be developed through the legal services initiative, with the invaluable assistance of individual attorneys like Bob Abrams (Abrams, Fensterman, Fensterman,

SEYMOUR W. JAMES, JR., can be reached at sjames@nysba.org.

Eisman, Formato, Ferrara & Einiger, LLP), the dedicated elder law attorney and former chair of both the Elder and Health Law Sections, who facilitated this partnership.

Chief Judge's Hearings on Civil Legal Services

The State Bar was again honored to take part in the Chief Judge's Hearings on Civil Legal Services, which were held in September and October in each Appellate Division Department in the state. Representatives from the state bar have assisted in presiding over these hearings each year since they began in 2010. Every year, we receive testimony from civil legal service providers, advocates, experts, judges, district attorneys and clients about the vast unmet need for civil legal services in New York State. We continue to learn more about the enormous impact legal representation can have, not only in the lives of people in need, but also on the justice system as a whole. Our courts operate more smoothly when people who cannot afford to hire an attorney have access to legal counsel; it helps expedite the judicial process and can save millions in tax dollars by reducing delays, resolving legal problems and averting the need for more costly government interventions.

Chief Judge Lippman has been an extraordinary advocate for access to justice in New York State. Through his infusion of funding for IOLA and his dedication of $25 million of the judiciary budget to civil legal services funding, Chief Judge Lippman has offered a lifeline to providers and people in need, when so many other sources of funding are shrinking or disappearing altogether. We are tremendously grateful to the Chief Judge for his continued commitment to this critical area, and we are proud to have been involved in his hearings again this year.

Doing the Public Good

We have also continued to encourage and facilitate pro bono efforts by individual attorneys and law firms through educational programs and recruitment initiatives coordinated by our various committees and our Department of Pro Bono Affairs. Although pro bono can never fully meet the need for civil legal services for the disadvantaged, it is nonetheless an important professional responsibility and a necessary component in our overall strategy to address the gap in legal services.

Each year at the State Bar, we participate in the American Bar Association's National Pro Bono Week by co-sponsoring and hosting events designed to engage attorneys in pro bono service and connect them with opportunities that match their expertise. This fall, the State Bar has been involved in coordinating a series of CLE training events and recruitment efforts to promote pro bono among our members. On October 4, we held a free CLE training on unemployment insurance appeals as an incentive to get attorneys in the third and fourth judicial districts involved in pro bono, and specifically to represent low-income claimants in these matters. That event was co-sponsored by the Albany County Bar Association and the Legal Aid Society of Northeastern New York. On October 25, along with the New York County Lawyers' Association, the New York State Courts Access to Justice Program, and the Office of the Mayor of the City of New York, the State Bar co-sponsored a pro bono week celebration featuring an award ceremony and a volunteer expo in New York City.

This November, we will host two exciting pro bono events at the Bar Center. On November 13, we will hold our annual pro bono CLE training and recruitment event. The theme this year is "Pro Bono Anew," and many civil legal service providers will be on site to meet with local attorneys and discuss volunteer opportunities in the third judicial district. On November 29, the Bar Center will host a CLE program on LGBT rights that will also serve as a recruitment effort for attorneys who are interested in assisting members of the LGBT community. That event will be co-sponsored by the State Bar's Committee on LGBT People and the Law, the Legal Aid Society of Northeastern New York and The Legal Project. In addition to those events, on November 7 we are co-sponsoring a CLE training for attorneys who are interested in assisting low-income individuals and families in landlord-tenant disputes. This program will be held at the Albany County Judicial Center. For more information about these events, please visit www.nysba.org/probono.

The unmet need for civil legal services is a complex and challenging problem, and one we believe is best addressed with a multi-faceted strategy, in collaboration with bar associations, state agencies, the courts and other members of the legal community. We appreciate these opportunities to work with so many outstanding organizations throughout New York State. Our work on addressing the legal services gap and promoting access to justice for all New Yorkers is, and will remain, a top priority for the state bar now and for the years to come. ■

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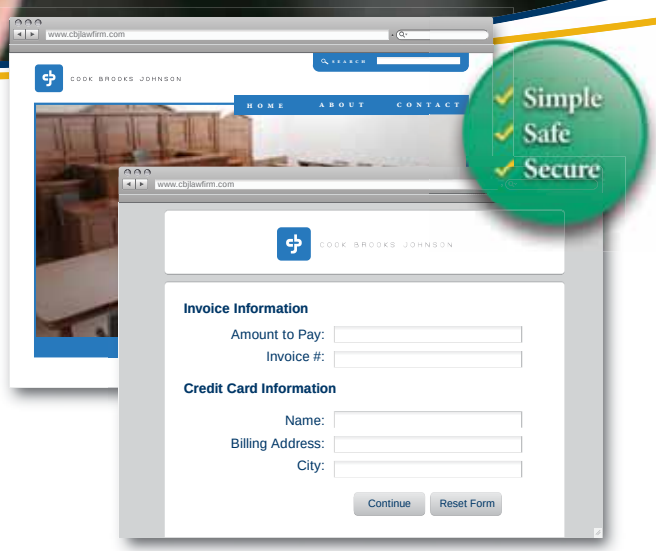

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November 16 New York City
November 29 Albany

Matrimonial Trial Institute II
November 16 Syracuse
December 7 Albany
December 14 New York City

Developing an Elder Law Practice
(9:00 a.m. – 12:45 p.m.)
November 8 Rochester
November 16 Long Island
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Automobile/Trucking Institute
November 15 New York City

The ABC's of Adoption: What Family Law Practitioners Need to Know
November 15 New York City
November 16 Albany

Administrative Hearings Before New York State Agencies
November 27 New York City
December 5 Albany

Accounting for Lawyers
November 28 New York City
December 6 Albany

Practical Skills: Basics of Intellectual Property Law Practice
November 29 New York City
November 30 Albany (Live & Webcast)

Obamacare
(9:00 a.m. – 12:00 p.m.)
November 30 New York City (Live & Webcast)

Construction Site Accidents: The Law, The Trial 2012
November 30 Long Island
December 7 New York City
December 14 Albany

Persuasive Legal Writing for Lawyers
December 3 Westchester (6:00 – 9:00pm)
December 4 New York City (6:00 – 9:00pm)
December 5 Long Island (6:00 – 9:00pm)
December 6 Albany (1:30 – 4:30pm)

Practical Skills: Probate and Administration of Estates
December 3 Albany
December 4 Long Island
December 5 Rochester
December 10 New York City; Syracuse; Westchester
December 11 Buffalo

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December 3 New York City
December 6 Long Island; Syracuse
December 10 Albany; Buffalo
December 13 Westchester
December 14 Rochester

Buying or Selling a Small Business
December 5 New York City
December 11 Albany

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Researching Jurors on the Internet—

Ethical Implications

By Robert B. Gibson and Jesse D. Capell

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Jesse D. Capell (jcapell@hpmb.com) is an associate at Heidell, Pittoni, Murphy, & Bach, LLP and works in its New York City office. He represents hospitals, municipal institutions, and individual health care providers in all stages of pre-trial litigation, including case development, legal research, fact investigation, motion support and suit evaluation. Mr. Capell also represents landlords and premises owners in toxic exposure and negligence cases. The authors would like to thank Ryan Harris, a law student intern, who performed research for this article.

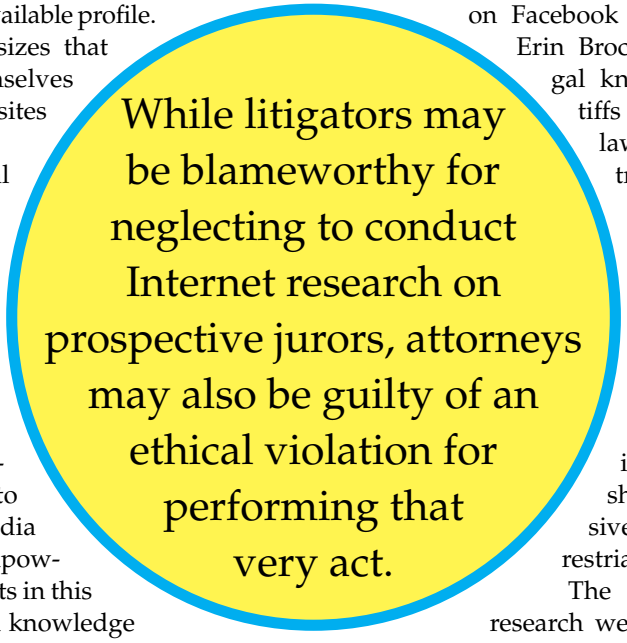
Introduction

As the membership rates of social networking[1] websites continue to soar, attorneys are increasingly relying on Internet research of prospective jurors to gain an advantage at trial. The ease with which litigators can obtain valuable information about members of the jury pool has made this a prevalent strategy. Anecdotes constantly surface about the trial consultant who miraculously discovers prospective jurors' hidden biases through their online activity. Pre-trial Internet research is becoming so much the standard that the New York City Bar Association (NYCBA) recently suggested that a trial attorney's failure to thoroughly investigate prospective jurors might be an abdication of the attorney's professional duty.[2]

But there is an apparent conundrum: while litigators may be blameworthy for neglecting to conduct Internet research on prospective jurors, attorneys may also be guilty of an ethical violation for performing that very act. In June, the NYCBA issued Formal Opinion 2012-2, a comprehensive report on the ethical implications for lawyers who research jurors on the Internet. Formal Opinion 2012-2 states that attorneys might be in violation of the New York Rules of Professional Conduct if

they contact a prospective juror through a social media site – even if the contact was unintentional. According to the NYCBA, if a social media site automatically notifies a juror when another person has viewed the juror's profile page, a lawyer "communicates" with a juror simply by looking at the juror's publicly available profile. Formal Opinion 2012-2 emphasizes that attorneys must educate themselves about how social media websites work before they use them.

At first glance, these ethical views may seem hard to reconcile. On one hand, an attorney could be liable for forgoing Internet background checks. On the other, an attorney may be culpable just by looking at a juror's publicly available social media profile page. But these guidelines are not in conflict. By compelling attorneys to learn how various social media sites operate, the NYCBA is empowering attorneys to become experts in this field. If lawyers are armed with knowledge about how these websites function, they can perform precise research that comports with their ethical obligations.



Internet Research of Jurors

The number of individuals with online profiles is growing exponentially. One recent survey estimates that 35% of adults and 60% of people under the age of 30 now belong to a social media networking site.[3] Given those figures, trial lawyers are using websites like Google, Facebook, and Twitter to learn as much as possible about the character traits of prospective jurors.[4] With the assistance of an associate or a paralegal, litigators can conduct real-time background searches on a multitude of potential jurors.

The primary purpose of performing Internet background research is to enable trial attorneys to weed out biased jurors during the *voir dire* process.[5] Litigators can use peremptory challenges – limited objections that a lawyer may use to strike a prospective juror – if attorneys discover evidence that a potential juror will be prejudiced against their clients.[6]

The benefits of Internet background research can be substantial.[7] Historically, trial lawyers have depended on confidential juror questionnaires to obtain background information about prospective jurors, but lawyers have criticized the paucity of information contained in juror questionnaires.[8] Now, through the Internet, trial attorneys can obtain information about prospective jurors that would otherwise not be disclosed during *voir dire*, such as the juror's political beliefs and economic philosophies.[9] Litigators can also use the Internet to identify jurors who may be receptive to their clients' claims or jurors who seem likely to disregard the rule of law.

For instance, a trial consultant in a products liability case learned that a potential juror had posted on Facebook "that one of her heroes was Erin Brockovich, the crusading paralegal known for her work for plaintiffs in environmental cases."[10] In a lawsuit involving patent rights, a trial consultant for the plaintiff discovered that a prospective juror had previously blogged about the unfairness of copyright infringement, and he sought to keep this juror on the panel.[11] And in a somewhat eccentric example, a potential juror in a personal injury case was rejected because she had blogged about her extensive attempts to contact extraterrestrials.[12]

The benefits of pre-trial Internet research were starkly realized in a recent products liability trial in Fort Lauderdale, Florida. The plaintiff claimed that he was injured after he was forced to clean a machine in a confined space. Before examining prospective jurors, the plaintiff's attorney began researching them on social networking sites. During the course of her research, the attorney learned that one of the potential jurors belonged to a support group for claustrophobics. She selected this juror for the panel, and the juror ultimately served as the foreman. The result: a verdict in favor of the plaintiff.[13]

Furthermore, Internet background searches are extremely efficient. Compared with traditional forms of investigative research, attorneys and their staff members can sift through vast amounts of information on the Internet in a relatively short amount of time.[14] Attorneys inside a courtroom can email the names of prospective jurors to associates or paralegals, who can then plug these names into various search engines or social media websites. Electronic data on social media websites can be retrieved within seconds, and the trial lawyer can receive the background information before making a decision about whether to strike the prospective juror.[15]

Social media websites may also be used by attorneys to verify the accuracy of statements made by prospective jurors during *voir dire*. Depending on the jurisdiction, *voir dire* can be a frenetic process, and it may not be possible to scrutinize the background information of each juror. In *Dellinger*,[16] a criminal fraud trial, a juror denied during *voir dire* that she had a social relationship with the defendant. After the jury rendered a guilty verdict against the defendant, the defendant disclosed that he

had received a message from the juror before the trial through a social networking site. In the message, the juror sympathized with the defendant's plight and said they would "Talk Soon!" The Supreme Court of Appeals of West Virginia ultimately held that the trial court abused its discretion in failing to order a new trial.

The efficacy of researching potential jurors on the Internet is leading some commentators to suggest that trial attorneys may be obligated to perform this service.[17] Indeed, the NYCBA observed that clients have begun to assume that their attorneys will conduct Internet background searches of jurors and that "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[18] One recent scholarly essay proffers that it may even be malpractice for a trial attorney not to perform this research.[19]

To be sure, the New York Rules of Professional Conduct (NYRPC) do not provide any indication about whether pre-trial Internet research is required. Two rules in the NYRPC, however, bear on this issue. Rule 1.1 provides that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And Rule 1.3(a) states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[20] So, for the time being, it seems safe to assume that trial attorneys are not invariably required to perform this service. But it may not be long before that changes.

And while pre-trial Internet research may eventually be an obligatory ethical duty, the NYCBA's Formal Opinion 2012-2 indicates that when engaging in this conduct, attorneys must be mindful of their ethical responsibilities.

Ethical Rules About Researching Jurors Electronically

Until recently, the ethical rules for lawyers who conduct Internet research on potential jurors in New York State were not explicit. The NYRPC provides only that "a lawyer shall not communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case."[21] In 2011, the New York County Lawyers' Association Committee on Professional Ethics issued an interpretation of Rule 3.5(a)(4).[22] The Committee determined that it is ethical and proper under Rule 3.5(a)(4) for an attorney to "undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send Tweets to jurors or otherwise contact them."[23] Still, the precise meaning of "contact" and "communicate" in this context had not yet been defined.

In June, however, the NYCBA released its groundbreaking ethical opinion on using social media and related technology for pre-trial research. In it, the NYCBA attempted to clarify the meaning of "communication" within the context of Rule 3.5(a)(4). While the NYCBA does not have the authority for policing ethical violations in New York State, formal ethical opinions from the NYCBA definitely hold sway. In discerning the meaning "communication," the NYCBA referenced several sources: *Black's Law Dictionary* (9th Ed.), *The Oxford English Dictionary*, and Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York. Ultimately, it determined that it is irrelevant whether an individual intends to communicate with another person; communication is accomplished when knowledge or information is transmitted from one person to another. The focal point is on the recipient of the communication, not on the communicator.[24]

The NYCBA recognizes that some social media services automatically notify users when their profiles have been viewed. For example, members of LinkedIn, a highly popular professional networking site, receive a message when other LinkedIn members have viewed their profiles. Other social networking services that offer this feature include Bebo and Tagged.[25] The NYCBA concludes that

> [a] request or notification transmitted through a social media service may constitute a communication even

> if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.
>
> …
>
> The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent.[26]

Still, the NYCBA did not decide that an inadvertent or unintentional communication necessarily constitutes an ethical violation – only that it may. The NYRPC may ultimately need to weigh in on this subject.

The NYCBA repeatedly states that attorneys who engage in electronic background searches of jurors should study the functionality of the websites they use. If an attorney is unable to grasp how the social media service works, the NYCBA urges the attorney to proceed with caution and be aware that he or she may be at risk of violating the ethical rules.[27]

Before you conduct any research on a social media site you must confirm that the site does not notify other users when their profiles have been viewed.

Reconciling the Two Views

While one may initially believe that Formal Opinion 2012-2 creates an ethical dilemma, the fallacy of this assessment becomes evident upon closer inspection. Formal Opinion 2012-2 simply advises attorneys of the following: (1) you may – if not now, at some time in the future – be obligated to perform Internet research of prospective jurors; (2) you can view the publicly available electronic profiles of prospective jurors as long as you do not contact or communicate with the juror in any fashion; and (3) before you conduct any research on a social media site you must first examine how the site works, understand its privacy policies, and confirm that the site does not notify other users when their profiles have been viewed.[28]

If, for example, an attorney planned to use Facebook to research prospective jurors, the attorney would need to visit the Facebook's Help Center at http://www.facebook.com/help/?ref=ts. The Help Center is a user-friendly resource providing an abundance of basic information about Facebook. It contains a glossary of commonly used terms; debunks certain myths; and describes various features, services, and applications offered by the service. Most important, the Help Center provides a comprehensive explanation of Facebook's privacy policies, and it clearly delineates Facebook's policy about tracking who views your profile:

> Facebook does not provide a functionality that enables you to track who is viewing your profile (timeline), or parts of your profile (timeline), such as your photos. Third party applications also cannot provide this functionality. Applications that claim to give you this ability will be removed from Facebook for violating policy.[29]

Similarly, LinkedIn users can access the LinkedIn Learning Center, which contains detailed information about how the site works. LinkedIn further offers a function called "Answers" in which a user can ask questions about a variety of topics, including questions about various features offered through LinkedIn. The answers are provided by other users. A simple inquiry about whether users have the ability to track who views their profile yields an overwhelming number of responses that yes, indeed, you can (although users' ability to ascertain the identity of people who have viewed their profiles varies based on the type of LinkedIn account they have).

Twitter requires users to subscribe to another user's Twitter account, which has been found to be a blatant act of communication – and therefore it is a prohibited form of juror research. Still, if Twitter users have a public account, it is possible to access their Twitter accounts through a Google search without notifying the users that one has viewed their profile.

The more an attorney understands about a social media website, the more equipped the attorney will be to take advantage of all of the website's search capabilities. For example, the Facebook Help Center provides a cogent description of the Facebook Search function, explaining how users can filter their searches, search public information, or search for two things at the same time.

Conclusion

Pre-trial Internet research of prospective jurors is becoming an integral component of the trial preparation process. Trial attorneys would be well advised to apply this practice whenever possible because it may increase the likelihood of a favorable outcome. But before undertaking this research, attorneys must be familiar with the local ethical rules governing this practice. They must also determine whether jurors will receive a notification from the website if another user views their profiles. Fortunately, the leading social media websites provide user-friendly support software that allows trial attorneys to discern this information with relative ease. Given the role of social media in our society, investing the time to understand how these websites function is a worthwhile endeavor. ■

1. Social media is defined as "[w]eb sites and other online means of communication that are used by large groups of people to share information and to develop social and professional contacts: Many businesses are utilizing social media to generate sales." *See* Dictionary.com. http://dictionary.reference.com/browse/social+media?s=t (Mar. 5, 2012).

2. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2.

3. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 Kan. L. Rev. 611, 612 n.5 (2012).

4. Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, Reuters Legal (Feb. 17, 2011).

5. Potential jurors are generally selected through a system of examination, known as *voir dire*, during which attorneys for each party can object to a juror.

6. Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. Rev. Disc. 28, 34–35 (2011).

7. *See* Beth Germano, *Social Media Changing the Way Juries Are Picked*, CBS Boston (Nov. 15, 2010), http://boston.cbslocal.com/2010/11/15/social-media-changing-the-way-juries-are-picked (medical malpractice attorney in Boston claims that social media research of prospective jurors has been revolutionary).

8. *Id.*

9. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 32–33.

10. Grow, *Internet v. Courts supra* note 4.

11. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times (Sept. 29, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29.

12. *Id.*

13. Hoffmeister, *Investigating Jurors supra* note 3, pp. 612, 626.

14. *Id.* at 630.

15. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 33–34.

16. *See State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2010) (per curiam).

17. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 630.

18. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 I.

19. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 631.

20. *See* Rules 1.1, 1.3(a) of the NYPRC.

21. *See* Rule 3.5(a)(4) of the NYRPC.

22. NYCLA Comm. on Prof'l Ethics, Formal Opinion 743 (May 18, 2011).

23. *Id*. Indeed, although the New York Appellate Division has not directly addressed this question, a New Jersey Appellate Division decision is consistent with the New York County Lawyers' Association's position. In *Carino v. Muenzen*, 2010 N.J. Super. Unpub. LEXIS 2154, at *10 (Aug. 30, 2010), a medical malpractice case, the trial court ruled that a plaintiff's attorney could not use the Internet to obtain information about prospective jurors during jury selection because the plaintiff's attorney had failed to give advance notice to defense counsel that he would be conducting such research. The jury ultimately awarded the defendant a defense verdict, and the plaintiff appealed. On appeal, the Appellate Division determined that trial judge acted unreasonably. *Id.* at 26. The Appellate Division explained:

> In making his ruling, the trial judge cited no authority for his requirement that trial counsel must notify an adversary and the court in advance of using Internet access during jury selection or any other part of the trial. The issue is not addressed in the Rules of Court.

Id. The Appellate Division, however, determined that the plaintiff did not demonstrate that he suffered any prejudice as a result of the trial court's error, and the defense verdict was affirmed. *Id.* at 27.

24. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2.

25. Bebo, launched in 2005, is a social media site where users can post blogs, pictures, music, videos, and questionnaires. www.bebo.com. Tagged is a "social discovery site" that enables members to browse the profiles of other members, play games, and share tags and virtual gifts. www.tagged.com.

26. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2–3.

27. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.3.

28. NYCBA Comm. on Ethics Formal Opinion 2012-2 is extremely thorough. It also provides that an attorney may not engage in deception or misrepresentation in researching jurors on social media websites and discusses an attorney's obligation to reveal improper juror conduct to the court.

29. *See* http://www.facebook.com/help/?page=11603751514719 (Aug. 4, 2012).

"I don't have too many answers. I'm just up here avoiding jury duty."

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 24 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice, Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. He serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

If a *[Single]tree* Falls . . .

Introduction

The follow-up to September's column on *Doe v. Sutlinger Realty Corp.*,[1] once deferred to discuss the First Department's adoption of *Singletree* in its *Garcia v. New York*[2] decision, must again be deferred due to the Second Department's recent decision in *Rivers v. Birnbaum*.[3] There, the Second Department, affirming a trial court's consideration of an expert's affidavit where the expert had not been disclosed prior to the filing of the note of issue, "clarif[ied] that the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely."[4]

Singletree Clarified by *Rivers*

In a decision by Justice Ariel E. Belen, the *Rivers* court explained how certain decisions of the court had been "interpreted":

> We recognize that certain decisions of this Court may have been interpreted as standing for the proposition that a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness, by itself, requires preclusion of an expert's affirmation or affidavit submitted in support of a motion for summary judgment.[5]

The Second Department then used its 2008 decision in *Construction by Singletree, Inc. v. J.C. Construction Management Corp.*[6] to illustrate the application of this interpretation. After reviewing the facts and chronology of *Singletree*, the court noted:

> Indeed, some of our decisions may be interpreted as so holding and as setting forth a bright-line rule in which expert disclosure pursuant to CPLR 3101(d)(1)(i) is untimely if it is made after the filing of the note of issue and certificate and readiness and, thus, in the absence of a valid excuse for such a delay, a court must preclude an affidavit or affirmation from an expert whose identity is disclosed for the first time as part of a motion for summary judgment.[7]

Justice Belen followed this statement with a string of 10 additional decisions from the Second Department hewing to this interpretation. The court's explanation for its clarification is worth reading in its entirety:

> We now clarify that the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction.
>
> We further reiterate that a trial court, under its general authority to supervise disclosure deadlines, and consistent with its discretion to supervise the substance of discovery, may impose a specific deadline (for example, prior to the filing of the note of issue and certificate of readiness or prior to the making of a motion for summary judgment), for the disclosure of experts to be used in support of a motion for summary judgment, or who are expected to testify at trial, or both. Moreover, where a trial court has set a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline.
>
> As clarified, this rule is consistent both with the statute and with the general purpose of summary judgment itself. Summary judgment is the procedural equivalent of a trial and "must be denied if any doubt exists as to a triable issue or where a material

issue of fact is arguable." In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist.[8]

Justice Belen's decision was joined by Justices Balkin and Hall. Justice Robert J. Miller wrote a concurring opinion, explaining:

> I write separately to express my views regarding the duty CPLR 3101(d)(1)(i) imposes on parties to provide pretrial expert disclosure and the extent to which a court has the discretion to fashion penalties for a party's failure to comply. It is my belief that further analysis of CPLR 3101(d)(1)(i) and of this Court's case law will help clarify this area of the law and permit the application of the statute in a manner that is predictable for the bar, workable for the bench, and consistent with the Legislature's purpose in enacting it.[9]

Following a lengthy review of the development of expert disclosure in New York state practice, Justice Miller's concurrence continued:

> Some commentators may have interpreted this Court's case law as standing for the proposition that a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness requires a court to preclude an expert's affirmation or affidavit submitted in support of a motion for summary judgment. However, this Court has never so held, and in cases where this Court has approved of the penalty of preclusion, this Court has consistently done so on the ground that the trial court "did not improvidently exercise its discretion" in imposing such a penalty for noncompliance with the disclosure deadlines imposed under CPLR 3101(d)(1)(i). Although this Court may have referred to an expert's affidavit as "not admissible," it was only rendered inadmissible by a preclusion order, imposed as a penalty for noncompliance by a trial court in the provident exercise of its discretion.
>
> In sum, under this Court's precedent, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness constitutes noncompliance under the statute. However, such a failure does not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a motion for summary judgment. Rather, the determination of whether and to what extent a penalty should be imposed upon a party for its failure to comply with CPLR 3101(d)(1)(i) is left to the providently exercised discretion of the court. In considering whether preclusion is an appropriate penalty for noncompliance, a court should look to whether the party seeking to avoid preclusion has demonstrated good cause for its noncompliance, whether the noncompliance was willful or whether it served to prejudice the other party, and any other circumstances

The determination of whether and to what extent a penalty should be imposed upon a party for its failure to comply with CPLR 3101(d)(1)(i) is left to the providently exercised discretion of the court.

> which may bear on the appropriateness of preclusion. These may include, but are not limited to, the length of time that has passed since the commencement of the litigation, the amount of time that has passed since expert disclosure was demanded, and the extent to which the nature of the case or the relevant theories asserted therein rendered it apparent that expert testimony would be necessary to prosecute or defend the matter.[10]

Justice Miller's statement that "under this Court's precedent, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness constitutes noncompliance under the statute," is stronger than the majority's holding that "the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely." While Justice Miller does not identify the statute that is violated by failing to exchange expert disclosure prior to the filing of the note of issue, presumably he is referring to the Certificate of Readiness accompanying the Note of Issue, since CPLR 3101(d)(1)(i) does not mention or reference the filing of the note of issue.

Rivers Interpretation Adopted in *Roman* and *Andrade*

The same day as *Rivers* was decided, the Second Department issued its decision in *Roman v. 233 Broadway Owners, LLC*,[11] affirming a trial court's decision to consider the affidavit of an expert, who was not exchanged prior to the filing of the note of issue, submitted by the plaintiff in opposition to the defendants' motions for summary judgment.[12]

> With respect to motion and cross motions for summary judgment, contrary to ADT's and the building defendants' contentions, under the particular circumstances of this case, the plaintiff's allegedly untimely disclosure did not render her expert's affidavit inadmissible (*see Rivers v Birnbaum*, AD3d [decided herewith]).

That same day, the Second Department issued its decision in *Andrade v. T.C. Dunham Paint Co., Inc.*,[13] wherein it cited *Rivers* as authority:

> In the present case, as an initial matter, the Supreme Court providently exercised its discretion in considering the affidavit of the plaintiff's expert, Arad Ben Bassat, submitted in opposition to the motion and cross motion of fact (*see Rivers v Birnbaum*, AD3d [decided herewith]).[14]

The decision in *Roman* was joined by Justices Angiolillo, Dickerson, Belen, and Chambers. The decision in *Andrade* was joined by Justices Skelos, Dickerson, Belen, and Miller. Accordingly, a total of eight Justices from the Second Department have either joined the *Rivers* decision or concurred in decisions that adopted the *Rivers* court's interpretation of CPLR 3101(d)(1)(i) vis-a-vis the use of expert affidavits on summary judgment where the expert was not exchanged prior to the filing of the note of issue.

Conclusion

With the *Rivers* court's felling of *Singletree*, this troubling line of cases in the Second Department, dating back to 2008, should be relegated to a footnote. Unfortunately, the clarification in *Rivers* will not assist the parties previously adversely impacted by the *Singletree* line of cases.

What remains to be seen is whether a litigant in the First Department will be able to use the *Rivers* decision to limit the application of that Department's decision in *Garcia v. New York*.[15]

While this column will eventually return to the medical privilege issues raised by *Doe v. Sutlinger Realty Corp.*,[16] next issue's column will review a number of recent trial-level decisions applying the Fourth Department decision in *Thompson v. Mather*.[17]

Of course, by then, we will all have celebrated assorted holidays and rung in the New Year. So, happy holidays to all and best wishes for a wonderful New Year! ■

1. 96 A.D.3d 898, 947 N.Y.S.2d 153 (2d Dep't 2012).
2. 2012 N.Y. Slip Op. 06112, 2012 WL3930555 (1st Dep't Sept. 11, 2012).
3. 2012 N.Y. Slip Op. 06935, 2012 WL4901445 (2d Dep't Oct. 17, 2012).
4. *Id.* at *7.
5. *Id.* at *6.
6. 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008).
7. 2012 N.Y. Slip Op. 06935, at *7.
8. *Id.* (citations omitted).
9. *Id.* at *11.
10. *Id.* at *13 (citations omitted).
11. 2012 N.Y. Slip Op. 06936, 2012 WL4901625 (2d Dep't Oct. 17, 2012).
12. The Second Department agreed with one of the defendants that the trial court should not have considered portions of the plaintiff's expert's opinions on other grounds.
13. 2012 N.Y. Slip Op. 06905, 2012 WL4900824 (2d Dep't Oct. 17, 2012).
14. *Id.* at *2.
15. 2012 N.Y. Slip Op. 06112.
16. 96 A.D.3d 898.
17. 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dep't 2010).

CORRECTION:

In her article "Trials in Opera," *Journal*, October 2012, page 38, Karen DeCrow referred to the character of Phyllis, in the Gilbert and Sullivan opera *Iolanthe*, as a full-blooded fairy. She was in fact a mortal. We regret the error.

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Latest ABA Guidance: Old Wine in a Tech-Ethics Bottle?

By Devika Kewalramani

Information security may no longer be relegated to a lawyer's IT department. Recently adopted amendments to the American Bar Association (ABA) Model Rules of Professional Conduct, recommended by its Commission on Ethics 20/20,[1] require lawyers to be technologically competent. Simply put, lawyers have a duty to stay up-to-date and to upgrade and update when it comes to technology and its security.

Admittedly, for the most part lawyers were not early adopters of new technology, but technology has largely transformed the way lawyers work, communicate and build their business. Productivity and accessibility are the hallmarks of our (not so) newfound tools. But, coupled with these benefits are the potential risks to client confidentiality, attorney-client privilege and attorney competence. How can lawyers, law firms and corporate legal departments manage to keep pace with the many benefits of using technology while remaining attentive to the new threats posed to client confidentiality and the attorney-client relationship? The alarming rise in inadvertent disclosure and unauthorized access to confidential client data through misdirected emails, lost or stolen mobile devices, cloud-based data storage systems or sophisticated hackers has signaled the need for greater and clearer ethical guidance for the legal community on the use of technology.

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The ABA Model Rule amendments attempt to close the ever-widening gap between modern law practice and evolving technology. Lawyers perhaps deal with more confidential and privileged information than any other professionals. That is why it is imperative that law firms and legal departments understand how to protect and secure the information clients entrust to them. Today, every law firm and legal department maintains electronic client data in some shape or form. This makes the ABA guidance on a lawyer's use of technology critical to every lawyer's practice.

The ABA Model Rule amendments serve as a useful framework for New York lawyers who should keep an eye out for possibly similar amendments to the New York Rules of Professional Conduct,[2] which have largely incorporated the Model Rules. The notable ABA amendments to particular Model Rules and Comments to Model Rules are discussed below.

Technology, Confidentiality and Competence

Lawyers regularly communicate with clients electronically and confidential client information is routinely transmitted, stored or accessed on law firm or third-party servers, mobile devices or wireless networks. These online interactions have raised new concerns about data security and client confidentiality. Consequently, lawyers need to develop a competent understanding of how electronic client data is created, stored, retrieved and accessed in order to draft documents, do legal research, run investigations and conduct sophisticated electronic discovery.

Protecting Confidences

The lawyer's duty of confidentiality is one of the most fundamental ethical duties owed to a client. The Model Rules define "confidential information" broadly as "information relating to the representation." A significant change to Model Rule 1.6 on "Confidentiality of Information" is to subsection (c) which adds: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Up until the amendments, the duty of confidentiality only required a lawyer "not to reveal" client confidences, unless otherwise permitted. The amended rule obligates the lawyer to act affirmatively "to prevent" such a revelation. The ABA Commission describes three scenarios where unintended revelation of client information could occur: (1) inadvertent disclosure where an email is sent to the wrong person, (2) unauthorized access where a third party hacks into a firm's network or a lawyer's email account, and (3) unauthorized release where employees or other people post client information on the Internet.

Note that Comment [16] to Rule 1.6 clarifies that no ethical violation occurs if "the lawyer has made reasonable efforts to prevent the access or disclosure." Factors to consider in determining the reasonableness of the lawyer's efforts include "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."

Lawyers are cautioned by Comments [16] and [17] that compliance with the duty of confidentiality in Rule 1.6 does not vitiate their obligations under federal and state law regarding data privacy and breach notice requirements in the event of a breach of privacy. Thus, lawyers need to remember that their obligations vis-a-vis client information do not end with the ethics rules. There is a burgeoning body of privacy and breach notification laws that appear to apply equally to lawyers as they do to those who store or transmit confidential information electronically. Lawyers need to know these laws, understand their ramifications and comply with their requirements as necessary.

Techno-Competence

Model Rule 1.1 on "competence" requires a lawyer to provide competent representation to clients; this consists of legal knowledge, skill, thoroughness and the preparation reasonably necessary for the representation. In addition, the rule requires the lawyer to stay abreast

of changes in the law and its practice. Comment [6] now specifies that, to remain competent, lawyers must also have a firm grasp of "the benefits and risks associated with relevant technology." The ABA Commission noted that a lawyer must understand the basic features of relevant technology – how to create an electronic document and how to use email – in order to ensure clients receive competent and efficient legal services.

Interestingly, the amendments to the Model Rules exemplify how the duty of confidentiality and the duty of competence, especially in the context of a lawyer's use of technology, are closely related: lawyers must act competently to protect confidentiality.

Lawyers are cautioned that compliance with the duty of confidentiality in Rule 1.6 does not vitiate their obligations under federal and state law regarding data privacy and breach notice requirements in the event of a breach of privacy.

Inadvertent Disclosure

The ABA Commission recognizes the deficiency of certain words used in the Model Rules and makes some practical word changes to modernize the rules so they reflect how lawyers actually utilize technology in their practice. So, for example, Model Rule 4.4 on "Respect for Rights of Third Persons" provides that a lawyer's receipt of inadvertently disclosed "documents" can trigger notification obligations. Since the word "documents" seems inadequate to properly address the ways in which electronic information can be inadvertently transmitted (for example, via emails, flash drives and metadata), the ABA Commission has expanded it to add "electronically stored information." So, the amended rule states that a lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client, and the lawyer knows or reasonably should know that the document or electronically stored information was inadvertently sent, shall promptly notify the sender.

In addition, Comment [2] to Model Rule 4.4 now defines "inadvertently sent" as when a document or electronically stored information is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that is intentionally transmitted.

Metadata

"Embedded data," commonly referred to as "metadata," is the hidden information that may contain confidential and privileged material belonging to the client. Unlike other data, metadata can be harder to see and review without going behind the document. The subject of metadata is addressed in Comment [2] to Model Rule 4.4, which now states that electronically stored information includes "metadata" and clarifies that "metadata in electronic documents creates an obligation under Rule 4.4 only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

The issue of "metadata mining" differs from state to state, and lawyers dealing with adverse counsel practicing in various states should be aware that ethics opinions on this issue run the full spectrum from prohibiting data mining entirely (as in New York) to allowing full access and use of metadata (as in some states). Given the rather confusing and conflicting ethics opinions issued by different jurisdictions regarding the propriety of metadata mining, lawyers who produce or receive electronically stored information should be familiar with the applicable ethics rules and ethics opinions where they and their adversaries practice.

Screening

The ABA Commission observed that modern technology has made client information more accessible to the whole firm. Thus, the process of restricting access to this information ought to require more than placing relevant physical documents in an inaccessible location; it should also require appropriate treatment of electronic data. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12 and 1.18. Comment [9] elaborates on this definition and points out that a key feature of an ethical wall is to limit the screened lawyer's access, to avoid creating a conflict. To provide greater clarity and specificity, the ABA Commission makes explicitly clear in Comment [9] that screening procedures should apply to information in tangible and electronic form.

The expansion of the screening procedures to encompass digital client data highlights the pervasive nature of technology and the recognition by the ABA Commission that the days of storing client papers in locked file cabinets are long gone.

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Technology and Client-Lawyer Relationships

How clients locate lawyers and how lawyers market and deliver legal services is also affected by technology. Clients increasingly access information regarding legal services via search engines, websites, blogs and rating or ranking services. Today's client may seek to hire counsel by visiting attorneys' websites or blogs, which may ask the prospect to supply details about his or her inquiry. Similarly, lawyers frequently use Internet-based tools for client development (such as pay-per-click services and social and professional networking sites), exchange information with prospects on a blog, or use their social networking page to offer advice to "friends." These types of interactions raise ethics issues regarding the actual nature of the client-lawyer relationship.

> The expansion of the screening procedures to encompass digital client data highlights the pervasive nature of technology; the days of storing client papers in locked file cabinets are long gone.

Prospective Clients

"Discussions" imply two-way verbal exchanges, such as an in-person meeting or a telephone conversation, and can give rise to prospective client relationships. However, this does not capture non-verbal Internet-based communications that can often trigger duties to prospects. To bridge the gap in Model Rule 1.18 on "Duties to a Prospective Client," the ABA Commission decided to replace "discusses" with "consults" and to revise Comment [2] to identify the circumstances where a "consultation" prompts Rule 1.18's duties. The Comment notes that a consultation giving rise to a prospective client relationship can occur when a person responds to "written, oral or electronic communications" by the lawyer that specifically invites information regarding a potential representation without clear warnings that limit the lawyer's duty. The Comment clarifies that no prospective client relationship is created where the person communicates unilaterally and offers matter-specific information in response to an advertisement that lists "legal information of general interest."

Recommendations

Model Rule 7.2 on "Advertising" prohibits a lawyer from paying others (such as "runners" or "cappers") for generating client leads. New marketing tools such as "pay-per-click" and "pay-per-lead" services enable lawyers to pay to have their names listed in response to Internet-based queries by people who use certain search terms and other methodologies. To avoid confusion arising from how the rule applies to these e-marketing tools, the ABA Commission, in Comment [5], clarifies that a lawyer may pay others for generating "Internet-based client leads" as long as the lead generator does not recommend the lawyer, and the lawyer observes other ethics rules that prohibit misleading the public as well as the restrictions on fee sharing with nonlawyers.

Solicitations

Model Rule 7.3, retitled "Solicitation of Clients," prohibits soliciting professional employment by "in-person, live telephone or real-time electronic contact," where a significant motive is the "lawyer's pecuniary gain," unless excepted by the rules. To clarify when a lawyer's online communications constitute the type of direct "solicitations" that are governed by the rule, Comment [1] defines "solicitation" as a "targeted communication" that is directed to specific people and offers legal services but excludes communications from a lawyer that are "directed to the general public," such as through a "billboard, an Internet banner advertisement, a website," or "automatically generated in response to Internet searches."

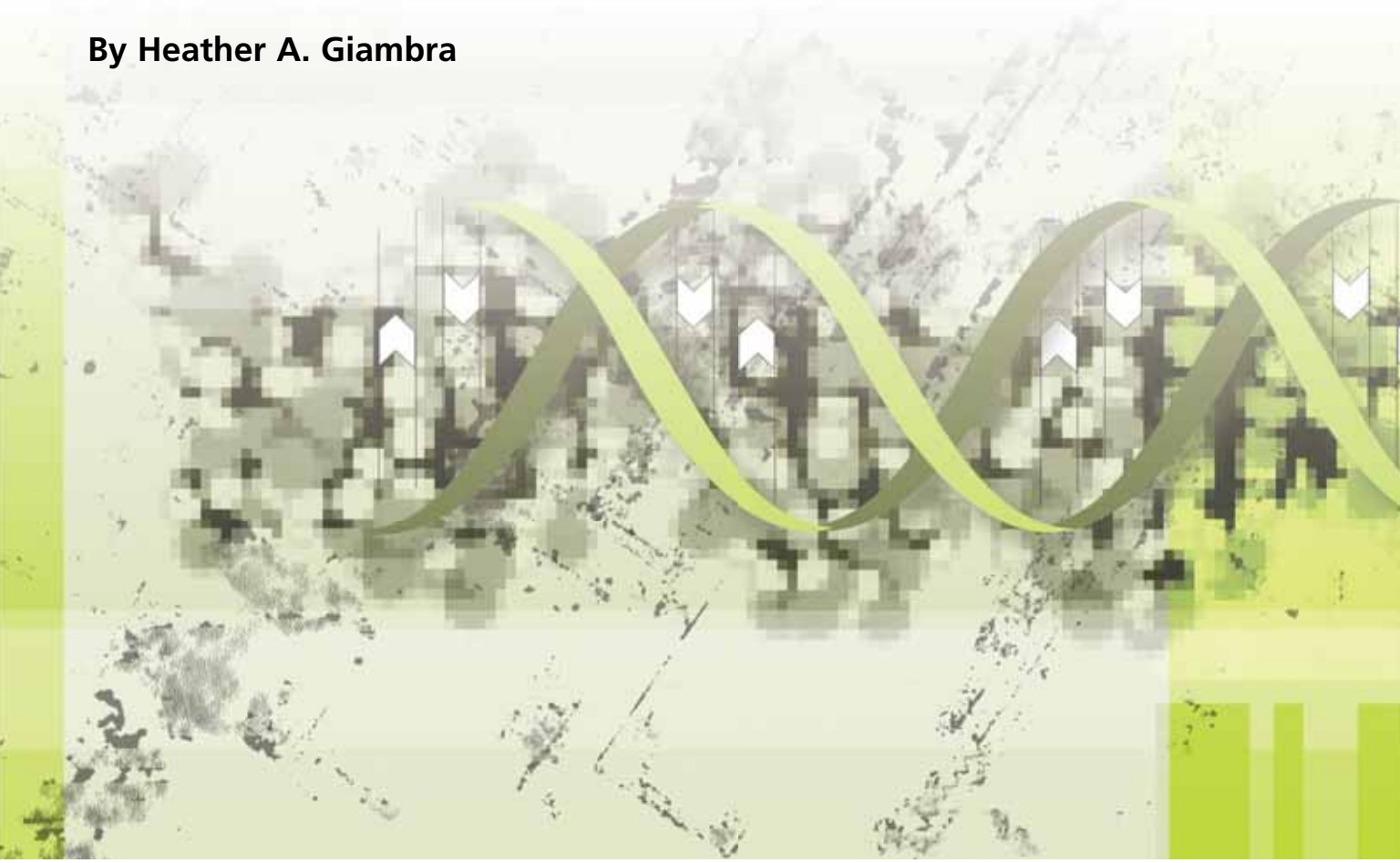
Techno(law)gy Ethics

The ABA Model Rule amendments signify a recognition that technology is vital to a lawyer's practice today and that the ethics rules needed to be sharpened to provide helpful and practical guidance on continuing professional duties. Lawyers owe their clients an ethical obligation to competently and reasonably safeguard confidential client data. This involves understanding the limitations in lawyer competence when it comes to technology, obtaining appropriate assistance, and continuing to monitor technology and its security as they evolve over time. Many of the amended Model Rules previously resembled the corresponding New York ethics rule. It remains to be seen whether the New York Rules of Professional Conduct will make the "technology leap." ■

1. *See* ABA House of Delegates Resolutions 105A and 105B adopted at the Annual Meeting in August 2012.
2. N.Y. Comp. Codes, R. & Regs. tit. 22, pt. 1200.

A Primer on Title II of the Genetic Information Nondiscrimination Act of 2008 and Its Implementing Regulations

By Heather A. Giambra



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Introduction

On May 21, 2008, Congress enacted the Genetic Information Nondiscrimination Act of 2008 (GINA). Title II[1] of GINA, which took effect on November 21, 2009, prohibits discrimination in employment on the basis of "genetic information."[2] The Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing Title II of GINA on November 9, 2010. This article is intended to familiarize the reader with the provisions of Title II of GINA and its implementing regulations and to explore areas of the statute that are expected to give rise to future litigation.

Title II of GINA makes it an unlawful employment practice for an employer to discriminate against an employee, applicant or former employee in hiring, discharge or with respect to other terms and conditions of employment, on the basis of genetic information.[3] GINA further prohibits employers from limiting, segregating or classifying employees in any way that would deprive or tend to deprive an employee of employment opportunities or otherwise affect the employee's status as an employee because of genetic information.[4] GINA also makes it unlawful for an employer to request, require or purchase genetic information with respect to an employee or a family member of the employee.[5] In addition, Title II of GINA requires that employers who come into possession of genetic information of an employee maintain that information in a separate file and treat it as a confidential medical record of the employee in accordance with the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA).[6] GINA also places certain limitations on the disclosure of genetic information.[7] Each of these prohibitions/requirements will be discussed in detail below.

Employers Covered by GINA

GINA applies to both public and private sector employers with 15 or more employees, employment agencies, labor organizations and joint labor-management training or apprenticeship programs.[8] Indian tribes and bona fide private clubs (other than labor organizations) that are exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986 are not governed by GINA.[9] While not specifically set forth in the regulations, the supplementary information to the EEOC's GINA regulations notes that, because the statute defines employers to include employers as defined by Title VII of the Civil Rights Act of 1964 (Title VII), and because numerous courts have held that Title VII did not intend to create individual liability, there is no individual liability under GINA.[10]

Genetic Information

GINA defines genetic information as including information about (1) an individual's genetic tests; (2) the genetic tests of an individual's family members; (3) a family member's medical history (the manifestation of disease or a disorder in an individual's family members); (4) an individual's request for or receipt of genetic services, or the participation in clinical research that includes genetic services by the individual or family members of the individual; and (5) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using assisted reproductive technology.[11] Genetic information does not include information about the sex or age of an individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test.[12]

> Title II of GINA makes it unlawful for an employer to discriminate on the basis of genetic information.

Genetic Tests and Genetic Services

"Genetic test" is defined as "an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations, or chromosomal changes."[13] Examples of genetic tests include

1. tests to determine whether an individual has a certain genetic marker evidencing a predisposition to a particular disease;
2. carrier screening using genetic analysis to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, or spinal muscular atrophy in future offspring;
3. amniocentesis and other evaluations used to determine the presence of a genetic abnormality in a fetus;
4. newborn screening that uses DNA, RNA, protein or metabolite analysis to detect genotypes, mutations or chromosomal changes;
5. pre-implantation genetic diagnosis performed on embryos created using *in vitro* fertilization;
6. pharmacogenetic tests that detect genotypes, mutations or chromosomal changes that indicate how an individual will react to a drug;
7. DNA testing to detect genetic markers associated with information about ancestry;
8. DNA tests that reveal family relationships, such as a paternity test;[14] and
9. a test to determine the presence of a genetic predisposition for alcoholism or drug use.[15]

"Genetic test" does not include an analysis of proteins or metabolites that does not detect genotypes, mutations or chromosomal changes.[16] Thus, medical tests that test for the presence of a virus that is not composed of human

DNA, RNA chromosomes, proteins or metabolites are not "genetic tests."[17] Likewise tests for infectious diseases that may be transmitted through food handling, complete blood counts, cholesterol tests and liver function tests are not considered "genetic tests."[18] Tests for the presence of alcohol or illegal drugs are not "genetic tests."[19]

"Genetic services" include genetic tests, genetic counseling (obtaining, interpreting or assessing genetic information) and genetic education.[20] The supplementary information provided with respect to Section 1635.3(e) of the EEOC's GINA regulations notes that "making an employment decision based on knowledge that an individual has received genetic services violates GINA even if the covered entity is unaware of the specific nature of the services received or the specific information exchanged in the course of providing them."

Family Members

Included in GINA's definition of "genetic information" is the genetic information of an individual's "family members" and information about the manifestation of a disease or disorder in an individual's family members. Therefore, a proper understanding of the definition of "family members" is important. GINA defines the family members of an individual as anyone who is a dependent of that individual as a result of marriage, birth, adoption or placement for adoption[21] and any relative of the first-degree, second-degree, third-degree or fourth-degree.[22]

The Section-by-Section Analysis of this provision of the regulations notes that spouses and adopted children are included within the definition of family members, even though their genetic information will have no bearing on whether the employee protected by GINA might acquire a disease or disorder. This indicates that Congress intended to prevent employers from discriminating against employees because of concerns over potential increased health insurance rates.

GINA defines relatives of the first-degree as an individual's children, siblings and parents.[23] Second-degree relatives include an individual's grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings.[24] Great-grandparents, great-grandchildren, great-aunts, great-uncles and first cousins are relatives of the third-degree.[25] Fourth-degree relatives include great-great-grandparents, great-great-grandchildren and first cousins once removed (i.e., the children of the individual's first cousins).[26] Interestingly, GINA defines "family member" broader than the health care industry does. The American Medical Association's intake questionnaire for an adult medical history includes information about only first- and second-degree relatives and some third-degree relatives (cousins). Thus, it appears that, by including all relatives of the fourth-degree in GINA's definition of family member, Congress intended to provide broad protection against employment discrimination on the basis of genetic information.

The Prohibition of Discrimination on the Basis of Genetic Information

Congress used language similar to that used in Title VII to set forth the employment practices prohibited by GINA. Specifically, GINA provides that it is unlawful for an employer

> (1) to fail or refuse to hire or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions or privileges of employment of the employee, because of genetic information with respect to the employee, or (2) to limit, segregate, or classify the employee of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information.[27]

Congress used language similar to that used in Title VII to set forth the employment practices prohibited by GINA.

The use of this language evinces Congress's intent to prohibit a broad range of employment practices. The Section-by-Section Analysis to the EEOC's regulations specifically notes that this broad language indicates Congress intended to prohibit harassment on the basis of genetic information.[28]

GINA also prohibits retaliation against any individual because such individual has opposed any act or practice made unlawful by GINA, or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under GINA.[29] The Section-by-Section Analysis to the EEOC's regulations notes that given the similarities in the anti-retaliation provisions of GINA to those of Title VII, the proper standard for determining what constitutes retaliatory conduct under GINA will be the same standard used in Title VII cases, as announced by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*.[30] Thus, to constitute retaliation, conduct need not be related to employment and it need not rise to the level of an adverse employment action, so long as it is "materially adverse" and "well might" dissuade a reasonable person from making or supporting a charge of discrimination.[31]

At the present time there is no cause of action available under GINA for disparate impact. The statute specifically excludes from coverage claims for disparate impact on the basis of genetic information.[32] However, it is possible that at some time in the future claims for

disparate impact will be permitted. GINA provides for the establishment, in May 2014, of a commission, to be known as the "Genetic Nondiscrimination Study Commission," to review developments in the science of genetics and to make recommendations to Congress regarding whether a disparate impact cause of action should be included under GINA.[33]

The Prohibition on Requesting, Requiring and Purchasing Genetic Information

GINA also makes it unlawful for employers to acquire the genetic information of their employees. Specifically, GINA prohibits employers from requesting, requiring or purchasing genetic information with respect to an employee or a family member of an employee unless one of six enumerated exceptions is applicable.[34] A "request" includes "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health in a way that is likely to result in a covered entity obtaining genetic information."[35]

The six specific exceptions to the general prohibition on requesting or requiring genetic information include

1. where an employer inadvertently requests or requires the family medical history of the employee or family member of the employee;
2. where health or genetic services are offered by the employer, including as part of a wellness program, provided certain conditions are met;
3. where the employer requests or requires family medical history from the employee to comply with the certification provisions of the Family Medical Leave Act, 29 U.S.C. §§ 2601, *et seq.* (FMLA) or a similar state family and medical leave law;
4. where the employer purchases documents that are commercially and publicly available (newspapers, magazines, periodicals and books) which contain family medical history;
5. where the information is obtained in the course of genetic monitoring of the biological effects of toxic substances in the workplace, provided certain conditions are met; and
6. where the employer conducts DNA analysis for law enforcement purposes, such as a forensic laboratory, or for purposes of human remains identification, and requests or requires employee genetic information to be used exclusively for quality control and/or to detect sample contamination.[36]

Inadvertent Requests

The GINA regulations make it clear that if an employer acquires genetic information in response to a lawful request for medical information,[37] the request will only be considered inadvertent if the employer directs the individual or entity providing the information not to provide any genetic information.[38] The regulations provide that where the following "safe harbor" language is used when requesting medical information, any receipt of genetic information in response to the request will be deemed inadvertent. The safe harbor language set forth in the regulations is as follows:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[39]

The regulations note that failure to give the safe harbor notice set forth above will not prevent an employer from establishing that receipt of certain genetic information was inadvertent if the request for medical information was not likely to result in the employer obtaining genetic

information (i.e., where an overly broad answer is received in response to a specifically tailored inquiry).[40]

It is mandatory for employers to instruct the health care professionals they use to provide employment-related medical examinations, not to collect any genetic information, including family medical history, as part of any employment-related medical examination.[41] Employers are required to take "reasonable measures" within their control if they learn that the health care provider is requesting or requiring genetic information in connection with employment-related medical examinations.[42] These "reasonable measures" selected by the employer will depend on the facts and circumstances under which the health care provider requested the genetic information, and may include no longer using the service of any health care provider who continues to request or require genetic information after being instructed not to do so.[43]

> GINA permits employers to engage in genetic monitoring of the biological effects of toxic substances in the workplace.

Additional situations in which the exception for inadvertent acquisition of genetic information may be applicable include when information is obtained passively in the course of casual workplace conversation, commonly referred to as talk around the water cooler. Thus, where a manager or supervisor acquires an individual's genetic information by overhearing a conversation, receiving it from the individual or a third party, or by receiving it directly during casual conversation or in response to an ordinary expression of concern, the acquisition will be deemed inadvertent.[44] Thus, the regulations note that a general health inquiry, such as "How are you?" or "Did they catch it early?" or "Is you child feeling better today?", which elicits a response containing genetic information, will be deemed an inadvertent acquisition.[45] However, the exception will not apply if the employer follows a general question with more probing health-related inquiries, such as asking whether other family members have the condition or whether the individual has been tested for the condition.[46] In addition, unsolicited acquisition of genetic information (i.e., receipt of an email about the health of an employee or an employee's family member) will be deemed an inadvertent acquisition.[47] Finally, where a manager or supervisor is given permission by an employee to access a social media platform maintained by the employee (i.e., the manager and the employee are Facebook friends) and the manager acquires genetic information about the employee or employee's family members via that social media platform, the acquisition will be deemed inadvertent.[48]

Wellness Programs and Providing Health and Genetic Services

The second exception to GINA's prohibition on the acquisition of an employee's genetic information is where health or genetic services are offered by the employer, including such services offered as part of a wellness program, provided that (1) the employee provides prior, knowing, voluntary and written authorization; (2) only the employee and licensed health care professional or board-certified genetic counselor involved in providing the services receive individually identifiable information concerning the results of the genetic services; and (3) any individually identifiable genetic information provided in connection with the services is available only for purposes of those services and shall not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.[49]

Knowing Authorization

To be knowing, the authorization must (1) be written so that it is likely to be understood by the individual from whom the genetic information is being sought; (2) describe the type of genetic information that will be obtained and the general purpose for which it will be used; and (3) describe the restrictions on disclosure of genetic information.[50]

Written Authorization

The regulations permit the authorization to be provided in electronic format, if the electronic authorization required before the program will permit the individual to answer any questions that request genetic information.[51]

Voluntary Authorization

The GINA regulations provide that this exception applies only where the provision of genetic information is "voluntary," which means that the employer cannot require an employee to provide genetic information and cannot penalize employees who choose not to provide genetic information.[52]

Many wellness programs offer financial incentives for employees to participate. GINA does not prohibit financial incentives, but it requires that where they are offered, they be equally available to employees who elect not to provide genetic information. Thus, the regulations explain that an employer

> may not offer a financial inducement to individuals to provide genetic information, but may offer financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information, provided the covered entity makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the inducement will be made available whether or not the participant answers questions regarding genetic information.[53]

Thus, to be voluntary, a health risk assessment that offers a financial inducement to individuals that complete it, and which contains questions seeking genetic information, must specifically identify the questions that seek genetic information and must inform the individual providing the information that he or she need not answer the questions seeking genetic information to receive the financial inducement.[54]

Employers may also offer financial inducements to encourage individuals who have voluntarily provided genetic information (i.e., in a health risk assessment) that indicates that they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs designed to promote a healthy lifestyle. However, to comply with GINA, these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at an increased risk of developing a condition.[55]

In offering financial inducements in an employee wellness program, employers must be cognizant of the need to comply with the requirements of the ADA and the Health Insurance Portability and Accountability Act (HIPAA). Specifically, if a financial inducement that requires individuals to meet certain health goals is included in a wellness program, an employer must make reasonable accommodations to the extent required by the ADA. If the wellness program provides medical care, the program may constitute a "group health plan" and, therefore, may be required to comply with the special requirements for wellness programs that condition rewards on an individual satisfying a standard related to a health factor, including the requirement to provide an individual with a "reasonable alternative" under HIPAA when it is "unreasonably difficult due to a medical condition to satisfy" or "medically inadvisable to attempt to satisfy" the otherwise applicable standard.[56]

Disclosure of Genetic Information in the Aggregate

The GINA regulations state that employers are only permitted to receive information obtained through health or genetic services offered by the employer (including employee wellness programs) in aggregate terms that do not disclose the identity of specific individuals. In the Section-by-Section Analysis of 29 C.F.R. § 1635.8, the EEOC indicated that where an employer receives genetic information in aggregate terms that, for reasons outside the control of the provider of the information or the employer, make the genetic information of a particular individual readily identifiable with no effort on the employer's part (such as where the number of participants is small), there will be no violation of GINA. However, efforts undertaken by the employer to link the genetic information to a particular employee will violate GINA.

FMLA Certification

The third exception permits employers to request family medical history to comply with the certification provisions of the FMLA or state or local family and medical leave laws, or pursuant to a policy that permits the use of leave to care for a sick family member, and requires employees to provide information about the health condition of that family member to substantiate the need for the leave.[57]

Commonly and Publicly Available Sources

GINA is not violated where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books) which contain family medical history or where the employer obtains such information through electronic media, such as information communicated via television, movies or the Internet.[58] This exception does not apply to medical databases or court records.[59] The Section-by-Section Analysis of the regulations notes that while the statutory language of this provision references only "family medical history," the EEOC reads this exception as applying to all "genetic information" obtained through commercially and publicly available sources and will not limit it exclusively to family medical history.[60] The regulations note that media sources with limited access, such as social networking sites (i.e., Facebook, LinkedIn, MySpace) and other media sources that require a specific individual's permission to access them, or to which access is limited to members of a particular group, are not considered "commercially and publicly available" unless it can be demonstrated that access is "routinely granted to all who request it."[61] Even where the source from which the genetic information is obtained is "commercially and publicly available," if the employer seeks access to the source with the intent of obtaining genetic information, or if the source is one from which the employer is likely to acquire genetic information (i.e., a website that focuses on issues such as genetic testing of individuals), this exception will not apply.[62] The Section-by-Section Analysis of this part of the GINA regulations states that "the requirements and prohibitions of GINA do not apply to acquisitions of genetic information outside the employment context." Thus, it appears that where an employer can demonstrate that the source from which genetic information was acquired was accessed by a manager or human resources professional outside his or her role as an employer, the GINA prohibition on acquiring genetic information will not apply. However, in the event that genetic information about an employee is acquired, whether through a commercially and publicly available source or outside the employment context, that information may not be used to discriminate in the employment context.

Genetic Monitoring

GINA permits employers to engage in genetic monitoring of the biological effects of toxic substances in the workplace, as long as that monitoring meets certain requirements.[63] These requirements are (1) the employer must provide written notice of the genetic monitoring to the employees; (2) the employee must provide prior, knowing, voluntary and written authorization for the genetic monitoring, or the monitoring must be required by federal or state law; (3) the employee must be informed of his or her individual monitoring results; (4) the monitoring must be in compliance with any federal and/or state genetic monitoring regulations; and (5) the employer, excluding any licensed health care professional or board-certified genetic counselor, may receive the results of the monitoring only in aggregate terms that do not disclose the identity of the specific employees.[64] Employers may not retaliate or otherwise discriminate against any individual because he or she refuses to participate in a voluntary genetic monitoring program that is not required by federal or state law.[65] Employees who refuse to participate in voluntary genetic monitoring programs should be informed of the potential dangers of forgoing genetic monitoring, including the potential for exposure to toxins in the workplace and the possible consequences that might result if such exposure is not identified. The employer may not take any adverse employment action because an employee refuses to participate in a voluntary genetic monitoring program.

Prior, Knowing, Voluntary, Written Authorization

To satisfy the requirement of a prior, knowing, voluntary, written authorization, the employer must use an authorization form that (1) is written in a manner that is reasonably likely be understood by the individual from whom the authorization is sought; (2) describes the genetic information that will be obtained; and (3) describes the restrictions on disclosure of genetic information.[66]

Results of Genetic Monitoring

When genetic monitoring is conducted, regardless of whether the testing is required by federal or state law, GINA requires that each individual monitored receive his or her individual monitoring results[67] and that the employer receive the results only in "aggregate terms that do not disclose the identity of specific individuals."[68] Consistent with its position in cases dealing with employer-provided health or genetic services, the EEOC states in the Section-by-Section Analysis applicable to the genetic monitoring provision that there will be no violation of GINA where an employer receives information only in aggregate terms but is able to identify the genetic information of specific individuals for reasons outside the employer's control and with no effort on its part.

Employers Who Engage in DNA Testing

Employers who engage in DNA testing for law enforcement purposes such as in a forensic laboratory or for purposes of human remains identification are permitted to request or require genetic information from their employees for the sole purpose of using that information for analysis of DNA identification markers for quality control to detect sample contamination.[69] The Section-by-Section Analysis of the GINA regulations relative to this exception notes that this is a "very limited exception" and that a proper analysis will not allow an employer to obtain health-related genetic information.

Manifested Disease in a Family Member

Within the confines set by the ADA, employers may make medical inquiries with respect to a manifested disease, disorder or condition of an employee, because information about a manifested disease of an *employee* is not "genetic information" pursuant to GINA. However, information about a manifested disease, disorder or condition of a *family member of an employee* is considered "family history" and, therefore, it is considered "genetic information" under GINA. Thus, under the express language of the statute, there is potential for a conflict to arise when an employer employs two or more members of the same family and has a need to request information about a manifested disease of one of the family members, perhaps in the course of identifying a reasonable accommodation for that employee under the ADA. While GINA permits the employer to acquire this information with respect to the employee with the manifested condition, it prohibits the acquisition of this information with respect to the family member(s) also employed by the employer because, with respect to them, it is considered "genetic information." To eliminate this conflict, the GINA regulations make clear that an employer does not violate GINA's prohibition on the acquisition of genetic information when it "requests, requires or purchases information about a manifested disease, disorder, or pathological condition of an employee . . . whose family member is an employee for the same employer."[70] Similarly, where an employee's family member with a manifested disease, disorder or pathological condition is voluntarily receiving health or genetic services through a program provided by the employer, the employer will not violate GINA by seeking information about that manifested disease, disorder or condition.[71] The GINA regulations state that an employer "does not unlawfully acquire genetic information about an employee when it asks the employee's family member who is receiving health services from the employer if her diabetes is under control."[72]

Confidentiality Requirements and Limitation on Disclosure of Genetic Information

GINA also requires that employers maintain genetic information about their employees in a confidential

manner and limits the circumstances under which the employer is permitted to disclose an employee's genetic information.[73]

Confidentiality Requirements

GINA requires employers who possess genetic information about their employees to maintain that information in separate medical files and to treat it as confidential medical records of the employees. Employers will be considered to have satisfied the confidentiality requirement if they maintain the genetic information in accordance with the confidential medical records requirements set forth in § 102(d)(3)(B) of the Americans with Disabilities Act,[74] which requires that the information be "maintained on separate forms and in separate medical files" and that it be "treated as a confidential medical file."[75] Genetic information may be maintained in the same file in which the employer maintains confidential medical information subject to the ADA.[76] If an employer receives genetic information orally, that information need not be reduced to writing.[77] Genetic information acquired through commercially and publicly available sources is not considered "confidential genetic information" and is not subject to the confidentiality provisions of the GINA regulations. However, it may not be used to discriminate against the individual.[78]

The GINA regulations clarify that "genetic information placed in personnel files prior to November 21, 2009, need not be removed and a covered entity will not be liable under this part for the mere existence of the information in the file."[79] However, the Section-by-Section Analysis of this part of the GINA regulations notes that in the event the personnel files of an employee containing genetic information acquired prior to November 21, 2009, must be disclosed, for any reason, that genetic information must be removed. In addition, because most genetic information will also be considered "medical information" that has been subject to the ADA's confidentiality requirements since 1992, it is not anticipated that removing such information from personnel files will impose a significant burden on employers.

Limitations on Disclosure of Genetic Information

In addition, an employer that lawfully possesses genetic information (except for genetic information acquired through commercially and publicly available sources) may not disclose that information except (1) to the employee (or family member if the family member is receiving genetic services) at the written request of the employee (or family member); (2) to an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under 45 C.F.R. part 46, which governs research involving human subjects; (3) in response to a court order, but only as expressly authorized by that order and only where the employer informs the employee or family member that the information was disclosed pursuant to the order; (4) to government officials investigating compliance with GINA; (5) in connection with the employee's compliance with the certification provisions of the FMLA or other state and family medical leave laws; and (6) to a federal, state or local public health agency, provided the disclosure is limited to information about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee whose family member is the subject of the disclosure is notified of the disclosure.[80]

Within the confines set by the ADA, employers may make medical inquiries with respect to a manifested disease, disorder or condition of an employee, because information about a manifested disease of an *employee* is not "genetic information" pursuant to GINA.

It should be noted that the exception for disclosure of genetic information pursuant to a court order is an extremely limited exception requiring that the genetic information disclosed be carefully tailored to the specific terms of the court order.[81] The Section-by-Section Analysis of this provision of the GINA regulations notes that "this exception does not allow disclosure in other circumstances during litigation, such as in response to discovery requests or subpoenas that are not governed by an order specifying that genetic information must be disclosed."

Enforcement and Remedies for Violations

GINA incorporates by reference the enforcement and remedy provisions already in place for redressing other types of employment discrimination.[82] Thus, the enforcement mechanism applicable and remedies available to employees covered by Title VII are applicable to GINA as well.[83] Prior to instituting litigation, employees must first exhaust their administrative remedies by filing a charge of discrimination on the basis of genetic information with the EEOC. The EEOC will investigate the charge and, where the EEOC believes a violation of GINA has occurred, the agency will attempt to conciliate the matter. The EEOC has the power to commence litigation in its name to compel compliance with GINA.

An aggrieved individual may recover pecuniary and non-pecuniary damages, including compensatory and punitive damages under GINA.[84] GINA also incorporates the statutory cap on combined compensatory damages for future pecuniary losses, emotional pain and suffering,

inconvenience, mental anguish, loss of enjoyment of life and punitive damages, based on the size of the employer's business, as set forth in 42 U.S.C. § 1981a(b)(3).[85]

In addition, GINA authorizes the court, in its discretion, to allow the prevailing party in GINA litigation reasonable attorney fees and costs. Expert witness fees may be included as part of the attorney fees award.[86]

Injunctive relief, including reinstatement, hiring, back pay and other equitable remedies available under Title VII, are also available under GINA.[87]

The GINA regulations require that employers post a notice describing GINA's applicable provisions – in a conspicuous place, where notices to employees and applicants for employment are customarily posted.[88] The EEOC has issued a revised EEO poster incorporating this information which satisfies this requirement. A willful violation of this posting requirement is punishable by a fine of not more than $100 for each separate offense.[89]

Employers in the Health Care Industry

Employers who provide health care service (i.e., hospitals, clinics and doctors' offices) may have employees who are also patients of the employer. Where this is the case, the employer must be aware of additional issues with respect to confidentiality and storage of medical records and genetic information.

Compliance With the HIPAA Privacy Rule

GINA makes clear that it is does not limit the rights or protections provided under any other federal or state statute that provides equal or greater protections.[90] In this regard, the GINA regulations specifically state that they do not apply to genetic information that constitutes "protected health information" subject to the HIPAA Privacy Rule. Thus, employers subject to the HIPAA Privacy Rule must continue to apply the requirements of that Rule, not the requirements of GINA Title II and its implementing regulations, to genetic information that is also protected health information.[91] The Section-by-Section Analysis of this provision of the GINA regulations provides the following example of genetic information that is also protected health information subject to the HIPAA Privacy Rule:

> If a hospital subject to the HIPAA Privacy Rule treats a patient who is also an employee of the hospital, any genetic information that is obtained or created by the hospital in its role as a health care provider is protected health information and is subject to the requirements of the HIPAA Privacy Rule and not those of GINA. In contrast, however, any genetic information obtained by the hospital in its role as employer, for example, as part of a request for leave by the employee, would be subject to GINA Title II.

Thus, employers covered by the HIPAA Privacy Rule must first determine in which context genetic information of an employee was acquired, and then apply the applicable provisions of either HIPAA or GINA.

Combining Personal Medical Records and Occupational Health Records

Another area of concern for employers in the business of providing health care services is whether a health care service provider should have access to the personal health information of its employees who have received treatment unrelated to their employment and, conversely, whether, in its role as a health care service provider, the entity should have access to the occupational health records of a patient who also happens to be an employee. The EEOC has issued guidance, in the form of an Informal Discussion Letter, addressing this topic.[92] In this letter, the EEOC reviews the provisions of the ADA, which limit an employer's ability to access the personal medical records of an employee or applicant, and the provisions of GINA, which place further limitations on when an employer may request personal health information which is also "genetic information." The EEOC concludes that because both the ADA and GINA strictly limit an employer's right to access such information, there is a real possibility that maintaining personal medical records and occupational health records in the same file could result in a violation of the ADA or GINA, or both. Thus, it is recommended, that employers maintain this information separately.

Conclusion

While Title II of GINA has been in effect since November 21, 2009, the case law interpreting its provisions remains limited. This may be due in part to the fact that the claim is relatively new. The EEOC reports receiving 201 charges alleging a GINA violation in fiscal year 2010 and 245 charges alleging a GINA violation in fiscal year 2011. Thus, the total number of GINA charges filed is relatively small and some of those charges are likely still winding their way through the administrative process at the EEOC. The case law that has developed deals primarily with the pleading standards. Stay tuned for future decisions addressing substantive developments under GINA. ■

1. Title I of GINA, which is not the subject of this article addresses the use of "genetic information" in health insurance.
2. 42 U.S.C. §§ 2000ff, *et seq*.
3. 42 U.S.C. § 2000ff-1(a)(1); 29 C.F.R. § 1635.2(c).
4. 42 U.S.C. § 2000ff-1(a)(2).
5. 42 U.S.C. § 2000ff-1(b).
6. 42 U.S.C. § 2000ff-5(a).
7. 42 U.S.C. § 2000ff-5(b)(1)–(6).
8. *See* 42 U.S.C. §§ 2000ff-1–2000ff-4.
9. 29 C.F.R. § 1635.2(d).
10. 42 U.S.C. §§ 2000e *et seq.*
11. 42 U.S.C. § 2000ff (4)(A) and (B); 29 C.F.R. § 1635.3 (c)(1)(i)–(v).
12. 42 U.S.C. § 2000ff (4)(C); 29 C.F.R. § 1635.3 (c)(2).
13. 42 U.S.C. § 2000ff (7)(A).
14. 29 C.F.R. § 1635.3(f)(2)(i)–(viii).
15. 29 C.F.R. § 1635.3(f)(4)(ii).
16. 42 U.S.C. § 2000ff (7)(B).
17. 29 C.F.R. § 1635.3(f)(3)(ii).
18. 29 C.F.R. § 1635.3(f)(3)(iii)–(iv).
19. 29 C.F.R. § 1635.3(f)(4)(i).
20. 42 U.S.C. § 2000ff (6)(A)–(C); 29 C.F.R. § 1635.3(e).
21. 29 C.F.R. § 1635.3(a)(1).
22. 29 C.F.R. § 1635.3(a)(2).

23. 29 C.F.R. § 1635.3(a)(2)(i).
24. 29 C.F.R. § 1635.3(a)(2)(ii).
25. 29 C.F.R. § 1635.3(a)(2)(iii).
26. 29 C.F.R. § 1635.3(a)(2)(iv).
27. 42 U.S.C. § 2000ff-1(a)(1)–(2).
28. *See* Section-by-Section Analysis of 29 C.F.R. § 1635.4.
29. 42 U.S.C. § 2000ff-6(f); 29 C.F.R. § 1635.7.
30. 548 U.S. 53 (2006).
31. *Id*. at 57-58.
32. 42 U.S.C. § 2000ff-7(a); 29 C.F.R. § 1635.5(b).
33. 42 U.S.C. § 2000ff-7(b).
34. 42 U.S.C. § 2000ff-1(b).
35. 29 C.F.R. § 1635.8(a).
36. 42 U.S.C. § 2000ff-1(b)(1)–(6).
37. Lawful requests for medical information may include a request for documentation to support a request for reasonable accommodation under the ADA or state law, where the disability or need for accommodation is not obvious; a request in support of an employee's request for leave under the FMLA, a state family and medical leave law or other state leave of absence statute or where an employee complies with the FMLA's return to work certification requirements. 29 C.F.R. § 1635.8(b)(1)(i)(D)(1)–(3).
38. 29 C.F.R. § 1635.8(b)(1)(i)(A).
39. 29 C.F.R. § 1635.8(b)(1)(i)(B).
40. 29 C.F.R. § 1635.8(b)(1)(i)(C).
41. 29 C.F.R. § 1635.8(d).
42. *Id*.
43. *Id*.
44. 29 C.F.R. § 1635.8(b)(1)(ii)(A)–(B).
45. 29 C.F.R. § 1635.8(b)(1)(ii)(B).
46. *Id*.
47. 29 C.F.R. § 1635.8(b)(1)(ii)(C).
48. 29 C.F.R. § 1635.8(b)(1)(ii)(D).
49. 42 U.S.C. § 2000ff-1(b)(2)(A)–(D).
50. 29 C.F.R. § 1635.8(b)(2)(i)(B)(1)–(3).
51. 29 C.F.R. § 1635.8(b)(2)(i)(B).
52. 29 C.F.R. § 1635.8(b)(2)(i)(A).
53. 29 C.F.R. § 1635.8(b)(2)(ii).
54. It should be noted that, while GINA permits financial inducements to be offered for participation in a wellness program, subject to the conditions set forth above, the ADA does not specifically address, and the EEOC has not taken a position as to, whether employers may be permitted to offer a financial incentive for employees to participate in a wellness program that includes disability-related inquiries such as questions about the employee's current health status on a health-risk assessment. *Incentives for Workplace Wellness Programs*, June 24, 2011 (EEOC Informal Discussion Letters) http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html (last visited Aug. 22, 2011).
55. 29 C.F.R. § 1635.8(b)(2)(iii).
56. 29 C.F.R. § 1635.8(b)(2)(iv).
57. 42 U.S.C. § 2000ff-1(b)(3); 29 C.F.R. § 1635.8(b)(3).
58. 42 U.S.C. § 2000ff-1(b)(4); 29 C.F.R. § 1635.8(b)(4).
59. 42 U.S.C. § 2000ff-1(b)(3); 29 C.F.R. § 1635.8(b)(3)(i).
60. *See* 29 C.F.R. § 1635.8(b)(4).
61. 29 C.F.R. § 1635.8(b)(4)(ii).
62. 29 C.F.R. § 1635.8(b)(4)(iii)–(iv).
63. 42 U.S.C. § 2000ff-1(b)(5).
64. 42 U.S.C. § 2000ff-1(b)(5)(A)–(E).
65. 29 C.F.R. § 1635.8(5).
66. 29 C.F.R. § 1635.8(5)(i)(A)–(B).
67. 29 C.F.R. § 1635.8(b)(5).
68. 29 C.F.R. § 1635.8(b)(5)(iii); 42 U.S.C. § 2000ff-1(b)(5)(C), (E).
69. 42 U.S.C. § 2000ff-1(b)(6); 29 C.F.R. § 1635.8(6).
70. 29 C.F.R. § 1635.8(c)(1).
71. 29 C.F.R. § 1635.8(c)(2).
72. *Id*.
73. 42 U.S.C. § 2000ff-5.
74. 42 U.S.C. § 12112(d)(3)(B).
75. 42 U.S.C. § 2000ff-5(a).
76. 29 C.F.R. § 1635.9(a)(2).
77. 29 C.F.R. § 1635.9(a)(3).
78. 29 C.F.R. § 1635.9(a)(4).
79. 29 C.F.R. § 1635.9(a)(5).
80. 42 U.S.C. § 2000ff-5(b)(1)–(6).
81. 42 U.S.C. § 2000ff-5(b)(3)(A)–(B).
82. 42 U.S.C. § 2000ff-6.
83. Employees covered by the Government Employee Rights Act of 1991, or the Congressional Accountability Act of 1995 or Chapter 5 of Title 3, of the United States Code or Section 717 of the Civil Rights Act of 1964 are subject to the procedural requirements of those statutes respectively.
84. 42 U.S.C. § 2000ff-6(a)(3); 29 C.F.R. § 1635.10(b)(1).
85. 42 U.S.C. § 2000ff-6(a)(3); 29 C.F.R. § 1635.10(b)(1).
86. 42 U.S.C. § 2000ff-6(a)(2); *see also* 42 U.S.C. § 1988(b)–(c); 29 C.F.R. § 1635.10(b)(2).
87. 42 U.S.C. § 2000ff-6(a)(3); 29 C.F.R. § 1635.10(b)(1); *see also* 42 U.S.C. § 2000e-5(g).
88. 29 C.F.R. § 1635.10(c)(1).
89. 29 C.F.R. § 1635.10(c)(2).
90. 42 U.S.C. § 2000ff-8(a).
91. 42 U.S.C. § 2000ff-8(a); 29 C.F.R. § 1635.11(d).
92. Confidentiality Requirements (5/31/2011) (EEOC Informal Discussion Letters) *at* http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_confidentrequre.html (last visited Aug. 22, 2011).

New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law (PL), Criminal Procedure Law (CPL) and other related statutes. While, in total, the Legislature passed the lowest number of bills since 1914, there was no dearth of criminal justice measures. It is recommended that the reader review the legislation for specific details as the following discussion will primarily highlight key provisions of the new laws. In some instances, where indicated, legislation enacted by both houses has not yet been sent to the Governor for his signature.

DNA Databank Expanded

A number of significant procedural changes were enacted in the past legislative session. One new law expands the 16-year-old state DNA databank. Beginning August 1, 2012, for the first time in this state and in the country, DNA samples are now collected from defendants convicted of all felonies, both within and outside the Penal Law, and all Penal Law misdemeanors.[1]

In all, 250 felonies were added to the 400 Penal Law felonies already in the databank, and 180 Penal Law misdemeanors were added to the 35 Penal Law misdemeanors in the databank, which was last expanded in 2006. The only exception precludes the taking of a sample from individuals convicted of the Class B misdemeanor of marijuana possession when they have no prior convictions.

Since its inception in 1996, there have been 10,000 "hits," or matches against the databank, resulting in more than 2,900 convictions. At the same time, 27 individuals were exonerated in New York through the use of DNA evidence, as well as numerous suspects who were excluded and cleared at early stages of an investigation.

From a practical standpoint, if the defendant is sentenced to a term of imprisonment, the sample is taken by prison or jail officials. If the defendant is sentenced to a term of probation, the sample is taken by the Probation Department. When a defendant is not sentenced to a period of imprisonment or probation, the sample is taken by the sheriff's office (outside New York City) and a court officer (inside New York City).

The new law also contains several provisions increasing a defendant's access to DNA evidence – both before trial and after conviction – in the effort to establish his or her innocence. For the first time, post-conviction DNA testing is now permitted where a defendant pleads guilty, but this only applies to guilty pleas entered on or after August 1, 2012. In addition, the testing is only permitted when there is a "substantial probability" that, had DNA been tested prior to the entry of the guilty plea, the evidence would have established "actual innocence" of the offense that is subject to the defendant's motion. In addition, the testing is restricted to homicides, sex crimes pursuant to Article 130 of the Penal Law and Class B violent felony offenses. Finally, there is a five-year statute

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of limitations with exceptions in the interest of justice or because of extenuating circumstances.

In addition, where a defendant has been convicted of a felony and a court has ordered a hearing pursuant to CPL § 440.10, and the defendant has asserted his or her actual innocence, the court may order production of property in the control or possession of the prosecutor, which property was secured in connection with the investigation or prosecution of the defendant. The court may deny the request for property based on a number of factors enumerated in the statute. There is a five-year statute of limitations for making the request, which is tolled for five years if the defendant has been in custody in connection with the conviction that is the subject of the motion.

Finally, the new law provides an additional ground for vacating a conviction after trial or the entry of a guilty plea, based upon DNA testing. After a trial, the defendant must establish that there is a "reasonable probability" that a "more favorable verdict" would have been rendered. After a guilty plea, the defendant must establish a "substantial probability" that the defendant was "actually innocent" of the offense for which he or she was convicted.

Other Procedural Changes

Other significant procedural changes were enacted in the last legislative session. When setting bail in domestic violence cases, where a defendant is charged with offenses against a family member or household member, judges are now required to consider certain risk factors, that is, whether the defendant has previously violated an order of protection, whether the order is still in effect, and the defendant's prior history of use of a firearm.[2]

Another bail-related statute creates charitable bail organizations that can now post up to $2,000 for indigent defendants charged with misdemeanors.[3] The organizations will have fewer requirements than for-profit entities and will operate under the oversight of the Department of Insurance.

A new law allows the Chief Administrative Judge to implement mandatory e-filing in up to six counties with the approval of the local district attorney and defense bar.[4] The three-year program will only be implemented in post-indictment matters and exempts certain sealed documents, such as search warrants. Another new law permits a judge to impose, as a condition of an adjournment in contemplation of dismissal, that a defendant participate in an educational program on cyberbullying or texting messages of a sexual nature.[5] Finally, defendants who have been committed pursuant to a temporary order of observation, pursuant to Article 730 of the Criminal Procedure Law, may be sent to out-patient treatment with the consent of the prosecutor.[6]

Expanded Crimes and Penalties

In addition to the above procedural changes, the Penal Law has been amended to expand the definition of certain crimes and increase the penalties for others. Earlier this year, the New York Court of Appeals for the first time examined the statutory construction of two child pornography-related statutes as applied to the increasing amount of pornography consumed over the Internet. In *People v. Kent*,[7] the Court analyzed the elements of two crimes: Promoting a Sexual Performance by a Child (PL § 263.15) and Possessing a Sexual Performance by a Child (PL § 263.16). The Court held that an individual is not guilty of either crime when the individual merely accesses a website containing child pornography but does not engage in some affirmative act (printing, saving, downloading) that demonstrates the individual exercised "dominion and control" over illegal images.

> For the first time in this state and in the country, DNA samples are now collected from defendants convicted of all felonies, both within and outside the Penal Law, and all Penal Law misdemeanors.

In response to *Kent*, the Legislature amended each statute to include "knowingly access[ing]" child pornography with the intent to view it.[8] An exemption has been added for defense attorneys who access such material solely in the course of their representation of clients charged with possession of child pornography.

The Legislature has increased the penalty for impersonating an attorney and elevated the offense from a misdemeanor to a Class E felony.[9] This makes the penalty consistent with the penalties for the impersonation of practitioners of numerous other professions. The assault statutes have been amended to increase the penalties for assaults on sanitation workers and employees of local social services districts while they are performing their duties.[10] Previously, assaults on these classes of individuals constituted only a Class A misdemeanor; they now constitute a Class D felony. In an effort to promote the safe and effective use of prescription drugs, the Legislature has classified a number of substances as "narcotic preparations," including oxycodone and hydrocodone.[11]

The Legislature has amended the statute dealing with incompetent or physically disabled persons. The crime of Endangering the Welfare of an Incompetent or Physically Disabled Person has been divided into two crimes. The current crime, a Class A misdemeanor, has been elevated

to a Class E felony and is committed when a person "knowingly" acts in a manner that is injurious to a person who cannot care for himself or herself. A new crime, a Class A misdemeanor, has been enacted; it is committed when a person "recklessly" engages in conduct which is likely to be injurious.[12] Finally, the crime of Falsely Reporting an Incident in the Third Degree has been amended to include making false reports of abuse or neglect of a vulnerable person.[13]

New Crimes

Each year the Legislature enacts a number of new crimes and this year was no exception. Two new crimes were enacted to enhance protection for victims of domestic violence. First, a new Class E felony – Aggravated Family Offense – was enacted to provide that a defendant with a history of domestic violence who repeatedly commits misdemeanor offenses can be prosecuted as a felon.[14] An individual can be charged with this crime when he or she commits one of 50 "specified offenses" against a member of the same family or household after having been convicted of one or more specified offenses within the preceding five years. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed and such persons do not need to be members of the same family or household.

> Owning, possessing or manufacturing animal fighting paraphernalia, with the intent to engage in animal fighting, is a Class B misdemeanor.

The second new crime, Aggravated Harassment in the Second Degree, is a Class A misdemeanor.[15] A person is guilty of this crime when, with the intent to harass, a person strikes, shoves, kicks or otherwise subjects another person to physical contact, thereby causing physical injury to such person or to a family or household member of such person.

Other new crimes include owning, possessing or manufacturing animal fighting paraphernalia, with the intent to engage in animal fighting, a Class B misdemeanor.[16] Although "animal fighting" has been illegal for some time, this legislation closes a loophole by making illegal items used to promote or facilitate animal fighting. A new, unclassified misdemeanor makes it unlawful for a funeral director to knowingly give or sell embalming fluid to another person who is not authorized to perform embalming activities.[17] This legislation is an effort to prevent the increased use of embalming fluid with illegal drugs. A new law also bans the sale of electronic cigarettes to individuals under the age of 18.[18]

Finally, a new law establishes a Justice Center for the Protection of People with Special Needs that will investigate reports of abuse and neglect. The agency will be staffed with a prosecutor who has concurrent jurisdiction with local prosecutors to prosecute abuse and neglect crimes. Under the new law, if a human service professional fails to report to the central agency incidents of suspected abuse against vulnerable persons, that will constitute a Class A misdemeanor.[19]

New Laws and Legislation for Crime Victims

This past legislative session produced a large number of new laws designed to protect crime victims. One such law provides several protections to victims of domestic violence. For example, a person who is the subject of an order of protection protecting an individual who is now deceased, or a person who has been charged with causing the death of such deceased person, will no longer be eligible to exercise control of the disposition of the deceased's remains.[20] An Address Confidentiality Program (ACP) has been enhanced by enabling victims to keep their whereabouts secret by using a substitute mailing address maintained by the Department of State and requiring state and local governments to recognize the substitute address.[21] A domestic violence fatality review team has been created within the Office for the Prevention of Domestic Violence. The team will examine ways to reduce domestic violence homicides and suicides.[22] Finally, domestic violence victims have been given an additional 90-day period within which to remain in residential shelters; the maximum length of stay is now 180 days.[23]

Other victim-related legislation was enacted. The Crime Victims Board is now authorized to make awards to guardians, siblings, stepbrothers and stepsisters of a person who died as a direct result of a crime.[24] When a defendant is convicted of a crime where the defendant files a financial statement under the UCC falsely alleging that an individual is indebted to the defendant, the court must file with the Secretary of State a Certificate of Conviction. The court must certify that a judgment of conviction was entered against the defendant who was listed as the secured party in the false statement. This will assist victims in proving that the financing statement was false.[25]

Victims of sexual assaults who are at risk for contracting HIV/AIDS will now receive additional medical treatment. They will be provided a seven-day starter pack of HIV post-exposure prophylaxis treatment.[26] A new law expands the universe of victims who must be notified when a criminal prosecution is terminated after a defendant has been committed to the custody of the Commissioner of Mental Hygiene. Previously, notification had to be sent only in cases where the defendant was committed in a

felony prosecution. Notification must now be sent where charges are dismissed in a misdemeanor prosecution as well. In addition, both in felony and misdemeanor prosecutions, all victims of family offense crimes must be notified regardless of the victim's relationship to the perpetrator.[27] A new law codifies the right of prosecutors to employ licensed practitioners to provide mental health services to people who are impacted by crime and the criminal justice system.[28]

Finally, the Legislature has increased protection for patients who are under the care of a health care provider. Currently, there is only a mechanism for reporting sexual acts committed by a psychiatrist. A new law requires that law enforcement officials be notified when there is an alleged act of sexual misconduct by other licensed professionals – for example, a psychotherapist or a social worker.[29]

Sentencing and Parole

A number of changes have taken place in the area of sentencing and parole. Courts are now permitted to transfer supervision of defendants serving *interim* probation to the probationer's county of residence in the same manner currently in place for individuals serving *regular* probation.[30] This will allow courts to offer defendants, when appropriate, the same plea options whether or not they reside in the same county as the court. The sentencing court shall retain jurisdiction during the period of interim probation but the probation department in the receiving jurisdiction will assume the powers and duties of the original probation department.

Parole officers are no longer required to collect fees from parolees who are on community supervision; this removes a conflict of interest that has strained the relationship between parole officers and parolees.[31] Two new laws will impact on inmates in correctional facilities. First, inmates will no longer be assigned to duties that involve access to Social Security numbers of other individuals.[32] Second, the State Commission of Correction now has the authority to review hospital records of inmates in order to conduct post-mortem investigations of people who have died while in the custody of corrections officials.[33]

Finally, in New York City, the Department of Corrections is now prohibited from honoring civil immigration detainers by holding an individual beyond the time when such person would otherwise be released from custody or notifying federal immigration authorities of such person's release.[34] However, this applies only where a defendant's case is dismissed, results in an adjournment of contemplation of dismissal, or where the defendant is only charged with or convicted of a violation. In addition, Corrections will honor the detainer if the defendant has an outstanding warrant or is identified as a known gang member or is a possible match in a terrorist screening database.

Sex Offenders

Several new laws relate to sexual offenders. First, law enforcement officials are now authorized to update the photographs of level three offenders every 90 days or if the offender's appearance has changed, depending on which comes sooner.[35] Second, Parole Boards are now required to make a verbatim record of parole release interviews when the inmate is a sex offender. These records are then provided to the Office of Mental Health and the Attorney General's office for use in determining whether to seek civil confinement for an offender.[36] Finally, several changes were enacted to the Sex Offender Management and Treatment Act (SOMTA). Courts now have the authority to permit psychiatric examiners, upon good cause shown, to testify via two-way closed circuit television at probable cause hearings. In addition, a respondent can now be sent back to the custody of the Department of Corrections if the respondent has not reached his or her maximum expiration on the sentence and it is determined, after an administrative hearing, that the respondent was significantly disruptive of the treatment program at the secure treatment facility.[37]

Other Statutory Changes

A number of changes have been made in statutes other than the Penal Law and Criminal Procedure Law. The Department of Health has issued new regulations to deter the increasingly widespread use of synthetic drugs that are marketed and sold as bath salts. The new regulations will affect small business owners who sell these products containing "designer drugs" that are manufactured with a modified structure as a means of avoiding existing drug laws. A first offense now carries a criminal penalty of a $250 fine and up to 15 days in jail. Each subsequent offense carries a penalty of a $500 fine and up to 15 days in jail.[38]

In an effort to speed up criminal investigations, the Legislature has created a voluntary surveillance access database (VSAD). This permits residential homeowners and business owners who maintain video surveillance systems to register voluntarily their contact information in the database. This will eliminate many hours of investigation by law enforcement.[39]

In an effort to curb sex trafficking in New York City, the City Council has enacted a law that penalizes a taxi driver for knowingly using his vehicle to facilitate sex trafficking. There is a $10,000 civil penalty and it will result in the revocation of the driver's license.[40] ■

1. 2012 N.Y. Laws ch. 19 (amending Executive Law § 995-c, CPL § 240.40, adding CPL §§ 440.30(1)(b), 440.30(1-a)(2) and 440.10(g-1), eff. Oct. 1, 2012); 2012 N.Y. Laws ch. 55 (changing effective date to August 1, 2012).
2. S.7638 (sent to the Governor for signature Oct. 15, 2012).
3. 2012 N.Y. Laws ch. 181 (amending Insurance Law § 1108, eff. Oct. 16, 2012).
4. 2012 N.Y. Laws ch. 184 (adding Judiciary Law § 6-a, § 6-b and § 6-c, eff. July 18, 2012).
5. 2012 N.Y. Laws ch. 55 (amending CPL § 170.55, eff. Mar. 30, 2012).
6. 2012 N.Y. Laws ch. 56 (amending CPL § 730.40, eff. Mar. 30, 2012).

7. 19 N.Y.3d 290 (2012).

8. 2012 N.Y. Laws ch. 456 (amending PL § 263.11 and 263.16, eff. Sept. 7, 2012).

9. S.1998-A (adding Judiciary Law § 485-a, not yet sent to the Governor for his signature).

10. 2012 N.Y. Laws ch. 377 (amending PL § 120.05, eff. Sept. 16, 2012) (sanitation workers); 2012 N.Y. Laws ch. 434 (amending PL § 120.05, eff. Nov. 1, 2012) (social service workers).

11. 2012 N.Y. Laws ch. 447 (amending Public Health Law § 3306(II)(b)(1), eff. Aug. 27, 2012).

12. S.7749 (adding PL § 260.24, not yet sent to Governor for his signature).

13. S.7749 (amending PL 240.05, not yet sent to the Governor for his signature).

14. S.7638 (adding PL § 240.75, sent to Governor for signature Oct. 15, 2012).

15. S.7638 (adding PL § 240.30, sent to the Governor for signature Oct. 15, 2012).

16. 2012 N.Y. Laws ch. 144 (adding Agricultural and Markets Law § 6(a), eff. Oct. 16, 2012).

17. 2012 N.Y. Laws ch. 29 (amending Public Health Law § 3455, eff. Sept. 13, 2012).

18. 2012 N.Y. Laws ch. 448 (amending Public Health Law § 1399-aa, eff. Jan. 1, 2013).

19. S.7749 (adding Social Services Law § 489, not yet sent to the Governor for signature).

20. S.7638 (amending Public Health Law § 4201, sent to Governor for signature Oct. 15, 2012).

21. S.7638 (amending Executive Law § 108, sent to Governor for signature Oct. 15, 2012).

22. S.7638 (adding Executive Law § 575(10), sent to Governor for signature Oct. 15, 2012).

23. 2012 N.Y. Laws ch. 459 (amending Social Services Law § 459-b, eff. Apr. 1, 2013 Oct. 15, 2012).

24. 2012 N.Y. Laws ch. 233 (amending Executive Law § 624, eff. July 18, 2012).

25. 2012 N.Y. Laws ch. 113 (adding CPL § 440.70, eff. July 18, 2012).

26. 2012 N.Y. Laws ch. 39 (amending Executive Law § 631, eff. Nov. 27, 2012).

27. 2012 N.Y. Laws ch. 476 (amending CPL §§ 730.40 and 730.60 eff. Oct. 3, 2012).

28. 2012 N.Y. Laws ch. 358 (amending County Law § 700, eff. Aug. 1, 2012).

29. 2012 N.Y. Laws ch. 365 (amending Education Law § 6510, eff. Aug. 1, 2012).

30. 2012 N.Y. Laws ch. 347 (amending CPL § 410.80, eff. Aug. 1, 2012).

31. 2012 N.Y. Laws ch. 201 (amending Correction Law § 201, eff. July 18, 2012).

32. 2012 N.Y. Laws ch. 371 (amending Correction Law § 170, eff. Nov. 12, 2012).

33. 2012 NY Laws ch. 232 (amending Correction Law § 46, eff. July 18, 2012). *See also N.Y. City Health & Hosps. Corp. v. N.Y. State Comm. of Corr.*, 19 N.Y.3d 239 (2012).

34. Local Law 62-2011 (eff. Mar. 21, 2012).

35. 2012 N.Y. Laws ch. 364 (amending Correction Law § 168, eff. Aug. 31, 2012).

36. 2012 N.Y. Laws ch. 363 (amending Executive Law § 259-i, eff. Aug. 31, 2012).

37. 2012 N.Y. Laws ch. 56 (amending Mental Hygiene Law §§ 10.06 10.08, eff. Mar. 30, 2012).

38. Public Health Law pt. 9 (eff. Aug. 7, 2012).

39. 2012 N.Y. Laws ch. 287 (adding Executive Law 718, eff. Jan. 28, 2013).

40. Local Law 36-2012 (eff. Sept. 20, 2012).

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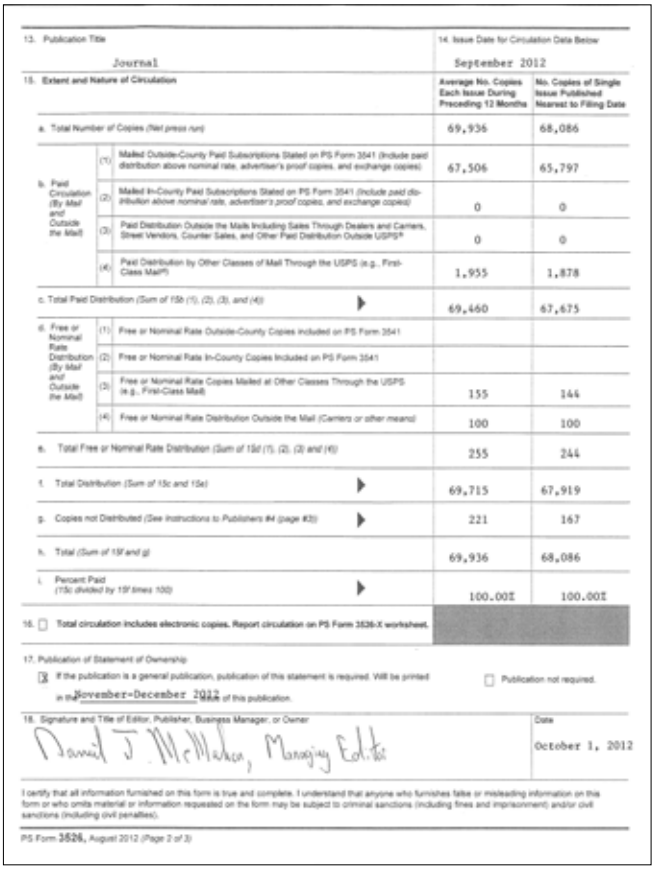

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PS Form 3526, August 2012 (Page 2 of 3)

Thomas A. Dickerson, **Daniel D. Angiolillo**, **John M. Leventhal**, **Cheryl E. Chambers**, and **Jeffrey A. Cohen** are Associate Justices of the Appellate Division, Second Department, of the New York State Supreme Court and have co-authored several articles on New York State consumer law. In addition, Justice Dickerson is the author of *Class Actions: The Law of 50 States*, Law Journal Press, 2012; *Travel Law*, Law Journal Press, 2012; Article 9 [New York State Class Actions] of Weinstein, Korn & Miller, *New York Civil Practice CPLR*, Lexis-Nexis (MB), 2012; *Consumer Protection* Chapter 98 in *Commercial Litigation in New York State Courts: Third Edition* (Robert L. Haig, ed.) (West & NYCLA 2012); Dickerson, Gould & Chalos, *Litigating Foreign Torts in U.S. Courts*, Thomson-Reuters (West) scheduled for publication in 2012, and over 300 articles and papers on consumer law, class actions, travel law and tax certiorari issues, many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

New York State Consumer Law and Class Actions: 2011–2012

By Justices Thomas A. Dickerson, Daniel D. Angiolillo, John M. Leventhal, Cheryl E. Chambers and Jeffrey A. Cohen

Recently, New York courts have ruled on a variety of important consumer law issues involving health clubs and defibrillators, gift cards and federal preemption, tenants and an implied covenant for attorney fees, Lien Law article 3-A and the liability of the principals of home improvement contractors, and notice and standing requirements in residential foreclosure actions. In addition, the Court of Appeals clarified the scope of General Business Law (GBL) § 350 (false advertising), broadening its availability in consumer class actions while the U.S. Supreme Court sought to narrow the availability of class-wide remedies by enforcing class arbitration waivers in consumer contracts.

Health Clubs and AEDs

If you exercise in a health club within the jurisdiction of the Second Department,[1] the health clubs which are governed by GBL § 627-a are now not only required to have an operable automated external defibrillator device (AED) and a person trained in its use *but also have an affirmative duty to actually use* this life-saving device upon a club member in apparent cardiac distress. In *Miglino v. Bally Total Fitness of Greater New York*,[2] the Second Department noted that

> [t]he risk of heart attacks following strenuous exercise is well recognized, and it has also been documented that the use of AED devices in such instances can be particularly effective if defibrillation is administered in the first few minutes after the cardiac episode commences . . . "Sudden cardiac arrest is a major unresolved health problem. Each year, it strikes more than 350,000 Americans. . . . More than 95% of these people die because life-saving defibrillators arrive on the scene too late, if at all."

The *Miglino* court held that GBL § 627-a "imposes an inherent duty to make use of the statutorily required AED" and, further, that such a duty was assumed at common law because the defendant's employee "was trained in the use of the AED [and] his failure to use the device was tantamount to not acting carefully."[3] Prior

to *Miglino*, there had been several cases addressing the duties of health clubs, in New York and elsewhere, to have AEDs available, along with employees trained in their use, and to use the AED in a responsible manner when needed. These issues were recently explored in *Digiulio v. Gran, Inc.*,[4] where the First Department rejected the "argument that [GBL § 627-a] implicitly obligated the club to use its AED," finding that "[w]hile the statute explicitly requires health clubs to have AEDs and people trained to operate them on their premises, it is silent as to the clubs' duty, if any, to use the devices."[5] Although the Court of Appeals affirmed, it did so leaving "open the question of whether GBL § 627-a creates a duty upon a health club to use the AED which it is required to provide."[6]

Health clubs are now not only required to have an operable AED and a person trained in its use *but also have an affirmative duty to actually use it* upon a club member in apparent cardiac distress.

Gift Cards and Preemption

New York consumers have been vigorously challenging the fees imposed by the issuers of gift cards. For example, in *Lonner v. Simon Property Group, Inc.*[7] a class of consumers challenged the imposition of gift card dormancy fees of $2.50 per month setting forth three causes of action – seeking damages for (1) breach of contract, (2) violation of GBL § 349 and (3) unjust enrichment. Within the context of the defendant's motion to dismiss the amended complaint, the Court found that the *Lonner* plaintiff had pleaded sufficient facts to support causes of action for breach of contract, based upon a breach of the implied covenant of good faith and fair dealing, and a violation of GBL § 349. The struggle between gift card issuers (a multi-billion dollar business) and cooperating banks and consumers has shifted to whether or not actions (which rely upon the common law and violations of salutary consumer protection statutes such as GBL §§ 349, 396-I and CPLR 4544) are preempted by federal law.[8] This issue seemingly was resolved earlier in *Goldman v. Simon Property Group, Inc.*[9] Very recently, however, the Appellate Division, Second Department, in *Sharabani v. Simon Property Group, Inc.*,[10] a gift card class action challenging the imposition of a $15 renewal fee on expired gift cards as a deceptive business practice, found that GBL § 349 is not preempted by the Home Owners' Loan Act (HOLA) or the Office of Thrift Supervision (OTS) regulations.

Tenant May Recover Attorney Fees and Costs

In *Casamento v. Juaregui*,[11] the Appellate Division, Second Department, held that a lease providing for payment of the landlord's attorney fees in an action against a tenant triggered an implied covenant in the tenant's favor to recover attorney fees as the prevailing party. As noted by the court,

> we are called upon to determine whether (a paragraph) of the parties' lease gives rise to the implied covenant in the tenant's favor pursuant to (Real Property Law § 234). . . . The implication of a covenant in favor of the tenant here is consistent with the Legislature's remedial purpose of effecting mutuality in landlord-tenant litigation and helping to deter frivolous and harassing litigation by landlords who wish to evict tenants.

Lien Law Article 3-A

In *Ippolito v. TJC Development, LLC*,[12] homeowners who terminated a home improvement contract were awarded $121,155.32 by an arbitrator and commenced a Lien Law article 3-A class action against the contractor TJC Development, LLC (TJC) and its two principals. The plaintiffs' claim against TJC was dismissed on the grounds of res judicata, based upon the arbitrator's award. However, as a matter of first impression, the court held that the homeowners, "beneficiaries of the trust created by operation of Lien Law § 70," had standing to assert a Lien Law article 3-A claim against TJC's officers or agents alleging an improper diversion of trust pursuant to Lien Law § 72.

Foreclosures and Standing

In two first impression mortgage foreclosure cases, the Appellate Division, Second Department, clarified the notice requirements of Real Property Actions & Proceedings Law § 1304 (RPAPL) and the standing of Mortgage Electronic Registration Systems, Inc. (MERS).

MERS was created in 1993 to "'streamline the mortgage process by using electronic commerce to eliminate paper,' [and facilitate] the transfer of loans into pools of other loans which were then sold to investors as securities [and which avoids] the payment of fees which local governments require to record mortgage[s]."[13] In *Bank of New York v. Silverberg*,[14] the court noted the Court of Appeals's decision in *MERSCORP, Inc. v. Romaine*[15] ("whether MERS has standing to prosecute a foreclosure action remained for another day") and that MERS "purportedly holds approximately 60 million mortgage loans and is involved in the origination of approximately 60% of all mortgage loans in the United States."[16] The court distinguished *Mortgage Electronic Registration Systems, Inc. v. Coakley*[17] and, being mindful of the possible impact its decision "may have on the mortgage industry in New

York and perhaps the nation," held that MERS as "nominee and mortgagee for purposes of recording [is unable to] assign the right to foreclose upon a mortgage . . . absent MERS's right to, or possession of, the actual underlying promissory note."[18] The court further declared that "the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property."[19]

And in *Aurora Loan Services, LLC v. Weisblum*,[20] the court not only held that the plaintiff lacked standing to foreclose on the mortgage ("there is nothing in [the mortgage] document to establish the authority of MERS to assign the first note . . . [or] that MERS initially physically possessed the note") but equally important found that the plaintiff had failed to comply with the notice requirements of RPAPL § 1304 and provide defaulting borrowers with "'a list of at least five housing counseling agencies'" with their "'last known addresses and telephone numbers.'" Rejecting the concept of constructive notice in the absence of shown prejudice, the court held that "proper service of the RPAPL § 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of [a] foreclosure action."[21]

New York Class Actions Reinvigorated

The receptivity of New York courts in making the class action device readily available to consumers, amongst other groups, as set forth in the legislative history,[22] has been problematic. As noted in *New York State Class Actions: Make It Work – Fulfill the Promise*,[23] "[n]otwithstanding the broad language in the legislative history of CPLR Article 9, New York courts have not implemented this salutary statute as broadly as they might have. As a remedial vehicle, CPLR Article 9 is operating at approximately forty percent of its intended potential."[24]

Game Changer

In *Koch v. Acker, Merrall & Condit Co.*,[25] the Court of Appeals has, *inter alia*, clarified that justifiable reliance is not an element of a GBL § 350 claim (false advertising). In *Koch*, the plaintiff alleged that the defendant auction house offered certain wines for sale after having conducted a careful inspection of the wines to verify that they were genuine.[26] The defendant allegedly described its wines as "extraordinary," "absolutely stunning," "superlative," "incredible," and among the "greatest wines . . . ever experienced." Tucked away in the defendant's extensive April 2005 and January 2006 catalogs was an "as is" disclaimer.[27] The plaintiff alleged that certain wines purchased were counterfeit. In the action, the plaintiff asserted that the defendant misrepresented the authenticity of the wines, and that the defendant's inspection protocols were false or materially misleading. The defendant sought dismissal on the grounds that the "as is" disclaimer barred the GBL §§ 349 and 350 claims.

The Court of Appeals held that to assert GBL §§ 349 and 350 claims, a consumer "'must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'"[28] The Court found that the plaintiff sufficiently pled such causes of action, and that the disclaimers in the defendant's brochures "'do not . . . bar [the plaintiff's] claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law.'"[29]

GBL § 350 and Reliance

Equally important was the Court's finding that "[t]o the extent that the Appellate Division order imposed a reliance requirement on [GBL §§ 349 and 350] claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim."[30] The Court of Appeals's determination in this regard is in conformity with the language of both statutes, but appears to overrule a line of Appellate Division cases dating to 1982.[31] It should be noted that the Court of Appeals previously had not expressly ruled on whether claims pursuant to GBL § 350 include a reliance requirement. The Court had stated, however, that "[t]he standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349." Nonetheless, with *Koch*, the Court of Appeals has now made expressly clear that justifiable reliance is no more an element of a GBL § 350 cause of action than it is an element of a GBL § 349 claim.[32]

GBL § 350 Class Actions Now Available

In addition to making GBL § 350 more accessible to injured consumers, the *Koch* decision is equally important for classes of consumers seeking to utilize not only GBL § 349 but GBL § 350.[33] While consumer class actions alleging violations of GBL § 349 are generally certifiable,[34] the courts have previously declined to certify GBL § 350 class actions, finding that reliance is not subject to class-wide proof.

Class Action and Class Arbitration Waivers

A particularly disconcerting development for consumers, however, has been the enforcement of class action waivers and class arbitration waivers in consumer contracts. In that regard, the U.S. Supreme Court rendered two important consumer law decisions which address the enforceability of contractual clauses prohibiting class actions and class arbitration: *AT&T Mobility LLC v. Concepcion*,[35] abrogating *Discover Bank v. Superior Court*;[36] and *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp*.[37] In *Concepcion*, the Supreme Court, by a 5 to 4 vote, held that the Federal Arbitration Act of 1925 (FAA) preempted a

rule enunciated by the California Supreme Court in *Discover Bank*, which provided that class action waivers in consumer contracts of adhesion were unconscionable in cases where disputes between the contracting parties predictably involve small amounts of damages, "and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[38] Significantly, § 2 of the FAA contains a savings clause, which permits agreements to arbitrate to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[39] Relying on its recent decision in *Stolt-Nielsen*, in which it held that "an arbitration panel exceeded its powers under § 10(a)(4) of the FAA imposing class procedures based on policy judgments rather than the arbitration agreement itself," the Supreme Court found that "class arbitration to the extent that it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[40]

> The receptivity of New York courts in making the class action device readily available has been problematic.

Reaction to *Concepcion*

The reaction of several state[41] and federal[42] courts – including those in New York – has been interesting. For example, in denying en banc review in *American Express Merchant's Litigation*[43] the Second Circuit held that "*Amex III* strives to give full effect to the Supreme Court's teachings that where a contractual agreement functions 'as a prospective waiver of a party's right to pursue statutory remedies' then the contractual agreement may not be enforced."

New York state courts have also reacted to *Concepcion*. For example, *Gomez v. Brill Securities, Inc.*[44] concerned a class of employees who sought to recover for overtime wages (violation of 12 N.Y.C.R.R. § 142-2.2), impermissible wage deductions (violation of Labor Law §§ 193, 198-b) and wages and commissions as agreed (violation of Labor Law § 191). The court denied a motion to compel arbitration because

> the agreement to arbitrate, by its very terms, clearly precludes arbitration when arbitrable claims are brought as a class action . . . the agreement between the parties makes it exceedingly clear that arbitration shall be governed by the rules promulgated by FINRA . . . rule 13204(d) prohibits arbitration of class actions. . . . Contrary to defendants' contention . . . *Concepcion* (does not) warrant reversal of the motion court's decision and compulsion to arbitrate . . . (which is) inapposite since in that case the Court, reiterating that an agreement to arbitrate must be enforced as written, simply held that such an agreement, freely entered into, cannot be vitiated by a state law deeming unconscionable the preclusion of a right antithetical to the goals of arbitration as envisioned by the FAA.[45]

In *JetBlue Airways Corp. v. Stephenson*,[46] 728 unnamed current JetBlue pilots and 18 named former JetBlue pilots entered into separate employment contracts containing the same salary adjustment clause. The pilots "filed a single demand for arbitration with the AAA on behalf of all of the pilots" seeking, in effect, collective or class arbitration. JetBlue sought an order compelling individual arbitration. The Appellate Division, First Department, distinguished *Stolt*, noting that the instant action was not brought as a class action but by affected pilots as actual parties and concluded that the arbitrator would decide whether "AAA Rules permit collective, or joint, arbitration, in the first place." In *Cheng v. Oxford Health Plans, Inc.*,[47] the Appellate Division, First Department, held that an arbitration panel's determination that an arbitration in that case should proceed as a class arbitration "neither exceeded its powers nor manifestly disregarded the law in certifying the class." The Court also found that the plaintiff's claim was typical of those of the class and that the issues raised, "at least for the liability phase" predominated over individual issues.

And in *Frankel v. Citicorp Insurance Services, Inc.*,[48] a class action challenging the repeated and erroneous imposition of $13 payments for the defendant's "Voluntary Flight Insurance Program," the defendant sought to compel arbitration relying upon a unilateral change of terms notice imposing a class action waiver set forth in a notice mailed to the plaintiff. In remitting, the Appellate Division, Second Department, noted that "[t]here is a substantial question as to whether the arbitration agreement is enforceable under South Dakota law." On remittal the trial court should consider, *inter alia*, the issues of unconscionability, adequate notice of the change in terms, viability of class action waivers and the "costs of prosecuting the plaintiff's claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim, and the corresponding costs likely incurred if the matter proceeded on a class-wide basis." ■

1. The Court rejected the reasoning of the First Department case of *Digiulio v. Gran, Inc.*, 74 A.D.3d 450 (1st Dep't), *lv. granted*, 16 N.Y.3d 701, *order aff'd*, 17 N.Y.3d 765, *reargument denied*, 17 N.Y.3d 881 (2011) which found no such duty under either GBL § 627-a or the common law.
2. 92 A.D.3d 148, 155–56 (2d Dep't 2011).
3. *Id.* at 158–60.
4. *Digiulio*, 74 A.D.3d 450.
5. *Id.* at 453.
6. *Miglino*, 92 A.D.3d 148.
7. 57 A.D.3d 100 (2d Dep't 2008); *see also Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 289 (1st Dep't 2003).

8. *See, e.g.*, *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007); *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132 (E.D.N.Y. 2009).

9. 31 A.D.3d 382, 383 (2d Dep't 2006).

10. 942 N.Y.S.2d 551 (2d Dep't 2012).

11. 88 A.D.3d 345 (2d Dep't 2011).

12. 83 A.D.3d 57 (2d Dep't 2011); *see also Stern v. DiMarzo, Inc.*, 77 A.D.3d 730 (2d Dep't 2010).

13. *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 278 (2d Dep't 2011).

14. *Id.*

15. 8 N.Y.3d 90 (2006).

16. *Silverberg*, 86 A.D.3d at 283.

17. 41 A.D.3d 674 (2d Dep't 2010).

18. *Silverberg*, 86 A.D.3d at 279–83.

19. *Id.* at 283.

20. 85 A.D.3d 95, 109 (2d Dep't 2011); *see also* Daniel Wise, *Lenders Must 'Strictly Comply' With Foreclosure Notice Rules*, N.Y.L.J., May, 24, 2011, p. 1.

21. *Aurora Loan Servs.*, 85 A.D.3d 95.

22. In recommending passage then Assembly Majority Leader Stanley Fink stated that "[i]n its present form the Statute fails to accommodate pressing needs for an effective, flexible and balanced group remedy in vital areas of social concern, such as claims arising from exposure of numerous persons to environmental offenses, violation of consumer interests, invasion of civil rights, execution of adhesion contracts and many other collective activities reaching virtually every phase of human life. While the substantive law applicable in these areas may be generally adequate, there exists no workable remedy when neither relief on an individual basis nor actual joinder of the class is economically feasible" (A. 1252-B, L. 1975 ch. 207, reprinted in 1975 N.Y. State Legislative Annual 9 (N.Y. Legislative Serv., Inc. 1975)).

23. Thomas A. Dickerson, *New York State Class Actions: Make It Work – Fulfill the Promise*, 74 Alb. L. Rev. 711 (2010–2011).

24. *Id.* p. 715.

25. *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940 (2012).

26. ROA 63, 195-197, 208.

27. *See Koch v. Acker, Merrall & Condit Co.*, 73 A.D.3d 661, 661 (1st Dep't 2010), *rev'd*, 18 N.Y.3d 940 (2012). ("The 'Conditions of Sale/Purchaser's Agreement' included in each of defendant's auction catalogues contains an 'as is' provision alerting prospective purchasers that defendant 'makes no express or implied representation, warranty, or guarantee regarding the origin, physical condition, quality, rarity, authenticity, value or estimated value of [the wine],' that any statements made by defendant were 'opinion only, and shall not be relied upon by any bidder,' and that '[p]rospective bidders must satisfy themselves by inspection or other means as to all considerations pertinent to any decision to place any bid.'").

28. *Koch*, 18 N.Y.3d 940, 941 (quoting *City of N.Y. v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009)).

29. *Id.* (quoting *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002)).

30. *Id.*

31. *See Dank v. Sears Holding Mgmt. Corp.*, 93 A.D.3d 627 (2d Dep't 2012); *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 217 (3d Dep't 2010); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 72 (2d Dep't 2006); *Gale v. Int'l Bus. Mach. Corp.*, 9 A.D.3d 446, 447 (2d Dep't 2004); *Butler v. Caldwell & Cook*, 122 A.D.2d 559 (4th Dep't 1986) (GBL §§ 349, 350 claims dismissed "because of the failure to state facts showing that plaintiffs relied to their detriment upon deceptive practices"); *Bello v. Cablevision Sys. Corp.*, 185 A.D.2d 262 (2d Dep't 1992) (GBL §§ 349 and 350 claims dismissed "for failure to sufficiently demonstrate reliance"); *Gerson v. Hertz Corp.*, 215 AD2d 202, 203 (1st Dep't 1995) ("cause of action under General Business Law § 350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising"). The error of requiring reliance in GBL §§ 349 and 350 claims can be traced to *Burns v. Volkswagen of Am., Inc.*, 118 Misc. 2d 289, 292 (Sup. Ct., Monroe Co. 1982), *aff'd*, 97 A.D.2d 977 (4th Dep't 1983) ("A necessary element of any action based upon deception is reliance" citing as authority a 1978 common law fraud (not asserting GBL §§ 349, 350 claims) class action in *Strauss v. Long Island Sports*, 60 A.D.2d 501, 506 (2d Dep't 1978)).

32. *Koch*, 18 N.Y.3d 940.

33. *See* Thomas A. Dickerson, *New York State Class Actions Under CPLR Article 9 in* New York Civil Practice: CPLR 2006 (2006).

34. *See id.*

35. 131 S. Ct. 1740 (2011).

36. 36 Cal. 4th 148 (2005).

37. 130 S. Ct. 1758 (2010); *see also Fensterstock v. Educ. Fin. Partners*, 611 F. 3d 124, 141 (2d Cir. 2010).

38. *Concepcion*, 131 S. Ct. at 1746).

39. 9 U.S.C. § 2.

40. *Concepcion*, 131 S. Ct. at 1750–51. Notably, in his concurring opinion in *AT&T*, Justice Thomas interpreted the FAA as "requir[ing] that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement," and the *Discover Bank* rule "does not relate to defects in the making of an agreement." *Concepcion*, 131 S. Ct. at 1753.

41. *See, e.g.*, *Medina v. Sonic-Denver T, Inc.*, 252 P.3d 1216 (Colo. App. 2011); *McKenzie v. Betts*, 55 So. 3d 615 (Fla. App. 2011); *Feeney v. Dell, Inc.*, 2011 WL 5127806 (Mass. Super. Oct. 4, 2011); *Picardi v. Eighth Judicial Dist. Court*, 251 P.3d 723 (2011); *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010); *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 717 S.E.2d 909 (W. Va. 2011).

42. *See, e.g.*, *Sutherland v. Ernst & Young, LLP*, 847 F. Supp. 2d 528, 535 (S.D.N.Y. 2012) ("Although the applicability of *Concepcion* . . . is a close question, the facts before this court differ significantly . . . because Sutherland, unlike the Concepcions is not able to vindicate her rights absent a collective action"); *see also* NLRB Decision January 3, 2012, in *D.R. Horton, Inc. and Michael Cuda*, Case 12-CA-25764 prohibits employers from "(b) Maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial."

43. 681 F.3d 139, 140 (2d Cir. 2012); *cf. Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (FAA preempted Washington state law invalidating class action waiver as unconscionable).

44. 95 A.D.3d 32 (1st Dep't 2012).

45. *Id.* at 36–38.

46. 88 A.D.3d 567, 568, 574 (1st Dep't 2011).

47. 84 A.D.3d 673, 675 (1st Dep't 2011); *see also Cheng v. Oxford Health Plans, Inc.*, 2009 WL 3704354 (N.Y. Sup. 2009); *Cheng v. Oxford Health Plans, Inc.* 45 A.D.3d 356 (1st Dep't 2007).

48. 80 A.D.3d 280, 290, 291 (2d Dep't 2010); *see generally Scott v. Cingular Wireless*, 160 Wash. 2d 843 (Wash. Sup. 2007).

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English Is *Not* Your Exclusive Company Language

By Donald C. Dowling, Jr.

Translating human resources policies and employee communications can be a million-dollar issue. The Texas Supreme Court once overturned a $1.6 million jury verdict for worker-compensation retaliation in large part because the allegedly retaliatory act was consistent with a provision in a company handbook that the employer had communicated in Spanish to the monolingual Spanish-speaking worker plaintiff – the company had even had the worker sign a handbook acknowledgement "written in Spanish."[1] Whatever the cost to translate that particular handbook and acknowledgement was well worth the price.

The employer, Haggar Clothing, was unusual in that it translated documents for domestic American staff. Many multinationals take the completely opposite approach and avoid translating even HR communications for their non-English-speaking jurisdictions abroad. This strategy, while streamlined and frugal, risks violating foreign workplace language laws. Before issuing any English-only international employee communication, investigate and comply with applicable translation mandates.

Workplace Language

In the old days (say, 20 or more years ago), multinationals ran global HR as siloed operations, with little day-to-day coordination from headquarters HR. In that bygone era almost all a multinational employer's communications to local workers at its plant in, say, Montreal, came from on-site Québécois personnel administrators – in French. Work rules for its office in, say, Tokyo came from on-site Japanese management – in Japanese. Benefit plans for its employees in São Paulo were drafted by local Brazilians – in Portuguese. Employment contracts in every country were in the local language, or at least in two-column, dual-language format.

In many respects this regime continues even today. Multinationals' foreign local HR teams constantly generate routine local employment contracts, policies, benefits documents and HR communications for local workforces in the local language. The difference is that, on top of local communications, *headquarters* now steps in with intranets, e-newsletters, all-hands emails, and global policy/plan distributions, transmitting a new layer of global and regional HR documents to affiliate employees worldwide – often in English. These documents might be anything from internal news bulletins to routine email announcements to global HR policies/handbooks/codes of conduct/whistleblower hotline communications to global/regional bonus plans, sales incentive plans, compensation plans, benefits plans, equity plans – and more.

Issuing headquarters HR documents in English cuts down on translation delays, translation costs, the risk of a message getting "lost in translation," and eliminates the problem of issuing inconsistent, competing versions of the same document. Many American multinationals issue global HR communications in English because, they reason, fluency is necessary in today's globalized business world and anyone who comes to work for a U.S.-based company probably should understand English anyway.

For that matter, even some multinationals headquartered in parts of the non-English-speaking world, such as Luxembourg and Scandinavia, are now starting to designate English their "official" language.

But a designation of English as "official company language" is for the most part symbolic; it offers no defense to an accusation of breaching a workplace language law. Indeed, an "official English" designation might itself be argued to evidence a prior intent to flout local language laws. Multinationals are powerless to exempt themselves from these laws. English-speaking countries tend not to impose language mandates, so multinationals often miss the legal issue here entirely, getting blindsided by foreign translation requirements.

An English-only stance can also spark unfair labor practices and labor disputes. In April 2011, 185 employees at the Saint-Marcellin-en-Forez, France, plant of UK-based Morgan Thermal Ceramics went on strike because their "Anglo Saxon imperialist management" would "say 'hello' in French," but otherwise communicated only in English.[2]

The easy legal advice here is to tell every multinational to translate every cross-border workplace communication into every relevant language. But that approach is too burdensome, expensive and time-consuming to be practical. Multinationals headquartered in the English-speaking world inevitably issue certain cross-border employee communications in English. The question, therefore, is: *What are the precise legal constraints?*

Ascertaining overseas workplace language laws is trickier than it might seem. The world's workplace language laws impose very different types of mandates. The problem is that advisors tend to report, unhelpfully, that in their jurisdiction local translations are "necessary" or "required" or "must" or "should" be issued. This advice fails to distinguish high-risk countries where untranslated workplace communications are themselves flatly illegal from low-risk countries where translations are only theoretically "necessary" or "required" later, if the employer someday needs to enter a document as evidence in a local court.

We can categorize the world's workplace language laws into four tiers: (1) flat prohibitions, (2) enforceability barriers, (3) *de facto* language requirements and (4) hostile reception in local proceedings. Then, beyond legal compliance comes the problem that untranslated employee communications raise human resources and business issues. Here, we discuss the four levels of workplace language laws and then offer some thoughts on the HR and business issues.

Four Levels of Workplace Language Laws

Flat Prohibitions

The world's toughest workplace language laws are the flat prohibitions, the absolute bans that punish employers for the act of issuing written communications to employees other than in the local language. Examples:

- *France*, which sponsors an academy with the *raison d'etre* of upholding the integrity of the French language, imposes a statute called the *Loi Toubon* that in effect commands "Thou Shalt Communicate with Thy Local Employees Exclusively in French." The French labor code[3] imposes fines for issuing employment documents other than in French. In 2006, a U.S. *Fortune* 10 multinational was fined US$800,000 (halved on appeal from an initial fine of US$1.6 million) because U.S. headquarters had issued an English-language global benefits plan to subsidiary employees in France.
- *Belgium* also flatly prohibits issuing documents to employees in foreign languages. Belgium's law grows out of the uniquely Belgian tension between Flemish Dutch and Walloon French, and so requires employee communications in the *regional* language. Where to draw regional lines sometimes is a matter of dispute.
- *Quebec* imposes a law that requires written employee communications in French.[4] Quebec allows opt-outs – individual employees can sign waivers declaring they speak English and accept English communications. But an employer cannot simply hire English speakers and demand opt-outs, because Quebec courts forbid employers from conditioning most jobs on fluency in English.[5]
- In *Spain*, in some regions ("Autonomous Communities"), sectoral collective bargaining agreements bind all employers in certain industries, and require that employee communications be in both co-official languages (Spanish plus the regional language, such as Catalan or Basque).
- *Mongolia* requires that all employment documents be in Mongolian; violators are subject to fines.[6]
- *Turkey* requires that human resources policies, if not all HR communications, be in Turkish; violators are subject to "administrative fines."

Enforceability Barriers

A relatively few jurisdictions impose the flat prohibitions that punish employers just for issuing untranslated communications. More common are countries like Chile, Macedonia, Poland and Russia, with laws that *invalidate* untranslated employee communications, rendering them void even as to affected employees fluent in the document's language. Under these laws, for example, a multinational that issues an untranslated work rule or code of conduct is estopped from disciplining an employee for violating it. In one recent case, the French Supreme Court invalidated an employer's bonus term sheet because it was written in English.[7] The terminated employee – who apparently had understood the term sheet perfectly well – won his full target bonus. The

criteria by which his bonus should have been reduced had not appeared in French and so were unenforceable. (Under France's *Loi Toubon*, that employer might also have been fined.)

- *Untranslated work orders unenforceable*: Venezuela, plus a number of Central American countries including Costa Rica, El Salvador, Guatemala and Honduras, imposes laws that invalidate *work rules* not in Spanish. These laws are said to be a legacy of the era when American plantation bosses barked English-language orders at banana workers, firing hapless uncomprehending locals. Because HR policies, handbooks and codes of conduct invariably contain "work rules," to be enforceable these must appear in Spanish.
- *Untranslated employment agreements unenforceable*: A number of countries including Egypt, Mali, Mozambique, Nicaragua and Ukraine affirmatively require that, to be enforceable, *employment agreements* be in the local language (or dual-language format). Slovakia requires that written "legal acts of employment relations" (presumably employment contracts and binding HR policies) be in Slovak.[8] Non-compliant documents are unenforceable.

De Facto Language Requirements

Many countries require, by law, that employers submit certain documents to government agencies and certain other documents to workers or their representatives. These laws tend to be silent on language, but untranslated submissions will not usually comply. For example, imagine a hypothetical unionized Boston subsidiary of a German-headquartered company that tries to file a German-language qualified retirement plan with the U.S. IRS and Department of Labor and then tries to submit a German-language benefits proposal to its Boston labor union local. These submissions likely do not comply with ERISA filing requirements and the National Labor Relations Act § 8(a)(5).

It works the same way abroad. Countries from Haiti and Panama to Peru, Niger, Vietnam and beyond require employers to file employment agreements with local agencies. Almost every country requires submitting at least payroll data to government agencies, as well as, in many cases, other HR data filed with government labor, tax, Social Security and data protection authorities. Also, most countries require employers to turn over certain documents and proposals to employee representatives. France and Germany, for example, require giving draft HR polices, benefit plans and crisis plans to works councils and health and safety committees.

Simply submitting these documents in the foreign language rarely complies. The translation burdens of European Works Councils alone are enormous. In essence, the laws that require these submissions are *de facto* translation mandates as to the specific documents submitted. For this reason, a multinational trying to launch a global code of conduct, a global whistleblower hotline, or a global pandemic policy can find itself under a *de facto* duty to translate in many jurisdictions. (But there are exceptions; in Scandinavia, for example, government agencies and even trade unions might accept certain English documents.)

Hostile Reception in Local Proceedings

These workplace language laws, although important, are exceptional. Most jurisdictions impose no language law or translation mandate as to most routine HR communications. In non-English-speaking countries, issuing English-language HR communications is often legal, in that untranslated documents do not usually violate specific mandates. But everywhere on earth, employees can argue that HR communications in foreign languages are *presumptively* unenforceable, especially as to staff not proficient in the language.

To understand the dynamic here, take an American example. Think of Toyota's auto plant in Georgetown, Kentucky.[9] Imagine hypothetically if Toyota's Aichi, Japan, headquarters were to issue to its Kentucky staff a global code of conduct and a global equity plan in its native language – Japanese. Imagine that Toyota's management then disciplined a Kentucky autoworker for violating some provision in the code. Also imagine that management invoked some term in the equity plan to cut off share-vesting rights of a terminating Kentucky executive. If the autoworker's obligation to follow the code of conduct and the terminated executive's rights under the equity plan became issues in local litigation, no judge in Kentucky is likely to hold these locals responsible for complying with, or understanding, Japanese-language texts. Remember, the Texas Supreme Court reversed a $1.6 million jury award in *Haggar Clothing*[10] in part because the employer had translated its policy for the plaintiff.

It works the same way abroad. Multinationals often need to establish in overseas labor courts that local employees were bound to follow (or were on notice of) some HR policy or offering. Expect to have a tough time meeting that burden when the policy or offering has been issued in a foreign language – even if issued in the "global language" of English, and even if the document later gets translated, after the fact, to be admitted in local court. The multinational might argue that the employee in question himself speaks English, but a monolingual local judge may show sympathy for an employee claiming otherwise.

Human Resources and Business Issues

Any multinational can designate English as its "official company language." And many multinationals do.

CONTINUED ON PAGE 51

INDEX TO ARTICLES 2012

This index places each article in one of the following categories. All articles are available online, to members.
The articles are listed, alphabetically, by title, followed by the last name(s) and first initial(s) of the author(s); the issue date; and the page number.
A word-searchable index to the *Journal*, for years 2000–2012, is available online at www.nysba.org. Click on "publications," then Bar Journal. Scroll down, and on the right-hand side click on "Searchable Index by Category (2000-present)."

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Attorney Professionalism

Books on Law

Civil Procedure

Commercial Law

Consumer Law

Criminal Law

Elder Law

Environmental Law

Evidence

Family Law

Government & the Law

History

INDEX TO AUTHORS 2012

English

Continued from Page 48

Official-English designations are meant to streamline and speed employee communications and also to reduce costs. Indeed, in this age of constant, fluid HR communications – intranets, e-mails, global Human Resources Information Systems – having to stop and translate every routine HR communication into every possibly relevant language is, if not impossible, at least cumbersome, expensive, slow, and impractical.

We have discussed four levels of workplace language laws – flat prohibition, enforceability barriers, *de facto* language requirements, and hostile reception in local proceedings. But because these mandates are the exception (again, most employee communications in most jurisdictions do not *have* to be translated), the question often shifts from whether a multinational employer *can* issue English-language global HR communications to whether it makes *business sense* to issue English documents in non-native-English-speaking countries. Whether to translate more often raises business and human resources issues rather than issues of strictly legal analysis.

Even where legal, distributing untranslated HR documents to non-English-speaking workforces does not always make business sense and can be bad HR. English is not quite the *lingua franca* of international business that Americans think it is. Much of the world, and many key executives, do not speak fluent English. Even a book titled *English as a Global Language*[11] concedes that "English-monolingual companies are increasingly encountering [communication] difficulties as they try to expand in those areas of the world thought to have the greatest prospects of growth, such as East Asia, South America, and Eastern Europe – areas where English has traditionally had a relatively low presence."

Translating key employee communications is usually a good HR practice and often makes good business sense. The purpose of any employee communication, after all, is to get a message across to staff. We all understand messages best in our native tongues. And translating respects ethnic diversity. American employees working stateside for multinationals based overseas well understand the frustration and exclusion of conversations and documents in headquarters language.

Of course, English is in some respects unique because it is a *lingua franca* and a common denominator among many. The fact remains, though, that most people on earth do not speak it. ■

1. *Haggar Clothing v. Hernandez*, 164 S.W.3d 386, 387 (2005).

2. Peter Allen, *French Workforce on Strike Because of "Anglo Saxon Imperialist" Management*, The Telegraph, Apr. 20, 20/11.

3. Arts. R1325, L1221-3, L1321-6.

4. Charter of French Lang., bill 101, at arts. 4, 46.

5. *Cf. Pouliot c. Quality Inn*, 2011 QCCRT 214 (CanLII).

6. Mongolia Law on Official Language of the State, art. 5.4.

7. *Cass. Soc.* 09-67492, June 2011.

8. Slovak Act No. 270/1995 Col.

9. *Cf.* www.toyotageorgetown.com.

10. *Haggar Clothing*, 164 S.W.3d 386.

11. David Crystal, English as a Global Language 19 (Cambridge Univ. Press, 2d ed., 2003).

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Karla Berenice Mendez
Toby Rachel Merrill
Viva Leigh Miller
Thejaswini Mohan
Jeffrey Paul Mongiello
Cyrus Richard Montesa
Jonathan Frederick Mor
Kacey-ann Camille Mordecai
Mitsuo Moriya
Bryan Kyle Morley
Atosa Morvarid
Nader Ali Sadat Mousavi
James Alwin Murphy
William Parks Murray
Richard Frost Nace
Hiren Bharat Naik
Jesse Michael Nelman
Jessica Brooke Newman
Alejandra Nunez
Deirdre Mary O'Brien
Christopher Sean O'Grady
Tatiana Patricia Obando
Taro Okusa
Osarodion Omoigiade
Anne Olutola Oredeko
Ilit Ostrovitch-levi
Julie Ritsuko Ota
Joseph A. Pacello
Janghyuck Park
Michelle Joyce Parthum
Stanley Julius Parzen
Eric Scott Pasternack
Jatin Kantilal Patel
Shalaka Waman Patil
Isabel Freitas Peres
Courtney Renee Perez
Cristian Perretta
Douglas Richard Peterson
Louis A. Petroni
Katharine Bridget Pierce
Noelle Marie Pierotti
Cecile Eglantine Pierrette Pudebat
Brett Michael Pugach
Megan Leslie Quattlebaum
Kyung Won Ra
Bhargavi Rajan Babu
Vivienne Rakowsky
Jessica Ann Rancie
Sari Johanna Rasinkangas
Amanda Kelly Rice
Christian John Riddell
Sarah Virginia Riddell
Arlene Rivera
Diego Juan Rosado
Alberto Gabriele Rossi
Jennifer Rae Round
Lee Philip Rovinescu
Ryan Matthew Royce
Michael Robert Rudick
Marlon Patrick Rufino
Morgan Shahan Russell
Gregory Sanders
Matej Sapak
Lawrence Gunnar Scarborough
Jennifer Ann Schear
Kevin Ian Schwartz
David Francis Segadelli
Sergio Selvera
Anand Ajay Shah
Aruna Sharma
Andy S. Shen
Ying-chia Shih
Efrat Shpilman
Jason David Silver
Aaron Y. Silverstein
Blake A. Smith
Wrede Howard Smith
Adrian Frank Joseph Lee Snead
Ge Song
Brian Isaac Sperber
Cristina Rachel Stella
Jason Lee Stevenson
Nicole Jovanna Sparks Sudhindra
Ye Sun
Yunfei Sun
Mohamed Sidiki Sylla
Jonathan Michael Tauberg
Kerene Nicole Tayloe
John Stephen Taylor
Cherish A. Thompson
Aoife Tierney
Joseph Terence Tierney
Ashley Totorica
Claire-marie Toupe
Michael Raymond Tucker
Natalia Van Der Laat Garcia
Galina Varchena
Catherine Lynne Vazquez
Vincent Anthony Vecchione
Xiaobing Wang
Xiaolu Wang
Jessica Kalen Wash
Brad Daren Weiss
David Samuel Weiss
Warren McKay Williams
Rhonda Hill Wilson
Victorien Zai-xin Wu
Xiao Wu
Shang Xiang
Tianning Xiang
Yao Xiao
Sae Bom Yoon
Pamela Michelle Young
Kim Linda Yu
Shu-yin Yu
Zahraa Basim Zalzala
Stuart James Zander
Yiqing Zhuang
Izabela Zielinska-Barlozek
Timothy Michael Zieziula
Yun Zou

In Memoriam

Roger S. Aaron
Scarsdale, NY

Matthew J. Domber
Clearwater, FL

Carroll E. Dubuc
Falls Church, VA

Joseph Fleming
New York, NY

Arthur Goldstein
Huntington, NY

Huyler C. Held
New York, NY

Barry R. Hill
Manlius, NY

Bellenden Rand Hutcheson
Leverett, MA

Susan E. Jaffee
New Rochelle, NY

Thomas J. Newman
Suffern, NY

Norbert J. Sherbunt
Amsterdam, NY

Neil Sherwood
Buffalo, NY

Jerome M. Solomon
New York, NY

John L. Walsh
Greenlawn, NY

Gerald A. Wolf
Englewood Cliffs, NJ

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

To the Forum:

I represent Wishful Thinking Development (WTD). In 2007, WTD took out a multi-million dollar mortgage on a piece of commercial real property which it owns in midtown Manhattan.

After approximately four years, WTD ceased paying its mortgage and the lender instituted a foreclosure action by filing a summons and complaint in Manhattan Supreme Court in early 2012.

The complaint was personally served upon Inover Hishead (IH), the principal of WTD at his office in downtown Manhattan on February 1, 2012. On the morning of February 13, IH called to inform me that he was previously served with the complaint and I advised him that we needed to respond to the complaint within 20 days, which would require a response by February 21, 2012. The complaint contained 10 separate causes of action against WTD, which consisted of nearly 200 paragraphs of allegations. Because of the complexity of these allegations, I consulted with IH and we decided that it would be appropriate to request a 30-day extension of time from the lender's counsel so that we could respond to the foreclosure complaint. In addition, I needed an extension of time as well because last fall I was scheduled to begin a week-long trial in federal court in California on February 16.

Later that day, I telephoned opposing counsel and advised him that I was just retained to represent WTD and requested a 30-day extension to respond to the complaint both because of the time required to address the complex nature of the lender's allegations in the complaint as well as because of my upcoming trial on the West Coast. The lender's counsel informed me that his client wanted to aggressively pursue this action and foreclose on the property immediately. In short, I was informed by my adversary that the lender wanted a "take no prisoners" approach in the case and was instructed by his client to not grant any requests to extend deadlines or courtesies to me or my client. Although I explained to opposing counsel that an extension of time is a basic courtesy and would not prejudice the lender, he responded that his client was "sick and tired of lawyers being nice to each other" and told me that my request for an extension was denied. He further informed me that if I did not answer or move to dismiss the complaint by February 21, 2012, then he would immediately file a motion for a default judgment against WTD.

Isn't my adversary's conduct a violation of the Rules of Professional Conduct and the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,

Concerned Counsel

Dear Concerned Counsel:

Although your opposing counsel's behavior is deplorable and almost certainly violates the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), it does not necessarily violate the Rules of Professional Conduct (the RPC) or serve as a basis for a disciplinary complaint.

The Standards were first proposed in the "Report on Guidelines on Civility in Litigation," a report issued by the NYSBA's Commercial and Federal Litigation Section (the Report). Seeing a disturbing increase during the 1990s in so-called "Rambo" litigation tactics by attorneys, the Report expressed the Section's concern that there was an urgent need for our profession to address the rising level of incivility by members of the bar. This incivility manifested itself in a variety of ways which included, amongst other issues, "deliberate scheduling of proceedings at times that [were] knowingly inconvenient for one's adversary" as well as "arbitrary refusal to stipulate to reasonable requests for extensions of time and modification of schedules." Report at 1. As stated in the Report, there were "[v]arious contributing causes" to the lack of civility that our profession was experiencing, including:

> the ever-increasing size of the bar . . . the ever-expanding scope of pretrial discovery . . . the misperception by clients or lawyers that mean spirited, "give-no-quarter" advocacy is the only way to win a lawsuit . . . competitive business demands in which the perceived need for billable hours leaves no time for reflection on the values of civility; and inadequate training of lawyers with respect to matters of professionalism.

See id. at 4–5 (internal citations omitted).

The Report also noted that incivility led "to a growing perception that litigation attorneys sometimes confuse the duty of zealous advocacy with a basic lack of respect for other persons" and that incivility made "litigation unpleasant for those participants in the enterprise who rightly believed that lawyers should be able to 'disagree

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.**

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

without being disagreeable.'" *Id.* at 4 (internal citations omitted).

In an effort to promote solutions that were intended to combat the growing incivility amongst attorneys at the time, the Report (which was adopted by the House of Delegates and eventually evolved into the Standards) made the case for the need for guidelines designed to raise "the consciousness of the bar in a way that will affect attitudes and conduct." *Id.* at 5.

Enacted in 1997, the Standards were "intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." Although the Standards are a model for appropriate behavior, they were "not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [the predecessor to the RPC], or any other applicable rule or requirement governing conduct." Since the Standards are guidelines only, it is unlikely that reporting your adversary's conduct to the Disciplinary Committee would result in the issuance of a disciplinary complaint. That being said, it does not follow that your adversary's conduct gets a free pass. Rejection of your extension request exposes opposing counsel to likely repercussions before the eventual judge who will be assigned to this matter. Most judges view requests for extensions of time as a matter that should be left exclusively to the attorneys and not involve the courts. It is widely known that judges (most of whom have extensively heavy case dockets) do not want to waste valuable time dealing with minor matters that competent counsel should be able to resolve. In our view, it is not just a matter of attorney professionalism. Intelligent counsel should be mindful of the potential consequences faced by an adversary who demonstrates a lack of civility.

Part II(B) of the Standards provides that "[l]awyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature of the status of the case." Furthermore, Part III of the Standards of Civility sets forth a series of guidelines meant to encourage lawyers to "respect the schedule and commitments of opposing counsel, consistent with the protection of their clients' interests." These include:

> A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.
>
> B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.
>
> C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.
>
> D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

See Standards Part III(A)–(D).

Obviously, there are situations where no extension may be warranted because of possible prejudice to the plaintiff. However, where there is no prejudice, the Standards suggest that your request for a 30-day extension to respond to the complaint is reasonable in light of the fact that the complaint contained 10 separate causes of action and nearly 200 paragraphs of allegations against your client. *See* Standards Part III(A). In the absence of a showing by your adversary that the client would be adversely affected by an extension of time, he should have granted you the courtesy of the extension you were seeking. *Id.* We doubt that the plaintiff's interests would be adversely affected if opposing counsel granted your extension request, unless there was a situation where your client was committing an act that could cause irreparable harm to the plaintiff (and which would have likely resulted in the plaintiff seeking a provisional remedy against your client at or close to the time when the foreclosure action was commenced).

Rather than simply saying "no," consideration could have been given to a shorter extension and, as discussed below, the extension request may also create an opportunity for the plaintiff to get certain reasonable concessions from the defendant as the price for the extension. In our view, except in very unusual situations, first requests for an extension of time should be granted as a matter of courtesy. *See* Part III(B).

Many times when an attorney is faced with a request from opposing counsel for an extension of time to respond to a complaint, there are conditions which may be placed on granting such request. However, these conditions should not be "unfair or extraneous" and can be given so long as they are "appropriate to preserve rights that an extension might otherwise jeopardize." *See* Part III(C). Examples of conditions given in exchange for an extension of time to respond to a complaint include an acknowledgment of service and the waiver of jurisdictional defenses, including the defenses of improper service and personal jurisdiction. Since this is a foreclosure action involving real property located in New York County and the principal of the defendant borrower acknowledged that he was properly served with the complaint, it is unlikely that you would be raising any jurisdictional defenses to this action.

An example of a condition which is regularly discouraged is the requirement of client consent in order to grant an extension of time. Countless requests for extensions of time are often met with the response "I have to consult with my client" or something to that effect. It is a commonly held belief that the only reason an attorney would impose this condition is to prevent the requesting attorney from obtaining an immediate response to his request for an extension. As discussed at length herein, the decision to grant extensions of time is a matter that rests with the attorneys only and does not expressly require client consent.

Last, opposing counsel should respect and take into account your previously scheduled trial when scheduling deadlines in connection with the instant foreclosure action. *See* introductory paragraph to Part III of the Standards. As stated above, Part III(D) provides that "[a] lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflict" and "should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized." Your upcoming federal trial in California is unlikely to be adjourned. In addition, rescheduling the trial would require altering the travel plans of not only you, but your client(s), your adversary in that case, as well as his or her client(s), and all necessary witnesses. The trial court would have to reschedule the matter while taking into account its own limited availability, which may not be for months. Most important, a delay in the trial date may result in prejudicing your client in that particular case. Therefore, you might want to provide your adversary in the foreclosure action with an affidavit of engagement describing your participation in the trial scheduled in California. If opposing counsel in the foreclosure action takes the position that your affidavit of engagement is meritless and tells you to seek relief from the court, then you would be left with no alternative but to make an application to the court for an extension of time to respond to the complaint. By forcing you to make this application, your adversary risks losing credibility before the court, since he will likely be seen as unnecessarily forcing judicial intervention in a matter that should have been dealt with between attorneys.

The RPC does not directly address civility but does set forth a number of provisions to deal with "overly aggressive behavior" by attorneys "including Rule 3.1 ('Non-meritorious Claims and Contentions'), 3.2 ('Delay of Litigation'), 3.3 ('Conduct Before a Tribunal'), 3.4 ('Fairness to Opposing Party and Counsel'), and 8.4(d) ('engage in conduct that is prejudicial to the administration of justice')." *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, at 3, col. 1.

Arguably, an attorney's failure to grant reasonable extensions of time could qualify as "conduct that is prejudicial to the administration of justice." *See* Rule. 8.4(d). However, Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice* . . . ." (emphasis added). Although your adversary's conduct is a prime example of uncivil conduct, it is not behavior that parallels the more egregious conduct that could be deemed a violation of Rule 8.4(d). Examples of conduct subject to discipline include "advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding . . . " and the like. *See id.* Comment [3].

As discussed above, the courts do not look favorably upon applications seeking extensions of time because such requests can legitimately be viewed as a waste of judicial resources. Determinations of extension requests are matters that should be exclusively the domain of the attorneys in a particular matter. An attorney who forces a dispute over whether to grant an extension of time before a judge risks losing credibility in the eyes of the court. As the Standards suggest, you can be aggressive but still be civil. Therefore, it is the attorneys' responsibility to behave in a civil manner and grant all necessary courtesies so as to avoid unnecessary proceedings before the court, especially on trivial matters such as applications for extensions. There should always be a certain amount of respect between attorneys as to their respective time commitments. This will allow cases to proceed more easily, which will result in a more expedient resolution of client matters.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently received a $10,000 retainer to represent a client (Daniel Developer) in a real property development project. I anticipate the project will take about a year to 18 months to complete. I will be billing on an hourly basis every two months. It has been my practice to put these retainers in my escrow account but in discussing the matter with a couple of fellow attorneys, one expressed the opinion that these retainers should not be put into the escrow account and instead should be deposited into our firm's operating account. The other attorney said that the retainer payment belongs to the client and must be put into an escrow account. Which is it?

In addition, could I enter into a "flat fee" or "minimum fee" payment arrangement with Daniel Developer?

With regards to fee amounts, it has been my firm's practice to increase billing rates at the beginning of each calendar year. Am I required to inform Daniel Developer once our new billing rates take effect?

Last, if for some reason I do not use up the retainer given to me by Daniel Developer, am I required to refund the remaining amount to him?

Sincerely,
Andrew Advocate

The court will construe the evidence in the light most favorable to the non-moving party. That doesn't mean that as the non-moving party you may be "evasive, indirect, or coy" in your opposition papers. Showing only part of your proof in your opposition papers and waiting until trial to show the rest of your proof might backfire.[14]

Included in your proof on your summary-judgment motion should be a copy of the pleadings. Some judges automatically deny a summary-judgment motion when the moving party fails to include the pleadings in the motion papers. Other judges allow the moving party under CPLR 2001 to remedy the omission.

Moving for summary judgment more than once in a single case is rare. CPLR 3212, however, provides no restriction on the number of summary-judgment motions you may make in the same case. But courts discourage parties from making "'[m]ultiple summary judgment motions in the same action . . . in the absence of a showing of newly discovered evidence or other sufficient cause.'"[15] A court might allow a second summary-judgment motion if "a new, as yet untested defense is permitted [by the court] to be added by amendment."[16]

Some courts, such as the Commercial Division of Supreme Court, New York County, have additional and specific rules for summary-judgment motions. Familiarize yourself with those rules before moving for summary judgment.

More nuances exist about how to move, oppose, and cross-move for summary judgment. The *Legal Writer* will address those nuances in upcoming issues.

You'll need to decide what tactics and strategies you'll use in your case. Like fingerprints, each case is unique. Consider the advantages and disadvantages before moving for summary judgment.[17]

The court will construe the evidence in the light most favorable to the non-moving party.

Advantages to Moving for Summary Judgment

The best-case scenario is winning your summary-judgment motion. Winning your motion means winning the case without having a trial. If the court grants your summary-judgment motion, you'll save effort, money, and time by not having to prepare for trial.

Your summary-judgment motion might persuade your opponent to settle the case right away. Adversaries might see the strengths to your case and the weaknesses in their own case. Your adversary might determine that its chance of success in opposing the motion or in proceeding to trial is minimal. Your adversary will also have to consider the effort, money, and time in preparing opposition papers to your motion. Likewise, your adversary will consider the effort, money, and time in preparing for trial even if you won't succeed with your summary-judgment motion. If your client will appear to trial jurors as an unsympathetic witness, having a judge adjudicate your case based on your summary-judgment papers might be more beneficial than having a jury decide your client's case. Jurors will use their "subjective perceptions about the issues, parties, witnesses, or lawyers."[18] A summary-judgment motion, however, is based on the "cold record" — the paperwork — that you submit to the court.[19]

Another possibility is that you could partly lose and partly win your summary-judgment motion. Even if you lose in part and win in part, the court in its decision will explain the facts that are or aren't in dispute and will establish the law. In partly granting and partly denying your motion, the court will narrow the claims, defenses, or issues for trial.

Even if you lose the motion, preparing the motion prepares you for trial. You'll know what proof, in the form of documents and witnesses, you'll need to prove your case. You'll know what's irrelevant to your case. You'll determine what additional proof you'll need to prove your case. Depending on the evidence your opponent submits in opposition to your motion, you'll also get to see what evidence your opponent will use at trial. You'll see the "quality and quantity of your opponent's proof."[20] You'll also get to see the legal arguments your opponent will make at trial.

The worst-case scenario is losing your motion. But even if you lose your motion, your motion will prepare the judge for trial. Your summary-judgment motion will be your opportunity to educate and persuade the court of your client's position. In your motion, you'll need to educate the court about the law and facts in your case. This is true if the judge who decides your motion will also preside at your trial. Many counties in New York, however, have different judges hearing motions and different judges conducting trials. Know the rules and practices of the court in your county. Knowing which judge will decide your motion and which judge will be presiding at trial is critical.

Moving for partial summary judgment has an additional advantage: The court "can eliminate specific claims, defenses, and even parties from the action before trial."[21] In the next issue, the *Legal Writer* will discuss moving for partial summary judgment.

Continued on Page 58

Disadvantages to Moving for Summary Judgment

Preparing the summary-judgment motion might mean expending effort, money, and time. You'll have to prepare the paperwork for the motion. You'll need to compile information you've obtained through disclosure. You'll need to talk to your client and any witnesses to obtain affidavits. Depending on the judge's or court's rules, you'll need to write a memorandum of law and prepare for oral argument.

Moving for summary judgment might cause your adversary to cross-move for summary judgment instead of merely opposing the motion. Cross-moving for summary judgment, which the *Legal Writer* will explain further in the upcoming issue, means that your adversary is seeking a judgment in its favor.

Even if your adversary doesn't cross-move for summary judgment, the court might grant summary judgment to your adversary. Be careful because your summary-judgment motion might come back to bite you. Under CPLR 3212(b), the court may grant summary judgment to your adversary even if your adversary hasn't moved for summary judgment. Judges and practitioners call this "searching the record." The court will grant summary judgment for your adversary when it's clear that your adversary is entitled to judgment as a matter of law. Many judges are disinclined to grant summary judgment when a party hasn't moved for summary judgment. The *Legal Writer* discusses below the specifics to a court's searching the record.

Moving for summary judgment might discourage settlement. Once your adversary prepares the opposition papers, your adversary might not settle. Your adversary, in its own mind, is now prepared for trial. No incentive exists to settle the case.

Your adversary might easily defeat your summary-judgment motion. If your adversary can show that one material issue of fact exists for trial, the court will likely deny your motion. (The burdens in moving for summary judgment and in opposing a summary-judgment motion are discussed below.)

The judge who'll decide your motion might be predisposed to denying summary judgment. Many judges believe that granting summary judgment is an extreme remedy. In granting the motion, the court denies one of the parties the right to proceed to trial. Thus, make sure that you "investigate the philosophy, attitude, and track record of the judge who will consider the motion."[22] Sometimes, a judge will tell you early on in the litigation that your case is weak. It might be futile to invest time and money in moving for summary-judgment when you already know how the court will rule.

You might be at a disadvantage if you move for summary judgment. By moving for summary judgment, you're showing your hand to your adversary — the proof you have to win your case. Unlike criminal litigation, few surprises exist in civil litigation. For tactical reasons, however, you might not want to reveal everything at this point in the litigation. If you reveal it in your summary-judgment motion, no element of surprise will arise at trial. But you might want to wait until before trial or during trial to reveal the information. Be careful not to break any ethical, court, and civil-practice rules by waiting until the last minute to reveal the information. You might face sanctions or preclusion, or both, and you'll risk losing your client's case.

If the court grants your summary-judgment motion, your adversary might appeal. The appellate court might reverse the motion court's judgment. You might have to go to trial in any event.

Searching the Record

Under CPLR 3212(b), a court may grant summary judgment to a party without a party's needing to cross-move for summary judgment "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment." In practical terms, this means that if you, the plaintiff, move for summary judgment against the defendant, the court might grant summary judgment to the defendant even if the defendant never cross-moved for summary judgment; the court might grant summary judgment even if the defendant never asks for it. This is known as searching the record. If the plaintiff moves for summary judgment and attacks the defendant's answer, the court will "go behind the answer to examine the sufficiency of the complaint. If the complaint is defective, [the complaint] and not the answer is dismissed, and the plaintiff, although the movant, becomes the victim."[23] Perhaps that's why one scholar calls searching the record "the doctrine of extreme disappointment."[24]

Even though the court might search the record sua sponte and grant summary judgment for the non-moving party, the court might not grant summary judgment sua sponte.[25] A party needs to make a motion, on paper, with proof to substantiate its request for relief for summary judgment. A court, therefore, may not grant summary judgment when

The court might grant summary judgment even if the defendant never asks for it. This is known as searching the record.

no party has moved for summary judgment.

If the plaintiff has several claims but moves for summary judgment on one claim but not on all claims, the court may search the record only with respect that that one claim.[26]

The court may search the record on a motion under CPLR 3212 as well as under CPLR 3211, a motion to dismiss. (The *Legal Writer* has already discussed in this series motions to dismiss under CPLR 3211.[27]) The court may search the record if a plaintiff moves to dismiss a defense under CPLR 3211(b). After searching the record, the court may determine that the cause of action in the complaint is inadequate and dismiss the complaint instead of dismissing the defense.

The Evidence and Proof in Your Summary-Judgment Motion

Extract from the pleadings, EBT transcripts, written admissions, and discovery responses all the evidence you'll need for your summary-judgment motion. On a summary-judgment motion, the court may consider "[a]ny form of evidence, documentary or otherwise."[28] Practitioners' arsenal of choice is the affidavit. If you have holes in the evidence — other material facts in which you have no documents to substantiate them — prepare an affidavit that explains those holes. Your client or another witness, or both, will attest to those facts in the affidavit(s).

Prepare an affidavit that outlines all the evidence. Refer to the evidence — the documents you're relying on as proof — in the affidavit. Explain the documents and lay a foundation for them in the affidavit(s). Label and attach the documents as exhibits.

The affidavit must be from someone with personal knowledge of the facts. The affiant may rely on inadmissible hearsay (as opposed to hearsay that's admissible because it falls under an exception). Make sure to include in the affidavit the statement that the affiant has personal knowledge of the information contained in the affidavit.

Your affidavits must comply with CPLR 2101. The *Legal Writer* explained in the last issue about affidavits on a motion to dismiss. Affidavits in summary-judgment motions must contain a caption. At the end of the affidavit, it must have the affiant's signature with the affiant's printed name under the signature. Consult CPLR 2106 if you're submitting an affirmation from an attorney, physician, osteopath, or dentist.

Many attorneys submit their own affirmations. Unless the attorney has first-hand knowledge of the facts, an affirmation from a party's attorney has no probative value. Judges prefer that attorneys not make legal arguments in their affirmations. No attorney can swear to the truth of their legal arguments.

In the next issue of the *Journal*, the *Legal Writer* will discuss, among other things, writing the affidavits, the burdens each party has in moving, opposing, or cross-moving for summary judgment, and the various nuances to opposing a motion, replying to opposition papers, and cross-moving for summary judgment. ■

1. 1 Byer's Civil Motions § 77:01 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Oct. 24, 2012).
2. *Id.*
3. CPLR 3212(a).
4. David D. Siegel, New York Practice § 279, at 477 (5th ed. 2011).
5. Byer's Civil Motions, *supra* note 1, at § 77:01.
6. *Harrington v. Palmer Mobile Homes, Inc.*, 71 A.D.3d 1274, 1275, 900 N.Y.S.2d 152, 154 (3d Dep't 2010).
7. *Id.*; *see also* CPLR 3212(a).
8. *See generally Brill v. City of New York*, 2 N.Y.3d 648, 648, 814 N.E.2d 431, 431, 781 N.Y.S.2d 261, 261 (2004).
9. Byer's Civil Motions, *supra* note 1, at § 77:01; *see also* Patrick Connors & John Higgitt, *The 120-Day Deadline Is Final, Usually*, N.Y.L.J., June 13, 2005, at 9, col. 2.
10. Byer's Civil Motions, *supra* note 1, at § 77:01 (quoting *Gaines v. Shell-Mar Foods, Inc.*, 21 A.D.3d 986, 987, 801 N.Y.S.2d 376, 377 (2d Dep't 2005)).
11. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:42, at 37-14 (2006; Dec. 2009 Supp.).
12. Siegel, *supra* note 4, at § 279, at 478-79.
13. *Id.* § 281, at 481.
14. *Id.*
15. *Id.* § 279, at 479 (quoting *LaFreniere v. Capital Dist. Transp. Auth.*, 105 A.D.2d 517, 518, 481 N.Y.S.2d 467, 468 (3d Dep't 1984)).
16. Siegel, *supra* note 4, at § 279, at 479 (quoting *Armstrong v. Peat, Marwick, Mitchell & Co.*, 150 A.D.2d 189, 191, 540 N.Y.S.2d 799, 801 (1st Dep't 1989)).
17. Barr et al., *supra* note 10, § 37:350-§ 37:351, at 37-35, 37-36.
18. *Id.* § 37:14, at 37-12.
19. *Id.*
20. *Id.* § 37:11, at 37-12. Sometimes lawyers move for summary judgment to obtain disclosure; you'll learn about the other side's case without paying for costly EBTs.
21. *Id.* § 37:350, at 37-35 (emphasis omitted).
22. *Id.* § 37:32, at 37-13.
23. Siegel, *supra* note 4, at § 282, at 483.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See* Gerald Lebovits, *Drafting Civil-Litigation Documents, Parts XV–XIX, Motions to Dismiss*, NYSBA Journal, May–Oct. 2012.
28. Siegel, *supra* note 4, at § 281, at 480.

Gerald Lebovits, a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I speak English as a second language, and I have no trouble learning vocabulary, syntax, and grammar. But English pronunciation is very difficult. Here is one example: Why is *deliberate* pronounced differently in the following two sentences?

> We need to deliberate before deciding important issues.
>
> Deliberate choices must be made on important issues.

Answer: The difference in pronunciation is determined by whether *deliberate* functions as a verb (in the first sentence) or as an adjective (in the second sentence). The vowel sound of English verbs ending in *-ate* are stressed (accented), English speakers stress them to sound like the *a* of "ate" (past tense of the verb "eat)." But when *deliberate* functions as an adjective, the last syllable ("-ate") is unstressed and sounds like a schwa sound ("uh" or "ih").

That pronunciation is not due to a rule; it is idiomatic, indicating that a large majority of Americans have pronounced it that way for a long time. The same pronunciation is common and occurs in other verbs and adjectives ending in -ate: as in *moderate*, *separate*, *reciprocate*, and others.

Almost everyone who learns English as a second language finds pronunciation a challenge, and the differences in British and American pronunciation exacerbate the problem. The only benefit is that pronunciation indicates where words came from and approximately when they entered English. Thus, it is helpful for people like me – and perhaps only we care about that information.

In English, most nouns have first-syllable stress, so a term like the newly coined *clawback* is a noun, Americans say "claw*back*," (the first syllable of the compound receiving the stress). So when the new noun became a verb, the first syllable lost its stress, so Americans say *claw*back.

Notice also the pronunciation of the noun "*precedent*," which contrasts with the adjective *precedent* (seen in the legal phrase *condition precedent*). In that phrase you would pronounce the noun *precedent* with the first syllable stressed (pre*cedent*), but when you use the phrase *condition precedent*, the word *precedent* is a modifier – and is pronounced *condition precedent*.

Another feature of English that frustrates non-native speakers who learn it as a second language is seldom noticed by native speakers. You are probably unaware that you usually pronounce the word "Plato" like "Play-doh." There is no detectible difference in the voiceless *t* of "Plato" and the voiced *d* sound of "Play-doh" in the middle of both words. The difference occurs in the length of the first syllable. (The sound of *Play* is slightly extended.)

I can almost hear readers arguing that indeed there is a difference in pronunciation, and they are right that when they carefully say those words alone, they can detect a difference. But when the two words appear inside a sentence, the difference disappears. The difference occurs because you lengthen the sound of *a* in "Play-doh" to indicate that a voiced sound will follow, and you shorten the sound of the *a* to indicate that a voiceless vowel *t* will follow. (Prove this for yourself by pronouncing *latter* and *ladder.* And you do it without realizing that you are doing it!)

These are not the only idiosyncrasies of English syntax that confuse newcomers to the language. The placement of an otherwise unimportant word can completely change the meaning of a statement. Notice the contrast in the meaning of the following statements:

> I got my used car for a good price.
>
> I got a good price for my used car.
>
> Certainly I cannot say he is speaking the truth.
>
> I cannot certainly say he is speaking the truth.

Another problem for people attempting to learn English is that English words can have dual or triple meanings. *Oversight* can mean "unintentional error" or "intentional watchful supervision":

> The attorney filed his brief late due to an oversight.
>
> The Committee maintains oversight over the sub-committee's proceedings.

Effectively can mean either "well" or "actually."

> His responsibility was effectively discharged. (It was efficiently discharged.)
>
> His responsibility was effectively discharged. (It was, in effect, discharged.)

Presently can mean "soon" or "now."

> I will join the group presently. (I will join the group soon.)
>
> I am presently without lodging. (I am without lodging now.)

Sanction can mean "approval" or "penalty":

> The sanction of violence can never be government policy.
>
> Official sanction against the perpetrator is being considered.

Finally, even if foreigners have mastered all these problems, the following usage – which readers have pointed out in emails – remains frustrating: For example, why does one fill *in* a form by filling it *out*? Why do houses burn *down* while they are burning *up*? And, why, when the stars are *out* they are visible, but when lights are *out* they are invisible?

From the Mailbag:

From a column titled "Boston Capital" by Steven Syre: A former Harvard management professor who now heads a giant casino company explained to a packed room of corporate executives that gambling "exists to offer an opportunity for people to place a modest bit of consideration on the realization of an uncertain outcome." ■

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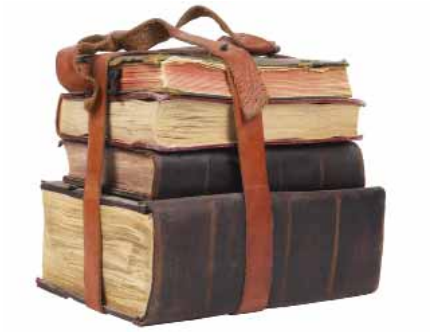

Drafting New York Civil-Litigation Documents: Part XX — Summary-Judgment Motions: An Overview

In the last issue, Part XIX of this series, the *Legal Writer* finished discussing motions to dismiss. We continue this series on civil-litigation document drafting with how to write summary-judgment motions: moving for summary judgment, opposing summary-judgment motions, and cross-moving for summary judgment. We'll explore each party's burden in moving, opposing, or cross-moving for summary judgment; the documents you'll need in support of your motion; and offer tips on writing to get the court to rule for you.

Preliminary Information About Summary-Judgment Motions

Before moving, opposing, or cross-moving for summary judgment, you'll want to know some basic information about summary-judgment motions.

Begin by consulting CPLR 3212 before moving for summary judgment.

On a summary-judgment motion, a court decides whether to grant a judgment for you without a trial. Without having a trial, you could win the entire lawsuit on the papers, that is, the admissible evidence you submit with a summary-judgment motion. The admissible evidence might consist of affirmations, affidavits, examination before trial (EBT) transcripts, photographs, diagrams, maps, records, reports, contracts, bills, admissions, checks, receipts, DVDs, disclosure responses and failures to disclose, stipulations, and like things that are admissible at trial, such as authenticated or certified documents.

Any party may move for summary judgment in any type of action. The one exception is found in CPLR 3212(e). A court may not grant summary judgment in the non-moving party's favor in a matrimonial action.[1] CPLR 3212(e) prohibits this type of "reverse summary judgment."[2]

The earliest you may move for summary judgment is after issue has been joined[3] — after the defendant serves its answer to the plaintiff's complaint (or after the plaintiff serves its reply to the defendant's counterclaim).[4] A court may set a date after which no party may move for summary judgment. That date may not "be earlier than 30 days after the filing of the note of issue."[5] Make sure to check the judge's rules for moving for summary judgment. In a scheduling order, a court might set a specific date by which you must move for summary judgment.[6] If the court doesn't set a date, a party may move for summary judgment "no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown."[7] The Court of Appeals strictly enforces the 120-day rule unless you show good cause for your delay in moving for summary judgment.[8]

If a court shortens the time period in which you may move for summary judgment and your motion is untimely under the court's rules, your motion will still be untimely even if you've moved within the statutory 120-day rule.[9]

If one party timely moves for summary judgment and another party untimely cross-moves for summary judgment, the party who missed the deadline may not "piggyback" on the timely motion.[10]

Moving for summary judgment is appropriate when no dispute exists about the material facts of the case. Whether a fact is material depends "on the law and its application to the claims and defenses in the pleadings."[11] You'll be entitled to summary judgment if you establish the elements of a claim or a defense as a matter of law.

> If the non-moving party fails to respond to a fact in opposition to a summary-judgment motion, the court will deem the fact admitted.

Moving for summary judgment under CPLR 3212 "automatically suspends all pending disclosure proceedings" until the court decides the motion or the "court orders otherwise."[12]

If you, the non-moving party, fail to respond to a fact in opposition to the summary-judgment motion, the court will deem the fact admitted. Also insufficient is if you respond that you're ignorant of a fact unless you show that your "ignorance is unavoidable and that with diligent effort the fact could not be ascertained in time for the motion."[13]

Even if you don't oppose a summary-judgment motion, the moving party must still prove that it's entitled to summary judgment. The moving party must still show the court that no issue of fact warrants a trial.

CONTINUED ON PAGE 57

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