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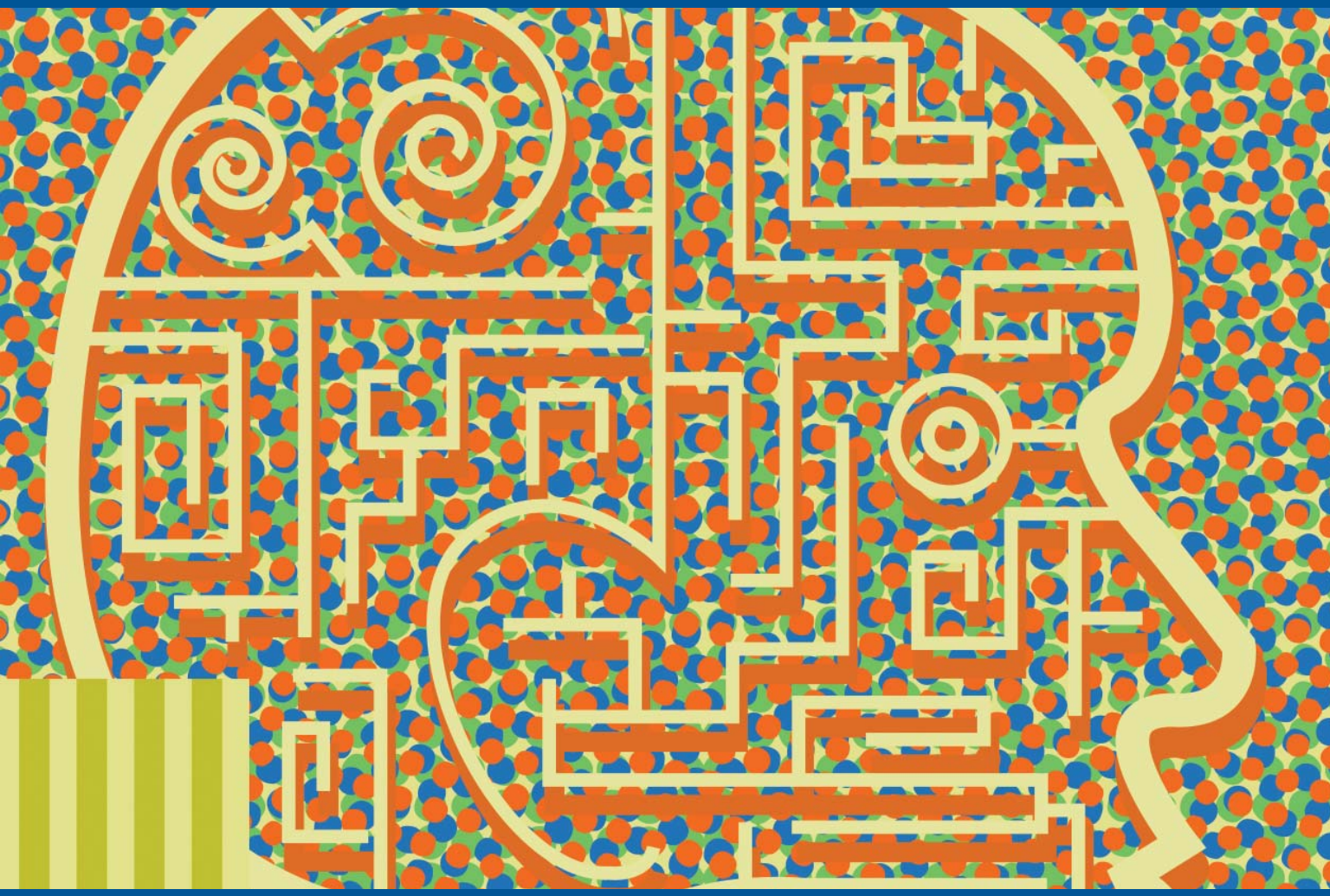
NEW YORK STATE BAR ASSOCIATION

Journal



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by Gordon J. Cochrane

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NEW YORK STATE BAR ASSOCIATION
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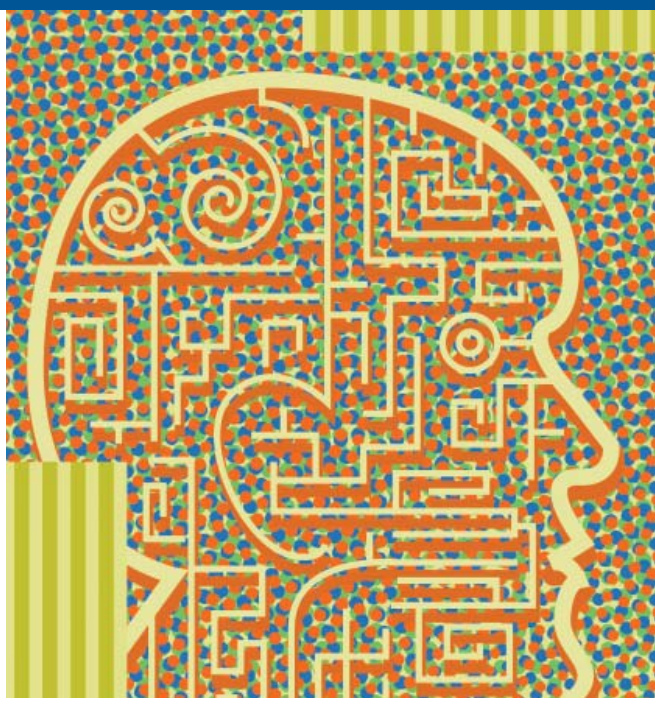
CONTENTS

NOVEMBER/DECEMBER 2010



PSYCHOLOGY AND THE LAW

Understanding and Presenting Your Clients

BY GORDON J. COCHRANE 10

DEPARTMENTS

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STEPHEN P. YOUNGER

Government Ethics Reform: Rebuilding Public Trust in Our Institutions of Government

The November election season is behind us, and New Yorkers are looking to the promise of a new administration, which will be taking office at a time when public faith in government is at an all-time low. Serious concerns have been voiced about the strength of New York's ethics codes for government officials, and the call for reform has been raised in many quarters. While thousands of public servants – many of them lawyers – make positive contributions on a daily basis through their government service, the unethical actions of a relative few tarnish the honest work of those who are dedicated to serving the public good.

Unless we reverse this, we risk losing dedicated and honest public servants whose reputations are called into question due to the misconduct of others. Moreover, it is becoming increasingly difficult to encourage the next generation of talented lawyers to devote their careers to public service given the low level of confidence in our public institutions. Public service is a higher calling, and the citizens of New York should view it in this light.

With these concerns in mind, last June I created a Task Force on Government Ethics, which includes government ethics experts, prosecutors, criminal defense lawyers, government attorneys and law professors. The task force was charged with conducting a systematic review of public sector ethics issues that impact the legal profession. Led by Professor Patricia E. Salkin, associate dean and director of the Government Law Center at Albany Law School, and Michael J. Garcia, a former United States Attorney for the Southern District of New York, the task force has spent the past few months focusing on four key areas: honest services legislation; enforcement and due process issues; financial disclosure; and municipal ethics.

Honest Services

In *Skilling v United States*,[1] the United States Supreme Court recently narrowed the federal law often used to prosecute government corruption, holding that it covered only bribery or kickbacks. The Court apparently exempted from the reach of the federal criminal statute situations where a government official makes a decision resulting in personal gain without disclosing that fact or when an official accepts an unlawful benefit. Recognizing the gap created by this decision, the subcommittee is focusing on state legislation that would enhance the power of New York's prosecutors in this important area of government corruption.

Enforcement and Due Process

Over the past couple of years, there has been a patchwork approach to ethics enforcement; the investigation or prosecution of wrongdoing by state employees is handled by various entities, including the Public Integrity Commission, the Attorney General, the Inspector General, District Attorney's offices and the United States Attorney's offices. This has created confusion and, even worse, uncoordinated and conflicting investigations and results. This subcommittee is looking into how best to structure the enforcement of New York's ethics laws, while making sure that state employees are granted the due process rights to which they are entitled.

Disclosure

In New York, high-level government employees are required to file financial disclosure statements. Critics contend that the required disclosure is inadequate and fails to reveal all that the public needs to know about the financial interests of public officials. This subcommittee is considering how much disclosure should be required, trying to balance the need for transparency with the privacy interests of government employees. As to lawyers who serve in government, the subcommittee is further considering how the desire for transparency can best be balanced against ethical obligations with respect to client confidentiality.

Municipal Ethics

It is well recognized that the state's regulations dealing with municipal ethics are out of date and ineffective. However, there is considerable

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ongoing debate about the shape and scope of reform in this area. The subcommittee is considering issues related to modernizing municipal ethics regulations, which include legislative proposals in the areas of disclosure, enforcement and the structure of local ethics boards. Subcommittee members are seeking to propose legislation that will balance the needs of both small and large municipalities.

Our task force is working on serious proposals that reflect a reasoned and neutral perspective. We are looking forward to receiving the task force's report and recommendations, which we anticipate will be ready for consideration at our January House of Delegates and Executive Committee meetings. In addition, this topic will be addressed during my Presidential Summit at the Annual Meeting on January 26.

The time is ripe for New York to tackle government ethics reform. With each passing day, the public grows more and more skeptical about our government process. Bar associations can and should play an important role in shaping the contours of the debate over government ethics and helping to restore the public trust. The State Bar has a responsibility to preserve the pillars of our democracy and, in my view, government ethics is one of the central pillars. ■

1. 130 S. Ct. 2896 (2010).

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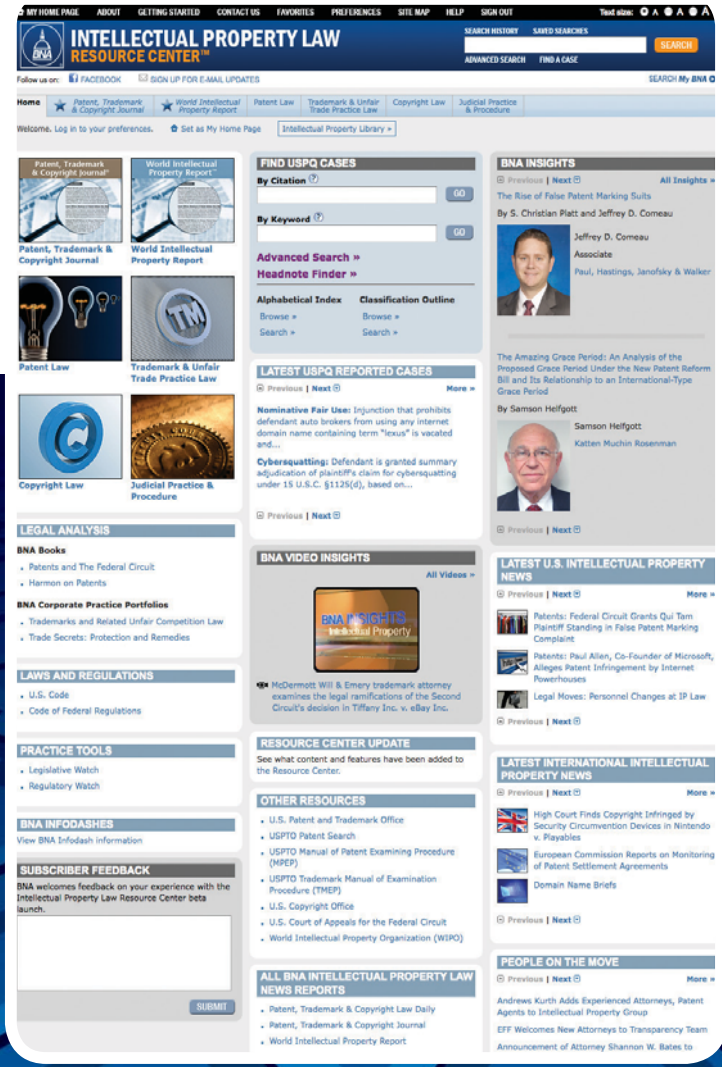

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December 3 — Rochester
December 6 — Albany
December 8 — Syracuse
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November 9 — Albany; Long Island; Westchester
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Jim McElhaney's A Day in Discovery
November 10 — Albany

Update 2010 – Live Session
November 12 — New York City

Expert Testimony – What You Need to Know in New York
November 18 — Buffalo

†Eighth Annual Sophisticated Trusts and Estate Institute
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November 18–19 — New York City

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

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

Ethics for Real Estate Lawyers
(9:00 am – 1:00 pm)
November 19 — New York City
December 15 — Westchester
December 16 — Albany

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

†Update 2010
(video replay)
December 2 — Albany
December 3 — Buffalo; Loch Sheldrake
December 10 — Canton; Plattsburgh; Westchester
December 15 — Jamestown
December 16 — Binghamton
December 17 — Corning; Long Island; Watertown

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

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

Gain the Edge: Negotiation Strategies for Lawyers
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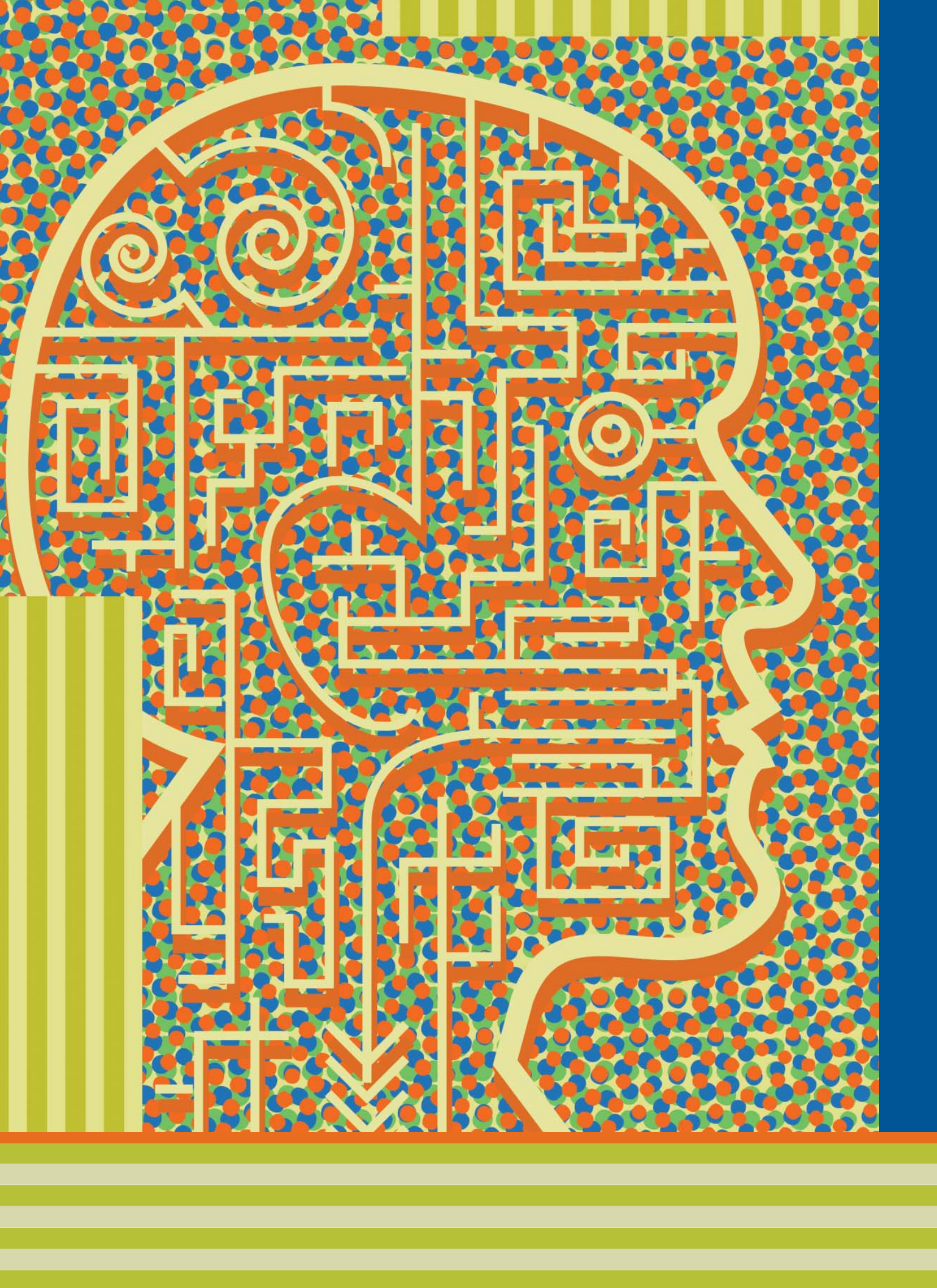

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Psychology and the Law

Understanding and Presenting Your Clients

By Gordon J. Cochrane

Often it's not what we don't know that causes problems;
It's what we know that isn't so that causes problems.

Will Rogers

Your client, a firefighter, was a primary responder to an unusual series of calls involving a severe burn victim, a motor vehicle accident resulting in a child fatality, and a gruesome teen suicide. He has been diagnosed with post-traumatic stress disorder (PTSD) arising from the cumulative effect of the three incidents and has been away from work for six weeks. However, his diagnosis, his treatment, and his readiness to return to work are being challenged by his employer and his insurance company. His employer argues that firefighters often deal with difficult situations and that your client should be able to return to work now. His insurance company insists that PTSD is not cumulative but, if his diagnosis is confirmed, he must receive the treatment known as Eye Movement Desensitization and Reprocessing (EMDR).

On what basis will you argue that your client's diagnosis is valid? Can PTSD arise from cumulative events? How will your client's recovery prognosis be determined? Has research shown that EMDR is an effective treatment for PTSD? These questions demonstrate that a basic awareness of psychology concepts will enhance your ability to represent your clients in cases where psychology plays an important role.

Psychology, like law, is more often gray than it is black or white. Psychology is a science but, unlike other sciences, the subjects in psychology research are subjective human beings. We creatively construct our sense of self. We attribute meaning to the world around us. We imagine, assume, generalize, and attribute meaning to ambiguities. We remember creatively, formulate our values and our beliefs through the screen of our culture, and selectively attend to that which confirms our biases and attitudes. We "mind-read" with excessive confidence and project our perceived realities onto other people and situations. We are sometimes honest and sometimes deceptive; we are rational and irrational. We are consciously and sometimes unconsciously motivated, yet we believe that we are more objective than subjective.

Within the justice system, lawyers, judges, psychologists and psychiatrists are charged with locating the truth from within the intricate labyrinth of human complexity. The search for truth can be a little less daunting if we can distinguish the valid and valuable aspects of the study of psychology and human behavior from the popular misconceptions, myths, and inaccuracies that are often attributed to the profession of psychology.

Research Design and Treatment Efficacy

Many clients and jury members erroneously equate psychology research with the research conducted in sciences such as chemistry or physics, in which what is studied is a constant. In psychology research, the subjects studied are humans – members of a creative, information-processing species. And each human's reality is unique. Humans are not passive receptors. They are not constants or even reliably consistent.

PTSD and the other *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-1V-TR*) anxiety disorders, depression, chronic pain, grieving and other psychological problems are often part of the damages-mosaic of clients. When clients need psychological treatment, their insurance carrier may insist upon a particular treatment model and may try to determine the number of sessions necessary for the client's recovery. Being aware of the key elements of research design in psychology, the realities of treatment efficacy and expected recovery rates will better position attorneys to effectively promote the needs of their clients.

Much of psychology research is devoted to the determination of treatment effectiveness: Can it be shown that a particular treatment model for a particular psychological problem actually results in positive change? This type of research is necessary, but it is far from perfect. Outcome research requires a design that includes one or more clearly described treatment models, therapists who are trained in the treatment being studied, randomly selected treatment groups, a control group for each treatment group, statistical control for selected variables such as gender, age, education, socio-economic status, religion, rural-urban location and any other variables that could influence the outcome. In addition, a means of establishing a valid benchmark is necessary, to measure the problem being researched, as well as a valid means of assessing any change that occurs following treatment.

The statistical procedure known as analysis of variance (ANOVA) is applied to the outcome data to determine if there was an average positive change. If so, was it greater than chance? If the design included valid measures of individual differences, some of the characteristics common to those who made positive changes can also be identified.

Limitations of Outcome Research

The design described above is the one most frequently used to determine if a treatment is effective. As client advocates, attorneys need a basic understanding of this design and the outcomes derived from it.

The studies are done with groups of people. A client's rate and degree of recovery is compared to the average recovery rate of the treatment group. This comparison is expressed as a probability statement rather than a definitive statement about a client's rate and degree of recovery.

It is very difficult in these studies to maintain treatment consistency across therapists and across groups. Therapists and the group members are not absolutes. The disorder being studied is not an absolute. The nature and severity of depression, for example, is not the same for each person who suffers from depression. Random selec-

tion is ideal from a statistical perspective but simply not possible in the real world. Approximate randomness is as good as it gets. Larger samples are best, but dropouts occur in every study, which further dilutes the theoretical randomness of the sample.

A key variable rarely included in psychology research is the self-efficacy of the individuals being studied. Research design for treatment effectiveness is based on the premise that the ability to utilize the cognitive, behavioral, and emotional tools provided in the treatment model is the same for each person in the study. The fallacy in this premise can be easily illustrated: It is obvious that the horse matters, but an experienced jockey who is well versed in the efficacy-based handbook of competitive riding should be able to get positive results on any horse. Recent research confirms the importance of self-efficacy in the attainment of a positive outcome in psychotherapy, but little has been done to incorporate this variable in the research designs or to devise effective strategies for the enhancement of client self-efficacy.[1]

Treatment effectiveness is determined by comparing the average score of the treatment group to the average score of the control group, whose members, as far as researchers can determine, received no treatment. A positive outcome can be viewed as quite beneficial or simply as better than nothing since the control group received no treatment.

The validity of treatment effectiveness is also influenced by the validity and reliability of the instruments used to measure change. Self-reports, which are often used in outcome research, are the least reliable measures of change. Measures of change are usually conducted immediately following treatment and sometimes again, with those subjects who make themselves available, six months or more after treatment. For example, recent research shows that initial outcomes for cognitive behavioral therapy (CBT) for depression are much better than they are at the follow-up two years later.[2]

Another factor that influences expectations of treatment effectiveness and recovery rates is the use of the medical model in psychology. Simply stated, the medical model consists of a client-reported problem followed by a diagnosis, a prescribed treatment and an expected recovery time. Even the word "treatment," which is part of the psychology lexicon, originates in the medical model, and it is actually unhelpful when applied to the practice of psychology.

Physicians commonly endorse cognitive behavioral therapy, and cognitive behavioral therapy sounds solid, scientific, specific, reliable, even unique. But, it is important to keep in mind what CBT means: "cognitive" refers to the identification of a client's problematic thinking patterns, beliefs, and biases; "behavior" refers to the client's decisions and actions that follow his or her cognitions; and "therapy" refers to appropriate changes in the client's cognitions, behavior, and, consequently, his or her emotional well-being.

CBT is not a medicine that a client takes over a specific period of time to treat a disease, although it is an important feature in all research-validated therapy models. As stated earlier, while humans are rational beings, they are also feeling and perceiving beings. For instance, emotionally focused couple therapy sounds soft and unscientific, while CBT for couples sounds solid and scientific, yet both models are research-validated – though neither model helps all couples and neither one has been found to be superior to the other. In the same vein, CBT plus controlled exposure has repeatedly been shown to be effective for treating PTSD,[3] but the outcome literature also shows that recovery times vary greatly. And close to 30% of PTSD sufferers never fully recover.[4]

Why Does Research Design Matter in the Legal Setting?

This brief summary of research design in psychology identifies three fundamental truths. Clients, like all people, are subjective beings and, consequently, do not fit well in the research designs traditionally used in scientific research. In spite of the many limitations evident in psychology research, however, a few therapy models, sometimes with modifications and sometimes temporarily supplemented with pharmaceuticals, are beneficial to many who struggle with PTSD, other anxiety disorders, depression, relationship problems, and personal performance issues.

Therefore, when the care and well-being of a client is threatened by a health professional or an insurance company representative who makes authoritative declarations about treatment models and recovery rates, attorneys and clients should not be intimidated. There is no certainty in psychological research, but rather only probability. Sometimes the probability of a positive outcome is high, while other times it is barely greater than chance. Certainty in psychology is a myth, and, as a result, an unchallenged myth could be detrimental to a client.

Psychological Assessments

If psychological assessments did not have an impact on the lives of the people involved, it would not matter if they were valid.[5] Psychological assessments and their cousins, which include workplace performance measures, achievement tests and lie detection devices, are of particular interest to those practicing in employment law, family law, personal injury law, and criminal law. Each year publishers send their glossy catalogs to registered psychologists, enthusiastically promoting a wide range of psychological assessment instruments. But it would be wrong to assume that all, or even most, of these instruments are valid and reliable simply because they appear in a catalog.

What Is Test Validity?

Test validity is the extent to which the test being used actually measures the characteristics intended to be measured. In employment law, for example, a test manual states that people with characteristics x, y and z make good leaders. Before this test can be considered valid, the research supporting the test must show that x, y and z are real and valid concepts. Then data must be gathered from a sufficiently large sample of the population in question, here, the "good leaders," confirming that characteristics x, y and z do in fact correlate highly with good leadership.

The *MMPI-2* is the most valid and reliable measure of mental health currently available.

When the validity of x, y and z has been demonstrated and there is an acceptably high positive correlation between these characteristics and good leadership, the statement that test takers who score highly on x, y and z will probably be good leaders is valid. Of course, some test takers will score moderately high on x, y and z, or high on two of the variables and lower on the third variable, which raises the question whether there are variables other than x, y, and z that predict good leadership. In other words, it is rather difficult to reduce individuals to variables or, alternatively, to identify all those variables that sum up a population of individuals.

What Is a Standardized Base?

In baseball a batting average of 300 has practical meaning only in terms of the standardized base established by the averages of all players in the same league. If the league batting average is 450, then 300 is not impressive. However, in the major leagues, where the mean batting average is about 265, a player with a batting average of 300 or higher is, when compared with his fellow major leaguers, a good hitter.

A standardized base for psychology assessments is a large and relatively current sample of people who definitely have the characteristics of the psychological disorder or disorders being assessed. The test taker's scores are compared to the scores of the people who constitute the standardized base. The test taker's scores are like or unlike those who have the disorder in question. The *Minnesota Multiphasic Personality Inventory* (*MMPI-2*) is an example of a mental health measure with a standardized base. Standardized measures in other realms have a base derived from criteria for career interests, achievement measures, and learning disabilities.

What Is Construct Validity?

A construct is research-based and its meaning is agreed upon by a consensus of professionals qualified in the appropriate field of study. All tests are reflections of real-world phenomena or characteristics. It is therefore important that the constructs in a test actually reflect real-world phenomena. There is a general consensus among health professionals concerning constructs such as depression and anxiety, while there is no general consensus concerning personality or the unconscious. Measures of poorly defined or undefined constructs are clearly perilous.

The *Myers Briggs Type Indicator* is widely used in employment settings. It purportedly measures the personality preferences of the test taker on four dichotomies. Extroversion-introversion is one, but people are not that simple. A person can, for example, be extroverted in some situations and introverted in others. *Myers Briggs* does not have a standardized base and lacks construct validity.[6] If a client is negatively affected by an employment decision even partly based on the client's *Myers Briggs* profile, an attorney may argue the unacceptability of a decision based on an invalid measure.

Surprisingly, the *Rorschach* inkblot test is still used by many psychologists and psychiatrists. It rests on ill-defined theory and has no standardized base. Reviewers point out that projective tests generally and the *Rorschach* specifically are not valid because the final interpretation resides exclusively with the examiner.[7] The interpretation of the *Rorschach* may reveal more about the theoretical orientation, favorite hypotheses, and idiosyncrasies of the examiner than it does about the person taking the test. It is not an appropriate assessment instrument for clients, under any circumstances.

Valid Law-Related Psychology Measures

The *MMPI-2* is a 567-item instrument designed to assess mental health on 10 *DSM-1V-TR*–defined clinical scales and three subscales. It can be administered by either a psychologist or psychiatrist who is specifically trained in the use of the *MMPI-2*.

The *MMPI-2* measures the mental health of the client at the time the assessment is conducted. It neither measures past or future mental health nor identifies causation of elevated scores. According to separate reviews, the *MMPI-2* is, in the 2004 edition of *Buros Mental Measurement Yearbook*, the most valid and reliable measure of mental health currently available. No competing psychological assessment device has stronger credentials for clinical assessment.

The responses of the person taking the *MMPI-2* are compared to the responses of the very large standardized sample for each clinical scale. For example, if the test taker responds in the same way the depressed individuals in the sample group responded, the person's score on

CONTINUED ON PAGE 16

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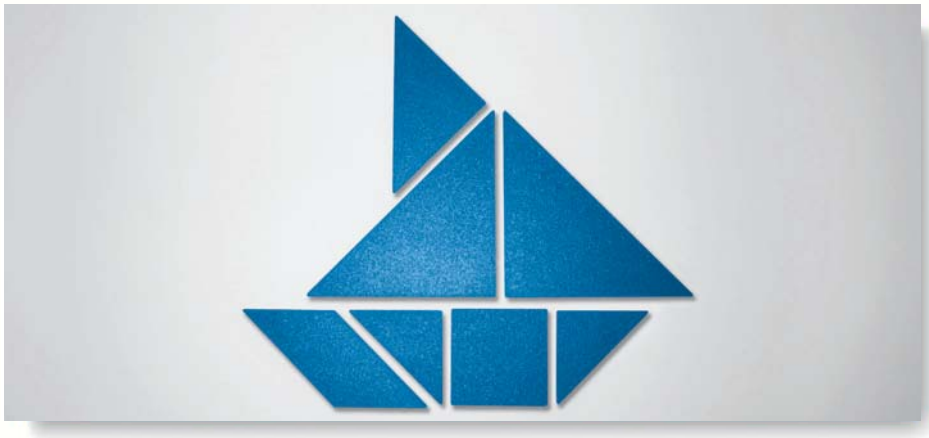

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Continued from Page 14

the depression scale will be elevated and the test taker is given a diagnosis of depression. The higher the test taker's score the greater the severity of his or her depression. A psychological assessment that includes a standardized instrument, such as the *MMPI-2*, is superior to an assessment based on a clinical interview and professional opinion, or an assessment based on a clinical interview and invalid assessment instruments.

Some controversial alterations to the *MMPI-2* have occurred in the past few years. A new instrument called the *MMPI-2 Restructured Form* or *MMPI-2-RC* was released in 2008. The controversy primarily concerns the validity of these new scales. According to Dr. James Butcher of the University of Minnesota, the Restructured Clinical (RC) scales and the Fake Bad Scale are theory-based and have no standardized base as of yet, whereas the standardized base of the *MMPI-2* validity scales and clinical scales is derived from 78,159 subjects.[8] While the *MMPI-2-RC* may eventually gain the credibility that a standardized base provides, a client's profile, if derived from an *MMPI-2-RC*, is much more vulnerable to a validity challenge than one derived from the *MMPI-2*.

The *Personality Assessment Inventory* (*PAI*) is also designed to assess *DSM-IV-TR* disorders. The test taker responds to each of the 344 items on a four-point scale, ranging from definitely false to definitely true. There are four validity scales, 11 clinical scales, five treatment scales, and two interpersonal scales. This instrument does not have a standardized base comparable to the *MMPI-2*, but it does have an initial base and the sample size should grow in time. Again, from a legal perspective, the key concern resides not in the range or importance of the issues assessed, but in the degree to which a client's *PAI* profile is vulnerable to a challenge to its validity.

It is important to ask the assessing psychologist or psychiatrist to explain what assessment instrument(s) he or she will be using, whether they include measures of particular concerns, and whether the instrument(s) have validity. Attorneys do not want to receive a seemingly impressive and expensive assessment report that is later challenged because the assessment instrument(s) lack validity.

Assessing Personality Disorders

The *DSM-IV-TR* lists 10 distinct Personality Disorders (PDs). A PD is generally defined as an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, as well as being pervasive and inflexible. Such disorders arise in adolescence or early adulthood. An individual may be stable over a period of time but ultimately experiences distress and impairment. The *DSM-V* is currently being prepared, and it is probable that there will be fewer distinct PDs listed in the new diagnostic manual.

The coping strategies of normal individuals are diverse and flexible. Individuals with PDs practice the same strategies repeatedly with only minor variations. Because they are adaptively inflexible, their stress level keeps rising. When other people or situations do not adjust to suit a person with a PD, a crisis ensues. A PD person's life is like a bad one-act play that repeats over and over again.[9]

Because normality and pathology reside on a continuum where one slowly fades into the other, a PD assessment, diagnosis, and prognosis can be a difficult undertaking. The complexity of the disorders, the possibility of one PD overlapping with others, the functioning of the individual when in crisis versus when not in crisis, the unreliability of self-reports, the frequent uncooperativeness of the individual being assessed, and the considerable time and money required to conduct a thorough assessment, all make this a challenging task. As work on the development of the *DSM-V* shows, the task is further complicated by professional disagreements concerning the nature of the PDs themselves and, consequently, about the appropriate assessment tools and interview strategies.

The *MMPI-2* or the *PAI* can be used in conjunction with structured interviews that are designed to assess the *DSM-IV-TR*, Axis II PD criteria. The *Millon Clinical Multiaxial Inventory* (*MCMI*) was developed exclusively for the assessment of PDs, but its sample base is not large. No single instrument or interview session is sufficient for a reliable assessment of a PD. Professional disagreement on the ultimate diagnosis is common. If a client is being assessed for the possibility of a PD, attorneys will want the person conducting the evaluation to be a psychologist or psychiatrist who is an expert in assessment procedures, knows the assessment and the PD literature, and has experience with PD assessment.

Post-Traumatic Stress Disorder

The diagnosis and treatment of PTSD often has a role in determining damages in personal injury law; in criminal cases involving assault, home invasion and other violent events; in potentially life-threatening health situations; and in employment law when decisions are made concerning insurance benefits.[10] PTSD is one of the *DSM-IV-TR* Anxiety Disorders. A central aspect of all the Anxiety Disorders, including PTSD, is an actual or perceived loss of control in the face of an actual or perceived threat. If a diagnosis of PTSD is made, the threat must involve perceived potential death or serious injury to self or others. When prolonged, the intense anxiety of PTSD becomes depressing. Therefore, many people initially diagnosed with PTSD are also diagnosed with depression.

It is important for attorneys to know that the research supporting the *DSM-IV-TR* criteria for PTSD is more than a dozen years old. The extensive research that has been

Continued on Page 18

Continued from Page 16
conducted in the past decade has greatly expanded our understanding of PTSD and will be incorporated in the *DSM-V*.[11]

No addiction treatment model has been confirmed by research to be more effective than any other model.

Some of the key findings from this decade of research are the following:

1. The event itself, as important as it is, is not the sole cause of PTSD. The fear-laden images that flood a client's mind during and after a potentially traumatizing event fuel his or her anxiety. The client did not know the outcome before the event was complete. During the event, he or she anticipated harm to himself or herself and/or to others and then, following the event, probably imagined the worst that could have happened.[12]
2. Individual circumstances play a role in PTSD onset. Recent research has found that immediate-onset and delayed-onset PTSD were similar in the number and type of symptoms reported, but the delayed-onset group showed a gradual accumulation of symptoms that were quite persistent.[13] Those with delayed-onset had greater stress sensitivity and were less able to adapt to continued exposure to stress than immediate-onset subjects. Exposure to continuous stress may well reflect the individual's type of work. People in careers such as the military, police force, fire-fighting, and paramedical service are more likely than most to be exposed to continuous severe stress. If the culture of their work is such that they ignore their accumulating stress, they risk suffering from delayed and cumulative PTSD symptoms.
3. While a client is able to anticipate a very harmful outcome before the potentially harmful event is complete, he or she is also able of generalize from the single event and become anxious about other, previously unconsidered threats.[14] This human capacity to generalize from what did happen to what could happen can result in a growing vulnerability to anxiety, reduced self-confidence, avoidant behaviors, fatigue, and a reduced quality of life.[15]
4. The diagnosis should include the *MMPI-2* for validity reasons and for the practical reason that the F scale on the *MMPI-2* is the most reliable measure of feigned or exaggerated symptom claims.[16] Current research confirms that CBT plus exposure are the central aspects of treatment, but adaptations are made for individual differences, such as the client's self-efficacy, previous negative experiences, anxiety sensitivity, chronic pain, continuing stress exposure, and support system.[17] The recovery prognosis is a statement of probability based on each client's mosaic.

Addiction Treatments

Strong and differing opinions dominate the addiction field and research is often overridden by these opinions. There are vocal advocates for various treatment models, primarily Alcoholics Anonymous and variations of CBT. Yet no addiction treatment model has been confirmed by research to be more effective than any other model.[18] Each model helps some participants.

The existing research does not support the popular disease model of addiction and does not support the related hypothesis that, as a disease, addiction afflicts all people equally. After the age of 30, most problem users are no longer problem users, leaving a minority of chronic users. This minority shows a high incidence of *DSM-IV-TR* problems with diminished self-efficacy, anxiety, and depression.[19]

The judge or jury that a client may face could be influenced by expert testimony on addiction theories and treatment models that are presented as definitive, which, however, does not exist in this field. Therefore, it is important to ask for supporting research evidence and assess what is provided using the research design and assessment concepts discussed in this article.

Memory and Truth Assessment

Clients, colleagues, jury members, and judges watch commercial television and read the popular print media, both of which expose them to misinformation about memory and truth assessment, and to other psychological fictions. In fact, a consensus now exists among memory researchers that memory is a dynamic medium shaped by our expectancies, needs, beliefs, emotions, and creative thoughts.[20] Individuals remember by reconstructing events according to their life experiences and emotional circumstances at the time of recall. Consequently, memory is altered each time it is recalled.[21] Memories can be distorted by variables, such as current information and misinformation, misattribution, selective attending, concentration variations, intended and unintended suggestion, and unconscious bias.[22] Nobody, including health professionals and police officers, is able to reliably tell whether an uncorroborated memory is factual, the product of creative imagination, socially influenced, or a fabrication.[23] Those who deem themselves to be highly intuitive are wrong more often than chance because they assume that they have special abilities and tend to draw conclusions based on overconfidence and insufficient evidence.[24] Whereas memory researchers recognize that uncorroborated memory is unreliable, many members of the general public still hold the view that memory, espe-

cially their own memories, are infallible even though they clearly are not.

Without corroborating evidence, we simply do not have the ability or the technology to reliably determine whether memories are accurate or whether a person is being truthful or untruthful. The *MMPI-2* and the *PAI* have scales that are reliable for determining whether the test taker is malingering, but these measures apply exclusively to the questions on the respective instruments.

The research on the verbal and nonverbal cues in human communication confirms the role of these conscious and unconscious cues but, without corroboration, we do not know with acceptable certainty the nature or meaning of these messages.[25] Even when we seek clarification from the sender, we still do not know whether the person's clarification is truthful or untruthful. In that regard, it is a myth that "truth drugs," such as Sodium Pentathol and sodium amytal, can induce a person to be truthful. These drugs are sedatives that actually interfere with the recipient's judgment and cognitive functioning. They are not, therefore, reliable as inducers of truth.

In the realm of commercial truth assessment, which includes the tests, devices, and techniques that are marketed as reliable methods of assessing truthfulness, it is important to attend to the details and terminology that are part of the marketing material. Take note of any terminology that sounds impressive but leaves you in a "faith" position – that is, you must have faith in the expert's explanation. People who promote training programs for truth detection or for a polygraph often use the term "baseline information" as if their quickly gathered unverified baseline information is the same as a standardized base, but it is not.

In the legal world, where the decisions impact the lives of the people involved, no reliable psychological means of assessing truthfulness without corroborating evidence exists. All the devices and programs currently marketed for assessing truth are based on meaning attribution. In other words, some type of information is identified, meaning is then attributed to the information and a decision is made. ■

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14. *See supra* note 11: N. Breslau & J.C. Anthony; R.A. Bryant et al.; R.A. Bryant & R.M. Guthrie; B.O. Olatunji & K.B. Wolitzky-Taylor.

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The February 2010 Attorney Professionalism Forum referred to in this article is reprinted here, starting on page 28.

Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism

By James M. Altman

New York lawyers became subject to an entirely new rule of professional ethics regarding inadvertent disclosure on April 1, 2009, when the New York Rules of Professional Conduct (Rules) replaced the New York Code of Professional Responsibility (Code). Rule 4.4(b) provides simply: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[1] Because Rule 4.4(b)'s use of the term "document" refers to readable electronic information as well as paper documents,[2] Rule 4.4(b) governs the "errant email" as well as the "errant fax."

Although the Code was the backbone of New York's legal ethics regime for almost 40 years, it never contained a disciplinary rule specifically addressing inadvertent disclosure. Nonetheless, in 2002 and 2003, two of New York's most important expositors of legal ethics – the ethics committees of the New York County Lawyers' Association (NYCLA) and of the City Bar, respectively – had opined, with certain qualifications, that a lawyer who receives an inadvertently disclosed document (the "Receiving Lawyer") had three ethical obligations: first, not to examine the document after receiving notice or realizing that the document had been inadvertently sent; second, to notify the person who had sent the document (the "Sender") of its receipt; and, third, to abide by the instructions of the Sender as to the disposition of the document.[3] Compared to those ethics opinions, Rule 4.4(b) dramatically reduced the ethical obligations of a Receiving Lawyer. It requires the Receiving Lawyer only to notify the Sender; it does not require the Receiving Lawyer to refrain from examining or using the document, or to return, destroy or sequester the document, as the Sender might request.

But, to paraphrase Professor Roy Simon, the Chief Reporter of the New York State Bar Association Committee on Standards of Attorney Conduct (COSAC), which spent five years drafting the Rules, Rule 4.4(b)'s "simple clarity" can be a trap for the unwary.[4] This was demonstrated last year in the answer to an inquiry regarding inadvertent disclosure published in the Attorney Professionalism Forum (Forum) of this *Journal*'s February 2010 issue.[5]

The Attorney Professionalism Forum Answer

In the Forum, a lawyer questioned whether it was "professional" to read a document from an adversary's law firm attached to an email that inadvertently was sent to him. From the document's title – "Confidential—Case Plan Report Analysis of Case Including Problems and Recommendations" – and the identity of the other listed recipients of the email, the inquiring lawyer recognized immediately that the email and its attached document "was not meant for me." Relying on the "facially simple" language of Rule 4.4(b), the Answer advises the inquiring lawyer that she or he can read the Case Plan Report and use the information therein because, even though "there are passionately held opinions on both sides of this issue[,] . . . the Rules of Professional Conduct as established by the four Presiding Justices of the State of New York impose no obligation on the receiving lawyer to refrain from reading the material, keeping the material, and using the information discovered."

The Answer is technically correct, but only as far as it goes. Because the Answer focuses on what Rule 4.4(b) requires and what it permits, the Answer considers the inquiry solely from the standpoint of professional discipline. The "Rules define proper conduct for the purposes of professional discipline"; they prescribe "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[6] Thus, the Answer rightly concludes that once the Receiving Lawyer notifies the other side of an inadvertent disclosure, the Receiving Lawyer has fulfilled all of his or her ethical obligations under Rule 4.4(b) regarding the errant email. The lawyer would not be subject to professional discipline for examining the inadvertently disclosed Case Plan Report, even though that Report almost surely qualifies under Rule 1.6(a) as "confidential information" of the opposing party[7] and such an examination would be tantamount to learning opposing counsel's analysis of the strengths and weaknesses of the opposing party's case. Similarly, the inquiring lawyer would not be subject to professional discipline for making use of the Report or the information gained about the opposing party's legal analysis of its claims, even, for example, by quoting in motion papers the opposing counsel's own admissions about the weaknesses of the claims or using the Report as impeachment material during cross-examination at trial.

A disciplinary focus is not a broad enough perspective, however, in determining how a Receiving Lawyer should respond to an inadvertent disclosure, for two reasons: First, the Receiving Lawyer should consider the requirements and limitations of law beyond the Rules; indeed, COSAC's Comments to Rule 4.4(b) emphasize the importance of doing so. Second, the Receiving Lawyer should take into account that Rule 4.4(b) provides only a minimum standard of ethical conduct, and her own standards of attorney professionalism may require more.

Rule 4.4(b)'s Seeming Simplicity – A Trap for the Unwary

The Rules themselves articulate the importance of considering the broader context of positive law in deciding how lawyers should conduct themselves. "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general."[8]

Comment 2 to Rule 4.4 specifically reminds lawyers about the bodies of law beyond the Rules that create obligations for lawyers, including significant legal obligations with respect to inadvertent disclosure:

> Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-ordered sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived.

Thus, in determining how to respond to an inadvertently disclosed document, the Receiving Lawyer should look

not only to the ethical requirements of the Rules, but also to other applicable law.

In the litigation context, for example, Federal Rule of Civil Procedure 26(b)(5)(B) specifically establishes a protocol for resolving claims of inadvertent disclosure that arise during discovery in a federal lawsuit, and it imposes specific legal obligations upon the Receiving Lawyer. Once the Receiving Lawyer has learned about an ostensibly inadvertent disclosure, the Receiving Lawyer is required to (1) "promptly return, sequester or destroy the specified information and any copies"; (2) "not use or disclose the information until the claim [of inadvertent disclosure of privileged information] is resolved"; and (3) "take reasonable steps to retrieve the information" if the Receiving Lawyer disclosed it before learning of the Sender's inadvertent disclosure.

Thus, if the Forum's inquiring lawyer received the inadvertently disclosed Case Plan Report during the discovery phase of a federal lawsuit, that lawyer would not only need to consider Rule 4.4(b) but also Federal Rule 26(b)(5)(B) in determining how to respond. Although further disclosure and use of that Report is not prohibited by Rule 4.4(b), it is proscribed by Federal Rule 26(b)(5)(B). And, even though that Federal Rule does not flatly preclude the inquiring lawyer from thoroughly examining the Case Plan Report, federal case law confirms, as envisioned in COSAC's Comment 2 to Rule 4.4, that at least in some circumstances the inquiring lawyer could be disqualified in the event that the Case Plan Report was, in fact, privileged and the privileged information contained therein was sufficiently crucial to the defense of the opposing client.[9] Similarly adverse consequences might befall lawyers acting too precipitously under Rule 4.4(b) in a state lawsuit as well.[10]

The Forum Answer makes no attempt to evaluate whether, as a matter of substance, Rule 4.4(b) is a good rule for resolving the conflict between the principle of client confidentiality underlying our legal system and a lawyer's duty of competent and diligent representation that shapes the differing perspectives of the Receiving Lawyer and the Sender whenever a document containing confidential information is inadvertently disclosed. As discussed below, however, Rule 4.4(b)'s resolution of that conflict is profoundly flawed.

Rule 4.4(b) Inadequately Protects Confidential Information

The principle of client confidentiality, which encompasses the protection afforded by the attorney-client privilege as well as the broader ethical duty of confidentiality,[11] underlies both the private attorney-client relationship and the successful functioning of our public system of justice. Comment 2 to Rule 1.6 explains the importance of that ethical duty to the success of the attorney-client relationship:

> The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing and legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.[12]

But the principle of client confidentiality supports not only a private relationship, it also promotes the "broader public interests in the observance of law and administration of justice."[13] Full and frank communication is essential to a lawyer's skillful advocacy in our adversary system of justice.[14] Not surprisingly, the principle of client confidentiality has been considered the single most important rule of legal ethics.[15]

Rule 4.4(b) provides no immediate protection to confidential information in the inadvertently disclosed document.

When COSAC rejected the approach of the prevailing ethics opinions and decided to adopt Rule 4.4(b), it placed confidential information at risk. Whereas the prevailing ethics opinions required the Receiving Lawyer initially to respect a Sender's claim that the document was inadvertently disclosed and contained confidential information, Rule 4.4(b) provides no immediate protection to confidential information in the inadvertently disclosed document. Instead, it places on the Sender the burden of taking legal action to retrieve and shield any confidential information. Rule 4.4(b) is a bad default rule, because, in a variety of circumstances, substantive law and procedural rules do not enable the Sender to safeguard confidential information.

Consider, first, inadvertent disclosure in the transactional context. Suppose two lawyers are negotiating a commercial lease. What happens if the landlord's lawyer receives an unambiguously inadvertent disclosure from the tenant's counsel of an email between counsel and the

tenant discussing the strengths and weaknesses of the tenant's position on several key negotiating points and its strategy on those points? The email clearly would be protected by the attorney-client privilege and disclosure to the landlord's lawyer surely would be damaging to the counsel's representation of the tenant. Under Rule 4.4(b), however, the sole ethical obligation of the landlord's lawyer would be to notify the tenant's counsel of the email's receipt.

But what remedy is available to the tenant once its lawyer learns about the errant email? Virtually none. Unlike inadvertent disclosure in a litigation context, when there is already a pending court proceeding in which the Sender can seek to prevent the Receiving Lawyer from examining, disclosing and using privileged information inadvertently disclosed, in the transactional context the Sender has no immediate access to a judge. Moreover, it is not even clear what claim for relief the Sender could assert successfully to prevent examination, disclosure and use of the privileged information. Thus, Rule 4.4(b) does not adequately protect the principle of client confidentiality when inadvertent disclosure occurs in the transactional context

Second, what if the inadvertent disclosure concerned confidential information a sending lawyer had an ethical duty to protect, but which was not protected by the attorney-client privilege or work-product doctrine? For example, the fact of a client's criminal conviction – the crime, the date of conviction, even the legal proceedings that led to the conviction – is a matter of public record that is not protected by the attorney-client or work-product privilege, but, because its disclosure can be embarrassing or detrimental to the client, it is still confidential information that lawyers have an ethical duty to protect.[16] Suppose a lawyer and his client are discussing the client's conviction in an email that is mistakenly addressed to opposing counsel and the Receiving Lawyer satisfies her ethical duty under Rule 4.4(b) by notifying the Sender. What can the Sender do to prevent the Receiving Lawyer from using that confidential information or disclosing it to others? Nothing. Even though there is a judge available in a pending lawsuit, the Sender cannot seek a protective order preventing the Receiving Lawyer and her client from disclosing that confidential information to others or possibly using that confidential information to its benefit in the lawsuit because that information is not protected by any evidentiary privilege. In that circumstance also, Rule 4.4(b) fails to protect a client's confidential information.

Third, even when an admittedly privileged document is inadvertently disclosed during formal discovery in a federal civil lawsuit and the judge ultimately grants the Sender's protective order, the interim protection afforded the privileged document under Federal Rule 26(b)(5)(B) is, as a practical matter, limited. Even though that Rule requires the Receiving Lawyer to take various steps to prevent further disclosure of the privileged document – the Receiving Lawyer must not disclose or use the document until the claim of privilege has been resolved – the Receiving Lawyer still may further examine the document. Thus, that Rule does not prevent the Receiving Lawyer from learning as much as possible about the privileged information contained in the inadvertently disclosed document, and once the Receiving Lawyer has done so, that information is available to assist the Receiving Lawyer in the litigation, even if, on the Sender's motion for a protective order, the judge ultimately prohibits the Receiving Lawyer from disclosing or using the privileged document. It is highly unlikely that what already has been learned by the Receiving Lawyer will be, in effect, unlearned, and Federal Rule 26(b)(5)(B) makes no effort to limit how much privileged information the Receiving Lawyer learns from the inadvertently disclosed document.

In short, Rule 4.4(b) is ethically challenged. The Rule itself fails to offer any protection to inadvertently disclosed confidential information, and the substantive law and procedural rules to which it defers leave the Sender remediless – and, therefore, confidential information wrongly exposed to disclosure and use – when the inadvertent disclosure takes place in a transactional context or otherwise outside the context of an existing lawsuit; when, in the litigation context, the confidential information is not protected by the attorney-client privilege or work product doctrine; and, in the interim period, when a protective order has not yet been granted.

There Is No Justification for Leaving Inadvertently Disclosed Confidential Information Unprotected

Why, then, did COSAC adopt Rule 4.4(b) and leave inadvertently disclosed confidential information unprotected, as described above? It appears that COSAC had two reasons. First, Rule 4.4(b) is identical to ABA Model Rule 4.4(b); adopting Rule 4.4(b) fostered the goal of uniformity, which was one of the animating principles of COSAC's work.[17] Second, COSAC believed that imposing obligations upon Receiving Lawyers other than mere notification was "too complex and would likely result in a rule too difficult to implement and enforce."[18]

Neither of these reasons is compelling. Together, they constitute an admission that COSAC avoided the substantive and practical difficulties of creating its own rule regarding inadvertent disclosure by following the ABA's approach. But, COSAC proposed, and the Rules contain, many provisions that differ from the Model Rules. So, uniformity is in itself a weak reason, especially when compared to the principle of client confidentiality. If, as a matter of substance, Model Rule 4.4(b) is a bad solution to the problem of inadvertent disclosure, then, in this case, the goal of uniformity is misleading.

Some of COSAC's concerns about the complex circumstances affecting inadvertent disclosure and the problem of enforcing a rule that imposes an ethical obligation upon the Receiving Lawyer beyond mere notification are reflected in the following three possible justifications for Rule 4.4(b):

1. if the Receiving Lawyer owes a duty not to examine the inadvertently disclosed document once the Receiving Lawyer realizes or is notified that the disclosure was inadvertent, there could be problems with enforcement because of ambiguity about when the Receiving Lawyer realized that or was notified and whether the Receiving Lawyer failed to stop examining the document at the appropriate point;
2. the Receiving Lawyer needs the opportunity to examine the inadvertently produced document in order to evaluate and possibly litigate whether the document is privileged or the privilege was waived; and
3. the Receiving Lawyer has a duty, as a partisan advocate, to exploit the Sender's mistake and that duty takes precedence over the principle of client confidentiality.

None of those justifications is sufficient.

> Lawyers have a duty of confidentiality even to clients not their own.

First, COSAC's concern about whether disciplinary authorities will bring unwarranted cases against a Receiving Lawyer for examining an inadvertently disclosed document after realizing or being notified that the disclosure was inadvertent seems overblown. Given the lack of sufficient resources plaguing disciplinary authorities, it is unlikely that disciplinary authorities will use scarce resources to bring such fact-specific, questionable cases. A healthier respect for the prosecutorial discretion of chief disciplinary counsel seems warranted. Conversely, the potential difficulties in proving a violation should not militate against adopting a rule that prohibits lawyers from examining documents they know were not intended for their eyes.

Second, the opportunity to evaluate whether the document was or still is privileged is not a reason that the Receiving Lawyer should be able to examine the document further or disclose it to others after realizing or learning that it was sent inadvertently. In the transactional context, the Receiving Lawyer generally has no right to information not intentionally provided by a counterparty. In the litigation context, the normal ways of providing information to opposing counsel sufficient to evaluate whether a document is protected as privileged are time tested and workable. The Sender will need to put the inadvertently disclosed document on a privileged log and describe it, the same as any other purportedly privileged document. The Receiving Lawyer should not be able to use the possibility that the document never was or is no longer privileged in order to bootstrap an opportunity to examine the contents of the document further before returning or destroying it, because the content of the document is unrelated to the determinative facts under Federal Rule of Evidence 502 and its state analogues regarding the carefulness or carelessness of the Sender in making and rectifying the disclosure.[19] The content of the document may be related to an argument that the document never was privileged, but in that respect the privilege log will give as much information about the document's content as that provided with respect to any other purportedly privileged document. And, if someone needs to examine the contents of the document to rule on whether the document is privileged or not, the court can and generally will review the document *in camera*. Thus, the issue of whether the inadvertently disclosed document was or still is privileged provides no justification for examining the document or sharing it with others or making use of it prior to the determination of its privileged status.

Third, in addressing the Receiving Lawyer's ethical duty upon receipt of an inadvertently disclosed document, the ABA,[20] NYCLA,[21] and the City Bar[22] all opined that the duty of zealous representation – enshrined previously as Canon 7 of the Code – was an insufficient reason for invading the confidentiality of the relationship between the opposing party and its counsel. As NYCLA's ethics committee explained, "all lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved – the most basic tenet of the attorney-client relationship – is respected when privileged information belonging to a client is inadvertently disclosed."[23] In effect, the NYCLA opinion provides that lawyers have an obligation as officers of the court to help safeguard the key underpinnings of the legal system, including the duty of confidentiality *even to clients not their own*.[24] Although the ABA's opinion has been withdrawn in light of Model Rule 4.4(b) and the NYCLA and City Bar opinions have been superseded *sub silentio* by the adoption of Rule 4.4(b), the reasoning of those decisions, particularly their weighing of the principle of client confidentiality vis-à-vis the duty of zealous representation, remains persuasive.

Moreover, the priority of a broadly conceived principle of client confidentiality over the duty of zealous representation has been woven into the fabric of legal ethics

in New York. For example, lawyers who are interviewing former employees of adverse corporate parties represented by counsel are prohibited from eliciting information about privileged communications with company counsel.[25] Similarly, it is unethical for lawyers to elicit from litigation experts or knowledgeable others an opposing party's privileged communications with its counsel.[26] Lawyers may not use technology to extract metadata containing another client's confidential information.[27] Nor may lawyers disclose to their clients or use for their clients' benefit confidential information gained through a good-faith unsolicited communication from a would-be client.[28] In each of these situations, the duty of zealous representation is circumscribed by the duty to respect the confidentiality of communications between another party and its current, former, or prospective counsel.

In fact, the 2009 change from the Code to the Rules gives the general principle of client confidentiality even greater priority over the demands of partisan advocacy. Whereas Canon 7 of the Code stated that "a lawyer should represent a client zealously," the Rules deliberately abandoned "zealous representation" as the standard for ethical partisan advocacy. Under Rules 1.1 and 1.3, competent and diligent representation of a client is sufficient. The view of courts and ethics committees that the duty of client confidentiality trumped the duty of zealous representation under the Code applies with even greater force now that the Rules have rejected "zeal" as the criterion for ethical client advocacy.

Rule 4.4(b) Undermines Attorney Professionalism

Comment 3 to Rule 4.4 seems to reflect COSAC's ambivalence about Rule 4.4(b)'s minimalist approach. In its first sentence, Comment 3 acknowledges that certain actions that Rule 4.4(b) does not ethically require of the Receiving Lawyer would foster the principle of client confidentiality: "Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality." Recognizing that there are lacunae in the substantive law and procedural rules regarding the Receiving Lawyer's obligations when confronting an inadvertently disclosed document, the last sentence of Comment 3 purports to identify a zone of impunity where, as a matter of professional conscience, a Receiving Lawyer who wants to honor the principle of client confidentiality may choose, subject in at least some circumstances to a discussion with the client, (1) not to examine or continue to examine the document after realizing or learning that it was inadvertently sent or (2) to abide by the Sender's instructions as to its disposition. That last sentence provides: "[I]f applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4."

This effort to identify a safe harbor for an ethically minded Receiving Lawyer is misconceived, because it ignores that lawyers who want to reject a legally permissible course of action that would benefit a client on the grounds of a higher professional duty may need to justify their conscientious choice through recourse to mandatory disciplinary rules that in effect provide protection from client pressure and malpractice liability. Because the last sentence of Comment 3 envisions a course of action that a conscientious Receiving Lawyer may, but is not required to, take, that makes it less likely that a Receiving Lawyer will do so.

Consider the dialogue between the conscientious Receiving Lawyer and her client that Rules 1.2 and 1.4 appear to require in the event that the Receiving Lawyer in a transactional matter is notified promptly that opposing counsel inadvertently sent her a document containing opposing counsel's analysis of the open negotiating points. Rule 1.4 arguably would require the Receiving Lawyer to inform her client about receipt of the document, since, given the practical value of knowing opposing counsel's analysis, receipt of that document might be construed as a "material development[] in the matter" or part of the Receiving Lawyer's obligation to "keep the client reasonably informed about the status of the matter."[29]

In the resulting dialogue, it is easy to imagine the client's wanting the Receiving Lawyer to examine thoroughly the inadvertently disclosed document. It is also easy to imagine that the client would not agree to subordinate its self-interest to the far more abstract concern about the principle of client confidentiality, especially when the disclosure of confidential information was caused by the mistake of the opposing party or its counsel. After all, how much does the Receiving Lawyer's client care about harm to the opposing client or to the legal system generally? Given the client's likely views, the conscientious Receiving Lawyer may find it difficult to convince her client that she should return the document to the Sender without examining it. Absent the client's agreement, it becomes difficult for the Receiving Lawyer to do what she believes is right, because she likely would be concerned that her client might discharge her in the pending matter, not retain her for future matters, or even sue her for malpractice for not aggressively exploiting the Sender's mistake.[30]

If, instead, Rule 4.4(b) required the Receiving Lawyer to return the document without examining it after notification that it was inadvertently sent, then the dialogue between the Receiving Lawyer and her client would be entirely different. Rule 1.4(a)(5) would require the Receiving Lawyer to consult with her client, because the Receiving Lawyer would know that her client would expect her to examine the document, but the pertinent ethical rule would prohibit that.[31] Because the Receiving Lawyer would be able to present the conscientious course of action as the only one allowed by the Rules (and, presumably, followed by responsible lawyers), this would parry both the malpractice concern and the concern that the client could take its business to another lawyer whose professional conscience was more malleable. In effect, reliance upon a disciplinary rule mandating conscientious conduct would make it possible for the Receiving Lawyer to do the right thing without any adverse consequence.

Professional ethics seeks to impose upon lawyers certain ethical obligations that, because they are based upon the fiduciary nature of the attorney-client relationship or the lawyer's special role in the administration of justice, are "higher" than the morals of the marketplace and sometimes more extensive or demanding than what positive law requires. Attorney professionalism shares the goal of professional ethics to establish such a realm of better conduct through disciplinary rules but, beyond that, also seeks to inculcate, support, and elicit the aspiration to exceed even those minimum ethical requirements. Regarding inadvertent disclosure, for example, professional ethics and attorney professionalism share the view that the ethical duty of client confidentiality is more expansive than the analogous evidentiary privileges both in terms of the scope of client information that is protected and the scope of the protection required.[32]

Lawyers act as partisan advocates for their clients, but they are also "officers of the court," with a special obligation as members of the legal profession to take care of our legal system and to safeguard justice. When, as a matter of professional conscience, a Receiving Lawyer returns an inadvertently disclosed document without examining it in order to honor a broadly conceived principle of client confidentiality, she is giving priority to her role as an officer of the court over her role as a partisan advocate. Because it is not ethically required, that is an act of attorney professionalism exhibiting special concern for the well-being of the legal system as a whole rather than a particular party participating in that system. In failing to support such action, Rule 4.4(b) erodes attorney professionalism.

Viewed in this context, the fundamental problem with Rule 4.4(b) stems from its overly modest ambition. Rule 4.4(b) is ethically anemic. Rather than impose a demanding ethical standard on Receiving Lawyers confronting an inadvertent disclosure, COSAC deliberately imposed a *de minimis* ethical requirement – mere notification – in effect referring to the civil justice system the resolution of the substantive conflict between the principle of client confidentiality and competent client representation. Unfortunately, the substantive law and procedural rules of the legal system sometimes leave confidential information unjustifiably unprotected. If a specific ethics rule really needed to be adopted to define the Receiving Lawyer's obligations in the event of an inadvertent disclosure,[33] it needed to be robust: it needed to be more protective of confidential information than the normal processes of law are. In terms of what was needed, Rule 4.4(b) is a failure.

Finally, the strategy underlying Rule 4.4(b) – to use the legal system's substantive and procedural rules to define the obligations imposed upon the Receiving Lawyer – not only resulted in a bad rule regarding inadvertent disclosure, but, more generally, it also undermined the view that the ethical realm constituted by professional ethics and attorney professionalism is different from – indeed, sometimes should be more extensive and more demanding than – what the law requires. That, too, erodes attorney professionalism.

In sum, Rule 4.4(b) should be replaced by a new rule that, without judicial intervention, provides protection for confidential information that is as complete as possible. In the interim, lawyers should consider their own professional conscience to determine if and when to respond to an inadvertent disclosure in a manner that better serves the principle of client confidentiality than the ethical minimum of mere notice to the Sender. ■

1. 22 N.Y.C.R.R. § 1200.35(b).

2. *See* Rule 4.4(b), cmt. 2. This article also uses the term "document" to refer to emails and other electronic information as well as paper documents.

3. NYCLA Comm. on Prof'l Ethics, Formal Op. 730 (2002); Ass'n of the Bar of the City of New York, Formal Op. 2003-04.

4. Roy Simon, Simon's New York Rules of Professional Conduct Annotated 257 (2009 ed.).

5. Attorney Professionalism Forum, N.Y. St. B.J. (Feb. 2010), pp. 52–53.

6. Rules, Scope, § 6.

7. Rule 1.6(a) defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." 22 N.Y.C.R.R. § 1200. Thus, "confidential information" includes privileged information as well as other information that, under DR 4-101(A) of the Code, was defined as a "secret." *See generally*, James M. Altman, *The Secret About Secrets*, N.Y.L.J., Jul. 14, 2000, p. 24, col. 1.

8. Rules, Scope, § 7.

9. *See, e.g.*, *Cars R US Sales & Rentals, Inc. v. Ford Motor Co.*, No. 08 C50270, 2009 WL 1703123, at *1 (N.D. Ill. Jun. 18, 2009).

10. *Cf., e.g.*, *Forward v. Foschi*, No. 9002/08, 2010 WL 1980838, at *15 (Sup. Ct., Westchester Co. May 18, 2010) (denying motion to disqualify counsel for violating Rule 4.4(b) because "the e-mails in question . . . do not give Forward and his counsel an unfair advantage in this litigation"). *Cf. also Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 819–20 (Cal. 2007) (upholding disqualification of counsel for disseminating and using inadvertently disclosed privileged documents).

11. *See supra* note 7.

12. Rule 1.6, cmt. 2.

13. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (discussing the purposes of the attorney-client privilege).

14. David M. Greenwald, Edward F. Malone & Robert R. Stauffer, 1 Testimonial Privileges, 1-6 (3d ed. 2005).

15. Roy Simon, Simon's New York Rules of Professional Conduct Annotated, 81 (2009 edition).

16. *See* Nassau Co. Bar Op. 96-7 (criminal conviction remains a secret unless public knowledge is widespread). *See generally* note 7, above.

17. *See* Executive Summary of Rule 4.4(b) when that Rule was presented to the New York State Bar Association House of Delegates meeting on January 26, 2007.

18. The Reporter's Notes to Rule 4.4(b) when that Rule was presented to the New York State Bar Association House of Delegates meeting on January 26, 2007 stated that "[a] disciplinary rule that would take into account all of the circumstances in which a lawyer should be able to read, retain, and use . . . the information contained in an inadvertently sent document would be too complex and would likely result in a rule too difficult to implement and enforce."

19. Federal Rule of Evidence 502 provides that inadvertent disclosure does not automatically constitute a privilege waiver. As to whether a waiver occurred, Rule 502(b) focuses the court's attention on whether the disclosure was inadvertent, whether the Sender took reasonable precautions to prevent inadvertent disclosure, and whether the Sender promptly took reasonable steps to rectify the disclosure.

20. Prior to the adoption of Model Rule 4.4(b), for roughly a decade the ABA's ethical guidance on inadvertent disclosure was based on ABA Formal Op. 92-368, which specifically rejected that a lawyer has an "obligation to capitalize on an error of this sort on the part of opposing counsel."

21. NYCLA Op. 730 (2002).

22. N.Y. City Op. 2003-04 (2003).

23. NYCLA Op. 730 (2002).

24. NYCLA 730, n.5 (2002) ("the principle that client confidences and secrets be preserved must sweep more broadly [than DR 4-101's duty to one's own clients], requiring lawyers to refrain from exploiting confidences and secrets of clients not their own. . . . Put another way, the Disciplinary Rule prohibiting lawyers from knowingly revealing the confidences and [secrets] of their own clients does incomplete justice to the fundamental principle that client confidences and secrets be preserved.").

25. *See* NYSBA Comm. on Prof'l Ethics, Op. 700 (1998); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506, 512 (2007).

26. *See* NYSBA Op. 735 (2001).

27. *See* NYSBA Op. 749 (2001).

28. *See* N.Y. City Op. 2001-01 (2001).

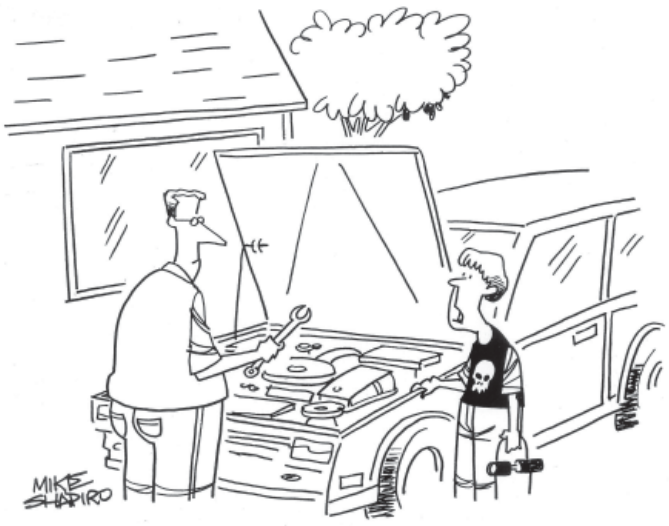
29. Rule 1.4(a)(1)(iii) states that "[a] lawyer shall promptly inform the client of material developments in the matter including settlement or plea offers." 22 N.Y.C.R.R. § 1200.4. Rule 1.4(a)(3) states that "[a] lawyer shall keep the client reasonably informed about the status of the matter." 22 N.Y.C.R.R. § 1200.

30. Although Rule 1.2(e) provides that "[a] lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, . . . when doing so does not prejudice the rights of the client," 22 N.Y.C.R.R. § 1200, it is likely that Rule 1.2(e) would not apply to the Receiving Lawyer's proposed course of action of returning the document to the Sender without examination because it is plausible, if not likely, that not examining the document would adversely effect the success of the Receiving Lawyer's negotiation efforts. In other words, it is likely that knowing the opposing counsel's evaluation of the open items would enable the Receiving Lawyer to achieve a better result for her client than if the Receiving Lawyer lacked such knowledge.

31. Rule 1.4(a)(5) provides that "[a] lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law." 22 N.Y.C.R.R. § 1200.

32. The scope of information protected by Rule 1.6's ethical duty of confidentiality is broader than that protected by the attorney-client privilege, *see* Rule 1.6, cmt. 3, and *supra* note 7, above, and Rule 1.6(a) proscribes disclosing and using confidential information in certain circumstances, while the attorney-client privilege only proscribes disclosure.

33. In deciding to create a rule specifically addressing inadvertent disclosure instead of allowing the prevailing ethics opinions to provide less positivistic guidance, COSAC followed the approach of the ABA, which adopted its own Rule 4.4(b) in 2002 as part of the Ethics 2000 Commission. *See* ABA Formal Op. 05-437. The ABA's decision to adopt Rule 4.4(b) was based, in part, on concerns of commentators and ethics committees that ethics committees did not have the authority to determine how lawyers should respond to inadvertent disclosures without previously adopted specific rules to guide them and that such lack of notice was unfair to respondents in disciplinary proceedings. *See* Maine Op. 146 (1994) ("this Commission is not free to add ethical limitations not expressed by the Bar Rules"), withdrawn by Maine Op. 172 (2000); Monroe Freedman, *The Errant Fax*, Legal Times, Jan. 23, 1995. From the standpoint of attorney professionalism, however, it would have been better for New York lawyers to have relied on the prevailing ethics opinions and perhaps others than to have COSAC avoid the difficult process of adopting a comprehensive ethical rule fully supportive of the principle of client confidentiality and leave protection for confidential information to the normal processes of law.



"I wish I could help, dad, but the only engines I know anything about are search engines."

ATTORNEY PROFESSIONALISM FORUM

This column is reprinted from the February 2010 NYSBA Journal

To the Forum:

As I write this the hour is late and it has been a long day. Just before shutting down my computer I took one last look at my e-mails and I saw an odd one from an adversary's law firm. The message was "fyi" and below was an attachment symbol. The message was "from" a paralegal in my adversary's office whom I had met and remembered. I double-clicked to check the "to" list and it was composed entirely of members of my adversary's law firm, individuals, including experts associated with my adversary's case and my adversary's client. I was on the list but I just did not seem to belong on it. Nevertheless I clicked on the attachment and saw the title of the attached "Confidential-Case Plan Report Analysis of Case Including Problems and Recommendations." At this point it became obvious that this was an internal memo sent to the law firm, associated support individuals and the client. It was not meant for me. My cursor is now at the bottom of the e-mail on the box with an arrow pointing down and the question is "Do I press down?" And further if I do press down and read, what do I do then? As I say it has been a long day, it is late at night, and I sure as hell could use some cheering up.

Sincerely,

Poised on the Edge

Dear Poised:

The answer to your question is, at least facially, simple. The answer is yes. You may click on the box, scroll down and read the communication. In fact, you may use the information obtained. But background is important to an understanding of the relevant rule.

As you may be aware, the New York State Bar Association appointed a committee – the Committee on Standards of Attorney Conduct (COSAC) – which spent several years reviewing the New York Lawyer's Disciplinary Code. It adopted the Model Rule approach and, while it did not adopt the substance of every one of the Model Rules of Professional Conduct (as promulgated by the American Bar Association), it did in this case. The Committee proposed to the Presiding Justices of the four Appellate Divisions the exact wording of Model Rule 4.4, and the Justices adopted it as one of the rules governing the conduct of attorneys in the State of New York. Specifically, Rules of Professional Conduct, Rule 4.4 states as follows:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The official comment of the American Bar Association states "[f]or purposes of this Rule, 'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." The official comments to the New York Rule do not contain this sentence, but the reporter's notes for COSAC clearly indicate that this Rule is intended to apply to e-mails and other electronic transmissions. The Rule is new – the former Code of Professional Responsibility contained no such provision and did not address this issue. However, the reporter's notes appear to explain the thinking of COSAC in adopting Rule 4.4, and illustrate some of the issues. The notes state as follows:

> This formulation places a modest burden on the innocent receiving lawyer, but enables the sender, upon receipt of notice, to take whatever steps the sender considers advisable. The current Disciplinary Rules do not contain a comparable rule, but the provision is needed to guard against breaches of confidentiality and other harms to clients that inevitably arise, even among careful and conscientious lawyers, with the proliferation of e-mail, faxes and other electronic means of communication.
>
> Rule 4.4(b) is deliberately simple in form and simple to implement, leaving to the courts and ethics committees the complex, case-by-case task of determining when lawyers should be able to read, retain, or use the information contained in inadvertently sent documents. A more detailed rule on inadvertently transmitted documents would likely be difficult to apply and enforce, and could not possibly anticipate all of the situations that will arise as technology evolves.

Again, then, the answer to the question, according to the recently adopted Rules of Professional Conduct, is a simple yes. However, to many lawyers who vigorously argue against the receiving lawyer's ability to read (much less use) the information obtained, the answer is anything but simple.

This is not the first time the issue has been addressed in this column; it was the subject of the Forum in the *Journal* of July/August 2003. As noted, there was no comparable rule at the time. The conclusion reached by the Forum was "by returning or destroying the errant fax, you would be merely preserving the clear right of your adversary to keep communications with his/her client confidential, and by so doing would be promoting the integrity of the legal system as a whole." In support of its view, the Forum cited American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 92-368. That Opinion stated: "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules." It spoke of confidentiality and stated further that "if the Committee were to countenance, or indeed encourage, conduct on the part of the receiving lawyer which was in derogation of the strong policy in favor of confidentiality, the Committee would have to identify a more important principle which supports an alternative result. . . .We conclude that their importance pales in comparison to the importance of maintaining confidentiality." The Opinion concludes:

> The preamble to the Model Rules correctly notes that "virtually all difficult ethical problems arise from the conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's interest in remaining an upright person while earning a satisfactory living." Similarly, the same introduction observes that "a lawyer is also guided by personal conscience and the approbation of professional peers." In this instance, those principles . . . all come together to support our conclusion that receiving counsel's obligations under those circumstances are to avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide by sending counsel's direction as to how to treat the disposition of the confidential materials. This result not only fosters the important principles of confidentiality, avoids punishing innocent clients and conforms to the law of bailment, but also achieves a level of professionalism that can only redound to the lawyer's benefit.

The Forum came to the same result and conclusion, as indicated by the passage quoted above regarding the confidential fax inadvertently sent to an adversary.

The purpose in setting forth the reasoning of these two opinions is that they express the position of a substantial number of attorneys on this subject, about which they are quite passionate. Many feel that the answer to this question involves a fundamental perception of what the practice of law is all about.

However, as was stated in the Forum, "unfortunately no clear guidance is furnished by the Code, as there is no Disciplinary Rule or Ethical Consideration which directly addresses the inadvertent discovery of confidential materials." That is no longer true. With Rule 4.4(b) as proposed by COSAC, and *as adopted by the Presiding Justices*, there is guidance, and the guidance requires no more than that the receiving attorney simply notify the sending attorney of the receipt of the materials.

Furthermore, Ethics Opinion 94-382 has been withdrawn by the American Bar Association Standing Committee on Ethics and Professional Responsibility, by way of Formal Opinion 05-437. It did so because in February 2002 the ABA Model Rules of Professional Conduct were amended, and narrowed the obligation of the receiving lawyer. The ABA Model Rules established the Rule as it is set forth in the rules applicable to New York attorneys under Rule 4.4(b). Formal Opinion 05-437 states: "The Rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." It should also be noted that on close examination a rule requiring a lawyer to not read the material, or not to use it, has limited practical application.

Certainly, one can come up with examples of accidental disclosure that few would hesitate to use. One might be confidential material coming into the hands of a criminal defense lawyer. A plaintiff's attorney receives material inadvertently sent by defense counsel to the effect that the defendant chemical company has deposited dangerous chemicals into the environment, which are slowly poisoning school children. Information is received that the physician defendant did in fact commit the negligent act that crippled the plaintiff. Or documentary proof accidentally arrives that the defendant drug company has tests proving that its latest pain medication caused the death of some patients. If we speak of the integrity of the judicial process, one can reasonably ask how that integrity is maintained by keeping secret evidence that should be seen by the trier of the facts, be it a court or jury, to ensure that is reaches a just result. All this being said, you should check out Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. This rule imposes much stricter regulations.

In conclusion, there are passionately held opinions on both sides of this issue. That being said, the Rules of Professional Conduct as established by the four Presiding Justices of the State of New York impose no obligation on the receiving lawyer to refrain from reading the material, keeping the material, and using the information discovered.

The Forum, by
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New Criminal Justice Legislation

By Barry Kamins

This article will discuss new criminal justice legislation, signed into law by the Governor, that contains amendments to the Penal Law, Criminal Procedure Law (CPL), Vehicle and Traffic Law (VTL) and other related statutes. It is recommended that the reader review the legislation for specific details, as the following discussion will highlight key provisions of the new laws.

In the past legislative session, three new laws attracted significant publicity and garnered a great deal of attention in the legal community.

Police Stops

First, the Governor signed a bill that prohibits the New York City Police Department (and any police department in a city with a population of one million or more) from electronically storing the names and addresses of individuals stopped on the street but found to have done nothing wrong.[1]

Since 2001, the New York City Police Department has been required to disclose to the City Council statistics on the number and race of those stopped by the police pursuant to Criminal Procedure Law § 140.50. Since 2005, the police have conducted two and a half million stops; last year alone, they stopped over a half a million people. Of that group, 90% were people of color and nine out of 10 persons stopped were released without any further legal action taken against them.

While the new law prohibits the police from entering into its electronic database the name, address and social security number of those released, the law does not prohibit the police from entering generic identifiers such as gender, race, location and reason for the stop.

Proponents of the bill argued that the racial disparity in the stops resulted in an unconstitutional inventory of primarily young black and Hispanic males who had not been arrested. In addition, critics of the database argued that the practice raised significant privacy issues and suggested the possibility that innocent people will more likely be targeted in future criminal investigations.

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Law enforcement officials argued that the new law will deprive them of an investigative tool and that the database had been used in the past to solve crimes. The New York City Police Commissioner warned that the bill will lead to an increase in crime. Although the new law prohibits the collection of names in an electronic database, police officers have been instructed that they can continue to record the information manually on worksheets and paper files that can be stored in individual precincts.

DWI

A second new law that will have significant consequences for New Yorkers is the New York State Child Passenger Protection Act, commonly referred to as Leandra's Law.[2] This law was enacted in response to the October 2009 death of 11-year-old Leandra Rosado, who was thrown from a car being driven on the West Side Highway by a drunk driver. The law has two main components: child-safety provisions and ignition interlock provisions. The former went into effect on December 18, 2009, while the latter took effect on August 15, 2010.

Pursuant to the child-safety provisions, any driver convicted of the misdemeanor offense of Driving While Intoxicated by alcohol or impaired by drugs will be guilty of an E felony offense if a child, under the age of 16, was present in the vehicle. As of July 2010, 311 individuals in the state have faced felony charges as a result of the new law. In addition, certain Penal Law crimes are elevated to the next higher felony level if, during the commission of the crime, the defendant drives while intoxicated and causes injury or death to a child under the age of 16: Vehicular Assault in the Second Degree and Vehicular Manslaughter in the Second Degree.

The second component of Leandra's Law went into effect August 15, 2010; it will affect any driver who is merely convicted of Driving While Intoxicated as a misdemeanor or felony (whether a child is present or not) pursuant to Vehicle & Traffic Law § 1192(2), (2-a) or (3). The new law requires anyone who is sentenced for a DWI offense that was committed on or after December 18, 2009, to install and maintain an ignition interlock device, for a minimum of six months, in any vehicle he or she owns or operates. The device prevents the car from starting if the operator is not sober. New York became the tenth state to utilize these devices on a mandatory basis.

Each year, approximately 25,000 individuals are convicted of DWI charges in this state. Under the new law, such individuals must receive, in addition to the imposition of any fine or imprisonment, a sentence of probation or conditional discharge, a condition of which is the installation of the ignition interlock device. In New York City, the Probation Department will monitor the compliance of motorists sentenced to probation, while the Queens District Attorney's office will be responsible for monitoring compliance by persons sentenced to conditional discharges. Each of the five district attorneys in New York City will designate a liaison to the monitor; the monitor will be responsible for informing the courts in each county when a defendant is not in compliance with the regulation.

Once installed, the driver will be required to blow into the device before starting the car. The car will not start if the device registers a blood alcohol level of .025% or higher. In addition, drivers will be required to blow into the device at regular intervals while driving. If the device registers in excess of .025% or higher while the vehicle is being operated, the lights in the car will begin to flash and a harsh sound will be emitted, rendering the car incapable of being driven.

The regulations require defendants, at their own expense, to install the device within 10 business days of sentence. If a defendant is financially unable to afford the device, the court can waive the costs. Once a month, the defendant will be required to report to a location where the data recorded by the device can be analyzed to determine how often the driver exceeded the blood alcohol limit. It will now be a Class A misdemeanor if a defendant allows another person to blow into the device for the purpose of starting the vehicle or operates a vehicle without an interlock device when he or she has been required to use one by the court. If a defendant drives a vehicle as part of his or her employment, the requirement for a device can be waived if the employer has been notified of the defendant's driving restrictions and the defendant provides a letter from the employer granting the defendant permission to drive the employer's vehicle.

Seven manufacturers have been approved to provide the device to defendants and they have contracted with installers at various locations around the state. Each of the manufacturers produces devices of varying technological sophistication. Some of the devices have cameras to record who is blowing into it – this will deter a defendant from having another individual start the vehicle.

Indigent Defense

The third piece of legislation that garnered substantial publicity was the creation of a Statewide Office of Indigent Services.[3] This entity will study and make recommendations for improvement in the current indigent defense system. A nine-member Indigent Legal Services Board was created to oversee the new agency. It will be chaired by Chief Judge Jonathan Lippman.

New and Expanded Crimes

The Legislature has enacted a new crime: Strangulation.[4] This conduct, which involves the intentional blocking of a victim's breathing or circulation, is one of the most lethal forms of domestic abuse. However, in a majority of cases involving strangulation, there are no visible injuries and,

therefore, prosecution under the assault statutes has been difficult, if not impossible.

The Legislature reacted to numerous reports that strangulation is frequently used in a domestic relationship to silence a victim of abuse without any concern by the abuser that there will be prosecution. The victim of the abuse suffers the torment of near asphyxiation rather than any actual pain or injury.

A new law criminalizes initiation activities that a person engages in for the purpose of joining a gang.

Strangulation is defined in the new statute as impairing or impeding, for any period of time, the normal breathing or blood circulation of the victim by intentionally applying pressure on the throat or neck of the victim or by intentionally blocking the victim's nose or mouth. The conduct constitutes an A misdemeanor and may be elevated to a Class E or Class C felony, depending on certain aggravating factors.

Mayor Bloomberg signed into law an amendment to New York City's Administrative Code that creates the crime of Criminal Street Gang Initiation Activity, a Class A misdemeanor.[5] The new law criminalizes initiation activities that a person engages in for the purpose of joining a gang. Although such activities can constitute any one of a number of underlying crimes (assault, burglary, etc.), an individual can now also be charged with Gang Initiation Activity in addition to the underlying crime.

In addition to the new crimes mentioned above, the Penal Law has been amended to expand the definition of certain existing crimes. For example, a person can now be guilty of the crime of Defrauding the Government, when a public servant uses government property or resources for private business purposes and the services or resources have a value in excess of $1,000.[6] In addition, the definition of "sexual contact" has been expanded to include the emission of ejaculate.[7] This will allow for the prosecution of individuals who ejaculate on women but who make no physical contact. Previously, such offenders could only have been charged, at the most, with Public Lewdness; they now can be charged with sexual abuse.

The assault statutes have been amended to increase the penalties for assaults on registered nurses, licensed practical nurses and sanitation enforcement agents.[8] Previously, assaults on these classes of individuals constituted only a Class A misdemeanor; they now constitute a Class C felony.

The Penal Law has also been amended to provide greater protection to individuals who are incapable of taking care of themselves. Previously, a caretaker of a person over the age of 60 could be charged with endangering that person's welfare. Under an amendment, a care giver can also be charged with endangering the welfare of *any* person who is unable to care for himself or herself because of a physical disability, mental disease or defect.[9] Other new legislation expands the laws dealing with the abandonment of a child. Previously, the Penal Law created an affirmative defense where a person leaves an infant not more than five days old with an appropriate person and notifies the authorities of the child's location. That affirmative defense has been repealed and the new legislation eliminates criminal liability where a person leaves an infant who is not more than *30* days old with an appropriate person.[10] This will provide parents with more time to make their decision and not subject them to criminal prosecution should they choose to abandon their child in a responsible manner.

The larceny statutes have also been amended. The theft of or from an ATM machine has been criminalized and now constitutes a Class D felony.[11] The definition of Grand Larceny in the Fourth Degree now includes religious items displayed *outside* places of worship.[12]

The Penal Law has been amended to promote programs that provide access to clean needles and syringes and reduce the transmission of blood-borne diseases such as HIV. Although the Public Health Law was amended years ago to permit the possession of needles and syringes as part of a needle exchange program, participants in these programs continue to be arrested and charged with possession of lawfully acquired syringes and residual amounts of controlled substances present on these syringes. To address this problem, the Legislature amended the crime of Criminal Possession of a Controlled Substance in the Seventh Degree to make it clear that it is not a violation of the statute when an individual possesses only a residual amount of a controlled substance on a needle or syringe that he or she is lawfully entitled to possess under the Public Health Law. Similarly, possession of the needle or syringe is not illegal.[13]

Finally, the Legislature created an affirmative defense to Unlawfully Dealing With a Child (providing alcohol to minors) that the defendant completed an alcohol training awareness program.[14] In addition, gun manufacturers can now transport firearm silencers into the state and the transportation of slot machines for the purpose of repairing or assembling them is also lawful.[15]

Procedural Changes

A number of *procedural* changes have been enacted by the Legislature. While most police agencies around the state, as a matter of custom, had permitted arrested persons to make "one phone call," the Legislature has now codified that right.[16] In the past, some law enforcement agencies have restricted a free phone call to the local area code of the specific agency. The new law permits a call to any

telephone number in the United States or Puerto Rico for the purpose of obtaining counsel or informing a relative or friend of the arrest. Another new law expands the ability of uniformed court officers to execute bench warrants in counties around the state.[17]

Finally, a new procedural change will benefit victims of sex trafficking who have been convicted of prostitution offenses. The new law adds an additional ground to CPL § 440.10 that will now permit a defendant to move to vacate a conviction when the underlying charge was prostitution-related and the defendant's participation in the offense was a result of having been a victim of sex trafficking.[18]

Crime Victims

Each year the Legislature enacts legislation to assist victims of a crime and this year was no exception. Two new laws cloak certain victim-related information with an added degree of confidentiality. First, voter registration records of domestic violence victims will remain confidential.[19] Second, victims of domestic violence, including family or household members, are now permitted to cast their votes at the Board of Elections by paper ballot instead of a polling place.[20] Each of these laws affords domestic violence victims the security they deserve.

Sex Offenders

Several new laws will affect individuals who must register as sex offenders. First, a level 2 or 3 sex offender will now be guilty of Criminal Trespass in the Second Degree if he or she enters a school attended or formerly attended by the victim of the crime. The Chief Administrator of the school – e.g., the Superintendent – can authorize certain exceptions including permission to enter for the purpose of voting.[21] In addition, the Division of Criminal Justice Services is now required to make sex offender registry information regarding level 2 and 3 offenders available to municipal housing authorities.[22] This law was a reaction to a report that 126 sex offenders were found to be living in New York City public housing facilities.

Sentencing

The Legislature enacted a number of laws relating to sentencing. First, a probation report will no longer be necessary in misdemeanor cases when a judge does not impose a jail sentence in excess of 180 days.[23] Previously, a report was required when the jail sentence was in excess of 90 days. The new law eliminates the needless delay and expense for a pre-sentence investigation on sentences of short duration. However, a court still retains the discretion to order a report in any case.

A second new law allows a court to require, as part of a sentence for a hate crime, that the defendant complete a program, training session or counseling session, directed at hate crime prevention and education.[24] Finally, the Drug Law Reform Act of 2004 was amended to clarify that a sentence of parole supervision can be either an indeterminate sentence of imprisonment or a determinate sentence of imprisonment imposed upon an "eligible defendant."[25]

Certain new laws will have an impact on sentenced prisoners. Initially, the Legislature significantly expanded eligibility for the SHOCK Incarceration Program.[26] New York State has the largest SHOCK Incarceration Program for sentenced prisoners in the nation. The program is an intensive "boot camp" operation available for male and female inmates convicted of non-violent offenses. It began in 1987 and, each year, supervised crews of SHOCK inmates perform thousands of hours of community service. The new law permits individuals with prior non-violent *felony* convictions that resulted in a state prison sentence to be eligible for the SHOCK program, when the current felony conviction is a SHOCK eligible offense.

In addition, a new law grants the State Department of Corrections the authority to place anyone who has received a parole supervision sentence into an institution other than the Willard facility in Seneca County.[27] Previously, inmates had challenged the authority of DOCS to do so, claiming that once an eligible offender received a parole supervision sentence, that person had to be transferred to Willard even though, in some cases, Willard did not have the capability of delivering the requisite level of mental health services. Finally, prison inmates may now perform work for non-profit organizations, in addition to working for the state and public institutions.[28]

Other VTL Amendments

The Vehicle & Traffic Law has been amended to remove a conflict between current medical practice and the statutory requirement that only a physician can supervise the drawing of blood which can then be tested for any blood alcohol content.[29] The medical community permits trained medical personnel to routinely withdraw blood from individuals without the direction and supervision of a doctor. However, the Vehicle & Traffic Law mandates that a licensed physician supervise this procedure. As a result, a number of courts have suppressed evidence of blood alcohol content.[30] The law has been amended to permit the procedure to be supervised by a registered professional nurse, a physician assistant, or a certified nurse practitioner. The blood may now be drawn by a clinical laboratory technician, a phlebotomist, or a medical laboratory technician.

Two other new VTL laws impose tougher penalties on sober but unsafe drivers who fail to exercise due care while operating a car and who injure pedestrians.[31] Under one law, a motorist who causes physical injury to a pedestrian or bicyclist, while failing to exercise due care, shall be guilty of a traffic infraction with a possible sanction of 15 days in jail; a motorist who causes *serious*

physical injury shall be guilty of a traffic infraction with a higher monetary penalty. A second conviction within five years will constitute a Class B misdemeanor. A second law mandates that an unsafe driver who causes serious physical injury shall have his or her license suspended for six months. When a driver is guilty of this offense a second time within five years, the driver will have his or her license suspended for a period of one year.

Miscellaneous Laws

Each year the Legislature enacts laws that either extend or repeal existing statutes. This year the Legislature repealed three sections of the loitering statute that had been declared unconstitutional decades ago.[32] Although various courts had struck down these offenses, they remained "on the books" and police officers continued to make arrests. Thus, the new law repealed loitering for the purpose of begging;[33] loitering for the purpose of engaging in certain sexual acts;[34] and loitering for the purpose of sleeping in a transportation facility.[35]

The Legislature also extended the sunset date of Kendra's Law until June 30, 2015.[36] The law establishes a procedure for obtaining court orders to require individuals with certain types of mental illness to receive and accept outpatient treatment.

New laws defining criminal conduct involve statutes other than the Penal Law, Criminal Procedure Law and Vehicle & Traffic Law. For example, a recent investigation in Brooklyn revealed the illegal harvesting of bones, tissue and organs from more than 1,000 bodies, which were then sold to processing companies to be used in unlawful transplant procedures. No precautions were taken to ensure that these transplants were free of disease. A new law, amending the Public Health Law, establishes penalties for unlawfully dissecting, stealing or receiving a dead human body or any tissue from the body for the purpose of selling it.[37]

A second law amends the Judiciary Law to authorize the Attorney General to bring a criminal action for the unlawful practice of law.[38] Previously, the New York Court of Appeals had rendered a decision limiting the Attorney General's jurisdiction to civil proceedings against those practicing law without a license.[39]

The Legislature amended New York's Arts & Cultural Affairs Law, dealing with the sale of tickets to places of entertainment, and reinstated a number of provisions that had expired earlier in the year.[40] One of the provisions reinstated criminal penalties for those convicted of various resale violations. The new law increases the fines that may be imposed upon a "firm, corporation or other entity that is not a single person."

Finally, the Judiciary Law was amended to require the Commissioner of Jurors in each county to collect demographic data on jury pools.[41] This law was a reaction to a report in 2006 that minorities are under-represented in civil jury pools in New York County. The new law requires the commissioners to collect and report demographic data on jury pool participation based on race and/or ethnicity, age, and sex and to report such data each year to the Governor, legislative leaders and the Chief Judge. ■

1. 2010 N.Y. Laws ch. 176 (amending CPL § 140.50, eff. July 16, 2010). A new law also prohibits the creation of any quotas for stops pursuant to CPL § 140.50; 2010 N.Y. Laws ch. 460 (amending N.Y. Labor Law § 215-a, eff. Aug. 30, 2010).
2. 2010 N.Y. Laws ch. 496 (amending VTL §§ 1192, 1193, 1198, 1198-a, eff. Nov. 18/09).
3. 2010 N.Y. Laws ch. 56 (amending Exec. Law § 30, eff. Jun. 22, 2010).
4. 2010 N.Y. Laws ch. 405 (amending PL § 120.71, eff. Feb. 9/11).
5. Law 2010/001 (amending Admin. Code 10-170, eff. May 31, 2010).
6. 2010 N.Y. Laws ch. 1 (amending PL § 195.20, eff. Feb. 12, 2010).
7. 2010 N.Y. Laws ch. 193 (amending PL § 130.00, eff. Oct. 14, 2010).
8. 2010 N.Y. Laws chs. 318, 345 (amending Penal 120.05, eff. Nov. 1/10 and Sept. 12, 2010).
9. 2010 N.Y. Laws ch. 14 (amending PL § 260.32, eff. May 22, 2010).
10. 2010 N.Y. Laws ch. 447 (amending PL § 260.00, eff. Aug. 30, 2010).
11. 2010 N.Y. Laws ch. 464 (amending PL § 155.35, eff. Nov. 1, 2010).
12. 2010 N.Y. Laws ch. 479 (amending PL § 155.30(9); eff. Aug. 30, 2010).
13. 2010 N.Y. Laws ch. 284 (amending PL §§ 220.03, 220.45, eff. Oct. 28, 2010).
14. 2010 N.Y. Laws ch. 435 (amending PL § 260.20, eff. Sept. 29, 2010).
15. 2010 N.Y. Laws ch. 61 (amending PL § 265.20(8), eff. Apr. 28, 2010); 2010 N.Y. Laws ch. 321 (amending PL § 225.30, eff. Aug. 13, 2010).
16. 2010 N.Y. Laws chs. 94, 96 (amending CPL § 120.90(8), eff. Aug. 24, 2010).
17. 2010 N.Y. Laws ch. 10 (amending CPL § 530.70(2), eff. May 22, 2010).
18. 2010 N.Y. Laws ch. 332 (amending CPL § 440.10(h), eff. Aug. 13, 2010).
19. 2010 N.Y. Laws ch. 73 (amending Election Law § 5-508, eff. May 5, 2010).
20. 2010 N.Y. Laws ch. 38 (amending Election Law § 11-306, eff. Apr. 4, 2010).
21. 2010 N.Y. Laws ch. 315 (amending PL § 140.15, eff. Nov. 1, 2010).
22. 2010 N.Y. Laws ch. 278 (amending Corr. Law § 168-b, eff. Sept. 28, 2010).
23. 2010 N.Y. Laws ch. 179 (amending CPL § 390.20(2), eff. Jul. 15, 2010).
24. 2010 N.Y. Laws ch. 158 (amending PL § 485.10(5), eff. Nov. 1, 2010).
25. 2010 N.Y. Laws ch. 121 (amending CPL § 410.91, eff. Jun. 15, 2010).
26. 2010 N.Y. Laws ch. 377 (amending Corr. Law § 865(1), eff. Aug. 13, 2010).
27. 2010 N.Y. Laws ch. 82 (amending Corr. Law § 2(20), eff. May 18, 2010).
28. 2010 N.Y. Laws ch. 256 (amending Corr. Law §§ 72(2-a), 170(3), 500-d, eff. Jul. 30, 2010).
29. 2010 N.Y. Laws ch. 169 (amending VTL § 1194(4)(a)(1), eff. 7/13, 2010).
30. *People v. Reynolds*, 307 A.D.2d 391, 762 N.Y.S.2d 683 (3d Dep't 2003); *People v. Ebner*, 195 A.D.2d 1006, 600 N.Y.S.2d 569 (4th Dep't 1993); *People v. Olmstead*, 233 A.D.2d 837, 649 N.Y.S.2d 624 (4th Dep't 1996).
31. 2010 N.Y. Laws chs. 333, 409 (amending VTL §§ 1146(b), 510(2)(b)(xiv), eff. Oct. 12, 2010 and Aug. 13, 2010).
32. 2010 N.Y. Laws ch. 232 (amending PL § 240.35, eff. Jul. 30, 2010).
33. PL § 240.35(1); *see Lopez v. N.Y. City Police Dep't*, 999 F.2d 699 (1993).
34. PL § 240.35(3); *see People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983).
35. PL § 240.35(7); *see People v. Bright*, 71 N.Y.2d 376, 526 N.Y.S.2d 66 (1988).
36. 2010 N.Y. Laws ch. 139 (amending MHL § 9.61, eff. Jun. 29, 2010).
37. 2010 N.Y. Laws ch. 382 (amending PHL §§ 4216, *et seq.*, eff. Nov. 1, 2010).
38. 2010 N.Y. Laws ch. 91 (amending Jud. Law § 476-a(1), eff. May 25, 2010).
39. *People v. Romero*, 91 N.Y.2d 750, 675 N.Y.S.2d 588 (1998).
40. 2010 N.Y. Laws ch. 151 (amending Arts & Cult. Affairs Law §§ 25.03, *et seq.*, eff. Jul. 2, 2010).
41. 2010 N.Y. Laws ch. 112 (amending Jud. Law § 528, eff. Sept. 13, 2010).

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This article reflects the state of legislation as of late 2009.

Corporate Compliance and Executive Compensation Since the AIG Scandal

By Johanna Pitcairn

"I think people are right to be angry. I'm angry. What I want us to do, though, is channel our anger in a constructive way,"[1] implored President Barack Obama in response to the AIG scandal. AIG happened to be at the epicenter of the turmoil that affected the global economy and led to the actual economic stagnation in worldwide markets. Excessive securitization through "an unprecedented period of excessive borrowing, excessive lending and excessive investment incentivized by a series of significant economic and regulatory factors" caused the actual economic crisis.[2] But AIG is not an isolated case. The Enron, WorldCom, Tyco and Adelphia scandals led to the creation, in 2002, of the Sarbanes-Oxley Act (SOX) in an effort to rescue public corporations from poor accounting methods and to protect their investors. However, the SOX is just one of several instruments specifically created to ensure that legal compliance is met within business organizations in the United States and worldwide.

Compliance is a unique body of law consisting primarily of a combination of government-created incentives and standards for compliance in addition to a small body of judicial decisions. The law of compliance mostly mirrors compliance best practices within organizations, which were created from initiatives that corporations and other organizations developed. Legal compliance could be well described as a give-and-take approach between the business world and the government.[3]

Compliance law is a complex legal field because it involves not only a set of rules, it also consists of a system. The economic stimulus legislation that Congress recently passed directly targeted the law of compliance by addressing an area largely overlooked under previous legal instruments such as SOX – executive compensation. Public outrage raised concerns about corporations such as AIG that paid their executives huge bonuses with taxpayer money. This was not lost on President Obama. In fact, after seeing that the existing federal legislation in that particular field was too weak, President Obama urged Congress to pass a new set of legal instruments aimed at better restricting unnecessary expenditures, meaning, among others things, no more unreasonable bonuses without assessing the executive's performance during a full calendar year. How will this legislation impact the work of compliance officers? Compliance officers will now face new hurdles and have to meet

additional requirements to fully protect the organizations where they are implementing compliance programs.

Protecting the Organization: The Need for Compliance Programs

Compliance law is a complex field because it covers the implementation of unique and effective compliance programs within an organization. Such programs are vital to the viability and success of corporations at every size and every level in the United States and in the world. The programs usually consist of formal policies and procedures that organizations implement to detect and prevent violations of any law, regulation, or company policy, as well as to promote ethical business conduct.

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Compliance law has been constantly developing since the late 1970s after several industries became involved in a series of corporate scandals. The Foreign Corrupt Practices Act (FCPA) was the first major body of law. It was enacted in 1977 in response to the Watergate scandal and led to the creation of anti-bribery compliance programs and codes of conduct.[4] After the FCPA, a succession of regulations followed. The regulations laid down what is considered to be the cornerstone of the law of corporate compliance: the U.S. Sentencing Guidelines for organizations. Enacted in 1991 and later amended in 2004, the Guidelines provide that, in order to have an effective compliance and ethics program, an organization must (1) exercise due diligence to prevent and detect criminal conduct, and (2) promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.[5]

A compliance program is vital to the success of an organization for three interdependent reasons:

1. Globalization. No organization is insulated against corporate scandals. If a high-level official of the Southeast Asian subsidiary of an American company commits accounting fraud or employment discrimination, other corporate entities all over the world will have access to that sort of information. The Internet and constant media coverage make it nearly impossible to keep violations a secret. Ultimately, such behavior will affect the image of the organization worldwide as well as the public's trust in the organization.
2. Trust. As recent history has shown, public outrage can play a role in legislating against unethical corporate behaviors. If high-level officials are permitted to circumvent the law, then anyone within the organization will break the law. A good compliance program helps cultivate a trustful corporate environment, where incentives and rewards are aligned with honesty and fair dealing. Such an environment is, therefore, good for business.
3. Business. If compliance violations become known, the public's good will toward the corporation may diminish. This creates a snowball effect, which will eventually lead to a loss in profits for the company that does not timely intervene in and sanction violations. If an effective compliance program is in place, the public will be informed that a company is sanctioning and deterring illegal conduct, while also working to promote an overall environment of trust, which, ideally, will reflect a good image of the company. In the end, a compliance program will ultimately affect how much the company earns.

U.S. Sentencing Guidelines

Compliance officers rely on the seven steps of the U.S. Sentencing Guidelines[6] to ensure the implementation of an effective compliance program:

1. Set up standards and procedures to prevent and detect non-compliance with the regulatory scheme.
2. Top management and the board must play a proactive role in overseeing the program.
3. Eliminate individuals with authority whose prior conduct is inconsistent with strict compliance standards.
4. Communicate standards and procedures effectively among directors and officers.
5. Monitor and audit the compliance program periodically and maintain an effective system for reporting non-compliance.
6. Enforce the program through effective incentives and establish appropriate disciplinary procedures to deal with non-compliance, including compensation reduction.
7. If non-compliance is discovered, take reasonable and prompt steps to avoid future problems, including modifying the compliance program, as needed.

By following these steps, organizations will act in five successive phases when adopting and implementing a viable program.[7]

Five Phases in Adopting and Implementing a Compliance Program

The five phases follow a logical pattern starting with the assessment of what the company needs to improve. To that effect, the organization, depending on its size and its human resources, will usually have to choose whether to either create a compliance committee composed of officers, such as the chief executive officer, the president, the general counsel, the chief financial officer, and the internal audit director, or assign the responsibility of assessing the company's best practices to the chief compliance officer, or to a member of the audit committee of the Board. This article will primarily focus on the role of the compliance officer.

The compliance officer will first interview key officers and employees of the company and its subsidiaries[8] and then prepare a report on the best practices and areas of deficiency based on the interviews. The report should primarily provide a risk assessment for relevant areas of the law and include a timetable and an action plan with respect to the compliance program.

The second phase will generally focus on the creation of the company's code of conduct, accompanied by a mission statement, a letter from the chief executive officer, and compliance program guidelines. An inventory of policies and procedures already implemented will take place during the third phase. Additional policies and procedures will be developed and brought into line with best practices from other organizations, such as subsidiaries, trade associations, practice groups, and law firms. During the fourth phase, the compliance officer will introduce the code of conduct to the company and develop an ongoing communications plan and training program. The final phase will ensure that effective controls and assessment procedures have been successfully implemented. The compliance officer carries the responsibility for adopting and implementing an effective program that will act as an early warning system for risk prevention and control within an organization.

Additionally, a compliance program should be "sold," almost like a marketed product, to the company's employees.[9] The compliance officer will bring the workforce on board by effectively communicating the importance of the program and continuously assessing the company's practices. It is crucial for a company to have a reliable compliance program – not only to prevent violations from occurring, but also to shield itself against potential illegal conduct. Its compliance program can be an affirmative defense against liability. For example, in the 1998 companion cases of *Burlington Industries, Inc. v. Ellerth*[10] and *Faragher v. City of Boca Raton*,[11] the U.S. Supreme Court held that a company can avoid liability for a hostile work environment claim if it exercises reasonable care in preventing, detecting and addressing sexual harassment, and the employee unreasonably fails to take advantage of the company's compliance policies and procedures.[12] Thus, if a company has an anti-harassment compliance policy and procedure in place, and an employee fails to use them to report harassing behavior, the employer can present the compliance program as an affirmative defense to a hostile work environment claim.[13]

Federal Legislation, Compliance, and Executive Compensation

Compliance officers deal with several bodies of laws that address executive compensation, such as tax, corporate, employment, securities, pension fund, and accounting laws. Every compliance officer must carefully review every applicable area of law in connection with every compensation program to ensure compliance with the law. Whether an officer works for a small or large organization should not affect an organization's commitment to comply with the law.[14] Naturally, smaller organizations will devote fewer resources to the creation of a compliance department and will often rely on one compliance officer who works in house or is outside counsel hired to conduct a review of the organization's compliance program.

A major area of doctrinal law addressing executive compensation is federal securities law that constitutes an

> integrated disclosure system which combines the preparation of financial information in accordance with Generally Accepted Accounting Principles (GAAP) and the disclosure of non-financial information and executive compensation.[15]

Elements of an organization's executive compensation policies, practices, and procedures will be subject to extensive and detailed disclosure prerequisites under Securities and Exchange Commission (SEC) rules and regulations, as well as the accounting rules under GAAP, including statements and related interpretative guidance from the Financial Accounting Standards Board (FASB).[16] Even if a private company is not subject to any of the SEC rules, SOX provisions and listing standards,[17] it is considered a best corporate practice to establish a compliance agenda consistent with such laws and regulations.

The compliance officer is obligated to implement a compliance program specifically designed to conform to the SEC system of disclosure controls and procedures. Under Section 302 of the SOX, the company's chief executive and financial officers are responsible for evaluating the effectiveness of their company's disclosure controls and procedures on a quarterly basis, as well as determining whether such disclosure controls and procedures are effective. An effective compliance program will, among other items, identify the company's compensation philosophies and objectives, and periodically evaluate the company's executive compensation practices, policies and procedures based upon evolving market conditions or material changes in the company's management

structure or business.[18] Noncompliance with the SEC reporting rules triggers liability of the chief executive and financial officers, who will have to disgorge profits received during the 12-month period following the materially non-compliant filing.[19]

The SEC has implemented a checklist containing seven main points and 14 additional points[20] that detail how a compliance officer should determine the organization's executive compensation levels. These points include the various forms of compensation that may be paid by the organization; the factors used to determine compensation amounts; how each element of compensation fits into the company's overall compensation objectives; how specific elements of compensation are structured and implemented to reflect items of a company's performance and an executive's individual performance; and the role of executive officers in the compensation process.

The SEC also recommends that the board of the organization form a compensation committee composed of directors who meet the criteria for independence,[21] that is, they cannot be current employees or former employees receiving compensation for prior services. At the least, the committee should have authority to determine executive compensation, review executive performance, and administer the company's executive compensation plans. The compensation committee's task also includes clearly defining the role and responsibilities of the chief executive officer in evaluating the performance of other executive officers and making determinations regarding their compensation. With the help of the audit committee, the compensation committee will annually identify and evaluate the company's executive compensation policies and objectives.[22]

For the SEC's final prerequisite, compliance officers should consider compensation data from peer companies when adopting and implementing a program. In doing so, the officer will assess the organization's current best corporate practices by using "size parameters ranging from 0.5 to 2.0 times a company's size, which may be based on revenue, assets and/or market capitalization."[23] The SEC considers such data to be material to understanding a company's compensation policies and decisions. Accordingly, the SEC requires this information to be disclosed.[24]

The Effect of the Stimulus Legislation

After public outrage raised concerns over excessive compensation paid to executives employed at failing or failed companies, the federal government required restrictions on pay as a condition of receiving federal stimulus funds. Late in 2008, Congress passed the Emergency Economic Stabilization Act (EESA) and, in early 2009, the American Recovery and Reinvestment Act (ARRA). Those statutes constitute an unprecedented intervention into an area not previously regulated by federal law, and imposed new obligations on boards of directors and compensation committees. In addition to these two statutes, the Interim Final Rules for Troubled Asset Relief Program (TARP) entities became effective on June 15, 2009. The TARP implements the executive compensation provisions of the EESA of 2008, as amended by the ARRA of 2009. Although these statutes apply only to companies that received governmental financial assistance under the TARP and only so long as governmental funds remain unpaid, it is likely that even non-recipient companies will regard the statutes as suggestive of new "best practices" for executive compensation compliance in the future.[25]

For instance, the ARRA contains a series of restrictions concerning compensation, severance, corporate tax deductions, bonus claw-backs, luxury expenditures, excessive risks, manipulated earnings, "say on pay" and CEO/CFO certifications.[26]

The ARRA provides that any "bonus, retention award, or incentive compensation" be restricted for the 10 to 25 highest paid employees, varying on the level of financial assistance received by the company. This restriction does not apply to long-term restricted stock so long that it does not fully vest until the governmental assistance is fully repaid and the value does not exceed one-third of annual compensation. The restriction also does not target bonuses under written, valid employment agreements as of February 11, 2009.[27] Furthermore, the ARRA requires a claw-back of bonus or incentive compensation paid to the top 25 executives, provided the amounts are later determined to have been based on criteria proven materially inaccurate.[28] The statute also does not provide for severance to the 10 highest paid employees. Luxury expenditures, such as aviation services, office renovations, and entertainment, must also be suppressed. Additionally, the compensation committee must evaluate executive compensation plans regarding any excessive risk posed to the TARP recipient from such plans, and companies must limit compensation to exclude incentives for executives to take such risks.[29] Finally, for public companies, the ARRA adds a mandatory but non-binding "say on pay" vote on the compensation of executives, disclosed in the annual proxy statement. The chief executive and financial officers must also provide a written certification that the company has complied with the ARRA in the company's annual SEC filings.

The Challenging Role of the Compliance Officer

Knowing that the laws addressing executive compensation are constantly developing, compliance officers face two major challenges when implementing a compliance program for an organization.

First, the variety of compliance areas addressing executive compensation, along with the complexity of the SEC and stimulus legislation, are extremely difficult to synthesize and address. The number of areas that affect execu-

tive compensation are particularly broad. Moreover, the laws, such as the SOX and the stimulus legislation, that do address such compensation fail to discuss an overall program which concentrates on executive compensation. Instead the laws provide an extensive list of items to review in every compliance area addressing the issue of compensation. Therefore, the compliance officer has sole responsibility for adopting a comprehensive approach towards executive compensation when implementing a compliance program. A risk always exists, however, that some areas may not be sufficiently disclosed to the SEC, which may jeopardize the organization in its best practices assessment.

The second major challenge involves the fact that the existing and upcoming regulations tend to overlap, and the definitions of identical terms in the regulations sometimes fail to correspond. Consider, for example, the independence of the compensation committee. For now, compensation committees are generally composed of two or more outside directors, who are independent.[30] Legislation proposed by the Obama administration directs the SEC to promulgate rules providing compensation committees with greater independence.[31] This would include a requirement that compensation committee members meet independence standards similar to those imposed by the SOX for audit committee members.[32]

Under the SOX, in order to be considered independent, audit committee members must neither (1) accept consulting, advisory or compensatory fees from the issuer or its subsidiaries, nor (2) be an "affiliated person" of the issuer or any of its subsidiaries, provided that the SEC can exempt a particular relationship from these requirements if it determines that doing so is "appropriate in light of the circumstances." If the definition of audit committee independence under the SOX was applied to the compensation committee, it would simply increase an already lengthy list of independence standards currently required of a public company's compensation committee. In addition to stock exchange rules and the laws of a number of states (such as Delaware) that include different definitions of director independence, public company compensation committee members are also subject to independence standards under Internal Revenue Code § 162(m) and Securities Exchange Act of 1934 § 16, which differ from each other. Aside from the actual definition of director independence, it is still unclear whether compensation committee requirements will mirror the provisions of the SOX.[33]

The Future for Compliance

The already extensive rules and regulations governing executive compensation will continue to grow. In legislating against excess, the rulemaking bodies have chosen to tackle the executive compensation issue as best as they could. On June 10, 2009, Treasury Secretary Timothy Geithner released a statement outlining the Obama administration's five broad-based principles with respect to configuring compensation structures for all public companies.[34]

The principles suggest that companies align compensation practices with sound risk management and long-term growth. Specifically, they outline "best practices" that the administration encourages all public companies to adopt. They are by design broad and generic and, therefore, resemble "tea leaves to be read for hints of the actual legislation and regulation to come."[35]

The five principles include the following guidance:

1. Compensation plans should properly measure and reward performance, conditioned on a wide range of internal and external metrics, not just stock price.
2. Compensation should be structured to account for the time horizon of risk. Compensation for all employees should be focused on the long-term value and soundness of the company and should not incentivize short-term gains. According to Secretary Geithner, mandating longer stock ownership holding periods may be the most effective means of accomplishing this goal.
3. Compensation practices should be aligned with sound risk management. Compensation committees should conduct and publish risk assessments of

CONTINUED ON PAGE 42

In Brief: Geithner's Five Principles

Compensation plans should do the following:

1. Properly measure and reward performance (and not just on stock price).
2. Be focused on long-term value and soundness of the company.
3. Be aligned with sound risk management compensation practices (through public risk assessments of pay packages and the improvement of companies' managers' effectiveness at balancing incentives and risk-taking).
4. Be reexamined regarding golden parachutes and supplemental retirement packages to determine whether they align the interests of executives and shareholders.
5. Promote transparency and accountability by providing compensation committees with greater independence and shareholders with more clarity in assessing their best compensation practices.

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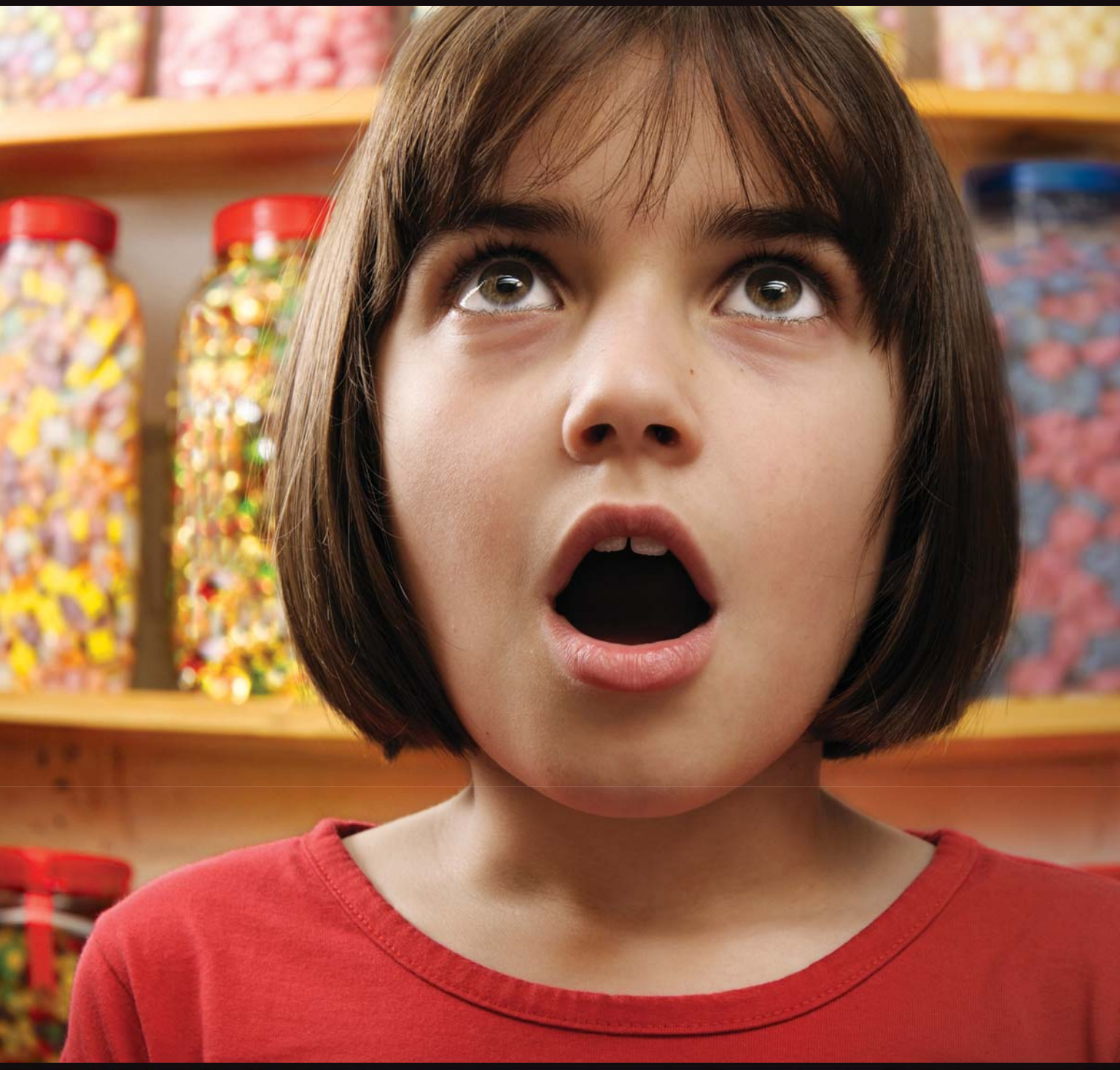

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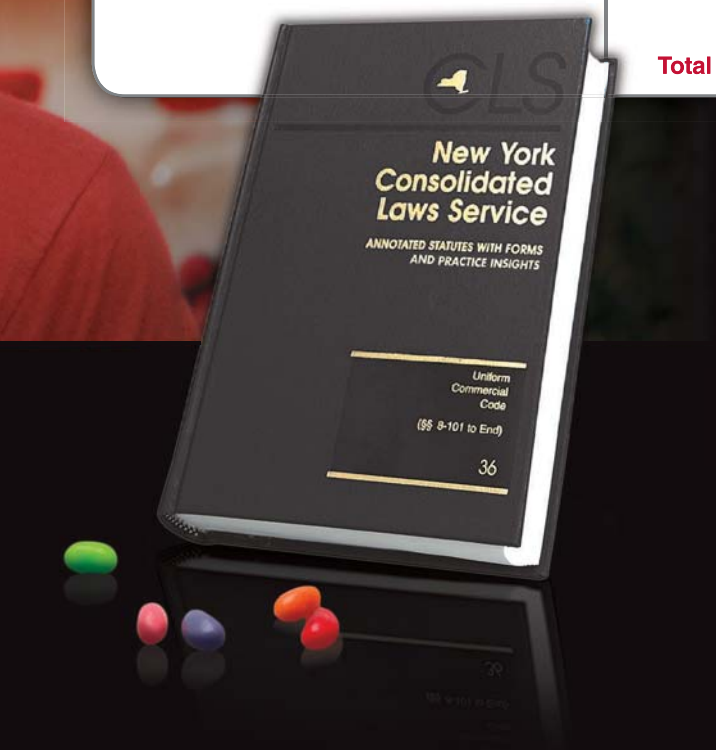

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pay packages to ensure that they do not encourage imprudent risk-taking. Companies should explore how they can provide risk managers with appropriate tools and authority to improve their effectiveness at managing the complex relationship between incentives and risk-taking.

4. Golden parachutes and supplemental retirement packages should be reexamined to determine whether they align the interests of executives and shareholders. However, as executive compensation regulation has repeatedly demonstrated in the past, prohibitions on certain forms of payment frequently have unintended, and often undesirable, consequences for shareholders when compensation committees have to confront the economic realities of attracting and retaining executives. For example, generous severance packages help facilitate management transitions. Limiting the ability to provide severance might result in decreased mobility for executives and less flexibility for public companies and their boards to manage succession among senior personnel.[36]
5. Corporations should promote transparency and accountability in the process of setting compensation. Many of the compensation practices that encourage excessive risk-taking might have been more closely scrutinized if compensation committees had greater independence and shareholders had more clarity.

According to some U.S. law firms,

> the Principles would best be read to emphasize three important, if unremarkable, points. First, compensation for each employee should be tailored to incentivize the employee to achieve the results the company desires relative to the employee's position. Second, performance criteria for incentive compensation should be multiple and varied and should provide incentives to achieve an appropriate balance among the company's objectives. Finally, stock and stock-based awards should be used only where appropriate and should not be viewed as a panacea for addressing the problem of excessive risk taking.[37]

In support of these principles, Secretary Geithner has proposed legislation in two areas that will affect all public companies: (1) compensation committee independence as previously explained, and (2) "say on pay." The "say on pay" proposal mandates an annual non-binding advisory vote on executive compensation, which would permit votes on the company's executive compensation program and on the annual compensation paid to the named executive officers. In addition, shareholders would have the right to cast a non-binding vote to approve or disapprove golden parachute compensation.

Secretary Geithner and SEC Chairman Mary Schapiro spoke with a united voice on the government's role in regulating executive compensation of all public companies.[38] Recognizing the dangers in creating "substantive, one-size-fits-all compensation requirements and prohibitions," Secretary Geithner states that the Treasury Department is not "capping pay . . . [and] setting forth precise prescriptions for how companies should set compensation, which can often be counterproductive." Rather, Treasury "will continue to work to develop standards that reward innovation and prudent risk-taking, without creating misaligned incentives."[39]

As such, the principles clearly indicate that any enacted law or regulation should leave room for compliance officers to make individualized decisions about how best to structure and implement compensation programs within organizations,[40] although the principles do leave room for misguided and misapplied legislation. It is clear, however, that the government's interest is "to protect investors by (i) providing shareholders with enhanced compensation disclosures, (ii) regulating compensation committee processes and the independence of compensation consultants and advisors, and (iii) requiring companies to manage risk in compensation decisions by focusing on long-term shareholder value."[41] The government does not provide compliance officers with a holistic approach regarding executive compensation. Implementing a compliance program is an extraordinarily difficult task; compliance officers must be extremely cautious and prepare a well-thought-out strategy before starting their best practices assessment.

Congressional action on executive compensation is advancing rapidly, which does not make compliance officers' jobs easier. The history of legislating and regulating in the area of compliance has, however, proven that achieving policy objectives through government intervention is difficult. Corporate governance, generally, has consistently required significant marketplace and legal pressures for it to effectively evolve. According to a number of U.S. law firms, "less government is more in the current environment."[42] This could mean that the executive compensation headache will not be so bad after all. But for how long? In the wake of the current economic crisis, legal compliance has been one area in the job market to fall victim to massive layoffs. Accordingly, the struggle to maintain a high level of expertise in the compliance field, in order to prevent corporate abuses, ironically threatens the very corporate systems, and by extension the public, it is meant to oversee and protect. ■

1. Suzanne Garment, *Populist Anger Is Hard to Contain*, Wall St. J., Mar. 23, 2009, *available at* http://online.wsj.com/article/SB123776419952308805.html.

2. Douglas W. Arner, *The Global Credit Crisis of 2008: Causes and Consequences*, 43 A.B.A. The Int'l Lawyer Pub. No. 1, 91–136 (2009).

3. Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, P.L.I. Corp. Compl. and Ethics Inst. Handbk. Ser. 17–49 (2007).
4. *Id.*
5. *Id.*
6. Carole Basri, *The Basics: Rolling Out Your Corporate Compliance Program*, P.L.I. Corp. Compl. and Ethics Handbk. Ser. 169–193 (2007).
7. *Id.*
8. Key officers and employees should include: the President; the Business Development/Sales Marketing representative; the General Counsel or Outside Counsel; the Chief Financial Officer; the Human Resources Director; the Environmental Health and Safety representative, if any; the Compliance Officer, if any; and any other key officer and employee as deemed necessary.
9. *Id.*
10. 524 U.S. 742 (1998).
11. 524 U.S. 775 (1998).
12. *Id.*
13. *Id.*
14. Paul E. McGreal, *The Amended Organizational Sentencing Guidelines: Top Ten Things Attorneys Should Know*, P.L.I. Corp. Compl. and Ethics Handbk. Ser. 133–147 (2007).
15. Henry C. Blackiston, *Specific Corporate Compliance Challenges by Practice Area: Executive Compensation*, Lexis Corp. Compl. Guide, Ch. 34 (forthcoming Sept. 2009).
16. *Id.*
17. Listing standards are the initial listing requirements which "mandate that a company meet specified minimum thresholds for the number of publicly traded shares, total market value, stock price, and number of shareholders." *See* http://www.sec.gov/answers/listing.htm.
18. Blackiston, *supra* note 15.
19. 15 U.S.C. § 7243.
20. *Id.*
21. Deloitte Center for Corp. Gov., *Treasury and SEC Executive Compensation Pronouncements*, June 12, 2009, *available at* http://www.corpgov.deloitte.com/site/us/compensation-committee/executive-compensation/.
22. *Id.* at 15.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 19.
32. 17 C.F.R. pts. 228–229, 240, 249, 274.
33. Cleary Gottlieb Steen & Hamilton LLP, *Treasury's Take on Executive Compensation: It's a Matter of Principles* (2009), *available at* www.cgsh.com/.../CGSH%20Alert%20Memo%20re_TALF.pdf.
34. *Id.* at 19.
35. *Id.* at 31.
36. *Id.*
37. *Id.*
38. *Id.* at 19.
39. *Id.* at 31.
40. *Id.*
41. *Id.*
42. *Id.*

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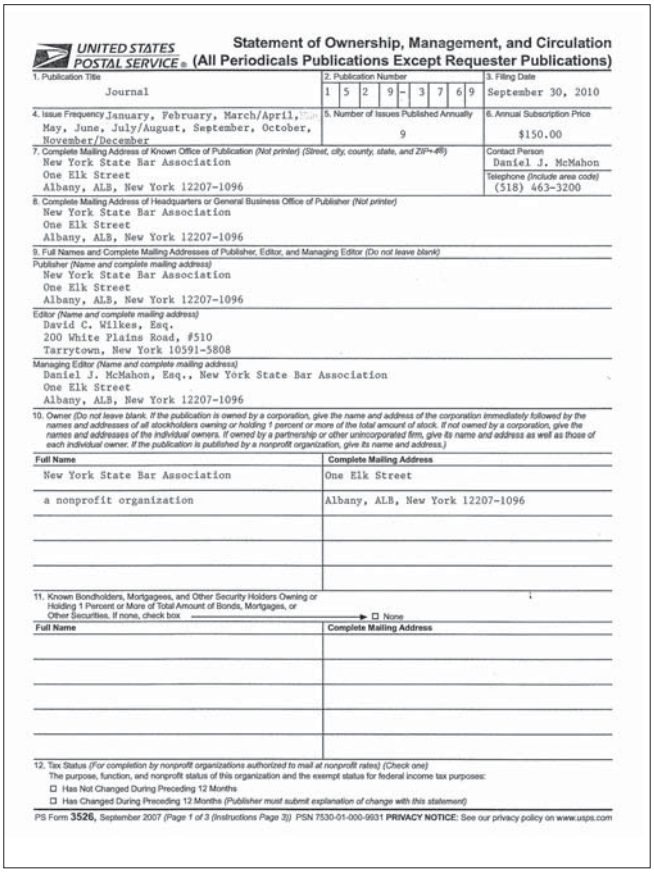

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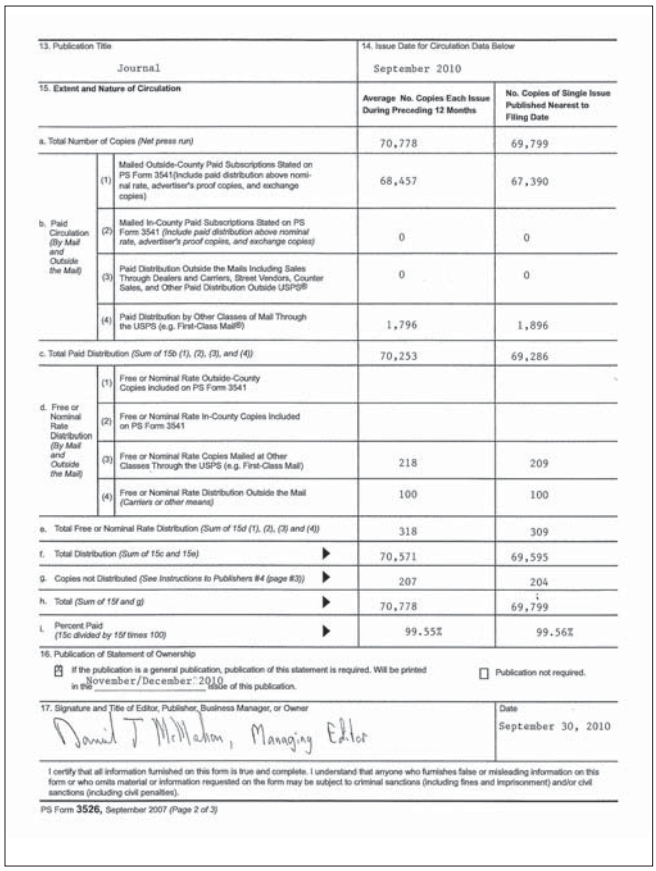

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Marc A. Perrone practices law in New York City where he focuses on insurance coverage issues and complex litigation.

Limits to Insurers' Obligations Under § 3420(d)

By Marc A. Perrone

New York Insurance Law § 3420(d) has long been a troublesome statute for insurers. It is the source of considerable litigation – most of which insurers lose. The statute requires that insurers provide written notice of coverage denials "as soon as is reasonably possible" for accident claims involving bodily injury and death.[1] Courts have long held that an insurer's failure to comply with the statute results in waiver of any defenses to coverage, even where there is no prejudice to the policyholder.[2] An insurer must raise in its notice all the grounds on which it bases its disclaimer.[3] When the insurer disclaims liability on some grounds but not others, it is deemed to intend to waive the other grounds.[4] Further, courts have held notice delays as short as 30 days as violating the statute's reasonableness standard.[5] Plainly, the statute stacks the chips against insurers and in favor of policyholders.

Recently, however, the Second Circuit Court of Appeals, in *NGM Insurance Co. v. Blakely Pumping, Inc.*, reemphasized the limited circumstances where the statute applies.[6] Relying on well-settled case law handed down by the Court of Appeals of New York, the Second Circuit reiterated the distinction between disclaimers of coverage "by reason of exclusion" from disclaimers "by lack of inclusion."[7] In other words, § 3420(d) applies to disclaimers based on defenses to coverage but not to disclaimers that merely inform the policyholder that the policy never contemplated coverage for such a claim in the first instance.

The issue in *Blakely Pumping* was the availability of coverage under a Businessowners Liability Policy for liability arising from an automobile accident. Brian Blakely, an officer and employee of Blakely Pumping, was involved in a traffic accident while operating his personal vehicle in the course of his work for Blakely Pumping. The other party to the accident filed suit against both Blakely and Blakely Pumping, and Blakely sought coverage under Blakely Pumping's Businessowners Liability Policy issued by NGM Insurance Co. (NGM). NGM promptly denied coverage for the claim, based on the policy's automobile exclusion.

Blakely disputed the denial, citing the policy's "Hired or Non-Owned Auto" endorsement. NGM again promptly disclaimed coverage, this time asserting that because Blakely was an executive officer of Blakely Pumping, his vehicle failed to qualify as either a Hired or Non-Owned Auto, as defined by the endorsement. NGM also sought a declaratory judgment that it was under no obligation to defend or indemnify Blakely Pumping.

The U.S. District Court for the Southern District of New York agreed with NGM that because Blakely was an executive officer of Blakely Pumping his vehicle failed to qualify as either a "Hired Auto" or "Non-Owned Auto" under the endorsement.[8] The court also found, however,

that because the endorsement "generally covered auto accidents," NGM's bases for disclaiming coverage were essentially exclusions to that general coverage afforded by the endorsement. Consequently, the court held that, pursuant to Insurance Law § 3420(d), because NGM originally disclaimed coverage pursuant to the policy's auto exclusion, it had waived its right to disclaim coverage on other grounds. This, the court reasoned, rendered NGM's subsequent disclaimer based on the Hired or Non-Owned Auto endorsement ineffective. Consequently, the court ruled that NGM was obligated to defend and indemnify Blakely Pumping with regard to the claim. NGM appealed.

The Second Circuit reversed, emphasizing that the limits of § 3420(d) rendered it inapplicable to the facts at hand. The court relied on the New York Court of Appeals's seminal holding in *Zappone v. Home Insurance Co.*, which interpreted § 3420(d) as requiring notice only for a "denial of liability predicated upon an exclusion set forth in a policy which, without the exclusion, would provide coverage for the liability in question."[9] The Second Circuit added that § 3420(d) is not applicable where "'the policy as written could not have covered the liability in question under any circumstances,' that is, notice is not required where there is no coverage by reason of lack of inclusion."[10]

The Second Circuit said that "determining whether there is no coverage by reason of exclusion as opposed to lack of inclusion can be 'problematic.'"[11] Nonetheless, the court interpreted the Hired or Non-Owned Auto endorsement as never having covered Blakely's vehicle in the first instance. This was in contradiction to the district court's ruling, which held that the policy initially covered the vehicle, which coverage was then removed by exclusion. The Second Circuit reasoned that "[t]he Endorsement did not generally cover auto accidents; it covered only accidents arising from the use of a Hired Auto or Non-Owned Auto" and "those terms were defined in such a way that . . . Blakely's [vehicle] . . . could never be covered."[12] Therefore, because there was no coverage "by reason of lack of inclusion," compliance with § 3420(d) was not required.[13] Accordingly, the Second Circuit reversed the district court's decision and ruled that NGM was not obligated to defend or indemnify Blakely Pumping for the subject claim.

The Second Circuit's holding is instructive concerning the limits of § 3420(d): it is limited to policy defenses to coverage; it does not create coverage where none existed in the first instance. Nonetheless, distinguishing between denials based on exclusions of coverage as opposed to denials based on "lack of inclusion" can be problematic. Although, as a general rule, the insuring agreement of a policy provides the general issuance of coverage from which the exclusions remove coverage, the nature of certain policy conditions and definitions can be ambiguous.[14] Depending on the language of the policy, courts have held some conditions and definitions to be providers of coverage and other such provisions exclusions of coverage.[15]

Accordingly, insurers should be sure to use an abundance of caution in complying with § 3420(d) in New York bodily injury cases. Nonetheless, *Blakely Pumping* provides a valuable lesson: § 3420(d) is not applicable to all disclaimers of coverage; and careful attention should be paid to the potential application of *Blakely Pumping* and *Zappone* where § 3420(d) is the basis for an action to invalidate a disclaimer of coverage. ■

1. N.Y. Insurance Law § 3420(d) (Ins. Law) provides: "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

2. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982) (if the insurance carrier fails to disclaim coverage in a timely manner, it is precluded from later successfully disclaiming coverage).

3. *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1090 (2d Cir. 1986).

4. *New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1432 (2d Cir.1991).

5. *See, e.g., W. 16th St. Tenants Corp. v. Public Serv. Mut. Ins. Co.*, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dep't), *lv. denied*, 98 N.Y.2d 605, 746 N.Y.S.2d 279 (2002) (30 days unreasonable as a matter of law where sole ground on which coverage was disclaimed was insured's delay in notifying insurer of occurrence); *Colonial Penn Ins. Co. v. Pevzner*, 266 A.D.2d 391, 698 N.Y.S.2d 310 (2d Dep't 1999) (same for 41-day delay); *Campos v. Sarro*, 309 A.D.2d 888, 767 N.Y.S.2d 442 (2d Dep't 2003) (39-day delay unreasonable after receipt of sufficient facts to disclaim on basis of homeowner's policy exclusions for injuries sustained in connection with insured's business and by individuals for whom insured was obligated to procure workers' compensation insurance; explanation for delay too vague); *Squires v. Marini Bldrs.*, 293 A.D.2d 808, 810, 739 N.Y.S.2d 777 (3d Dep't), *lv. denied*, 99 N.Y.2d 502, 752 N.Y.S.2d 589 (2002) (insurer waited 42 days after receiving plaintiff's complaint, which alleged his employment status, the sole factor in determining whether to deny coverage, and did not assert that it had any reason to doubt the allegations of the complaint); *Nationwide Mut. Ins. Co. v. Steiner*, 199 A.D.2d 507, 605 N.Y.S.2d 391 (2d Dep't 1993) (unexplained 41-day delay in disclaiming on ground of untimely notice of accident).

6. *NGM Ins. Co. v. Blakely Pumping, Inc.*, 593 F.3d 150 (2d Cir. 2010).

7. *Id*. at 153 (quoting *Zappone*, 55 N.Y.2d at 137).

8. *NGM Ins. Co. v. Blakely Pumping, Inc.*, 2009 WL 765042 (S.D.N.Y. 2009), *rev'd*, 593 F.3d 150 (2d Cir. 2010).

9. *Id*. at 153.

10. *Id*. (internal quotations omitted).

11. *Blakely Pumping*, 593 F.3d at 153 (quoting *Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 189, 712 N.Y.S.2d 433 (2000)).

12. *Blakely Pumping*, 593 F.3d at 154 (quoting *Zappone*, 55 N.Y.2d at 134 (internal quotations omitted)).

13. *Blakely Pumping*, 593 F.3d at 154 (quoting *Zappone*, 55 N.Y.2d at 137 (internal quotations omitted)).

14. *See* Leo Martinez et al., New Appleman Insurance Law Practice Guide § 30.05[3][a] (2008).

15. *See generally Planet Ins. Co. v. Bright Bay Classic Vehicles, Inc.*, 75 N.Y.2d 394, 554 N.Y.S.2d 84 (1990) (definition of coverage "amounts to an exclusion"); *Greater N.Y. Mut. Ins. Co. v. Miller*, 205 A.D.2d 857, 613 N.Y.S.2d 295 (1994) (an insurance policy's definition of an "insured" was an exclusion where it withheld coverage for drivers who used the auto in question without permission); *United Servs. Automobile Ass'n v. Meier*, 89 A.D.2d 998, 454 N.Y.S.2d 319 (1982) (found that various definitions in an insurance policy were "negative definitions, which, in effect, are nothing more than exclusions" but other definitions were not exclusions).

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The Rise of Biomechanical Experts at Trial

By Robert Glick and Sean O'Loughlin

The use of biomechanical experts in defending low-impact automobile cases has become, without surprise, a relatively new weapon in the arsenal of insurance defense attorneys. By and large, this type of defense seeks to establish that a plaintiff involved in an automobile accident either could not have sustained the magnitude of force necessary to compromise the alleged injured body parts or could not have physically moved in a manner that would have caused his or her alleged injured body parts to exceed their natural physiological ranges of motion. However, since most biomechanical experts are not licensed medical doctors, many plaintiffs' attorneys are mounting challenges to discredit the very essence of the science as a whole. With the judiciary divided over whether to allow biomechanical experts to testify, defense attorneys are now faced with the unique challenge of convincing the courts as to the legitimacy of biomechanics as an established science.

A biomechanical expert is one who reconstructs an automobile accident using physics and mechanical engineering principles. Using their understanding of human anatomy and physiology, how the human body functions, and what types of forces and motions the body undergoes daily, experts can determine whether the forces involved in an accident were of the magnitude to compromise the alleged injured body parts in a manner that would result in the injuries claimed or whether the resulting motions sustained by the vehicle occupants were such that the alleged injured body parts exceeded their natural physiological ranges of motion.

The biomechanical expert's inquiry begins with an accident reconstruction; the reconstruction will reveal sudden velocity changes of the vehicles during the accident. Sudden velocity changes of a vehicle will cause the sudden and unexpected motion of the occupants inside, and this sudden and unexpected motion can serve as a basis for a claim of injury.

The Physics of an Automobile Accident

During an accident, if the occupant makes contact with the vehicle's interior, it is because the occupant moved inside the vehicle compartment. If the occupant was restrained during the contact, then the basis for a claim for injury will most likely be attributed to the occupant's movement before the restraint took hold or from the restraint itself. Since the motion of an occupant inside a vehicle during a collision is the primary cause of the alleged injuries, then it is only logical that we begin by looking at what causes motion during a car accident.

Consider the following example of how people move inside a car during an accident. Two cars are traveling on a road, one in front of another, with the vehicle in the rear traveling faster than the vehicle in the front. At some point in time, the two vehicles will make contact. When this contact occurs, according to basic principles of physics and mechanical engineering, the faster car in the rear will transfer energy to the slower vehicle in the front causing this front vehicle to accelerate. As the front vehicle begins to accelerate, the occupants inside the vehicle are also affected. Prior to the impact, the occupants' velocity is the same as the vehicle they are traveling in. However, as their host vehicle suddenly changes velocity, the occupants do not. They initially continue to travel at their pre-impact velocity even though their host vehicle is accelerating beneath them, which causes the occupants to move inside the vehicle compartment. The vehicle is travelling faster than they are, which pushes them toward the rear, into their seats. Now, as their seats become loaded with force, the seat in turn becomes a spring, catapulting the occupants forward. If the occupants are wearing a restraint, the seat belt will take hold of them, to restrain them back into their seats. The sudden change in velocity of the host vehicle has caused this. The task now is to understand what causes this sudden change in velocity.

For every action, there is an equal and opposite reaction. This is Newton's Third Law. When two cars make contact, the force of the collision is equal in magnitude but opposite in direction. The reaction of the vehicles is subject to their masses, but the force is the same to both vehicles. The acceleration of each vehicle will be equal to the force of the impact divided by the vehicle's mass. This is Newton's Second Law, the famous equation being: Force equals Mass multiplied by Acceleration. Moreover, as long as an outside object does not interfere with the vehicles during and following the collision, the vehicles' total momentum must be maintained. This is the principle of Conservation of Momentum, which basically means that when two objects are travelling together, their total momentum will not change because of a collision, as long as they are not interfered with by an outside object. Thus: The momentum of each vehicle is equal to its mass multiplied by its velocity. The total momentum is equal to the sum of the momentum of both vehicles. This total momentum will not change as long as the vehicles are not interfered with by an outside object, even though both vehicles may change their velocities during the collision. Conservation of Momentum must be preserved on both the longitudinal and lateral directions of travel. In addition, a vehicle may change its velocity in both the longitudinal and lateral directions of travel.

In a collision, energy can be transferred laterally, causing lateral accelerations of the vehicles and their occupants. For example, if a car traveling north makes contact with a car that is traveling west, each vehicle will accelerate laterally because of lateral energy gained during the collision. More specifically, the north-bound vehicle will pick up west-bound energy from the west-bound vehicle, causing the north-bound vehicle to accelerate west. The west-bound vehicle will accelerate north because of energy received from the north-bound vehicle. The occupants inside both vehicles will move opposite to the accelerations or decelerations of their respective host vehicles. To understand the consequences of the impact, the practitioner needs to understand that, as a general rule, cars move away from the point of impact and people move toward the point of impact. This rule applies for both the longitudinal and lateral directions of travel. Once we understand how and why people move inside a vehicle during a car accident we can look at how engineers calculate how much energy is transferred during a collision to determine the magnitude of force imposed upon the occupants.

The Physics of Energy and Motion

The amount of energy gained or lost during a collision is directly related to how much a vehicle changes velocity. When a vehicle gains energy, the vehicle accelerates. When a vehicle loses energy, it decelerates. Vehicles can change velocity both longitudinally and laterally, energy can be gained and lost both longitudinally and laterally, and occupants can move inside a vehicle both longitudinally and laterally. The amount of energy gained or lost during a collision is determined by using standard principles of physics and by comparing the damage to the accident vehicle with an equivalent crash test vehicle that sustained damage to the same location.

The change in velocity of a vehicle during a collision can be calculated using basic physics principles. The force of an impact is the same for both vehicles, but the reaction of each vehicle to the impact will differ, subject to its mass.

Force equals Mass multiplied by Acceleration. The force to both vehicles is the same. The mass of the first vehicle multiplied by its acceleration is equal to the mass of the second vehicle multiplied by its acceleration. The mass of each vehicle is equal to its weight divided by the acceleration rate due to gravity or 32.2 feet per second squared. The acceleration for each vehicle is equal to its change in velocity. In addition, if the engineers know the closing speed of the vehicles, they can calculate the change in velocity of each vehicle using the following equation: the change in velocity for vehicle one is equal to the mass of vehicle two multiplied by the sum of one plus the Coefficient of Restitution multiplied by the closing speed divided by the total mass of both vehicles. The closing speed is the speed at which both vehicles are closing in on each other. For example, if two cars are travelling in a straight line and the car in the rear is travelling at 15 miles per hour and the car in the front is travelling

at 5 miles per hour, then the closing speed is 10 miles per hour. The Coefficient of Restitution is the vehicles' separation speed (the bounce back after impact) divided by the closing speed. The math can be very complicated, but it is important to have an idea of what engineers are talking about.

The amount of energy that is gained or lost during a collision is also determined by comparing the damage to the accident vehicle with an equivalent crash test vehicle that sustained damage to the same location. Consider, for example, two identical cars. If the first car is hit in a certain manner with a certain amount of force in a certain location and a certain dent results and we hit the second car in the same manner with the same amount of force in the same location, we should end up with a comparable deformation. The deformation represents the amount of energy that the car's material could not withstand. To illustrate: If I am sitting on a chair, my weight is exerting a downward force on the chair. The chair, in turn, is exerting an upward force to hold me up. However, if my weight is too great for the chair to bear, the chair will break or deform. It follows that if a car was damaged in a certain location from an accident and we compare that vehicle to an equivalent crash test vehicle that sustained greater damage in the same location, the crash test vehicle was involved in a collision that involved a greater transfer of energy. With that basic understanding of force and motion, we can take a look at injury-causing mechanisms.

The Physics of an Occupant's Injury

The human body is made up of both rigid-type structures, such as bones, and elastic-type structures, such as tendons and ligaments. In assessing whether a force or motion could break or compromise a body part, we must determine whether the body part made contact with another object or body part with such force as to cause a break or compromise or whether the body part was stretched beyond its limits because of the force or motion. If a rigid-type structure of the body receives a force that it cannot withstand, it will fracture. If an elastic-type structure of the body is stretched too far, it will tear. We know that certain twisting motions of the knee compromise its meniscus. So, what if the accident did not produce a twisting motion? Was the accident the cause of the alleged meniscus tear? We also know that certain movements of the arm above the shoulder plane compromise the Supraspinatus Tendon of the shoulder. But what if there was no motion of the arm above the shoulder plane? Did the accident cause the Supraspinatus Tendon tear? In addition, we know that hyper-flexion and hyper-extension of lumbar and cervical spines compromise their respective intervertebral discs. Once again, what if there was no hyper-flexing or hyper-extending of either the cervical or lumbar spines? Could the accident have caused the alleged herniations in either spine?

Since most biomechanical engineers are not licensed medical physicians, New York state courts are largely divided over the extent to which they may allow a biomechanical expert to testify.

In analyzing a car accident, a biomechanical engineer will determine whether the forces involved in the accident were of the magnitude to compromise the alleged injured body parts in a manner that would result in the injuries claimed or if the resulting motions sustained by the occupant were such as to cause the alleged injured body parts to exceed their natural physiological ranges of motion. Moreover, an engineer will look at the forces imposed upon the alleged injured body parts and compare those forces with the types of forces the body parts undergo on a daily basis to determine if the accident produced forces that exceeded the forces that the body parts regularly undergo.

Admitting and Using a Biomechanical Engineer Expert's Testimony

Although a biomechanical engineer is not a medical doctor and is not competent to opine as to a diagnosis of an injury, biomechanical engineers are engineers of the human body. From making cars safer to drive to designing artificial limbs, biomechanical engineers are experts in the application of mechanical engineering to the human anatomy and physiology. But since most biomechanical engineers are not licensed medical physicians, New York state courts are largely divided over the extent to which they may allow a biomechanical engineer to testify. The primary proceeding in New York for determining the admissibility of a biomechanical expert's testimony is a *Frye* hearing.[1] In order to have an expert admitted, during a *Frye* hearing the proponent of the expert must prove that

1. "the witness [is][] competent in the field of expertise that he purports to address at trial,"
2. the "expert testimony [is] based on scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs,"
3. "the processes and methods employed by the expert in formulating his or her opinion adhere to accepted standards of reliability within the field,"

4. "the proffered testimony is beyond the ken of the jury," and
5. the expert's testimony is "relevant to the issues and facts of the individual case."[2]

The expert's education, experience, and publishing will play a role in the court's decision.

Once it is established that the scientific principles or procedures that serve as a basis for the engineer's opinions have gained general acceptance in the biomechanical engineering community – through published papers, articles and textbooks which are subject to peer-review – counsel must also prove that the processes and methods employed by the expert in arriving at his or her opinions are methods or processes deemed reliable in the biomechanical engineering community. This is usually accomplished by establishing that the methods or processes used by the engineer in formulating his or her opinion have been extensively tested under proper testing conditions and that the tests and the results have been published and peer-reviewed to the extent that these methods or processes are now deemed reliable in the biomechanical engineering community. In addition, counsel will have to prove that the testimony of the biomechanical expert is of a technical nature and beyond the basic knowledge of the jury. Last, counsel will have to establish that the biomechanical expert's testimony is probative of causation as to alleged injuries and, therefore, relevant to the issues and facts of the case.

At a *Frye* hearing, practitioners should be prepared to satisfy all five requirements. When showing that the scientific principles or procedures that serve as a basis for the engineer's opinions have gained general acceptance in the biomechanical engineering community, counsel will need to explain and prove Newton's Laws and the general principles of physics as they apply. If necessary, the expert should bring his or her textbooks used at the major universities, as well as articles and papers supporting the basis for his or her reasoning. In showing that the processes and methods employed by the expert in arriving at his or her opinions are methods or processes that are deemed reliable in the biomechanical engineering community, attorneys will need to prove that the mathematical formulas used by the engineer are those deemed reliable by the biomechanical engineering community for the purpose for which the engineer used the formulas. Attorneys must also be prepared to show how these formulas have been used in countless tests and studies, including to what extent they have been published on and peer-reviewed. If the engineer is relying on a crash test or a study, attorneys need to demonstrate that the test or study was conducted under proper testing conditions and that the test or study has been published and peer-reviewed. In addition, attorneys must be prepared to prove the entire body of science at both the *Frye* hearing and at the damages portion of a trial. There is no substitute for a thorough and complete record. Last, attorneys must be prepared to explain the science to the jury during both the opening statement and the closing argument. It is particularly important to explain, during your opening statement, what the evidence will establish so the jury is not confused when the expert engineer is testifying. And during summation, it is imperative to remind the jury what was proved through the expert's testimony.

The testimony of a biomechanical engineer can be a very effective weapon for cross-examining a plaintiff's treating physician on how little he or she understands about the energy involved in a collision, the amount of force imposed on the alleged injured body parts during the collision, or the body moving during the accident in such a manner as to cause the injuries alleged. This can be particularly useful in disproving the medical argument that because a vehicle occupant was asymptomatic before the accident and is now symptomatic after the accident, the accident must have caused the occupant's injury. In addition, biomechanics can be used to support the defense's medical experts. If a medical doctor reconfirms his or her findings based upon the biomechanical engineer's findings, an attorney now has both a medical doctor and a biomechanical engineer testifying that the accident could not have caused the alleged injuries because the necessary injury-causing mechanisms were not present in the accident. This is why strategically it is best to put a biomechanical expert on the stand before the medical expert. Whatever the biomechanical expert cannot say, the medical doctor can.

Conclusion

It is important to remember that biomechanical experts reconstruct automobile accidents using physics and mechanical engineering principles. Using their knowledge of human anatomical and physiological functions and what types of forces and motions the body undergoes daily, they determine whether the forces involved in an accident were of the magnitude to compromise the alleged injured body parts and result in the injuries claimed or if the resulting motions sustained by the occupants were such as to cause the alleged injured body parts to exceed their natural physiological ranges of motion. Armed with the knowledge that the accident did not contain the magnitude of force necessary to compromise the alleged injured body parts or that the alleged injured body parts could not have moved in a manner that would have caused them to become compromised, defense counsel will have a much better chance convincing a jury the accident did not cause the alleged injuries. ■

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *People v. Legrand*, 196 Misc. 2d 179, 747 N.Y.S.2d 733 (Sup. Ct., N.Y. Co. 2002), *rev'd on other grounds*, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007).

2. *Borzacchiello v. Bousbaci*, Index No. 4875/04 (Sup. Ct., Queens Co. 2006), *available at* http://decisions.courts.state.ny.us/fcas/fcas_docs/2006mar/40000487520041sciv.pdf.

Overview of No-Fault Litigation in New York State

By Mitchell S. Lustig and Jill Lakin Schatz

New York's no-fault law, formally known as the Comprehensive Automobile Insurance Reparations Act, was enacted by the New York State Legislature in 1973 to address significant problems that existed under the common-law fault-based system. The law applies to all motor vehicle accidents commencing on or after January 1, 1974. "Its purposes were to remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic losses suffered as a result of such accidents."[1]

The no-fault law established a two-tier system for the reparation of personal injuries. Only in instances where an injured claimant suffered a "serious injury"[2] is the claimant allowed to commence a third-party suit for "non-economic loss" against the adverse owner or driver. In all other instances, the claimant is limited to recovery of first-party benefits or "economic loss" from the claimant's own insurer.[3]

Section 5106 of the New York State Insurance Law grants injured claimants and/or their assignees (e.g., medical providers) the option of submitting disputes for payment of first-party benefits to AAA Arbitration or filing lawsuits in court. For the period from 1974 to approximately 2000, injured claimants and/or their assignees overwhelming chose arbitration in lieu of litigation.

Beginning in or about 2001, the tide shifted and claimants increasingly turned to litigation, the result being that by 2003 the Civil Court of the City of New York and the District Courts of Nassau and Suffolk Counties were inundated with lawsuits filed by medical providers in their capacity as assignees of the injured claimants. Approximately one-third of the entire calendar in the Civil Court of the City of New York is composed of no-fault cases.[4] Indeed, special parts have been created in the Civil Court and District Court, devoted solely to no-fault litigation.

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This increase was largely fueled by a January 11, 2000, Opinion Letter[5] issued by the Office of General Counsel of the Superintendent of Insurance. There, the superintendent discussed the burden of proof that a medical provider must satisfy to establish a *prima facie* case of entitlement to reimbursement of no-fault benefits in light of the decisions of the Court of Appeals in *Presbyterian Hospital v. Maryland Casualty Co*.[6] and *Central General Hospital v. Chubb Group of Insurance Cos*.[7] These cases firmly established that an insurer that fails to deny a claim within 30 days of its receipt is precluded from asserting most defenses to the claim. The superintendent concluded that even when an insurer issues a late denial of claim, a medical provider still has the burden of establishing the medical necessity of the services rendered to the injured claimant.[8]

Based upon this Opinion Letter, many AAA Arbitrators issued awards denying the claims of medical providers even when the insurer's denial was late, on the basis that the medical providers did not prove the medical necessity of the services rendered. Consequently, the medical providers ceased filing arbitrations and began "shopping" at the courthouse.

At the same time, the courts began to issue decisions that liberally construed the provider's burden of proof for establishing a *prima facie* case.[9] In direct contrast to the Opinion Letter, the courts expressly held that a medical provider was not required to prove the medical necessity of the services rendered to the injured claimant.[10] Thus, when its denial was untimely, the insurer was precluded from raising any affirmative defenses to the claim, including lack of medical necessity.[11]

The *Prima Facie* Case

In order to be able to successfully recover in a no-fault lawsuit, the medical provider must establish a *prima facie* case. This involves submitting proof that the prescribed statutory claim forms have been mailed and received and that payment of no-fault benefits is overdue.[12] Typically, the medical provider submits (1) a statutory claim form, such as an NF-3 form, Verification of Treatment by Attending Physician or Other Provider of Health Services form, an NF-5 form, or a New York Motor Vehicle No-Fault Insurance Law Hospital Facility form; (2) the bill for the services rendered; (3) an assignment of benefits; and (4) proof of mailing of the claim.

Currently, there is a sharp split among the judicial departments as to the evidentiary standard a medical provider must satisfy to establish a *prima facie* case. In the Second Judicial Department, for example, a medical provider establishes the admissibility of the statutory claim forms by demonstrating that they are business records as provided under CPLR 4518.[13]

As a result, a medical provider must present admissible evidence that the statutory claim forms were made in the regular course of the provider's business and reflect a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business, that it was the regular course of the business to make the statutory claim forms and that the claim forms were made at the time of the acts, transactions, or occurrences or events describe therein.[14] To lay these foundational requirements and establish a *prima facie* case, the medical provider submits either an affidavit or testimony from an individual with personal knowledge of the provider's business practices and procedures, pursuant to which the statutory claim forms were made or created.[15] Without an affidavit or testimony, the statutory claim forms are inadmissible hearsay and cannot be used to establish a *prima facie* case.[16]

There is a sharp split among the judicial departments as to the evidentiary standard a medical provider must satisfy.

Conversely, in the First Judicial Department, the medical provider does not face the same evidentiary burden. Instead, a medical provider may establish its *prima facie* case simply by presenting the affidavit or testimony of a witness with knowledge of the provider's general practices and procedures for mailing the statutory claim forms to the insurer.[17] The witness does not need to establish the admissibility of the statutory claim forms pursuant to CPLR 4518.

Thus, until there is a definitive ruling by the Appellate Divisions or the Court of Appeals, the evidentiary split between the lower courts in the First and Second Judicial Departments will continue.[18] Other contradictory decisions have resulted as a consequence of this dispute. For example, in the First Judicial Department, a plaintiff can establish a *prima facie* case by using a Notice to Admit pursuant to CPLR 3123[19] or a defendant's responses to its demand for interrogatories.[20] However, a medical provider in the Second Judicial Department must independently establish the admissibility of its statutory claim forms, so an admission made by a defendant in either a Notice to Admit[21] or a response to an interrogatory[22] cannot be used by a medical provider to establish a *prima facie* case. Also, in the Second Judicial Department, a medical provider cannot establish a *prima facie* case through the testimony or affidavit of a representative from a third-party billing company.[23]

The 30-Day Rule

Pursuant to Insurance Law § 5106(a) and 11 N.Y.C.R.R. § 65-3.8(a)(1) (of the implementing regulations of the Superintendent of Insurance), the no-fault insurer must

pay or deny a claim within 30 days of its receipt of the statutory proof of claim forms. The insurer's 30-day period may be extended by a request for additional verification, which must be made by the insurer within 15 business days of its receipt of the statutory claim forms.[24] If the requested verification is not provided within 30 days of the original verification request, the no-fault insurer must, within 10 days after the expiration of the 30 days, issue a second verification request and label such as "SECOND NOTICE."[25]

If the insurer fails to issue a follow-up request, the insurer will lose the benefit of the toll and any resulting denial would be considered untimely.[26] In resolving a dispute between the lower courts, however, the Appellate Division, Second Department[27] recently held that an insurer does not have to wait a full 30 days after the original request before it can send a second request for verification.[28] Notably, the 30-day period to pay or deny does not begin to run until all demanded verification is received by the insurer.[29] Accordingly, if a lawsuit is commenced while there is an outstanding unanswered verification request, it will be dismissed as premature.[30]

Should the insurer fail to pay or deny a claim within 30 days of receipt of the bill or any request for additional verification, it will be precluded from raising most defenses to a provider's claim, including lack of medical necessity.[31] The theory behind the preclusion rule was articulated by the New York Court of Appeals in *Presbyterian Hospital in the City of New York v. Maryland Casualty Co.*, in which the Court stated:

> No-fault reform was enacted to provide prompt uncontested, first-party insurance benefits. That is part of the price to be paid to eliminate common-law contested lawsuits. . . . The trade-off of no-fault reform still allows carriers to contest ill founded, illegitimate and fraudulent claims, but within a strict, short-leashed contestable period and process designed to avoid prejudice and red tape dilatory practices.[32]

While the Court of Appeals has served as a zealous guardian of the 30-day rule,[33] in the seminal case of *Central General Hospital v. Chubb Group of Insurance Cos.*[34] the Court carved out a limited exception to the rule for cases where the insurer asserts a defense premised upon lack of coverage. As the Court stated in *Chubb*: "We are persuaded that an insurer, despite its failure to reject a claim within the 30-day period . . . may assert a lack of coverage defense premised upon the fact or founded belief that the alleged injury does not arise out of an insured incident."

Therefore, it is essential that the no-fault practitioner distinguish between those defenses that are precluded unless asserted by the no-fault insurer in a timely manner and "lack of coverage" defenses that are non-waivable and, therefore, exempt from the 30-day rule. The following is a list of defenses that have been held to constitute "lack of coverage defenses."

Staged Accidents

No-fault insurance policies only cover vehicular accidents;[35] an accident is by definition unintentional.[36] It has, therefore, been held that injuries resulting from a deliberate collision staged by the parties are not covered by no-fault insurance.[37] Accordingly, a denial of claim premised upon this ground does not have to be asserted in a timely denial.[38]

The Claimant's Injuries Are Not Causally Related to the Accident

In *Chubb*, the plaintiff's assignor, Pamela Mandresh, was a postal worker and had been injured in a work-related accident approximately one year prior to the automobile accident at issue. Moreover, Ms. Mandresh was being treated by the same physician for the identical cervical condition for both the work-related accident and the automobile accident. Under these circumstances, the Court of Appeals held that the insurer was not required to deny the claim within 30 days after its receipt.

Similarly, in *Primary Psychiatric Health, P.C. v. State Farm Mutual Auto Ins. Co.*,[39] the Civil Court of the City of New York, Kings County, held that a no-fault insurer was not precluded from asserting a late denial where two psychologists testified at trial on behalf of the insurer that the claimant's psychological injuries were not causally related to the automobile accident.

Accordingly, an untimely denial does not preclude an insurer from asserting a lack of coverage defense that the claimant's alleged injuries did not arise out of or were not causally related to the automobile accident.[40]

Fraudulently Incorporated Medical Providers

In *State Farm Mutual Automobile Insurance Co. v. Mallela*,[41] the Court of Appeals held that a no-fault insurer may withhold the payment of no-fault benefits to fraudulently incorporated medical providers – *to wit*, those not properly incorporated in accordance with the New York Business Corporation Law. The Court further stated that no-fault insurers "may look beyond the face of licensing documents to identify willful and material failure to abide by state and local law." However, the Court failed to answer whether the defense of fraudulent incorporation must be asserted in a timely denial or whether such a defense survives preclusion and cannot be waived.

Despite the compelling arguments by some learned practitioners to limit the reach of the "exceptional exemption" created in *Chubb*,[42] the courts have uniformly held that the defense of fraudulent incorporation survives preclusion and does not have to be asserted in a timely denial.[43]

Fraud in the Procurement of the Policy

Although N.Y. Vehicle and Traffic Law § 313 does not allow an insurer to cancel an automobile policy retroactively so as to protect innocent third parties injured in automobile accidents,[44] an insurer may nevertheless assert misrepresentation or fraud as an affirmative defense in an action by the insured and/or assignee to recover benefits under the policy.[45] Thus, it has been held that, in instances where the insured engages in a fraudulent scheme to procure the insurance policy in order to pay reduced insurance premiums, there is no coverage under the policy.[46] Moreover, a denial predicated on this ground is non-waivable and exempt from the 30-day preclusion rule.[47]

Where the insured engages in a fraudulent scheme to procure the insurance policy in order to pay reduced insurance premiums, there is no coverage under the policy.

For example, in *AA Acupuncture Serv. P.C. v. Safeco Insurance Co. of America*,[48] the Appellate Division, First Department reversed the lower court decision and held that the no-fault insurer had established a complete defense to a provider's claim for no-fault benefits where the evidence established that the application the plaintiff's assignor submitted to the insurer listed the insured's address as Connecticut; in actuality, her residence was in Brooklyn. The annual premium paid by the insured was $1,236, based upon her fraudulent representation that she resided in Connecticut. Had the insured disclosed that her residence was in Brooklyn, the annual premium would have been $4,807.

Services Performed by Independent Contractors

Insurance regulation 11 N.Y.C.R.R. § 65-3.11(a) provides for the payment of no-fault benefits "directly to the applicant . . . or upon assignment by the applicant to the providers of health services." However, where a billing provider seeks to recover no-fault benefits for services not rendered by it or its employees but rather by a treating provider who is an independent contractor, the billing provider is not considered a "provider" of services within the meaning of the regulation. Accordingly, the billing provider is not entitled to recover direct payment of assigned no-fault benefits.[49] Moreover, it has been held that such a defense to a provider's claim is non-waivable and not subject to preclusion.[50]

Additional lack of coverage defenses that are non-waivable and survive preclusion include those in which (1) the insurer asserts that it cancelled the policy prior to the accident or never issued a policy in the first instance;[51] (2) the injuries allegedly suffered by the claimant did not arise out of the "use or operation" of a motor vehicle;[52] or (3) the claimant was not an eligible injured person entitled to no-fault benefits under the PIP Endorsement.[53] Accordingly, a denial premised on any of these grounds does not have to be asserted in a timely manner.

Certain defenses that could arguably fit within the category of "lack of coverage" defenses have been specifically held not to be exempt from the 30-day rule, however. In *Westchester Medical Center v. Lincoln General Insurance Co.*,[54] the Appellate Division, Second Department held that a defense that an injured claimant was acting in the course of his employment at the time of the accident and that his injuries were covered by workers' compensation must be asserted in a timely denial or the defense will be precluded.[55] Moreover, a defense that the provider's charges are in excess of the fee schedule must also be interposed in a timely denial or the defense will be deemed waived.[56]

Conditions Precedent to Coverage

The Mandatory Personal Injury Protection (PIP) Endorsement, effective for policies issued or renewed after April 5, 2002, provides that an eligible injured person, or that person's assignee, shall "as may reasonably be required submit to examinations under oath (EUO) by any person named by the [insurer] and subscribe the same."[57] This was a significant departure from the prior mandatory PIP Endorsement which did not contain an explicit requirement that the claimant submit to an EUO.[58] Thus, the appearance of the eligible injured person at an EUO is a condition precedent to an insurer's liability under the PIP Endorsement.[59]

To successfully interpose a defense that the claimant failed to appear for an EUO ("EUO no-show" defense), several hurdles must be overcome. First, the insurer must establish that it had good reasons to request the EUO.[60] Second, the insurer must demonstrate that it mailed at least two EUO scheduling letters to the claimant and that the claimant failed to appear at two scheduled EUOs.[61] Third, the EUO scheduling letters must schedule the examination at a "place and time reasonably convenient to the applicant" and must inform the claimant that she "will be reimbursed for any loss of earnings and reasonable transportation expenses incurred" in complying with the insurer's request.[62]

Moreover, since a defense premised upon the failure of the eligible injured person to appear for an EUO is

not considered a lack of coverage defense, the assertion of this defense is subject to the 30-day preclusion rule.[63] Therefore, the insurer must show that it either denied the bill within 30 days of receipt or timely delayed the bill pending an EUO.[64]

Notably, general delay letters stating that the claim is being delayed pending an investigation will not suffice to toll the 30-day period.[65] In order to successfully toll the claim, the delay letter issued to the medical provider must specify that the bill is being delayed pending an EUO and, in addition, should specify the name of the person to be examined.[66]

> Overdue no-fault payments shall bear interest at a rate of 2% per month.

In addition, while the insurer is not required to schedule an EUO within 30 days of receipt of the bill, the insurer cannot employ "red tape dilatory practices" and must schedule the EUO within a reasonable time.[67] Finally, if the underlying automobile accident occurred after April 5, 2003, the insurer is not required to produce the policy of insurance to successfully invoke this defense.[68]

The Mandatory PIP Endorsement further provides that an eligible injured person shall submit to an independent medical examination (IME) by physicians selected by the insurer when, and as often as, the insurer may require.[69] As with an EUO request, the insurer must present admissible proof that it mailed at least two IME scheduling letters to the claimant and that the claimant failed to attend two IMEs.[70] If the insurer can satisfy this burden, it can lawfully deny all no-fault benefits retroactive to the date of loss.[71] However, the two IME requests that the claimant failed to attend must be in the same medical specialty (e.g., orthopedic, chiropractic, or neurological).[72]

Interest on Overdue No-Fault Claims and Attorney Fees

Section 65-3.9(a) of 11 N.Y.C.R.R. provides that all overdue no-fault payments shall bear interest at the rate of 2% per month. This amounts to 24% per annum, which is substantially greater than the 9% per annum permissible for all other types of civil actions. However, 11 N.Y.C.R.R. § 65-3.9(c) provides that, if an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of the denial of claim, interest shall not accumulate on the claim until "such action is taken."

Consequently, a heated debate ensued between medical providers and no-fault insurers as to when the payment of interest accrues on overdue no-fault claims – that is, those not paid or denied within 30 days of receipt by the insurer. Should it be 30 days after submission of the bill to the no-fault insurer as advocated by the medical providers or should interest accrue only upon commencement of a lawsuit or the filing of arbitration as claimed by no-fault insurers? The lower courts have issued conflicting decisions.[73]

In *LMK Psychological Services, P.C. v. State Farm Mutual Automobile Insurance Co.*,[74] the Appellate Division, Third Department held that interest on untimely denied claims accrues 30 days after submission of the bill to the no-fault insurer. In *East Acupuncture, P.C. v. Allstate Insurance Co.*,[75] however, the Appellate Division, Second Department repudiated the Third Department ruling, holding that interest on untimely denied claims does not accrue until the commencement of the action or the filing of the arbitration.

On appeal in *LMK Psychological Services, P.C. v. State Farm Mutual Automobile Insurance Co.*,[76] the New York Court of Appeals resolved the conflict between the Second and Third Departments, definitively holding that interest on untimely or improperly denied claims accrues upon the commencement of the action or the filing of arbitration.[77] The Court noted: "Once a denial is issued, even if untimely, a claimant should still be encouraged to resolve disputes quickly." However, it is generally accepted that if the insurer fails to issue any denial, interest will accrue or run 30 days after the submission of the bill to the insurer.[78]

In *LMK*, the Court also resolved the controversial issue of how attorney fees are to be calculated upon the settling of an action or after judgment. Deferring to an Opinion Letter by the Superintendent of Insurance,[79] the Court held that attorney fees are to be calculated based upon the aggregate of all bills for each injured claimant or assignor and not upon a per-bill or per-claim basis. For example, if a provider files a suit or commences an arbitration for 10 bills for services provided to a particular assignor, attorney fees are limited to 20% of the aggregate of all bills submitted or $850, whichever is less. No longer is the provider entitled to a minimum of $80 per each bill as some lower courts had held.[80]

Conclusion

This article provides the practitioner with an overview of the current state of the no-fault law. Note well that the law is constantly evolving and changing, and new decisions are being issued virtually every day. ■

1. *Walton v. Lumbermens Cas. Co.*, 88 N.Y.2d 211, 644 N.Y.S.2d 133 (1996); *see also Montgomery v. Daniels*, 38 N.Y.2d 41, 378 N.Y.S.2d 1 (1975).

2. A "serious injury" is defined by Ins. Law § 5102(d) as follows:

   Serious injury means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a

> medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

3. McKinney's N.Y. Ins. Law § 5104(a).

4. *See* Karen Rothenberg & Jennifer R. Rappaport, *No-Fault – The Litigation Epidemic*, N.Y.L.J., Jan 5, 2004, p. 4, col.4; Shlomo Hagler & Aaron H. Hauptman, *First Party No-Fault Benefit Actions*, N.Y.L.J., Oct. 8, 2004, p. 4, col 4.

5. *See* Ops. General Counsel NY Ins. Dep't No.: 00-01-02.

6. 90 NY.2d 274, 660 N.Y.S.2d 536 (1997).

7. 90 N.Y.2d 195, 659 N.Y.S. 2d 246 (1997).

8. As the superintendent specifically noted in the Opinion Letter of January 11, 2000:

> It should be noted that in determining whether the claimant has established a prima facie case for reimbursement based upon the evidence submitted by the claimant, the mere submission of a bill for services without additional proof of necessity or causation may be insufficient to meet the requirements of Section 5102 [of the N.Y. Ins. Law].

9. *Amaze Med. Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128(A), 784 N.Y.S.2d 918 (App. Term 2d Dep't 2003).

10. *A.B. Med. Servs., PLLC. v. Geico*, 2 Misc. 3d 26, 773 N.Y.S.2d 773 (App. Term 2d Dep't 2003); *Inwood Hill Med., P.C. v. Allstate Ins. Co.*, 3 Misc. 3d 1110(A), 787 N.Y.S.2d 678 (Civ. Ct., N.Y. Co. 2004).

11. *East Cost Acupuncture, P.C. v. N.Y. Cent. Mut. Ins.*, 18 Misc. 3d 139(A), 859 N.Y.S.2d 894 (App. Term 2d and 11th Jud. Dists. 2008); *King's Med. Supply, Inc. v. Country-Wide Ins. Co.*, 5 Misc. 3d 767, 783 N.Y.S.2d 448 (Civ. Ct., Kings Co. 2004).

12. *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dep't 2004).

13. *Dan Med., P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 14 Misc. 3d 44, 829 N.Y.S.2d 404 (App. Term 2d and 11th Jud. Dists. 2006); *Great Wall Acupuncture v. N.Y. Cent. Mut. Fire Ins. Co.*, 14 Misc. 3d 142(A), 836 N.Y.S.2d 499 (App. Term 2d and 11th Jud. Dists. 2007); *Bath Med. Supply, Inc. v. Allstate Ins. Co.*, 16 Misc. 3d 135(A), 847 N.Y.S.2d 900 (App. Term 2d and 11th Jud. Dists. 2007).

14. *Friendly Physician, P.C. v. Progressive Ins. Co.*, 17 Misc. 3d 1135(A), 851 N.Y.S.2d 69 (Civ. Ct., Kings Co. 2007).

15. *Psychol. YM, P.C. v. Nationwide Mut. Ins. Co.*, 24 Misc. 3d 140(A), 899 N.Y.S.2d 62 (App. Term 2d, 11th and 13th Jud. Dists. 2009).

16. *Second Med., P.C. v. AutoOne Ins. Co.*, 20 Misc. 3d 291, 857 N.Y.S.2d 898 (Civ. Ct., Kings Co. 2008).

17. *Jeff Mollins, DC v. Allstate Ins. Co.*, 20 Misc. 3d 141(A), 867 N.Y.S.2d 376 (App. Term 1st Dep't 2008); *Gotham Acupuncture, P.C v. Country-Wide Ins. Co.*, 20 Misc. 3d 141(A), 2008 N.Y. Slip Op. 51615(U) (App Term 1st Dep't 2008); *Fair Price Med. Supply, Inc. v. St. Paul Travelers Ins. Co.*, 16 Misc. 3d 8, 838 N.Y.S.2d 848 (App. Term 1st Dep't 2007).

18. For an excellent discussion of the evidentiary rift between the First and Second Judicial Department, see Jason Tenenbaum and Francis J. Scahill, *What Constitutes a 'Prima Facie' Case in No-Fault Practice*, N.Y.L.J., Aug 4, 2009, p. 4, col. 1.

19. *Prime Psychological Servs., P.C. v. Auto One Ins. Co.*, 18 Misc. 3d 1122(A), 859 N.Y.S.2d 898 (Civ. Ct., Bronx Co. 2008).

20. *P.L.P. Acupuncture, P.C. v. Travelers Indem. Co.*, 19 Misc. 3d 126(A), 859 N.Y.S.2d 908 (App. Term 1st Dep't 2008); *Fair Price Med. Supply, Inc.*, 16 Misc. 3d 8.

21. *Bajaj v. Gen. Assurance*, 18 Misc. 3d 25, 852 N.Y.S.2d 576 (App. Term 2d Dep't 2007). As the court noted in *Baja*, "to the extent defendant insurer issued denial of claim forms or admitted receipt of plaintiff's claim forms, we {have} held that said admissions were not concessions of the facts asserted in plaintiff's claim forms, and it was the plaintiff's burden to proffer such evidence in admissible form."

22. *Empire State Psychol. Servs. v. Travelers Ins. Co.*, 13 Misc. 3d 131(A), 824 N.Y.S.2d 753 (App. Term 2d and 11th Jud. Dists. 2006).

23. *563 Grand Med, P.C. v, Kemper Auto & Home Ins. Co.*, 27 Misc. 3d 127(A), 2010 N.Y. Slip Op. 50582(U) (App. Term 2d, 11th and 13th Jud. Dists. 2010); *Carothers, M.D.P.C. v. Geico Indem. Co.*, 24 Misc. 3d 19, 882 N.Y.S.2d 802 (App. Term 2d, 11th and 13th Jud. Dists. 2009); *Raz Acupuncture, P.C. v. Travelers Prop. Cas. Ins. Co.*, 26 Misc. 3d 132(A), 906 N.Y.S.2d 783 (App. Term 2d, 11th and 13th Jud. Dists. 2010).

24. *See* 11 N.Y.C.R.R. § 65-3.5(b).

25. *See* 11 N.Y.C.R.R. § 65-3.6(b).

26. *Vitality Chiropractic, P.C. v. Kemper Ins. Co.*, 14 Misc. 3d 94, 831 N.Y.S.2d 637 (App. Term 2d Dep't 2006).

27. *Compare Sea Side Med., P.C. v. State Farm Mut. Auto Ins. Co.*, 12 Misc. 3d 1127, 819 N.Y.S.2d 819 (Civ. Ct., Richmond Co. 2006) (second verification letter sent out 28 days after the first verification request was improper and eviscerated the toll occasioned by its initial verification request) *with Psych. & Massage Therapy v. Progressive Cas. Ins. Co.*, 5 Misc. 3d 723, 789 N.Y.S.2d 661 (Civ. Ct., Queens Co. 2004) (second verification letter sent out 25 days after the initial request was properly and the resulting denial was timely).

28. *Infinity Health Prods., Ltd. v. Eveready Ins. Co.*, 67 A.D.3d 862, 890 N.Y.S.2d 545 (2d Dep't 2009).

29. 11 N.Y.C.R.R. § 65-3.8(a)(1).

30. *Nyack Hosp. v. State Farm Mut. Auto Ins. Co.*, 19 A.D.3d 569, 796 N.Y.S.2d 538 (2d Dep't 2005); *Doshi Diagnostic Imaging Servs. v. State Farm Ins. Co.*, 16 Misc. 3d 42, 842 N.Y.S.2d 153 (App. Term 2d Dep't 2007).

31. *Presbyterian Hosp. v. Maryland Cas. Co.*, 90 N.Y.2d 274, 660 N.Y.S.2d 536 (1997).

32. 90 N.Y.2d 274, 285, 660 N.Y.S.2d 536 (1997).

33. For example, in *Hosp. for Joint Diseases v. Travelers Prop. Cas. Co.*, 9 N.Y.3d 312, 849 N.Y.S.2d 473 (2007), the Court of Appeals held that an insurer's defense that there was a defect in the assignment of benefits and that, therefore, the medical provider did not have standing to sue was subject to the 30-day rule. *See also Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 10 N.Y.3d 556, 860 N.Y.S.2d 471 (2008)(holding that an insurer's defense that the assignor never received the services or supplies in dispute, otherwise known as a defense of provider fraud, is subject to the 30-day rule).

34. 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997).

35. *Universal Open MRI of the Bronx v. State Farm Mut. Auto Ins.*, 12 Misc. 3d 1151(A), 819 N.Y.S.2d 852 (Civ. Ct. Kings Co. 2006); *V.S. Med. Servs., P.C. v. Allstate Ins. Co.*, 11 Misc. 3d 334, 811 N.Y.S.2d 886 (Civ. Ct., Kings Co. 2006).

36. *State Farm Mut. Automobile Ins. Co. v. Laguerre*, 305 A.D.2d 490, 759 N.Y.S.2d 531 (2d Dep't 2003); *Allstate Ins. Co. v. Massre*, 14 A.D.3d 610, 789 N.Y.S.2d (2d Dep't 2005).

37. *Westchester Med. Ctr. v. Travelers Prop. Cas. Ins. Co.*, 309 A.D.2d 927, 765 N.Y.S.2d 901 (2d Dep't 2003); *Metro Med. Diagnostics v. Eagle Ins. Co.*, 293 A.D.2d 751, 741 N.Y.S.2d 284 (2d Dep't 2002). *But see State Farm Mut. Automobile Ins. Co. v. Langan*, 55 A.D.3d 281, 865 N.Y.S.2d 102 (2d Dep't 2008), *appeal dismissed*, 12 N.Y.3d 383, 883 N.Y.S.2d 177 (2009) (holding that in determining whether an accident may be deemed intentional for insurance purpose, the court should look at the accident from the point of view of the injured claimant to "see whether or not from his or her point of view, the event was unexpected, unusual or unforeseen").

38. *Oleg Barshay, D.C v. State Farm Ins. Co.*, 14 Misc. 3d 74, 831 N.Y.S.2d 821 (App. Term 2d Dep't 2006).

39. 15 Misc. 3d 1111(A), 839 N.Y.S.2d 436 (Civ. Ct., Kings Co. 2007).

40. *Cent. General Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 199 (1997); *Mount Sinai Hosp. v. Triboro Coach, Inc.*, 263 A.D.2d 11, 669 N.Y.S.2d 77 (2d Dep't 1999).

41. 4 N.Y.3d 313, 794 N.Y.S.2d 700 (2005).

42. *See* Outside Counsel, *Restoring 'Exceptional Exemption': Effect of Fair Price, Moroff and Rosenberger*, N.Y.L.J., Sept. 9, 2008, p. 4, col. 4.

43. *Midwood Acupuncture, P.C v. State Farm Mut. Automobile Ins. Co.*, 14 Misc. 3d 131(A), 836 N.Y.S.2d 486 (2d and 11th Jud. Dists. 2007); *A.B. Med. Servs., PLLC v. Prudential Prop. & Cas. Ins. Co.*, 11 Misc. 3d 137(A), 816 N.Y.S.2d 693 (2d and 11th Jud. Dists. 2006); *Manhattan Med. Imaging v. State Farm Mut. Automobile Ins. Co.*, 20 Misc. 3d 1144(A), 2008 N.Y. Slip Op. 51844(U) (Civ. Ct., Richmond

Co. 2008); *Eastern Med., P.C v. Allstate Ins. Co.*, 19 Misc. 3d 775, 854 N.Y.S.2d 299 (Dist. Ct., Nassau Co. 2008).

44. *Liberty Mut. Ins. Co. v. McClellan*, 127 A.D.2d 767, 512 N.Y.S.2d 161 (2d Dep't 1987).

45. *Ins. Co. of N.A v. Kaplun*, 274 A.D.2d 293, 713 N.Y.S.2d 214 (2d Dep't 2000); *DiDonna v. State Farm Mut. Automobile Ins. Co.*, 259 A.D.2d 727, 687 N.Y.S.2d 175 (2d Dep't 1999).

46. *AA Acupuncture Service P.C. v. Safeco Ins. Co.*, 25 Misc. 3d 30, 887 N.Y.S.2d 739 (App. Term 1st Dep't 2009).

47. *A.B. Med. Servs., PLLC v. Commercial Mut. Ins. Co.*, 12 Misc. 3d 8, 820 N.Y.S.2d 378 (App. Term 2d Dep't 2006).

48. 25 Misc. 3d 30.

49. *A.M. Med. Servs., P.C. v. Travelers Ins. Co.*, 23 Misc. 3d 145(A), 889 N.Y.S.2d 504 (App. Term 2d, 11th and 13th Jud. Dists. 2009); *Craig Antell, D.O. v. N.Y. Cent. Mut. Fire Ins. Co.*, 11 Misc. 3d 137(A), 816 N.Y.S.2d 694 (App. Term 1st Dep't 2006).

50. *A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co.*, 22 Misc. 3d 70, 887 N.Y.S.2d 633 (App. Term 2d Dep't 2008); *Rockaway Boulevard Med. v. Progressive Ins.*, 9 Misc. 3d 52, 802 N.Y.S.2d 302 (App. Term 2d Dep't 2005).

51. *Perez v. Hartford Accident & Indem. Co.*, 31 A.D.2d 895, 297 N.Y.S.2d 875 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 625, 307 N.Y.S.2d 467 (1970).

52. *Santo v. Gov't Employees Ins. Co.*, 31 A.D.3d 525, 819 N.Y.S.2d 279 (2d Dep't 2006).

53. *See* 11 N.Y.C.R.R. § 65-1.1. For example, if a medical provider seeks reimbursement for medical services provided to a claimant-pedestrian struck by a motor vehicle whose owner has the requisite New York no-fault coverage in effect, the claimant-pedestrian is not an eligible injured person under her own policy and her insurer would not have to assert such a defense in a timely denial of claim.

54. 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dep't 2009).

55. *See also A.B. Med. Servs., PLLC v. Am. Transit Ins. Co.*, 24 Misc. 3d 127(A), 889 N.Y.S.2d 881 (App Term 9th and 10th Jud. Dists. 2009).

56. *Westchester Med. Ctr. v. Am. Transit Ins. Co.*, 17 A.D.3d 581, 793 N.Y.S.2d 489 (2d Dep't 2005); *A.B. Med. Servs., PLLC v. Prudential Prop. & Cas. Ins. Co.*, 11 Misc. 3d 137(A), 816 N.Y.S.2d 693 (App. Term 2d and 11th Jud. Dists. 2006); *Yklik Med. Supply v. Allstate Ins. Co.*, 23 Misc. 3d 240, 887 N.Y.S.2d 636 (N.Y. Civ. Ct., Richmond Co. 2008).

57. 11 N.Y.C.R.R. § 65-1.1.

58. The PIP Endorsement previously in effect merely provided that eligible injured person must "execute a written proof of claim under oath." No-fault insurers would often rely on this provision to request EUOs. However, such arguments were rejected by the courts. *See Oleg Barshay, DC, P.C. v. State Farm Ins. Co.*, 14 Misc. 3d 74, 831 N.Y.S.2d 821 (App. Term 2d Dep't 2006); *Bronx Med. Servs. v. Lumbermans Mut. Cas. Co.*, 2003 N.Y. Slip Op. 51022(U) (App. Term 1st Dep't 2003).

59. *W&Z Acupunture, P.C. v. Amex Assurance Co.*, 24 Misc. 3d 142(A), 901 N.Y.S.2d 903 (App Term 2d, 11th and 13th Jud. Dists (2009); *Hastava & Aleman Assocs., P.C. v. State Farm Mut. Auto Ins. Co.*, 24 Misc. 3d 1239(A), 899 N.Y.S.2d 59 (Civ. Ct., Bronx Co. 2009).

60. *See* 11 N.Y.C.R.R. § 65-3.2.

61. *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2d Dep't 2006). *Crossbridge Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 20 Misc. 3d 143(A), 867 N.Y.S.2d 373 (App. Term 2d and 11th Jud. Dists. 2008).

62. 11 N.Y.C.R.R. § 65-3.5(e).

63. *Westchester Med. Ctr. v. Lincoln General Ins. Co.*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dep't 2009).

64. *St. Vincent's Med. Care, P.C. v. Travelers Ins. Co.*, 26 Misc. 3d 144(A), 907 N.Y.S.2d 441 (App. Term 2d, 11th and 13th Jud. Dists. 2010).

65. *Nyack Hosp. v. Encompass Ins. Co.*, 23 A.D.3d 535, 806 N.Y.S.2d 643 (2d Dep't 2005); *Ocean Diagnostic Imaging, P.C. v. Commerce Ins. Co.*, 7 Misc. 3d 133(A), 801 N.Y.S.2d 237 (App. Term 2d and 11th Jud. Dists. 2005).

66. *A.B. Med. Servs., PLLC v. Utica Mut. Ins. Co.*, 10 Misc. 3d 50, 809 N.Y.S.2d 765 (App. Term 2d Dep't 2005).

67. *Great Wall Acupuncture, P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 22 Misc. 3d 136(A), 880 N.Y.S.2d 873 (App. Term 2d, 11th and 13th Jud. Dists. 2009); *Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 21 Misc. 3d 49, 871 N.Y.S.2d 580 (App. Term 2d and 11th Jud. Dists. 2008).

68. *Eagle Chiropractic, P.C. v. Chubb Indemnity Ins. Co.*, 19 Misc. 3d 129(A), 859 N.Y.S.2d 902 (App. Term 9th and 10th Jud. Dists. 2008); *Hastava & Aleman Assocs., P.C. v. State Farm Mut. Auto Ins. Co.*, 24 Misc. 3d 1239(A), 899 N.Y.S.2d 59 (Civ. Ct., Bronx Co. 2009); *Dana Wolfson, LMT v. Government Employees Ins. Co.*, 20 Misc. 3d 948, 862 N.Y.S.2d 794 (Civ. Ct., N.Y. Co. 2008).

69. 11 N.Y.C.R.R. § 65-1.1.

70. *Celtic Med. P.C. v N.Y. Cent. Mut. Fire Ins. Co.*, 15 Misc. 3d 13, 832 N.Y.S.2d 743 (App. Term 2d Dep't 2007); *Chi Acupuncture, P.C. v. Kemper Auto & Home Ins. Co.*, 14 Misc. 3d 141(A), 836 N.Y.S.2d 497 (App. Term 9th and 10th Jud. Dists. 2007).

71. *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2d Dep't 2006).

72. *See* Rogak, New York No-Fault Law and Practice, p. 272.

73. *See, e.g., Vista Surgical Supplies, Inc. v. State Farm Mut. Automobile Ins. Co.*, 15 Misc. 3d 1143(A), 841 N.Y.S.2d 824 (Civ. Ct., Kings Co. 2007) (interest accrues upon commencement of the action); *Chao, MD v. Country-Wide Ins. Co.*, 11 Misc. 3d 1090(A), 819 N.Y.S.2d 852 (Dist. Ct., Nassau Co. 2008) (interest accrues upon commencement of the action); *Elmont Open MRI & Diagnostic Radiology, P.C. v. Country-Wide Ins. Co.*, 15 Misc. 3d 552, 830 N.Y.S.2d 886 (Dist. Ct., Nassau Co. 2007) (interest accrues 30 days after submission of the bill to the insurer).

74. 46 A.D.3d 1290, 849 N.Y.S.2d 310 (3d Dep't 2007), *rev'd*, 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009).

75. 61 A.D.3d 202, 873 N.Y.S.2d 335 (2d Dep't 2009).

76. 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009).

77. *See* David Barshay & David Gotlieb, *After LMK: Calculating Interest and Attorney's Fees*, N.Y.L.J., Apr. 29, 2009, p. 3, col. 1.

78. *Alpha Chiropractic, P.C. v. State Farm Mut. Automobile Ins. Co.*, 14 Misc. 3d 673, 827 N.Y.S.2d 632 (Civ. Ct., Queens Co. 2006, Seigal, J), *aff'd*, 20 Misc. 3d 141(A), 872 N.Y.S.2d 689 (App. Term 2d Dep't 2008).

79. OPS Gen Counsel NY Ins. Dep't No. 03-10-04 (Oct. 2003).

80. *Fortune Med., P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 20 Misc. 3d 32, 862 N.Y.S.2d 704 (App. Term 2d Dep't 2008).

Editor's Note:

In the article titled "Update: Did the Odds Change in 2009," by Bentley Kassal (*Journal*, October 2010), the second chart on page 41 was mislabeled. The heading should have read "District of Columbia," not "Second Circuit." We regret the error.

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

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

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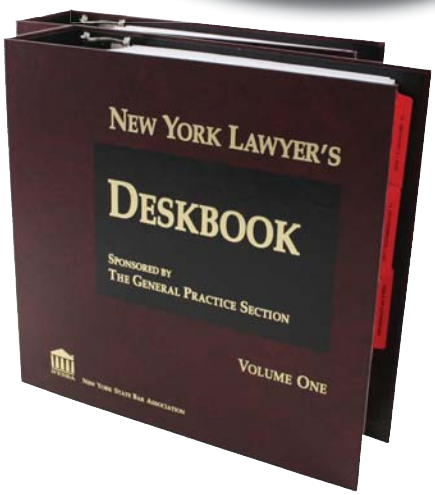

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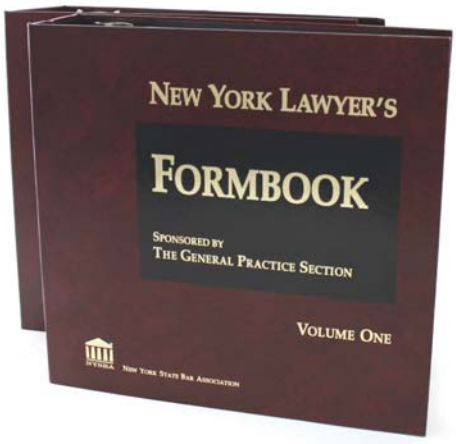

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A Peek at New York Defamation Law

By Mitchell H. Rubinstein

Introduction

It has been recognized for centuries that defamation could cause an individual serious injury. At common law, defamation was both a crime and a tort;[1] indeed, during medieval times, a defendant guilty of defamation had his tongue taken out.[2] We have come a long way since that barbaric remedy. Today, the law of defamation is, of course, governed by state tort law.[3]

More than four decades ago, Justice Potter Stewart recognized that an individual's protection of his or her good name is an essential part of human dignity and lies at the heart of our legal system.[4] It is important, therefore, that all lawyers, whether they practice tort law or not, have an understanding of the law of defamation. Indeed, the number of defamation law cases has exploded in the last decade.[5]

Defamation law does not only fall under the domain of tort lawyers. Defamation can come up in a variety of circumstances. For example, defamation issues frequently arise in employment law with respect to employment references,[6] as well as in the context of statements made by employers to co-workers.[7]

Defined

Defamation is defined as "the making of a false statement about a person that 'tends to expose the p[erson] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right thinking persons, and to deprive him [or her] of their friendly intercourse in society.'"[8] It is composed of two types: slander and libel. Slander refers to the spoken word, while libel refers to the written word.[9] The tort is further broken down into two forms: (1) libel (or slander) *per se*, in which the defaming statement appears on the face of the communication; and (2) libel (or slander) *per quod*, in which a defamatory import arises through reference to facts extrinsic to the communication.[10]

The elements of a cause of action for libel are:

1. a false and defamatory statement of fact
2. regarding the plaintiff,
3. which is published to a third party and
4. results in injury to the plaintiff.[11]

If a party is a public official, constitutional principles first articulated in *New York Times v. Sullivan*[12] must be considered.[13] In such situations, malice must be proven, *to wit*, it must be established that the statement was made with knowledge that it was false or with reckless disregard of whether or not it was false.[14] A plaintiff must prove malice by "clear and convincing evidence."[15] This heightened standard for public officials is necessary because of the importance of uninhibited and robust debate with respect to public issues.[16]

Role of Courts

It is the role of courts to determine whether the communication at issue is reasonably susceptible to a defamatory connection.[17] Stated differently, whether a communication constitutes defamation involves a question of law to be determined by a court.[18] A court will examine the particular words as well as the entire communication. The alleged circumstances and the context of the alleged defamation are critical.[19] The communication is judged based upon its effect on the average reader.[20]

In one recent decision, a puerile attempt by adolescents to outdo each other by making outrageous statements on Facebook, which included allegations that the plaintiff contracted AIDS by having sex with a horse or a baboon, was held to be non-actionable because a reasonable reader would not conclude that the allegations in question were intended to be statements of fact.[21]

As noted, damages are also an element of a cause of action for defamation. Significantly, however, if the statements at issue are considered to be defamatory *per se*, there is no need for a plaintiff to allege damages, which are often referred to as special damages.[22] Special damages involve the loss of something having economic or pecuniary value.[23] Special damages must be accurately and clearly identified and be causally related to the tortious act.[24] Round dollar figures or generalized allegations of a dollar amount of damages do not meet this standard.[25]

In the case of defamation *per se*, damages need not be alleged or proven because the law presumes damages.[26] Under New York law, a statement is defamatory *per se* in four categories of cases:

1. Charging a plaintiff with a serious crime;
2. Stating false facts that tend to injure a plaintiff in his or her business trade or profession;
3. Charging that a plaintiff has a loathsome disease; or
4. Imputing a plaintiff is unchaste.[27]

With respect to the serious crime element, not every type of unlawful behavior is defamatory *per se*. Only "serious crimes" meet this standard.[28] A specific crime does not have to be alleged. Thus, a statement that a cop was on the take has met this standard.[29] Similarly, a statement in a book that indicated that a judge was corrupt and incompetent, with strong undertones of illegality, was found to cause the plaintiff to be a victim of disgrace and contempt.[30] Therefore, the standard was met.

The business trade or profession exception is limited to defamation that is of a kind incompatible with the proper conduct of business, trade or profession. It must be made concerning a matter of significance for that purpose, as opposed to a more general reflection upon the plaintiff's character.[31] Thus, a charge of drunkenness or other moral misconduct may affect a clergyman in the performance of his duties; however, that same charge against a businessman may not affect his trade, business or profession.[32]

Significantly, due to First Amendment concerns, when a defendant is a media publisher or broadcaster, the analysis is a bit different. The analysis with respect to defamation *per se* is not applicable and the alleged defamation must involve a matter of public concern. Specifically, a private plaintiff must establish that the media defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" with respect to a matter of public concern.[33]

This standard is considered to be an objective one.[34] It is applicable only to private figures and differs from the subjective actual malice standard applicable to public figures.[35] The gross irresponsibility standard focuses on the journalist's satisfaction of objective professional standards. By contrast, the malice test focuses on a defendant's subjective state of mind.[36]

The gross irresponsibility standard does not require a media defendant to be "fair" or "balanced" and multiple-source checking is not required.[37] As long as the publisher relied on at least one authoritative source, which it had no reason to doubt, the publisher would not be found to have acted in a grossly irresponsible manner, even if its ultimate reporting turned out to be incorrect.[38] A typographical error would certainly not meet the standard of gross irresponsibility.[39]

With respect to the serious crime element, not every type of unlawful behavior is defamatory *per se*.

With respect to media defendants, the threshold issue of public concern appears to be fairly low. The New York Court of Appeals has held that an article that reported, albeit incorrectly, that a certain public school teacher was arrested fell within the scope of public concern because its content was related to "matters warranting public exposition."[40] Additionally, in another case, a county trial court held that a newspaper article about a public school teacher's discharge, due to an incident with a student, was a matter of public concern.[41]

Reports about mere gossip are not matters of public concern and in making this determination the entire context must be examined.[42] Publications directed only towards a limited private audience are matters of private concern.[43] The mere publication of a matter in a newspaper does not make an issue one of public concern.[44]

Litigation Issues

Like in most civil litigation, in defamation actions jurisdictional issues can arise[45] and it is the plaintiff who bears the burden of proof.[46] The alleged defamatory statement, of course, must involve the plaintiff.[47] If a public official is involved, the plaintiff also has the burden of establishing malice.[48]

Under New York law, a heightened pleading standard must be satisfied for a cause of action to be stated. Specifically, the CPLR provides:

> In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.[49]

A complaint that merely paraphrases the defamatory words does not comply with the statute.[50] Therefore, the failure to plead the specific defamatory words is fatal to a plaintiff's claim.[51]

The statute of limitations for a defamation action is one year.[52] The one-year time period begins to accrue from the date of first publication.[53]

A less well-known, but critically important, litigation tool in defamation, as well as in other actions, is the ability to seek pre-action disclosure. This may be necessary to obtain the identities of the defendants or to find out the exact defamatory words as required.[54] Specifically, the CPLR provides:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.[55]

Pre-complaint disclosure is "not a popular application with judges." It can only rarely be justified[56] and is available only in extraordinary circumstances.[57] A petitioner's conjecture and suspicion are insufficient "to allow a judicial franchise to penetrate into another party's affairs."[58]

Disclosure is also available only if the plaintiff has a meritorious cause of action and the information is material and necessary.[59] For instance, in a recent case against Google, pre-action disclosure was denied – the plaintiff could not establish a meritorious cause of action for defamation because the alleged defamatory statement was protected as an opinion.[60]

Defenses

Truth

Only facts can be proven false.[61] Falsity is a necessary part of any defamation cause of action. Accordingly, truth is an absolute defense to defamation regardless of the harm inflicted.[62] The defense of truth can be successfully asserted even if the publication is not literally or technically true in all respects. Thus, a publication that is "substantially true" is not defamatory.

The law recognizes that a statement may be substantially truthful if it contains minor inaccuracies.[63] The test of substantial truth is "whether the libel as published would have a different effect on the mind of the reader from which the pleaded truth would have produced."[64]

Opinion

While defamation law recognizes that an individual's right to protect his or her reputation is a basic part of our society, another staple of our society is the right of individuals to speak and write freely. That is why statements that merely express an opinion – no matter how offensive, vituperative, or unreasonable – are not actionable.[65]

It is, again, a question of law whether a statement is a fact or an expression of opinion.[66] The issue of fact versus opinion has been, and continues to be, the generator of significant litigation.[67] In deciding whether a disputed statement is fact or opinion, the court examines whether the reasonable reader would have believed that facts are being conveyed about the plaintiff.[68] The New York Court of Appeals has held that the following factors must be considered:

1. Whether the language has a precise meaning or whether it is indefinite or ambiguous;
2. Whether the statement is capable of objectively being true or false; and
3. The full context of the entire communication or the broader social context surrounding the communication.[69]

Subjective expressions about personal dealings or consumer dissatisfaction are, therefore, considered nonactionable opinion.[70]

It is often difficult to parse fact from opinion. An opinion that implies undisclosed facts is actionable because a reasonable listener would infer that the speaker knows certain facts which support the opinion.[71]

While defamation law recognizes that an individual's right to protect his or her reputation is a basic part of our society, another staple of our society is the right of individuals to speak and write freely.

Privileges

Privileges are an important part of the law of defamation and are frequently litigated.[72] Quite simply, the law recognizes that certain conversations, though possibly defamatory, should be shielded from litigation to prevent a chilling effect on the issuance of such statements.[73] An absolute privilege occurs when public policy requires that a speaker be immune from suit; statements fostering a lesser public interest are conditionally privileged.[74]

The Qualified Privilege

The recognition of a qualified privilege grew out of the public interest in encouraging full and fair statements by individuals who have a legal or moral duty to communicate about persons in whom both the sender and receiver have an interest.[75] The privilege does not extend beyond the statements the writer makes in the performance of his

or her duty and which statements he or she believes in good faith to be true.[76]

A qualified privilege extends to a statement made by one person to another upon a subject in which they both have an interest.[77] It has been applied, for example, to members of a faculty tenure committee, physicians of a health insurance plan, and members of the governing body of a tenants association.[78] It has also been applied to statements by employers to employees relative to performance.[79] Employees who have made statements to their employers critical of other employees have also been found to be protected by a qualified privilege.[80] Similarly, statements by union officials to management are protected by a qualified privilege.[81]

A qualified privilege, though not absolute, has been recognized by the New York Court of Appeals to be "considerable."[82] To illustrate, a statement by an employer to other employees that a former employee was fired for stealing may constitute slander *per se* because it implicates a crime,[83] while a qualified privilege exists for statements that may be made by that same employer in the context of an employment reference.[84]

Unlike absolute privileges, a qualified privilege can be dissolved if the plaintiff can demonstrate malice. Both common law malice, which involves spite or ill will, and actual malice, which is governed by the *New York Times* standard referenced above, will defeat a qualified privilege.[85] Where the plaintiff is a private individual, however, as opposed to a public figure, the clear and convincing standard of proof will not be applied. Rather, the preponderance of the evidence standard, which is applied in most civil litigation, is applicable.[86] Thus, mere falsity will not establish malice.[87]

The Absolute Privilege

The concept of an absolute privilege is an ancient doctrine. Under English common law, it was recognized as a means to protect speech and debate in Parliament. The notion of an absolute privilege was later embodied in state constitutions, including the New York State Constitution, to protect legislators.[88]

The right of non-judicial and non-legislative officials to assert an absolute privilege was first recognized in England in 1895 and is well recognized in New York today.[89] Nevertheless, New York state courts have been reluctant to extend the privilege because it essentially provides immunity.[90]

A statement submitted in the form of an affidavit to a court is protected by an absolute privilege.[91] Additionally, a statement made to a bar association is protected by an absolute privilege.[92] Statements made in disciplinary charges brought against an employee are absolutely privileged.[93] Similarly, a statement made to the New York State Division of Human Rights in connection with an investigation is protected.[94]

A statute may provide immunity from a defamation action, as well as other causes of action, and, thus, it is identical to an absolute privilege.[95]

Mistakes

Interestingly in New York, there is not much authority discussing whether a publication made by mistake can be considered defamatory. The authority in existence, however, suggests that a mistake is not a defense to defamation. The standard is not what the defendant intended, but what the readers may have understood.[96]

It appears that a mistake may be relevant to the amount of damages that might be awarded by a jury. Additionally, if a defendant makes a mistake in good faith, it might be relevant to determining whether or not malice has been established.[97]

Conclusion

This relatively short primer could not possibly cover all of the nuances of the law of defamation in New York. Hopefully, this article will provide practitioners and scholars with enough background information to start their research.[98]

With the surge of Internet use and increased reliance on email, the number of defamation cases can be expected to continue to rise. With the Internet, a person's reputation can be damaged in a matter of hours.[99] The Internet has become the dominant form of media today, and the same time-tested standards should apply.[100]

Lawyers should always advise their clients to check the facts before they publish them. With that precaution, a client may avoid being involved in what can become protracted and complicated litigation. ■

1. Russell L. Weaver, John H. Bauman, John T. Cross, Andrew R. Klein, Edward C. Martin, Paul J. Zwier, II, Torts , Cases Problems, and Exercises, 703 (3d ed. 2009).
2. Rodney A. Smolla, Law of Defamation § 1:3, 1-7 (2d ed. 2008).
3. Smolla *supra* note 2, § 1:1, 1-5.
4. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice Stewart's concurrence has been widely quoted with approval. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *see also Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) (recognizing the important social values which underlie the law of defamation); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004), *cert. denied sub nom. Troy Pub Co., Inc. v. Norton*, 544 U.S. 956 (2005) (stating that an individual's interest in his reputation should be placed in the same category with life, liberty and property).
5. Smolla *supra* note 2, § 1:5, 1-9 (discussing modern law of defamation).
6. *See, e.g., Fisher v. Schur*, 46 N.Y.2d 720, 413 N.Y.S.2d 372 (1978); *Wideberg v. Tiffany & Co.*, Index No. 4534/92, 1992 WL 454053 (Sup. Ct., Westchester Co. Dec. 4, 1992).
7. *See, e.g., Mancuso v. Allergy Assocs. of Rochester*, 70 A.D.3d 1499, 895 N.Y.S.2d 756 (4th Dep't 2010) (statement by owner to co-workers).
8. *Ava v. NYP Holding Co.*, 64 A.D.3d 407, 885 N.Y.S.2d 247 (1st Dep't 2009) (quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 379, *cert. denied*, 434 U.S. 969 (1977)).
9. *Id.*; *Am. Med. & Life Ins. Co. v. Crosssummit Enters., Inc.*, 27 Misc. 3d 1210(A), 2010 WL 1493136 (Sup. Ct., Nassau Co. 2010). For an excellent historical summary of the law of common law of defamation as well as the distinction between libel and slander, see John W. Little, Lyrissa B. Lidsky, Robert H. Lande, Torts: The Civil Law of Reparation for Harm Done By Wrongful Act,

852–55 (3d. ed. 2009) (reproducing excerpts from Report on the Committee on Defamation, Command Paper 5909, London (1975)).

10. *Ava*, 64 A.D.3d 407.

11. *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (Sup. Ct., N.Y. Co. 2009); *see Suson v. NYP Holdings, Inc.*, 19 Misc. 3d 1116(A), 862 N.Y.S.2d 818 (Civ. Ct., N.Y. Co. 2008), *aff'd for reasons stated below,* 22 Misc. 3d 135(A), 880 N.Y.S.2d 876 (App. Term 1st Dep't 2009) (citing Restatement (Second) of Torts, § 558); *see also Am. Med. & Life Ins. Co.*, 27 Misc. 3d 1210(A) (discussing elements of cause of action for defamation).

12. 376 U.S. 254 (1964).

13. *Cf. Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, *cert. denied,* 434 U.S. 969 (1977), *with Jimenez v. UFT,* 239 A.D.2d 265, 657 N.Y.S.2d 672 (1st Dep't 1997), *appeal dismissed,* 90 N.Y.2d 890 (1997) (holding that public school principals are public figures); *Visentin v. Haldane Cent. Sch. Dist.*, 4 Misc. 3d 918, 782 N.Y.S.2d 517 (Sup. Ct., Putnam Co. 2004) (holding that public school teachers are not public figures).

14. *Rinaldi*, 42 N.Y.2d at 379.

15. *Mancuso v. Allergy Assocs. of Rochester*, 70 A.D.3d 1499, 895 N.Y.S.2d 756 (4th Dep't 2010).; *Visentin*, 4 Misc. 3d 918.

16. *Rinaldi*, 42 N.Y.2d 369 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

17. *Ava v. NYP Holding Co.*, 64 A.D.3d 407, 885 N.Y.S.2d 247 (1st Dep't 2009).

18. *Sprewell v. NYP Holdings, Inc.*, 1 Misc. 3d 847, 772 N.Y.S.2d 188 (Sup. Ct., N.Y. Co. 2003).

19. *Ava,* 64 A.D.3d 407; *see also Sprewell*,1 Misc. 3d 847 (discussing the importance of context).

20. *Sprewell,* 1 Misc. 3d 847.

21. *Finkel v. Dauber*, N.Y.L.J., July 23, 2010, p. 32, col. 1 (Sup. Ct., Nassau Co.). This case is also significant in that the court held that there is no cause of action for cyber bullying in New York.

22. *Id.*

23. *Sprewell,* 1 Misc. 3d 847 (quoting *Liberman v. Gelstein*, 80 N.Y.2d 429, 434–35, 590 N.Y.S.2d 857 (1992)).

24. *Id.*

25. Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David Cook, 14 N.Y. Prac., New York Law of Torts Sec. 1:46, n. 12 (Aug. 2009).

26. *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (Sup. Ct., N.Y. Co. 2009).

27. *Liberman*, 80 N.Y.2d at 434; *Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dep't 2009); *Intellect Art Multimedia, Inc.,* 24 Misc. 3d 1248(A); *see also Ava*, 64 A.D. 3d 407 (statement which implies plaintiff is promiscuous is defamatory); *Cavallaro v. Pozzi*, 28 A.D.3d 1075, 814 N.Y.S.2d 462 (4th Dep't 2006) (noting that *Liberman* specifically changed the law of defamation to require the commission of a serious crime).

28. *Liberman,* 80 N.Y.2d 429.

29. *Sprewell*, 1 Misc. 3d 847; *Liberman,* 80 N.Y.2d 429.

30. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, *cert. denied,* 434 U.S. 969 (1977).

31. *Liberman*, 80 N.Y.2d 429.

32. *Id.*

33. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61 (1975); *Huggins v. Moore,* 94 N.Y.2d 296, 707 N.Y.S.2d 904 (1999).

34. *Khan v. N.Y. Times Co., Inc.*, 269 A.D.2d 74, 76, 710 N.Y.S.2d 41 (1st Dep't 2000).

35. *Id.*

36. *Id.*

37. *Visentin v. Haldane Cent. Sch. Dist.*, 4 Misc. 3d 918, 922, 782 N.Y.S.2d 517 (Sup. Ct., Putnam Co. 2004).

38. *Chapadeau*, 38 N.Y.2d at 200; *Visentin*, 4 Misc. 3d at 922 (collecting cases).

39. *Chapadeau*, 38 N.Y.2d 196.

40. *Id.* at 199–200.

41. *Visentin*, 4 Misc. 3d 918.

42. *Huggins*, 94 N.Y.2d 296.

43. *Id.*

44. *Id.*

45. For a discussion of procedural issues under New York's long arm statute in the context of defamation, see generally Victor A. Kovner & Lance Koonce, *Preliminary Considerations – Long-Arm Jurisdiction*, 4B N.Y. Prac., Com. Litig. in New York State Courts § 84:3 (2d ed. Robert L. Haig ed.).

46. *Rinaldi*, 42 N.Y.2d at 379.

47. *Lazore v. NYP Holding Co.*, 61 A.D.3d 440, 876 N.Y.S.2d 59 (1st Dep't 2009); *Haefner v. N.Y. Media*, 27 Misc. 3d 1208(A), 2009 N.Y. Misc. Lexis 3641 (Sup. Ct., N.Y. Co. 2009).

48. *Lazore*, 61 A.D.3d 440; *Haefner*, 27 Misc. 3d 1208(A).

49. CPLR 3016(a). *See Am. Med. Life Ins. Co. v. Crosssummit Enters., Inc.*, 27 Misc. 3d (A), 2010 WL 1493136 (Sup. Ct., Nassau Co. 2010).

50. *See, e.g., Murganti v. Weber*, 248 A.D.2d 208, 699 N.Y.S.2d 818(1st Dep't 1998); *Roth v. UFT*, 5 Misc. 3d 888, 787 N.Y.S.2d 603 (Sup. Ct., Kings Co. 2004). *Accord Salvatore v. Kumar,* 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dep't 2007), *appeal denied*, 10 N.Y.3d 703 (2008) (defamation complaint which generally refers to certain executives and personnel who would be able to discern the facts does not withstand motion to dismiss); *Cotler v. Retail Credit,* 18 A.D.2d 898, 237 N.Y.S.2d 781 (1st Dep't 1963) (pre-action disclosure denied in libel case as plaintiff was unable to show that he suffered any actionable wrong by meeting applicable pleading standard).

51. *Sandiford v. City of N.Y. Dep't of Educ.*, 26 Misc. 3d 1223(A),906 N.Y.S.2d 440 (Sup. Ct., N.Y. Co. 2010); *Emergency Enclosures v. Nat'l Fire Adjustment Co., Inc.*, 68 A.D.3d 1658, 893 N.Y.S.2d 414 (4th Dep't 2009); *Wideberg v. Tiffany & Co.*, Index No. 4534/92, 1992 WL 454053 (Sup. Ct., Westchester Co. 1992).

52. CPLR 215(3).

53. *Hoesten v. Best*, 34 A.D.3d 143, 821 N.Y.S.2d 40 (1st Dep't 2006).

54. *See Sandals Resorts Int'l, Ltd. v. Google, Inc.,* 27 Misc. 3d 1207(A), 2010 WL 1428266 (Sup. Ct., N.Y. Co. 2010) (pre-action disclosure sought to obtain identity, email messages, instant messages and account history for an individual only identified by an email address).

55. CPLR 3102(c).

56. McKinney's *Practice Commentary*, CPLR 3102 (2004).

57. *Goldsborough v. N.Y. State Dep't of Corr. Servs.*, 217 A.D.2d 546, 628 N.Y.S.2d 813 (2d Dep't), *appeal dismissed,* 86 N.Y.2d 834, 634 N.Y.S.2d 437 (1995); *Linquist v. Wm. Spencer & Son,* 65 N.Y.S.2d 482, 484 (Sup. Ct., Kings Co. 1946) (stating pre-complaint disclosure is rarely and sparely granted).

58. *Emmrich v. Tech. for Info.*, 91 A.D.2d 777, 457 N.Y.S.2d 1017 (3d Dep't 1982).

59. *Liberty Imports, Inc. v. Bourguet,* 146 A.D.2d 535, 536 N.Y.S.2d 784 (1st Dep't 1989); *Bliss v. Jaftin,* 176 A.D.2d 106, 573 N.Y.S.2d 687 (1st Dep't 1991).

60. *Sandals Resorts Int'l, Ltd.*, 27 Misc. 3d 1207(A).

61. *Gross v. N.Y. Times*, 82 N.Y.2d 146, 603 N.Y.S.2d 818 (1993).

62. *Matovcik v. Times Beacon Record Newspapers,* 46 A.D.3d 636, 849 N.Y.S.2d 75 (2d Dep't 2007).

63. *Id..*

64. *Id.* (quoting *Love v. Morrow & Co.*, 193 A.D.2d 586, 588, 597 N.Y.S.2d 423 (2d Dep't 1993)).

65. *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (Sup. Ct., N.Y. Co. 2009) (citing *Immono AG v. Moore-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 506, *cert. denied*, 500 U.S. 954 (1991)).

66. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, *cert. denied,* 434 U.S. 969 (1977).

67. *Gross*, 82 N.Y.2d 146.

68. *Intellect Art Multimedia, Inc.*, 24 Misc. 3d 1248(A) (citing *Millus v. Newsday*, 89 N.Y.2d 840, 652 N.Y.S.2d 726 (1996), *cert. denied,* 520 U.S. 1144 (1997)); *Brian v. Richardson*, 87 N.Y.2d 46, 637 N.Y.S.2d 347 (1995).

69. *Gross*, 82 N.Y.2d 146; *see also Intellect Art Multimedia, Inc.*, 24 Misc. 3d 1248(A).

70. *Intellect Art Multimedia, Inc.*, 24 Misc. 3d 1248(A).

71. *Gross*, 82 N.Y.2d 146. For additional discussion of opinion under New York defamation law, see Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David C. Cook, *Defamation – Privilege for Opinions*, 4 N.Y. Prac., New York Law of Torts § 1:48 (Aug. 2009).

72. The issue of privilege is part of the substantive law of defamation. It is distinguished from the use of privilege as a rule of evidence. *See* Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 Berkeley J. Lab. & Emp. L. 221, n. 9 (2008).

73. *Liberman v. Gelstein,* 80 N.Y.2d 429, 590 N.Y.S.2d 857 (1992).

74. *Id..*

75. *Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 746 (1977).

76. *Id.*

77. *Liberman,* 80 N.Y.2d 429.

78. *Id.*

79. *Mancuso v. Allergy Assocs. of Rochester,*70 A.D.3d 1499, 895 N.Y.S.2d 756 (4th Dep't 2010); *Rios v. Smithtown Gen. Hosp.*, 65 A.D.2d 808, 410 N.Y.S.2d 356 (2d Dep't 1978).

80. *Sassaman v. Brant,* 70 A.D.3d 1026, 895 N.Y.S.2d 526 (2d Dep't 2010).

81. *Handlin v. Burkhart*, 101 A.D.2d 850, 476 N.Y.S.2d 164 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 678 (1985); *McGovern v. Hayes,* 135 A.D.2d 125, 524 N.Y.S.2d 558 (3d Dep't), *appeal denied,* 72 N.Y.2d 803, 532 N.Y.S.2d 368 (1988). Defamation and

qualified privilege issues often arise in labor disputes. This important topic is beyond the scope of this work. *See generally*, Carolyn Kelly MacWilliam, *Libel and Slander: Statements Regarding Labor Relations or Disputes,* 94 A.L.R.5th 149

82. *Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 746 (1977).

83. *Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dep't 2009).

84. *Fisher v. Schur*, 46 N.Y.2d 720, 413 N.Y.S.2d 372 (1978); *Wideberg v. Tiffany & Co.*, Index No. 4534/92, 1992 WL 454053 (Sup. Ct., Westchester Co. Dec. 4, 1992). *See also Pandian v. N.Y. Health & Hosps. Corp.*, 54 A.D.3d 590, 863 N.Y.S.2d 668 (1st Dep't 2008) (reference to medical licensing bureau protected by qualified privilege); *Schaefer v. Brookdale Univ. Hosp.*, 18 Misc. 3d 1142(A), 859 N.Y.S.2d 899 (Sup. Ct., Kings Co. 2008), *aff'd*, 66 A.D.3d 985, 888 N.Y.S.2d 122 (2009) (same). *See also Sandiford v. City of N.Y. Dep't of Educ.*, 26 Misc. 3d 1223(A),906 N.Y.S.2d 440 (Sup. Ct., N.Y. Co. 2010) (recognizing qualified privilege in context of an employment dispute).

85. *Liberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d 857 (1992). Under the *New York Times* actual malice standard, to defeat a qualified privilege, it is plaintiff's burden to establish that the statements were made with a high degree of awareness of probable falsity. *Id.*

86. *Mancuso v. Allergy Assocs. of Rochester*, 70 A.D.3d 1499, 895 N.Y.S.2d 756 (4th Dep't 2010).

87. *Stukuls*, 42 N.Y.2d 272.

88. *Id.* (discussing history of absolute privilege).

89. *Id.*

90. *Id.*

91. *Cavallaro v. Pozzi*, 28 A.D.3d 1075, 814 N.Y.S.2d 462 (4th Dep't 2006).

92. *Weiner v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968).

93. *Sullivan v. Bd. of Educ.*, 131 A.D.2d 836, 517 N.Y.S.2d 197 (2d Dep't 1987) (statement in Education Law § 3020-a charges brought against a tenured teacher).

94. *Silver v. Mohasco Corp.*, 62 N.Y.2d 741, 476 N.Y.S.2d 822 (1984); *Missick v. Big V Supermarkets, Inc.*, 115 A.D.2d 808, 495 N.Y.S.2d 594 (3d Dep't 1985).

95. *See, e.g.*, N.Y. Social Services Law § 473-b ("[a]ny person who in good faith believes that a person eighteen years of age or older may be an endangered adult or in need of protective or other services . . . shall have immunity from any civil liability that might otherwise result by reason of . . . making . . . [a] report"). Thus, *in Marilyn S. v. Independent Group Home*, 73 A.D.3d 895, 904 N.Y.S.2d 70 (2d Dep't 2010), a defamation action as well as several other tort causes of action were dismissed because the defendant was absolutely privileged to report to the suspected sexual abuse.

96. *Michaels v. Gannett Co.*, 10 A.D.2d 417, 199 N.Y.S.2d 778 (4th Dep't 1960).

97. *Kidder v. NYP Holdings Co., Inc.*, 12 N.Y.3d 348, 884 N.Y.S.2d 194 (2009).

98. Readers could, of course, refer to some of the many excellent treatises. One that I favor is Rodney A. Smolla, Law of Defamation (2d ed. 2008).

99. Richard Raysman & Peter Brown, *Online Defamation and Anonymous Defendants*, N.Y.L.J., p. 5, col. 1, (Feb. 9, 2010).

100. *See Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (Sup. Ct., N.Y. Co. 2009) (applying defamation standards to alleged defamatory statement contained on a website); *Finkel v. Dauber*, N.Y.L.J., July 23, 2010, p. 32, col. 1 (Sup. Ct., Nassau Co.) (same with respect to alleged defamatory statement posted on Facebook). *See also Sandals Resorts Int'l, Ltd. v. Google, Inc.*, 27 Misc. 3d 1207(A), 2010 WL 1428266 (Sup. Ct., N.Y. Co. 2010).

The Internet, of course, often allows an individual to post a comment to a blog or other online media in an anonymous fashion. The case law concerning this new breed of lawsuit is still developing and is beyond the scope of this work. *See* Daniel Haier, Comment, *Ottinger v. Non-party The Journal News*, 54 N.Y.L. Sch. L. Rev. 603 (2009/2010). *Finkel*, N.Y.L.J., July 23, 2010, involved anonymous postings on Facebook.

BY ROBERT W. WOOD

Robert W. Wood is a tax lawyer with a nationwide practice (www.woodporter.com). The author of more than 30 books including *Taxation of Damage Awards & Settlement Payments* (4th ed. 2009 www.taxinstitute.com), he can be reached at wood@woodporter.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

Can Tax Rules Cut Legal Bills?

No one likes paying legal fees, but tax deductions make them less painful. For example, if your combined state and federal tax rate is 40%, $10,000 in legal fees cost you only $6,000. Here are 10 rules you need to know about taxes and legal fees.

1. Contingent Lawyer's Fees Are Income

Before addressing tax *deductions*, there's one big *income* worry: You may only consider deducting legal fees you pay yourself, as by writing a check. However you should also consider legal fees *someone else* pays your lawyer. Since a payment to your lawyer discharges your obligation, you must consider the income side of the equation.

Suppose you are a plaintiff in a lawsuit and recover $1 million, and your contingent fee lawyer keeps 40%. You might assume your largest tax problem will be $600,000 of income. How could you possibly have to pay tax on the full $1 million?

Answer: The Internal Revenue Code is not always logical. The U.S. Supreme Court ruled in 2005[1] that "as a general rule" you've got income when your lawyer is paid, even if you never touched the money and it was paid by a third party (like the defendant). That means you need to worry about how to deduct the fees.

2. You Can't Deduct Personal Legal Fees

The least desirable legal expenses are those of a purely personal nature. The best legal fees are business expenses. As you review the other categories of legal fees listed below, you may start to think that *nothing* is purely personal – but you'd be wrong. If you incur legal expenses to get divorced or because you insult a family member who sues you for slander, the legal fees you pay would generally be regarded as purely personal and therefore nondeductible.

But distinguish between purely personal expenses and investment expenses. For example, suppose you are a local businessman and you coach a little league team. You defame one of the parents at the game. You pay $25,000 in legal fees to resolve the case. Can you deduct it?

Even though the expense arose out of a personal activity, you'll argue that you had to incur the expense because of your business and reputation. That could make it a business expense, or at least an investment expense (for the difference, see below). You may succeed, but the Internal Revenue Service wins many such cases.

3. Legal Fees in Personal Physical Injury Cases Are Tax-Free

If a client hires a contingent fee lawyer in a pure personal physical injury case (say an auto accident or a slip-and-fall), *both* the legal fees and the net recovery are tax-free to the plaintiff. Put another way, if the recovery is tax-free, it doesn't matter whether you consider the gross recovery including legal fees or the net after legal fees.

Unfortunately, there is often confusion about what is and is not tax-free. The basic rule is that recoveries for personal physical injuries and physical sickness are tax-free, but punitive damages are taxable, as is interest (even in a physical injury case). So a settlement or judgment may be part tax-free and part taxable.

4. Legal Fees in Employment Cases Are Fully Deductible

Most employment lawsuit recoveries are taxable income. They may be wages (subject to withholding and employment taxes), or they may simply represent non-wage income (typically reported on an IRS Form 1099). Even in an employment case, payment for physical injuries or sickness is tax-free, but in most employment cases the monies are simply split between wages and other income. In an employment case, if the client receives 60% and the lawyer receives 40%, the client is still treated as receiving 100%.

But fortunately, due to a 2004 change to the Internal Revenue Code, the client can deduct the legal fees "above-the-line." The client includes the 40% legal fee in gross income, but then subtracts it before reaching adjusted gross income. That means the client isn't paying any tax – no regular tax and no alternative minimum tax – on the legal fees. (See item 7 below for more about the AMT.) Still, people often foul this up on their tax returns, so be careful.

5. Business Legal Fees Are Fully Deductible

Legal fees incurred in running a trade or business are fully deductible by corporations, LLCs, partnerships and proprietorships. Proprietorships report federal income tax on Schedule C to their IRS Form 1040. Schedule C tallies up income and expenses and arrives at net profit or loss from the business. That net profit or loss then goes on the face of the Form 1040. The legal fees on Schedule C operate like an above-the-line deduction, so the client pays no tax (no regular tax and no AMT) on the lawyer fees.

6. Investment Legal Fees Are Miscellaneous Itemized Deductions

If the lawsuit does not involve personal physical injury or employment, and does not arise in a trade or business, the client has a tax problem. The client can deduct the legal fees only as a miscellaneous itemized deduction on Schedule A of the client's Form 1040. That triggers numerous limitations.

First, the legal expenses are deductible only in excess of 2% of the client's adjusted gross income. Second, clients with higher incomes have their miscellaneous itemized deductions and personal exemptions phased out. Then there's the dreaded AMT!

7. AMT Liabilities Can Be Big

If you claim legal fees as miscellaneous itemized deductions, they are nondeductible for purposes of the AMT. The tax applies at a 28% rate and can effectively tax most or all your legal fees. When people talk about "paying tax on the lawyer fees," this is invariably what they mean.

Clearly, taxpayers have an incentive to try to net their legal fees. Some people file a Schedule C, claiming to be a proprietor. A recent example is the case *Purdy v. Commissioner*.[2] Purdy was an employee and received a Form W-2. After an employment dispute, Purdy received an award of wages, and paid his lawyer a $120,000 fee.

Notably, this occurred in 2003, prior to the enactment of the above-the-line deduction for employment claims. Because of that, Purdy put the lawyer's expense on his Schedule C, claiming he could report income and expense as a proprietor. The Tax Court easily concluded that Purdy was an employee so he could not deduct legal fees on Schedule C. He could deduct them only as a miscellaneous itemized deduction, so he paid AMT.

8. You Must Capitalize Some Legal Fees

Another big category of legal expenses are those that must be capitalized. If a legal expense relates to your investments or to your business, watch out for capitalization. In either case, to deduct those legal fees you need to be able to show that the fees relate to your current business operations or to the ongoing maintenance of your investment property – not to something fundamental.

For example, if you are trying to sell your business and spend $50,000 in legal fees, can you deduct it against other income, or must you add it to your basis in your company? Usually, the latter. Similarly, suppose you incur legal expenses to resolve a lot line dispute between your house and your neighbor's. Is that purely personal or is it investment-related, since your house is arguably an investment? Probably the latter.

Yet, even though these legal expenses should qualify as investment-related rather than purely personal, you can't deduct them. Instead, you must capitalize them, by adding them to your cost, just as you would handle the costs of a kitchen remodel. You only get a tax benefit later if you sell the house, when the legal expense can shield additional sales proceeds from tax.

9. Legal Fees for Tax Advice Are Deductible

Legal fees for tax advice are in a separate category and are always deductible (that means paying your tax lawyer is never as painful as paying other lawyers!). The rule covers legal fees for all taxes – income, estate, gift, property – even excise tax or sales and use tax. The taxes may be either personal or business. The advice may involve tax planning or tax controversies.

But there's a downside. Fees for tax advice deducted by individuals are only miscellaneous itemized expenses. That means you incur the same limitations and the same AMT trap discussed above. If the tax advice relates to your business, you are better off treating the legal fees as business expenses (fully deductible) rather than as tax fees (miscellaneous itemized).

On the other hand, sometimes you can deduct purely personal legal fees as tax advice. Divorce is personal, but the portion of your divorce legal fees related to tax advice is still deductible. A miscellaneous itemized deduction is better than nothing.

10. Allocate Fees in Combined Cases

If you receive tax-free and taxable damages, you'll generally need to bifurcate your attorney fees too. Some of the legal fees in a contingent fee case will be income, so you want to find a way to deduct them. Punitive damages and interest often raise this problem.

Employment cases also often involve multiple types of recoveries and multiple types of attorney fees. A case may involve some deductible legal fees and some that must be capitalized. Even divorce cases can involve hybrids.

Conclusion

Clients can be forgiven for not wanting to pay legal fees without deducting them, because tax deductions alleviate some of the pain. The tax analysis can be sophisticated, and you'll often find that the facts are ambiguous and that you may incur legal fees that fall into more than one category. Fortunately, there are often several ways of allocating fees, so planning can pay off. ■

1. *Commissioner v. Banks*, 543 U.S. 426 (2005).

2. T.C. Summary Op. 2010-26 (Mar. 8, 2010), *available at* http://www.ustaxcourt.gov/InOpHistoric/purdy.sum.WPD.pdf.

INDEX TO ARTICLES 2010

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 2000–2010, 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)."

Appeals

Arbitration / Alternative Dispute Resolution

Attorney Professionalism

Civil Procedure

Commercial Law

Consumer Law

Criminal Law

Evidence

Family Law

Government and the Law

Health Law

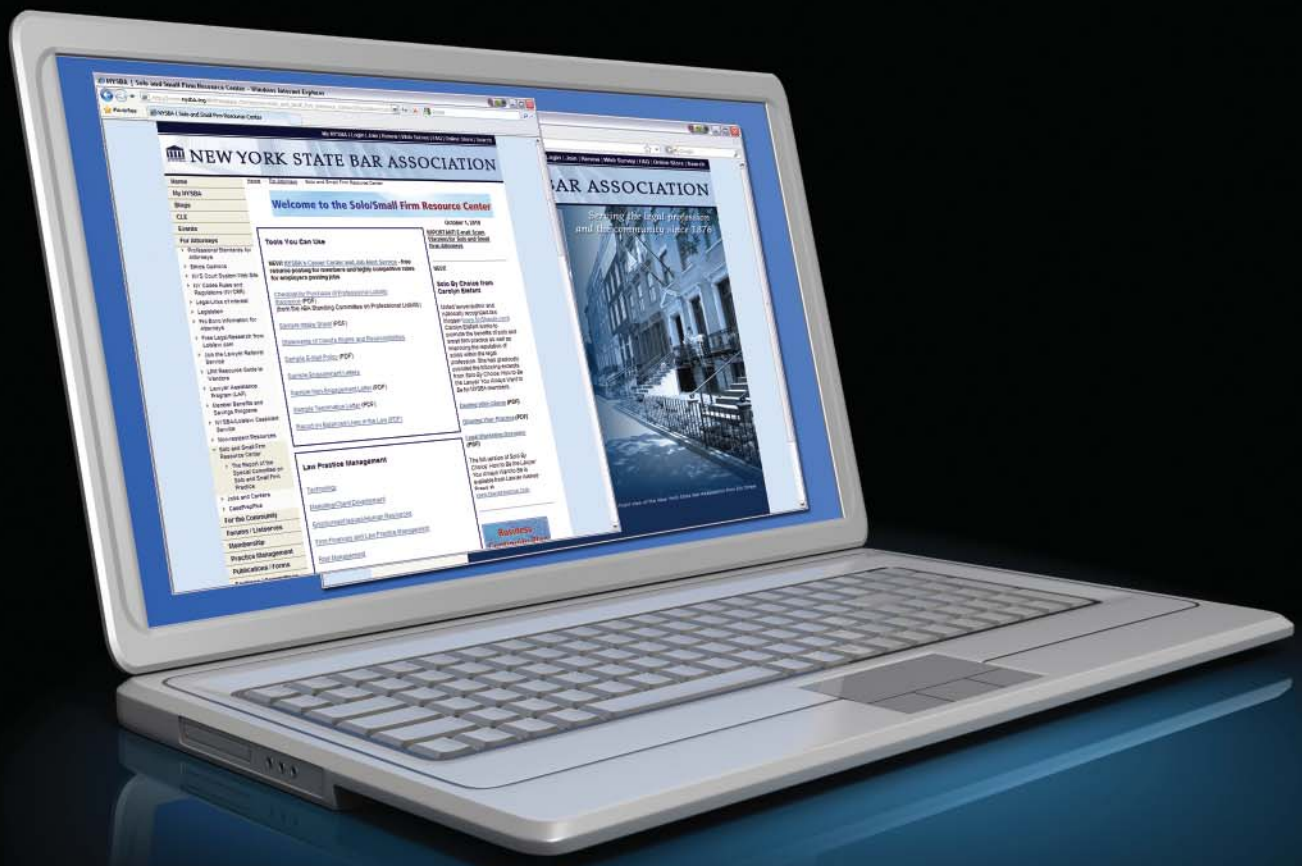
History

Labor and Employment

Law Practice

INDEX TO AUTHORS 2010

The following index lists the authors of all articles that have appeared in the *Journal* since the January 2010 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 66.



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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: This sentence appeared in an ABA *Journal* newsletter. It seems to me that the meaning of the sentence, and the number of attorneys at risk of being held in contempt, would be quite different if a comma had been inserted before the "and" in that sentence. Please comment.

> Judge Herbert Stettin has ordered Wingate, an attorney who formerly worked him and a lawyer who is now handling the cases for the plaintiffs to show cause why they shouldn't be held in contempt.

Answer: I agree that readers could easily misunderstand the sentence because they might overlook the important personal pronoun: *they*. If Wingate had been described as being the attorney who had formerly worked for Judge Stettin, as well as the lawyer who is handling the cases for the plaintiff, the pronoun *they* would have been *he*, a singular personal pronoun referring to Wingate alone. Had Wingate been alone, the sentence should have read:

> Judge Herbert Stettin has ordered Wingate, an attorney who formerly worked with him and who is now handling the cases for the plaintiffs, to show cause why **he** shouldn't be held in contempt. (Emphasis added.)

But the plural pronoun *they* indicates that Attorney Wingate and a second attorney are representing the plaintiffs. However, I believe the sentence should be re-drafted for clarity.

Some readers have argued that the word *and* always indicates plurality. It usually does: "John Doe and a friend came into the courtroom" obviously refers to two persons. But the statement, "I met John Doe, a fellow lawyer and an old friend" may mean that you have met two persons – or only one person who is also your old friend." (*And* could be shorthand for the pair *both . . . and*, with the first half of the pair omitted.)

Long-established idiomatic pairs like "both . . . and" are now being replaced in modern speech and even in print by writers who should know better. Some of the other idiomatic pairs being disjoined are "between . . . and," "as . . . as," and "as much . . . as." In a *Time* magazine report on a study of blood pressure, the journalist seemed unsure about whether to use *as* or *than* as the second half of the pair below:

> The men whose blood work showed D levels below 30 nanograms per milliliter . . . were twice **as** likely to have a heart attack **than** those with higher levels. . . . The same was true for blood pressure; men and women with less circulating D were three times **as** likely to develop hypertension **as** those with more D. (My emphasis.)

The journalist was wrong at first, but he got it right the second time. The time-honored pair *between . . . and* is often violated by journalists who substitute *or* for *and*:

Here's one example from the local newspaper:

> The Florida Supreme Court [should have compelled] the accused to choose **between** perjured self-representation **or** ethical assistance of counsel.

In the following clipping, the writer replaced the second half of the pair of *more . . . than* with the wordier *compared to*:

> The court may have felt **more** sympathy for the plaintiff **compared to** the defendant.

Perhaps accounting for the loss of the traditional pairs is the current substitution of television for print media as a model for writing.

Question: Please explain the use of the possessive apostrophe, when two or more persons own the items.

Answer: The answer to this question depends on whether the persons own the items jointly or individually. The following illustrations are correct:

> Bob and Mary's properties. (They own the properties jointly.)
> Bob's and Mary's properties. (They own the properties individually.)
> Ted and Sue's children. (The children belong to both Ted and Sue.)
> Ted's and Sue's children. (Some of the children are Ted's; the others are Sue's.)

However (to answer a question the correspondent didn't ask), there was once a grammatical rule saying that to indicate possession by an inanimate being you must use the longer possessive, the *of* form. The apostrophe form of the possessive case traditionally was reserved for animate beings. Thus, you should say "the leg of the table," not "the table's leg"; and "the photograph of my mother," not "my mother's photograph."

That rule is no longer in effect, having been breached so often (probably because of the awkward construction) that it was finally discarded. However, the *of* form is still acceptable and should be used in any constructions where the shorter form would be ambiguous. All of the following illustrations are correct:

The book's cover	The cover of the book
The article's title	The title of the article
The box's contents	The contents of the box

But avoid ambiguous structures like, "My mother's book." Instead, write either: "The book my mother wrote," or "The book my mother bought." When a choice is necessary, prefer clarity to brevity.

From the Mailbag

In the June "Language Tips," a reader asked whether "splitting infinitives" was now grammatically correct. I answered that the "rule" was arbitrarily created by a small group of influential 18th century writers who believed that the English language had recently undergone "corruption" and it was their obligation to cleanse it by fiat. Their rule was never followed by most English users.

But one faithful correspondent wrote that the issue was not one about grammar, but about good writing. He said that split infinitives cause a "grating distraction" to some people and urged that care should be made to avoid their "casual use." If there are other readers who have strong feelings about split infinitives, I'd like to hear from them. ■

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Example: "On information and belief, Defendant knew or reasonably should have known that the computer could not perform as Defendant warranted to Plaintiff."

Causes of Action

This part of the complaint is where you set out each legal theory on which you're seeking relief. Under CPLR 3014, state and number each cause of action separately. To make it easier for your reader to understand, use headings to separate each cause of action. In each heading, sequentially number the cause of action, state the name of the cause of action, and identify the defendant you're suing. Example: "SECOND CAUSE OF ACTION Against Defendants XYZ Corp. (Intentional Infliction of Emotional Distress)." Example: "THIRD CAUSE OF ACTION Against Defendants Law Corp. (Libel)." Headings are helpful. They separate the theories of recovery. Instead of using "cause of action," you may use "Count 1 (Intentional Infliction of Emotional Distress)," "COUNT 2 (Libel)," and so forth. *Or:* FIRST COUNT (Intentional Infliction of Emotional Distress)," "SECOND COUNT (Libel)," and so forth.

For each claim, identify the cause of action by name (example: "Breach of Contract"); specify the defendant(s) you're suing on this cause of action; state the cause of action's material elements; state, or incorporate by reference, the facts supporting each element; and specify the relief you demand.[10] If you represent the plaintiff, your goal is to make it difficult for the defendant to deny undisputed facts. For example, claiming that the defendant "owned, operated, managed, and controlled" a business raises four separate allegations.[11] This makes it tempting for the defendant to deny the allegations if one of them isn't true. Avoid multiple allegations to prevent an evasive reply. Stating each fact separately forces defendants either to admit or deny an allegation in specific terms that reveal the theory of their case. Ideally, each numbered paragraph should be no more than one sentence.

Include necessary facts, but don't repeat facts. Adopt the prior facts in the places where they're needed for a clear presentation of a later claim. Doing so is called "incorporation by reference."[12] Repeating facts in full will annoy your reader and make you look unprofessional and sloppy. Regurgitating facts is a waste of everyone's time. Incorporate the facts you want to repeat by referring to earlier paragraphs, either from your facts section or from an earlier count.[13] Usually, a court will deem prior facts repeated every place in the complaint where the facts are needed.[14] Example: "SIXTH CAUSE OF ACTION 15. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 though 6 of this complaint." Once you've edited the complaint, make sure that the numbers to the corresponding paragraphs match what you're incorporating by reference.

> Use objective words and undeniable facts rather than subjective opinions and loaded conclusions.

Given the flexible pleading requirements under CPLR 3013, attorneys have leeway in drafting. Whether to plead in brief, general terms or in specific terms will depend on the tactics you'll want to use, although some causes of action require specificity, as discussed in Part II of this series.

How much detail to include in your factual allegations is a matter of strategy. If a trial is inevitable, you might not want to reveal everything to your adversary. You might, instead, want to reserve information for a more advantageous time. On the other hand, you might include in the complaint lots of information to induce your adversary to settle.[15] The advantage of a detailed complaint is its power to persuade. The disadvantage is that it might give an opponent the facts that could form the basis of an affirmative defense or a counterclaim.

If your allegations are precise and brief, the defendant might be forced to admit them.[16] Admitting allegations saves time and money; anything admitted needn't be proven at trial.[17] If possible, use objective words and undeniable facts rather than subjective opinions and loaded conclusions.[18] Similarly, if possible, prefer verbs to nouns and delete adjectives and adverbs. Frame the allegations in a way that prevents an evasive reply from your adversary.[19] It's better to allege that "Fred drove faster than the speed limit" than "Fred drove recklessly or carelessly."[20] It's easier for your adversary to deny the latter because of the legal conclusions asserted.[21] By being precise, you might gain an advantage over your adversary: Your adversary's response will reveal your adversary's strategy.[22] It's far better to write that the defendant physician "left a surgical clamp in the plaintiff's stomach"[23] than to write that defendant acted very negligently.[24]

It's risky to be overly specific before you know your case fully. Just because your client tells you that the defendant ran a red light while driving 85 miles an hour down Broadway doesn't mean you should include these details in your initial pleading. What if your client is wrong about one aspect of the facts? Think of the impact on your adversary and the judge if you must amend your pleading to eliminate any reference to speeding. If you state in the pleadings that the defendant ran a red light, the defendant might be skeptical that you can prove it and might force you to trial rather than agree to settle.

Fortunately, modern pleadings are liberally construed. You're not required to be overly specific. Draft your complaint to survive a motion to dismiss.[25] Your allegations don't have to be long and verbose to survive a motion to dismiss. As long as a cause of action is presented on the face of the pleading, it'll survive a motion to dismiss under CPLR 3211(a)(7).[26]

To draft good documents, devote the time and effort to ensure that each part of the pleading is succinct and concise.

Choose your words carefully, paying special attention to their positive or negative connotations. Whether you use language that has memorable imagery or abstract language that can easily be glossed over without thought greatly affects the reader's impression. Compare these two examples: "Plaintiff was made a senior salesman by the Widget Company in 2008." *vs.* "The Widget Company selected the Plaintiff 2008 Salesman of the Year." Look at the passive voice using the non-descript language "was made" and compare it to the active voice "selected." Compare these two examples: "Plaintiff was Miss Ajax Company and attended a number of functions in that capacity." *vs.* "Plaintiff was chosen to represent Ajax Company as Miss Ajax Company in numerous official relations with the press and public." Compare "functions" to the words "chosen to represent" and "official relations." Anyone can "attend" a "function"; using abstract words creates little impression on the reader. The second sentence implies a more favorable impression. That the plaintiff was "chosen to represent" implies that she had some merit worthy of review and that the person choosing her had some confidence in her ability to "represent" the company. "Official relations," moreover, suggests that she played a major role; it's more impressive than simple "functions."[27] Also, "press and public" suggests she dealt with the public and was under close scrutiny.

Pleading evidentiary facts is neither prohibited nor required.[28] Examples of evidentiary facts include contracts, emails, letters, photographs that fairly represent conditions, and statements. Example: "Defendant delivered the letter, annexed as Exhibit 1." Pleading evidentiary facts might limit issues in the case or cause your adversary to admit those facts. You might want to include evidentiary facts to make your client's story believable. Pleading evidentiary facts can function as a disclosure device: Some attorneys include evidentiary facts to secure admissions from their adversary in cases in which, for example, receipt of notice or correspondence or acceptance of goods might be important. If your adversary moves to strike part of your pleading, the court might strike the excessive evidence as improper and prejudicial.

Conclusions of law are unnecessary in a complaint, but they're not prohibited. You might want to include them if they'll help the reader understand the issues.

Here's an example of the body of a pleading in a negligence action:

> FIRST CAUSE OF ACTION Against Defendant John Doe (Negligence).
>
> 1. On June 1, 1999, in a public street called Comstock Avenue in Syracuse, Defendant drove a motor vehicle into Plaintiff.
>
> 2. Plaintiff was crossing Comstock Avenue when defendant drove into him.
>
> 3. Plaintiff was thrown down, had his leg broken, and was otherwise injured.
>
> 4. Plaintiff has suffered pain of body and mind, loss of earnings and incurred expenses for care and treatment.[29]

This pleading contains all the essential elements needed in the body and explains both what happened and the basis for money damages. It also gives the reader an unmistakable picture about the case — all in a few sentences.

Know the rules for joining claims under CPLR 601. Also, be familiar with the rules for consolidating separate actions and conducting a joint trial under CPLR 602.

In the next column, the *Legal Writer* will discuss the final aspects of writing a complaint. ■

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BY GERALD LEBOVITS

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

The previous issue's Legal Writer column discussed the beginning parts of a complaint. The bulk of the complaint is contained in the body. Parts I and II of this series discussed the CPLR's requirements for writing a complaint. Most of the complaint-writing techniques discussed in Part III below and next month in Part IV aren't required under the CPLR, but they're helpful.

3. The Body (continued)

Identify the Parties

Although not required, start with an "Introduction" paragraph that tells the reader what the case is about.[1] You may also be more specific and name it "Identification of Parties."[2] Within the paragraph, you might want to identify the status of the parties in the lawsuit, such as the plaintiff and defendant; the representative capacity (if any) of the party suing or being sued; and the corporate status, if any.[3]

Use this introductory paragraph to establish the jurisdictional basis of the lawsuit and identify the case's venue. Unlike federal court, which requires that a complaint include a short statement showing that the court has jurisdiction,[4] you don't need to establish jurisdiction in a New York case between two state residents.

In a New York State court, when there are only two parties, use the first paragraph to identify the plaintiff and the second paragraph to identify the defendant. When the litigation involves more than two parties, include a separate paragraph for each additional plaintiff or defendant. Add the parties' names, addresses, and, if relevant and available, occupations. List an unknown party as "John Doe" or "Jane Doe."[5] Identifying the parties gives your audience useful information and sets the stage for your substantive allegations.

Nature of Action Statement

In a complicated lawsuit it's useful to include one or more paragraphs that summarize the complaint's legal and factual aspects.[6] Although every lawsuit is different and some are more complex than others, try, if practicable, to encapsulate the entire lawsuit in about four sentences. First sentence: Explain how this problem or action arose. Second sentence: State why you're suing. Third sentence: Give your causes of action. Fourth sentence: Say what you're seeking from this lawsuit. Remember that this is a brief summary of what will follow. Example:

> 3. This action arises out of Defendant's breach of its written agreement to provide advanced satellite equipment to Plaintiff. The equipment performed neither in a manner specified in the agreement nor as specified in oral representations. Plaintiff's business suffered damages. Plaintiff initiates this suit for breach of contract, breach of express warranty, breach of implied warranty, negligent misrepresentation, and fraud. Plaintiff seeks a judgment against Defendant for $3 million in compensatory damages, plus Plaintiff's costs, interest, and attorney fees.[7]

Background Facts

This section tells the reader the plaintiff's version of what happened.[8] Avoid legal theories and legal arguments. This is the place to highlight all the facts favorable to you, the plaintiff. Make sure to tell a story that's accessible, cohesive, and compelling. If your lawsuit is complex, consider using subheadings to help your readers. In a breach-of-contract case, your subheadings might include "Plaintiff's Business"; "Defendant's Services"; "Contract Negotiations"; "The Contract Terms"; "Defendant's Anticipatory Breach"; "Plaintiff's Response to Breach"; and "Materiality of Breach."[9] If your lawsuit is simple, you might want to use the heading "Facts Common to all Causes of Action."

> If your allegations are precise and brief, the defendant might be forced to admit them.

Sometimes, as the plaintiff, you won't have all the information you need to prove a claim. That's because, at this phase in the litigation, you haven't yet had the benefit of disclosure or further investigation. You may use "information and belief" allegations to allege facts not in your control but which the defendant knows.

CONTINUED ON PAGE 72

Periodicals

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