NEW YORK STATE BAR ASSOCIATION

Journal

MAY 2014
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Trial by Combat

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by Peter Drymalski

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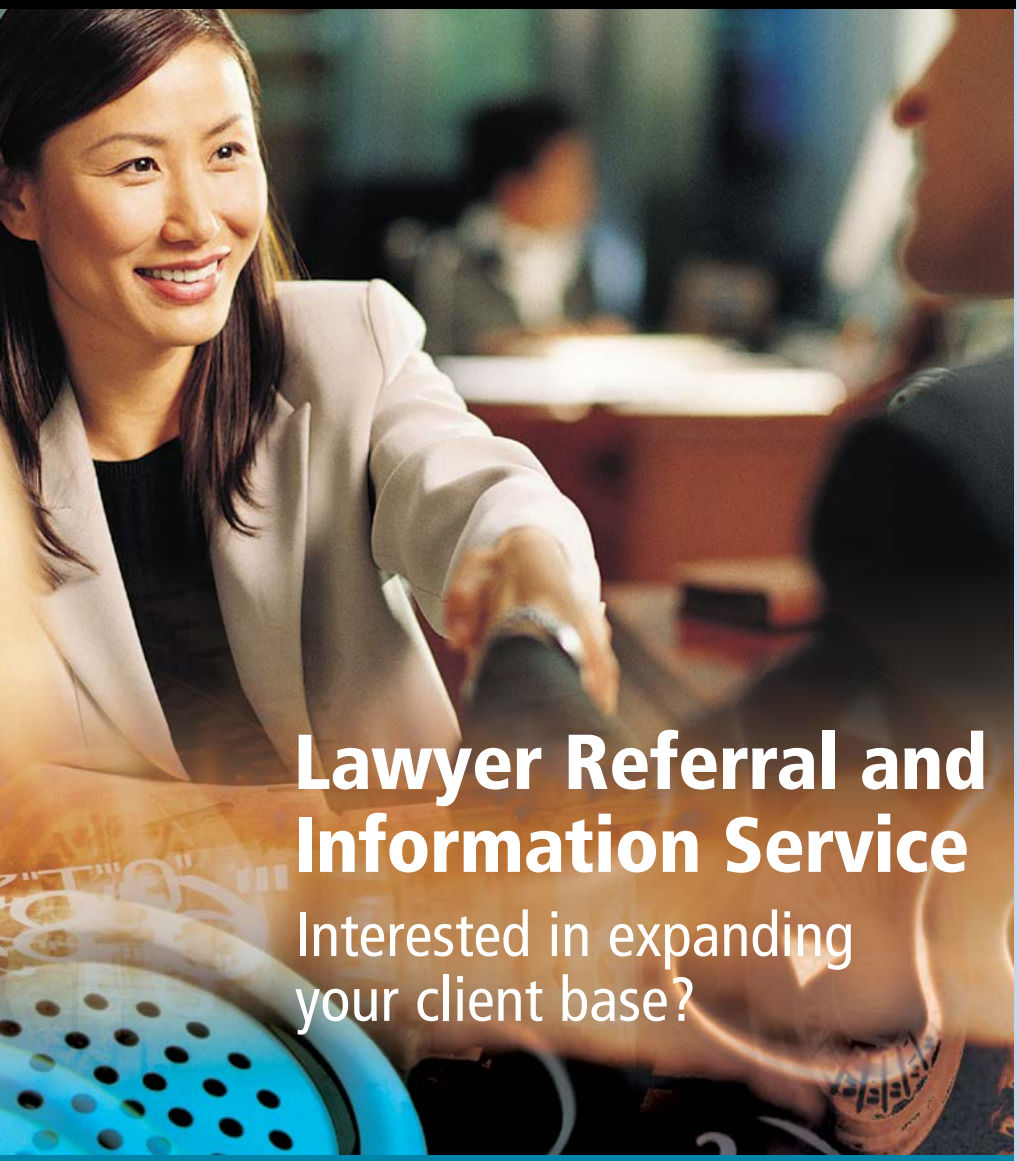

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BY PETER DRYMALSKI

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DEPARTMENTS

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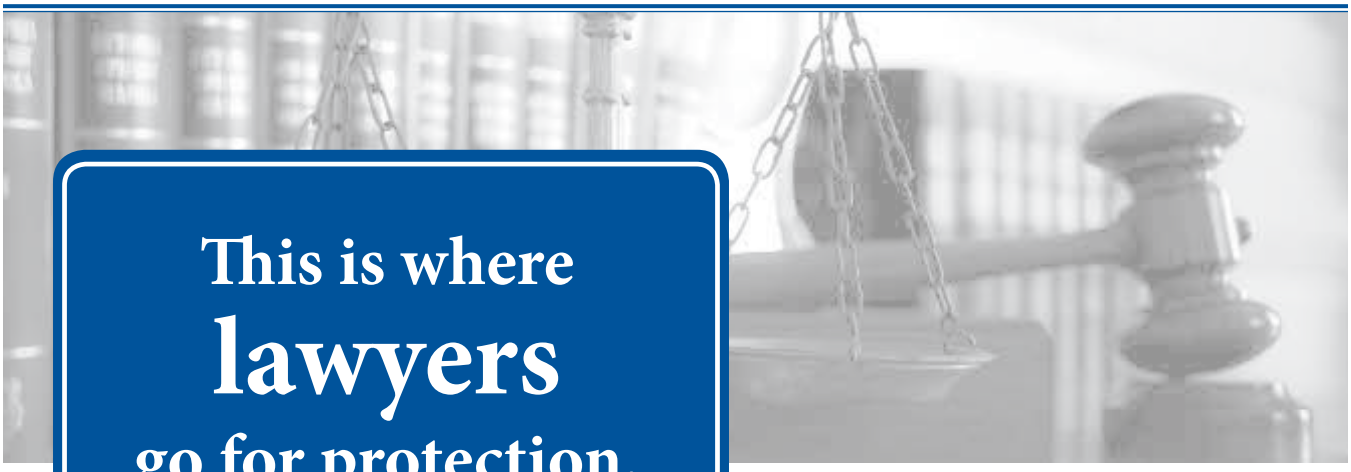

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PRESIDENT'S MESSAGE

DAVID M. SCHRAVER

A Time of Change. A Time of Opportunity.

We have focused substantial attention this year on the changes and challenges affecting our law schools and the legal profession with the September 2013 issue of the *Journal*, several articles in the *State Bar News*, and the Presidential Summit at the Annual Meeting in January. We will continue this discussion with the convocation we are sponsoring jointly with the New York State Judicial Institute on Professionalism in the Law at Pace Law School on May 22.

In this last President's Message of my term, I want to make you aware of some other changes and opportunities for our association.

We are in the process of searching for a new Executive Director to replace Pat Bucklin, who served in that position for nearly 13 years. To date, we have received more than 40 expressions of interest in the position in response to a nationwide search. Thus far, the search committee has interviewed five candidates. We are very pleased with the quality of the candidates and are optimistic that we will soon be in a position to announce our new Executive Director. We will also be searching for a new Associate Executive Director to join our executive team. In the meantime, Associate Executive Director Richard Martin will be working closely with President-Elect Glenn Lau-Kee, President-Elect Designee David Miranda and me to manage the operations of the Association. Glenn and David will take office as President and President-Elect on June 1, and the State Bar will be well served by their leadership.

In anticipation of the arrival of our new Executive Director, we are taking the opportunity to update the strategic plans that have been developed over the past several years; we are also studying other issues that are important to the future of the Association. In the process, we are focused on continuing to provide and improve the value of NYSBA membership; investing in technology to provide CLE and other member benefits and to improve communication and operations internally and externally; and carrying out the mission of the Association to serve our members, the legal profession and the public.

As we plan together for the future of the New York State Bar Association, we invite your feedback, ideas and suggestions about how we can be most relevant to you, our members. How can we best meet your needs and expectations? How can we help you to be competent, professional and successful in our rapidly changing profession? This is a time of opportunity to see what we are doing well, what we can do better, and how we can help each other meet the challenges presented by increasing client demands and expectations, globalization, technology, new forms of competition, law school debt and the need for creativity and innovation as lawyers in the 21st century.

> ***"The entrepreneur always searches for change, responds to it, and exploits it as an opportunity."***
>
> ***Peter Drucker***

It has been an honor to serve as your President. I encourage all of you to be actively involved in our Sections and Committees and to take advantage of the many benefits of membership in the New York State Bar Association. ■

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

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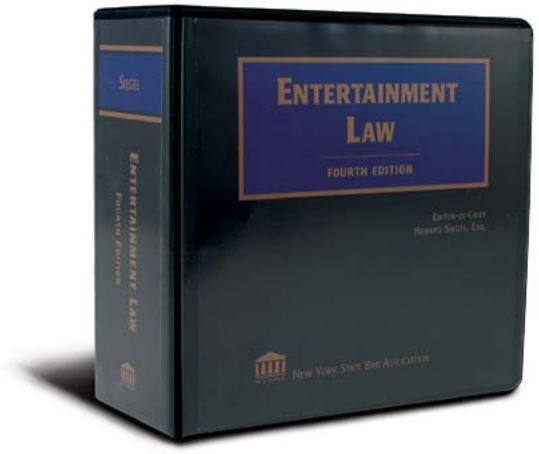

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May 1 — Albany; New York City; Rochester; Syracuse; Westchester
May 6 — Buffalo

Advanced Insurance Coverage: Emerging Issues, Developments and Strategy
(9:00 a.m. – 4:30 p.m.)
May 2 — New York City; Syracuse
May 9 — Albany; Buffalo
May 16 — Long Island

United States Immigration Law in 2014: Basics and Beyond
May 6–7 — New York City

CPLR Update 2014
(5:30 p.m. – 9:10 p.m.)
May 8 — New York City

DWI on Trial: The Big Apple XIV (live & webcast)
May 8 — New York City

The New Uniform Guardianship Act in New York and Article 81 Developments
(9:00 a.m. – 12:35 p.m.)
May 9 — Albany
May 13 — New York City

Trial of a Custody Case
May 9 — Westchester
May 16 — Rochester
June 6 — Albany; Long Island
June 13 — New York City (live & webcast)

Effective Trust Planning and Drafting: Doing the Best for Your Client – Part 2
May 12 (12:00-1:15) — Albany (live & webcast)
May 21 (12:00-1:15) — (webcast)
June 2 (12:00-1:15) — (webcast)
July 18 (11:00-12:15) — Albany (live & webcast)

Practical Skills: Easement Law in New York
(9:00 a.m. – 12:15 p.m.)
May 14 — Long Island
May 21 — New York City
May 28 — Albany (live & webcast)

Election Law and Representing a Political Candidate
(9:00 a.m. – 1:00 p.m.)
May 15 — Westchester

Telehealth and Telemedicine: New York Regulatory Trends and Legislative Initiatives
(12:00 p.m. – 2:00 p.m.; live & webcast)
May 15 — New York City

Starting a Practice in New York
May 16 — New York City

Persuasive Legal Writing: Winning With Words
May 28 — Albany
May 30 — New York City (live & webcast)

11 Steps to Superior Legal Writing
May 29 — New York City (live & webcast)

Discovery Proceedings for Trusts and Estates Practitioners
(9:00 a.m. – 1:00 p.m.)
May 29 — Albany; Syracuse
May 30 — Buffalo; Long Island
June 5 — Rochester; Westchester
June 11 — New York City (live & webcast)

Public Sector Labor Relations
June 3 — New York City (live & webcast)
June 12 — Syracuse

Practicing Entertainment Law in New York: What You Need to Know
(9:00 a.m. – 4:35 p.m.; live & webcast)
June 5 — New York City

Commercial Litigation Academy
(9:00 a.m. – 5:30 p.m.)
June 5–6 — New York City

Ethics for Real Lawyers: Traps and Snares for the Unwary
(9:00 a.m. – 12:35 p.m.)
June 6 — Buffalo
June 9 — Rochester
June 10 — Long Island; New York City
June 13 — Syracuse
June 16 — Westchester
June 27 — Albany (live & webcast)
June 30 — Ithaca

Practical Skills: Debt Collection and Enforcement of Judgments
June 24 — Westchester
June 25 — Long Island
June 26 — New York City; Syracuse
June 30 — Albany

Bridging the Gap
July 14–15 — New York City (live program)
Albany; Buffalo (videoconference from NYC)

Practical Skills: The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics (live & webcast)
July 21 — New York City

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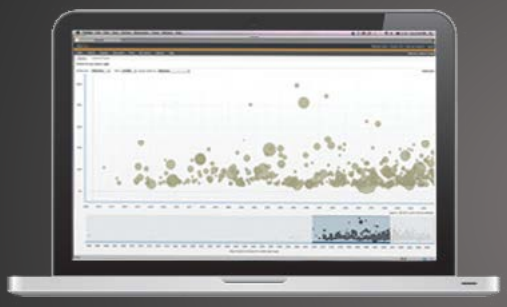

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Trial by Combat

Lawyers on the Battlefields of the Civil War

By Peter Drymalski

Common Destinies, Common Pasts

On June 29, 1863, William Colvill was in a foul mood, which was only partly due to the hot, humid weather typical of Middle Atlantic summers.

Colvill, a 6'5" husky man and the colonel commanding the 1st Minnesota Infantry Regiment, had risen swiftly through the ranks. Yet he had just been arrested by one of Union General Winfield Scott Hancock's staff officers. Hancock was in a tearing hurry to move his Second Corps of the Union Army of the Potomac north from Frederick, Maryland, to Gettysburg, Pennsylvania, where cavalry scouts had just located the main body of General Robert E. Lee's invading troops, the Army of Northern Virginia. Colvill was holding him up. Hancock had forced his troops to march up to 34 miles that day alone, and Colvill's crime was to have allowed some of his men to halt long enough at a river to take off their shoes to keep them dry before they waded across. As a penalty, Colvill had to march on foot at the rear of his regiment, eating its dust.[1] In three days, though, the arrest would be forgotten. Colvill would be at the front of his men and lead them to fame.

On a collision course with Colvill, Confederate Colonel William Forney of the 10th Regiment, Alabama Infantry was marching east from the mountains to Gettysburg. His men had been on the move for weeks as Lee's army invaded the North after Lee's magnificent victory at Chancellorsville, Virginia. Like Colvill, Forney began the war as a captain and was promoted three times in two years to the head of his regiment.

From all points of the compass, officers high and low were converging on Gettysburg. Union Major John Beveridge's 8th Illinois Cavalry Regiment was among them – his men would soon set off the battle by firing the first shots at Rebel General Joe Davis' Mississippi Brigade. Colonel Edward Salomon's 82nd Illinois Infantry marched north with the unlucky and despised Eleventh Corps and would shortly encounter Confederate Major General Jubal Early's hard-charging division, which was supported by the 1st Virginia Artillery Battalion of 20 cannons led by Captain Willis Dance.[2] Farthest away was the 7th Virginia Infantry under Colonel Waller Patton in General George E. Pickett's division. More elevated were Union Major Generals Dan Sickles and Henry Slocum, commanding two of the seven corps of the Union Army, the Third and Twelfth, which were hastening to the town. And near the bottom of the command ladder, Lieutenant Frank Haskell of Milwaukee, formerly of the fabled Iron Brigade and now a staff officer in Hancock's Second Corps, was also riding north.

These men, and many others in the two colliding armies, had something in common besides their destiny at Gettysburg – they were all lawyers.

Who Were These People?

As a student of the Civil War, I was intrigued by the frequent references in the histories to officers who had been lawyers before the war and wanted to know to what extent the legal profession was represented in the armies of the day, but I could not find any research on this topic. I decided to look into it myself and, as a case study, focused on the biographies of the officers who commanded regiments, brigades, divisions, corps, and armies at the Battle of Gettysburg, which took place July 1–3, 1863.

Peter Drymalski (Georgetown '75) is the staff attorney to the Montgomery County, Maryland, Commission on Common Ownership Communities.

The results were surprising. Of the 388 Union officers commanding regiments or larger units in the Army of the Potomac, no fewer than 77, or 20%, had been lawyers when the war started. This is higher than the number of career army officers, which was 61, or 16%. On the Confederate side, in the Army of Northern Virginia, the results were even more astonishing: 86 of that army's 277 field officers had been lawyers, *a ratio of over 30%.* The number of lawyers in the Confederate army, 30, or 11%, was almost three times that of its professional officers. Lawyers commanded infantry, cavalry and even artillery in both armies; many were killed or severely wounded in the battle.

There is no reason to think that Gettysburg was unique. Lawyers commanded entire armies – such as Benjamin Butler and Nathaniel Banks for the North and Jubal Early for the South. At the bloody battle of Shiloh, in 1862, the climactic Confederate charge was led by three generals, two of whom had been lawyers before the war. When Major General William T. Sherman began his March to the Sea in 1864, a lawyer commanded one of his two armies, and other lawyers commanded two of his four corps.

Armies commanded by lawyers sometimes clashed with each other. At the Battle of the Monocacy, near Frederick, Maryland, in July 1864, former prosecutor Jubal Early's Army of the Valley defeated the much smaller force led by Indiana attorney Lew Wallace (later the author of *Ben Hur*). Two years before that, a tiny army commanded by former lawyer and Confederate Colonel William Scurry was narrowly defeated by an equally tiny Union army under the command of Union Colonel John Slough (a former lawyer) at the Battle of the Glorieta Pass in New Mexico.[3]

Among the South's most famous cavalry commanders was attorney John Mosby, whose Rangers were the scourge of Union troops in northern Virginia. The South's most famous naval officer, Captain Raphael Semmes, who commanded the Confederate raider *Alabama* and sank 87 Yankee merchant ships, had practiced law before the war and would resume his practice after it.[4]

If Gettysburg is a fair example, lawyers served in the officer corps disproportionally to their numbers in the general population, as well as to their numbers among all those employed in occupations and professions. According to the 1860 Census, there were 33,000 lawyers in the entire United States out of a total population of more than 31 million people (including 4 million slaves); and there were 8 million people, mostly men, employed in more than 580 different fields.[5] Lawyers counted for only 0.12% of the total population (1 lawyer for every 818 people), or 0.4% of the workforce, yet they made up about 25% of the higher officers of the two armies at Gettysburg.

Of course, the law and the military were not the only professions represented in the opposing armies. The Army of the Potomac was an exceptionally diverse group of men, with field officers from no fewer than 79 professions and occupations.

The Army of Northern Virginia was notably different. Not only did lawyers constitute a much higher percentage of the officer corps, but only 29 different occupations were represented among the ranking officers, barely a third of that in the Union army, a clue to the contrasting natures of the North and the South.

Probably no other factor had more influence on the composition of the Civil War armies and their officer corps than the way they were created. These armies were primarily composed of volunteers, not draftees; they were men who signed up because their friends were doing so, and because they believed in the cause.

This is also reflected in the regional nature of the armies, which were composed of regiments from distinct sections of each state. All the volunteer regiments raised in the South, and almost all those of the North, were sponsored by the state governments. The governors called for volunteers and also allowed individual citizens to sponsor their own regiments.

Why Did So Many Lawyers Rise So High in the Ranks?

The wealthy Chicago lawyer and politician John Farnsworth, who had a country house in St. Charles, Illinois, advertised for volunteers to form a regiment of cavalry. More than enough men came from the towns near St. Charles to establish the 8th Illinois Volunteer Cavalry Regiment; Farnsworth was appointed its first colonel.[6] Similarly, Colonel Friedrich Hecker, a former lawyer and revolutionary from Germany, then a farmer near Chicago, founded the 82nd Illinois Volunteer Infantry. One of its companies was composed entirely of Jewish Chicagoans, sponsored and funded by the city's synagogues; its other companies were formed from German, Scandinavian,

and Swiss immigrants. The 82nd was led to Gettysburg by the 27-year-old former Chicago attorney and Jewish politician Colonel Edward Salomon.[7] The 6th Wisconsin Infantry was recruited from several of that state's southern towns, and the names chosen for its companies show their birthplaces: the "Sauk County Riflemen," the "Lemonweir Minute Men," the "Milwaukee Citizens Corps," and the "Buffalo County Rifles."

As was the prevailing custom in both North and South, the men of each company of the 6th Wisconsin elected their own officers, one of whom was Milwaukee lawyer Frank Haskell (although he was chosen as a mere lieutenant).[8] Overall, this system guaranteed that politics as much as or more than merit would influence the governors' decisions. This was perhaps especially true in the South, where so many of the lawyers were themselves politicians. But it was also a factor that weighed heavily with President Lincoln, who appointed prominent politicians, such as Benjamin Butler (Democratic congressman from Massachusetts), Nathaniel Banks (Republican governor of Massachusetts), and Dan Sickles (Democratic congressman from New York City) to high military positions, despite the fact that none of them had any significant military experience.

Lawyers had other advantages. Many of them, like Farnsworth, were wealthy enough to sponsor and pay for the outfitting of a regiment or a company. Also, they not only were literate, but they were trained in logical thought and thus, perhaps, were able to learn more easily the rudiments of military organization and tactics. Another factor was that lawyers tended to be men of importance in their communities, and other citizens tended to look to them for guidance on public matters. And it may well be that the legal profession is one of the few that are uniquely capable of creating officers, for it is a short step from advocacy to leadership.

It was relatively easy for an ambitious man to become a lawyer and to use the profession as a stepping-stone to a political career. There were few law schools, and in many states there were outbreaks of egalitarianism resulting in the abolition of formal requirements to practice law.[9] Even William T. Sherman, he of the March to the Sea, when casting about for a career after he resigned from the Army a few years before the Civil War, flirted with the Jealous Mistress:

> [Sherman] traveled to Kansas to become a lawyer but began to wonder about the standards of the bar when he was admitted to practice on the grounds of basic intelligence alone. "If I turn lawyer, it will be bungle, bungle from Monday to Sunday," he wrote home. "But if it must be, so be it." He stuck with the bar long enough to bungle a few cases, then quit.[10]

The Experience of Battle

Civil War officers were expected to share the hardships of army life with their men and most did so, enduring heat, dust, mud, rain and snow. Many were injured by accidents or sickened by disease. They nonetheless fared better than their men, most of the time. The leading study on Civil War casualty rates, William Fox's *Regimental Losses in the American Civil War 1861–1865*, found that almost twice as many men died of disease during the war as were killed in action or died of their wounds, and that for every officer who died of disease, 66 enlisted men went to their graves.[11]

This ratio may reflect the fact that officers had somewhat better field housing than the enlisted men and could afford to purchase better food than the army provided. Enlisted men tended to be crowded together in tents or huts, which facilitated the spread of diseases, and their standard fare was salted pork or beef, hardtack (a large, hard cracker), flour, and beans, few of which are foods high in vitamins.

But the figures change dramatically for deaths in combat. Fox calculated that 1 officer was killed or mortally wounded for every 16 enlisted men. (In the cavalry and artillery, it was worse: 1 officer for every 15 men.) At Gettysburg, 27% of the officers were killed or wounded, compared to 21% of the enlisted men. An officer's chances of being shot in battle were therefore 28% higher than for the men he led. Similarly, at the Battle of Shiloh, a year earlier, 21% of the officers became casualties compared to 18% for the enlisted men.[12]

As Fox explained, the officers "were not more brave [than the enlisted men] but their duties required them to expose themselves."[13] Before the invention of wireless radios, an officer had to depend on the power of his voice and upon signals carried by bugle or drum to direct his troops; therefore, he had to be close enough for them to hear his orders and for him to observe what was happening. Officers' uniforms and weapons were different from those of the enlisted men; and they were frequently on horseback in order to move quickly from one part of their command to another as well as to better see the fighting. The best officers made it their business to be where the action was, but it also made them better targets for the enemy.

Not everyone could do it. At Shiloh, Colonel David Stuart of the 55th Illinois Infantry, a Chicago lawyer, was able to inspire his men to fight throughout the day; but his neighbor attorney in the same brigade, Colonel Rodney Mason of the 71st Ohio ("that globule of adipose pomposity," according to one of his men), disappeared at the first sound of shooting, leaving his regiment without a leader and causing its almost instant collapse and retreat.[14]

What could make a man who might never have been in battle before the war stand and endure the enemy's fire without flinching (too much) and, without seeking cover, lead his men in a long march toward the enemy's firing line?

In *The Face of Battle*, John Keegan, an eminent British military historian, wrote about the Battle of Waterloo and

the motivations of the British officers there, who had to face similar conditions. Quoting from their postwar letters, he noted their fascination with, and respect for, their fellow officers who were wounded or killed:

> Here we approach perhaps as close as we are going to get to the officer's central motivation. It is the receipt of wounds, not the infliction of death, which demonstrated an officer's courage; that demonstration was reinforced by his refusal to leave his post even when wounded, or by his insistence on returning as soon as his wounds had been dressed; and it was by a punctiliousness in obeying orders which made wounds or death inevitable that an officer's honour was consummated. Officers, in short, were most concerned about the figure they cut in their brother officers' eyes. Honour was paramount, and it was by establishing one's honourableness with one's fellows that leadership was exerted indirectly over the common soldiers.[15]

I think the inspiration for American officers, North and South alike, was quite different and grew out of the much different nature of American society. Most of the officers of these volunteer regiments were not military professionals who would move on to other assignments after the war, but members of the same local communities from which the regiments' companies were drawn and to which most of them would return after the war. Their motivation was less to earn the admiration of their fellow officers than the respect of their fellow citizens.

One example involves the recruitment of the 24th Michigan Infantry, later to become part of the Iron Brigade, which fought stubbornly at Gettysburg. In 1862, the mayor of Detroit sponsored a recruitment rally at which the state's best-known citizens and politicians made patriotically heroic speeches. One of them, Judge Henry Morrow, started his speech but was soon interrupted by some rude heckler who yelled, "Are YOU going?" Morrow replied, "I have said I would! The government has done as much for me as for you, and I am ready to uphold it!"[16] (The judge did go, and he commanded the regiment at Gettysburg.) Another example involves Colonel Stuart's behavior at the beginning of the Battle of Shiloh. Winston Groom describes the scene:

> In 1855, Stuart had moved his law practice from Detroit to Chicago, and in a short time he became one of the city's wealthiest and most socially prominent citizens. Then, in 1860, he became entangled in one of the most notorious divorce cases of the century, which ruined him socially and politically, and when the war broke out the following year, he saw it as the only way to redemption.
>
> . . . .
>
> [Stuart's] men respected him, even though they all knew about his disgrace because so many of them were from Chicago where it had been front page news for months. It was this kind of closeness that allowed Stuart to give his noncommissioned officers what must surely rank as one of the strangest speeches in military history. Shortly after they encamped [near Shiloh], Stuart minced no words: "I am a man of somewhat damaged reputation, as you all well know. And I came into the army solely to retrieve that reputation, and I depend on this regiment to do it."

Shortly after the battle began, Stuart's inexperienced troops became nervous and began to edge backwards. Stuart rode among them, swearing at and encouraging them.

> . . . Even the dimmest among [his men] must have felt a sense of loyalty to the man, some kindle of his authority and his magnetic personality that caused them to rally upon him, otherwise they simply would have kept on running. "If Stuart had died then," the regimental biographer wrote, "he would have been canonized in the hearts of his men."[17]

Lawyers as Leaders at Gettysburg

It is impossible in an article like this to present the battlefield performances of all 164 lawyers holding field commands, so I will describe just a few examples from each day of the battle.

Day 1

The first day, July 1, is famous for the defense of the Yankee cavalry against a much larger Rebel force, the troopers buying time for the rest of the Union army to come up and take the hills near the town. That day also saw the "Last Stand of the Iron Brigade" (which would lose 65% of its men in a few hours, including Judge Morrow, who was wounded). Unfortunately, it was far less glorious for the unlucky Eleventh Corps, which, greatly outnumbered by the Confederate troops attacking it, soon collapsed.

At least one lawyer was partly responsible for the debacle. He was General Francis Barlow, a darling of Manhattan's high society and commander of an Eleventh Corps division.[18] Arriving on the field, Barlow saw a hill north of town (now called Barlow's Knoll), which he decided was an ideal defensive position, and ordered his division to take it. Barlow failed to take into account that once he was on the hill, his division was out of touch with the rest of the Eleventh Corps. Confederate General Early, however, quickly noticed Barlow's error and sent troops around both ends of Barlow's division, placing it in imminent danger of being captured. Barlow ordered a retreat, which soon degenerated into a confused and unstoppable rout.

Now, Early proceeded to shatter two more Union brigades and overwhelm the Union right flank, including the 82nd Illinois under Colonel Edward Salomon who, despite having two horses killed under him, appeared to his men as the epitome of nonchalance. His brigade commander later wrote that Salomon "was the only soldier at Gettysburg who did not dodge when Lee's guns thundered; he stood up, smoked his cigar and faced the cannonballs with the sang froid of Saladin." Sangfroid was not enough, however, and Salomon's regiment was driven back past Gettysburg.

The first day ended with the Union troops forced out of Gettysburg but holding on to high ground south of it. Lee planned a major attack for the next day in which half of his troops would attempt to get around and behind the left end of the Union army and crush it regiment by regiment.

That end of the Union line was held by General Dan Sickles' Third Corps. Sickles had briefly worked in the New York City Corporation Counsel's office but found it too dull and went into politics, where he became notorious. He would soon have all the excitement he could handle.

> It may well be that the legal profession is one of the few that are uniquely capable of creating officers, for it is a short step from advocacy to leadership.

Day 2

Ordered to defend a line that ended at an important hill called Little Round Top, Sickles, on July 2, much like Barlow the previous day, saw a nice hill, or plateau, in front of his lines. Exercising his initiative, and leaving his part of the line undefended, he moved his troops forward to the plateau, leaving Little Round Top undefended and creating an awkward, L-shaped line that was not connected to Hancock's Second Corps north of him. Lee's attack caught Sickles unready and came from an angle that Sickles' troops were not prepared to defend. Though Sickles and his men fought bravely, they too were overwhelmed and forced to retreat with heavy losses, including Sickles himself, whose leg was shattered by a cannonball. The destruction of Sickles' corps created a huge gap in the Union lines, and the Confederates were seen to be massing their regiments and preparing to charge straight through it.

Into this hole stepped two lawyers whose conduct helped to prevent disaster. One was Colonel Strong Vincent, a Massachusetts attorney just 26 years old, now commanding a brigade of men from New York, Pennsylvania, Michigan and Maine. As Vincent's brigade was arriving at Gettysburg, everyone could hear the roar of the fighting. Vincent spotted a courier riding urgently from the front lines and must have sensed that a crisis was impending. He stopped the courier, and the following hasty conversation took place:

> "Captain, what are your orders?"
> The Captain replied, "Where is General Barnes?"
> Vincent said, "What are your orders? Give me your orders."
> "General Sykes told me to direct General Barnes to send one of his brigades to occupy that hill yonder [Little Round Top]."
> Vincent said, "I will take the responsibility of taking my brigade there."[19]

Vincent's timely decision brought his brigade to the undefended hill just as the Confederates were about to attack it. After a long, hard fight, his brigade saved Little Round Top from being captured and prevented the Confederates from getting to the rear of the Union army, but Vincent was badly wounded.

At about the same time, Colonel Colvill entered the picture. His commander, Hancock, had been dashing about to prevent the Union left from being overrun and had ordered a good part of his own Second Corps to save Sickles' Third. Now Hancock was almost out of troops, and he could see another Confederate battle line of well over a thousand men, including Colonel John Forney's 10th Alabama Infantry, forming up to charge through the large hole in the lines created by the retreat of the Third Corps. Hunting for reinforcements, riding out of the smoke he found the 1st Minnesota, which, having fought since 1861, now was reduced to 262 officers and men.

> "My God!" [Hancock] exclaimed. "Are these all the men we have here? What regiment is this?"
> "First Minnesota," answered Colonel William Colvill.
> In a fight, Winfield Hancock was not one to waste words. Pointing to the flag of the enemy force that had fired on him, he barked, "Advance, Colonel, and take those colors!"[20]

Colvill immediately gave the order to advance.

> The veterans of the 1st Minnesota, that state's one regiment in the Army of the Potomac, had fought at First Bull Run and in every campaign since and they knew a forlorn hope when they became one, yet they fixed bayonets and charged anyway. Their swift, bold move took the Rebels by surprise and sent them scrambling backwards.[21]

But the Rebels soon recovered and held their ground, trading rifle fire with the Minnesotans at close range. There were at least four of them for every Yankee. Casualties among the Minnesotans mounted rapidly, and soon almost all its officers were shot, including Colvill. The regiment slowly retreated to its hill. Within 15 minutes, 215 of its 262 men, or 82%, were killed or wounded, the highest casualty rate suffered by a single regiment in a single charge in the Civil War.[22] (By comparison, the famous charge of British Light Brigade a few years earlier had suffered losses of 43%.) But the Confederates, having

beaten back the little regiment's charge, seemed stunned and did not pursue their own attack immediately; in the 15 minutes of grace granted to him, Hancock found enough reinforcements to rebuild and hold his lines.[23]

Day 3

The second day of the battle, like the first, had ended with the Union army again narrowly avoiding disaster and still holding the high ground. Lee, however, was not ready to give up. Impressed by the collapse of the Eleventh Corps on the first day, Lee concluded that the Union army's morale was poor and that it would retreat again if he could hit it hard enough. And so he ordered General James Longstreet, commanding the Confederate First Corps, to plan a decisive charge for the third day, which would include a big, newly arrived division composed entirely of Virginians and led by General George Pickett. Pickett's division of Virginians included three brigadier generals and 13 colonels, eight of whom had been lawyers before the war.[24] The attack would be aimed at the center of the Union army, where Lieutenant Frank Haskell happened to be stationed.

The attack opened at 1:00 pm on July 3 with a furious artillery bombardment of the Union lines designed to unnerve the Yankees on the ridge ahead. Union artillery replied, and the field was soon blanketed with smoke, blasted with explosions and filled with thunder. Perhaps as many as 300 cannons were at work on a battlefield a mile wide. Finally, after about an hour, the firing slackened, and three Confederate divisions, including Pickett's, about 12,000 to 13,000 men altogether, came out of the woods lining the battlefield. It was a climactic moment in the war and perhaps its turning point.

Haskell was there to watch it, and in a long letter to his brother, written shortly after the battle, he described it in words no historian or novelist has ever matched:

> None on that crest now need be told that the enemy is advancing. Every eye could see his legions, an overwhelming resistless tide of an ocean of armed men sweeping upon us! Regiment after regiment, and brigade after brigade, move from the woods and rapidly take their places in the lines forming the assault. Pickett's proud division, with some additional troops, hold their right; Pettigrew's (Worth's) their left. The first line at short interval followed by a second, and then a third succeeds; and columns between, support the lines. More than half a mile their front extends; more than a thousand yards the dull gray masses deploy, man touching man, rank pressing rank, and line supporting line. The red flags wave, their horsemen gallop up and down; the arms of eighteen thousand men, barrel and bayonet, gleam in the sun, a sloping forest of flashing steel. Right on they move, as with one soul, in perfect order, without impediment of ditch, or wall or stream, over ridge and slope, through orchard and meadow, and cornfield, magnificent, grim, irresistible.[25]

As the Confederate line neared the Union defenders, the rifle fire reached a crescendo. Haskell noted a battlefield phenomenon indicative of the depth of the primitive passions now provoked:

> The jostling, swaying lines on either side boil, and roar, and dash their flamy spray, two hostile billows of a fiery ocean. Thick flashes stream from the wall, thick volleys answer from the crest. No threats or expostulation now, only example and encouragement. All depths of passion are stirred, and all combatives fire, down to their deep foundations. Individuality is drowned in a sea of clamor, and timid men, breathing the breath of the multitude, are brave. The frequent dead and wounded lie where they stagger and fall – there is no humanity for them now, and none can be spared to care for them. The men do not cheer or shout; they growl, and over that uneasy sea, heard with the roar of musketry, sweeps the muttered thunder of a storm of growls.[26]

Haskell was no mere observer. Watching Pickett's men approach the Union line, Haskell saw with horror that some of the defenders were about to turn and run, and he personally led reinforcements into the fight.

Some of Pickett's division did break through the Union lines, but they were too few to hold what they had gained, and counterattacks quickly surrounded and captured them. Almost two-thirds of the men in Lee's three attacking divisions were killed, wounded or captured, and the great attack was over. It had lasted barely an hour.

The next day, Lee began the long retreat to Virginia. From then on, the Confederacy would be on the defensive on all fronts (with the brief exception of Early's grand raid the following year), and the Confederacy would shrink at a rapidly increasing rate.

The Measure of Their Devotion

In hindsight, Gettysburg seems to have been ordained by shadowy Fate. Neither army commander wanted to fight there, and the officers and men arrived on the field at times and places determined purely by chance. Some

lawyer-officers, like Barlow and Sickles, arrived in time to be placed in crucial positions where their military decisions, however well intentioned, were almost disastrous. It was likewise chance that chose when and where other lawyer-officers like Vincent and Colvill would arrive and redeem with their own blood the errors of their colleagues.

Yet we should not be too critical of our professional colleagues who erred in their military judgments. Worse mistakes were made in the battle (and in many other battles) by military professionals of more experience and higher renown. Perhaps the greatest mistake was Lee's, when he ordered the grand charge of the third day across a mile of open ground and against good troops who had had plenty of time to prepare.

Most of the lawyers at Gettysburg had no opportunity to exercise their judgments in a way that would be decisive to their cause. Like Pickett's eight lawyer-officers and Colvill, these men only had the chance to do what they were ordered to do although they knew the risks.

Of those mentioned in this article, Vincent would die of his wounds shortly after the battle; Haskell survived the battle, was promoted to colonel of a brigade; he would be shot in the head at the Battle of Cold Harbor a year later. Sickles lost his leg; Patton's jaw was shot off and after weeks of pain he too died;[27] Barlow was severely injured, and Colvill was shot three times, but both returned to service. Forney, whose unit received Colvill's charge, was shot four times leading his men that day but would survive as well. Beveridge and Salomon survived unhurt and were promoted. Judge Morrow's wound was light, and he would continue serving with a much-reduced Iron Brigade for most of the war. Early also survived unhurt; he succeeded to command of Lee's Second Corps and went on to lead a small Rebel army through Virginia and Maryland to attack Washington, D.C., in July 1864.

And this is only a small part of all that happened and of all that these men and their 160-odd fellow lawyers did in those three crucial bloody days.

The Aftermath

The war affected the survivors differently. After the war, many, like Colvill and Barlow, resumed their law practices (Colvill became Minnesota's attorney general and Barlow became New York's), while Sickles returned to his political career.[28] Salomon became governor of the Washington Territory and later the assistant district attorney for San Francisco.

Some Confederates preferred to ignore the present and fixed their gaze firmly on the past. Early, who eventually resumed his law practice, wrote extensively about the Confederate side of the Civil War, eulogizing Lee and condemning Lieutenant General James Longstreet, Lee's subordinate, for his disagreements with Lee. Confederate General John B. Gordon, a lawyer-officer in Early's division, was elected a U.S. Senator and, later, governor of Georgia; he is believed to have become the chief of the Georgia Ku Klux Klan.

> In hindsight, Gettysburg seems to have been ordained by shadowy Fate.

Others accepted the result of the war and moved on. Mosby became a Republican and staunch supporter of President Grant (as did Longstreet); and Amos Akerman, a former slaveowner and Confederate officer from Georgia, became President Grant's attorney general and prosecuted the federal civil rights laws against the KKK and others more vigorously than any of his successors for the next 100 years.[29] Many others would become governors, senators and congressmen. Two of them, lawyers and generals James Garfield and Rutherford B. Hayes, would be elected president of the United States. Some would not recover, such as Colonel Stuart of Shiloh, who never felt redeemed and killed himself in 1868. But perhaps the lawyer-soldier who found the most enduring meaning in his war experiences was Oliver Wendell Holmes, Jr.

Holmes was only 20 when the war broke out and not yet a lawyer. He enlisted in the 20th Massachusetts Infantry, which was called the "Harvard Regiment" because so many Harvard graduates joined it. He was soon promoted to lieutenant, wounded in the chest at the Battle of Ball's Bluff, near Leesburg, Virginia, the first battle of the war in the East. He was shot in the neck at the Battle of Antietam in 1862 – the bloodiest single day in American history – recovering in time to take part in the opening skirmishes of the Battle of Chancellorsville, Virginia, in 1863, when shrapnel from a cannon shell almost tore off the heel of his foot. He missed the rest of that battle as well as the Battle of Gettysburg two months later, but, having since been promoted to captain, returned to the army in time to serve in the defense of Washington against Early's army in July 1864.[30]

After the war, he completed his legal studies, became a lawyer, a renowned legal scholar, the Chief Judge of the Supreme Judicial Court of Massachusetts, and, eventually, a Justice of the U.S. Supreme Court, on which he served until 1932.

The Civil War was a supremely important event in Holmes' life. He wrote poems about it and often gave lectures in honor of his fellow veterans. In 1884, Holmes delivered a Memorial Day address to a convention of Civil War survivors:

> [Memorial Day] embodies in the most impressive form our belief that to act with enthusiasm and faith is the

> condition of acting greatly. To fight out a war, you must believe something and want something with all your might. . . . I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived. . . . [T]he generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. . . . [T]he one and only success which it is [a man's] to command is to bring to his work a mighty heart.[31]

We are the spiritual heirs to those lawyers who, 150 years ago, left their quiet, safe offices to take up a life of hardship and danger. They lived in atrocious conditions; they were frequently exposed to extremes of weather, their clothes were often filthy and infested with lice, their food was usually miserable. And then, to the beat of the drums and the calls of the bugles, they marched to hundreds of battlefields, great and small, and put their own lives at risk. Whether they fought for the North or the South, they all participated in the great challenge of their time.

We cannot share what Holmes called their "great good fortune," but we can be proud of our professional forebears for what they accomplished. And we can take inspiration from their examples and seek to participate in some effort, some movement, something worthwhile, that helps to make our own lives worth the living. ■

1. Harry Pfanz, Gettysburg: the Second Day 18 (Univ. of N.C. Press 1987).

2. The egregiously misnamed Jubal (Jubilee) Early was one of the important military figures of the Civil War. A former prosecutor in Rockingham County, Virginia, he was renowned for his sour temper. He fought under Stonewall Jackson, and Lee eventually promoted him to high command. In the summer of 1864, he led his army on a long raid that almost culminated in the capture of Washington, D.C. Such a victory would have had serious consequences for the 1864 elections, including Lincoln's own re-election campaign. The Battle of the Monocacy stalled him for a full day, and allowed Grant to rush reinforcements to the city in time to man its forts and discourage Early from pressing his attacks. Early was also a lifelong bachelor who fathered two families.

3. Scurry would be killed in action in 1864; Slough would survive the war to become Chief Justice of the Supreme Court of New Mexico. If you wonder why the Civil War was fought in New Mexico, it was because the cash-starved Confederacy was trying to capture the gold and silver mines of Colorado.

4. John Bowman, Who Was Who in the Civil War 183–84 (World Publications, 1998).

5. The 1860 Census is online at http://www.census.gov/prod/www/decennial.html. This list of occupations is, by itself, a fascinating clue to life in the United States; it includes apiarists, axle makers, bobbin makers, calico printers, feather dressers, ice dealers, moulders, ostlers, rag collectors, sail makers, shepherds, warpers and wigmakers.

6. The 8th Illinois Cavalry would be ordered to Washington D.C., where it would compile a distinguished record, including dueling with Mosby's Rangers in Virginia. Mosby himself would later call it the best cavalry regiment in the Union Army. No fewer than six generals came from this regiment alone. Abner Hard, M.D, History of the Eighth Cavalry Regiment Illinois Volunteers I (reprinted by Morningside Bookshop, 1984).

7. Eric Benjaminson, A Regiment of Immigrants: The 82nd Illinois Volunteer Infantry and the Letters of Captain Rudolph Mueller, http://dig.lib.niu.edu/ISHS/ishs-2001summer/ishs-2001summer137.pdf. Salomon was an immigrant from Schleswig-Holstein and one of the youngest aldermen ever elected in Chicago (he was 24 years old at the time). Two of his cousins (Charles and Frederick) also served in the Union Army, and all three became generals. Frederick was promoted to major general and was probably the highest-ranking Jewish soldier in either the Confederate or the Union Armies. (A third brother of this remarkable family was the wartime governor of Wisconsin.)

8. Alan Nolan, The Iron Brigade: A Military History 4, 14–16 (Macmillan, 1961).

9. According to the 1850 Census, p. 144, there were 16 law schools in the United States, with 35 professors and just 532 students (a ratio of just 1:16, so those really were the "good old days" for law students). No similar educational statistics were collected in the 1860 Census.

10. H.W. Brands, The Man Who Saved the Union: Ulysses Grant in War and Peace (Doubleday 2012); Bowman, *supra* note 4, pp. 189–90.

11. Fox's Regimental Losses was published in 1889 and is now online at http://archive.org/stream/reglossescivilwar00foxwrich#page/n5/mode/2up.

12. *Id.* at pp. 25–40.

13. *Id.* at p. 38.

14. Winston Groom, Shiloh, 1862 254–59 (Nat'l Geographic 2012).

15. John Keegan, The Face of Battle: A Study of Agincourt, Waterloo, and the Somme 189 (Vintage, 1977).

16. Nolan, *supra* note 8 at 149–50.

17. Groom, *supra* note 14 at 258–59.

18. Barlow would later be immortalized in Winslow Homer's famous painting of the Civil War, *Prisoners From the Front* (1866), in which a Union officer inspects three defiant prisoners against the background of a blasted landscape. Eleanor Harvey, The Civil War and American Art 169–71 (Smithsonian, 2012).

19. Pfanz, *supra* note 1 at p. 208. Note what happens here. Vincent has the perception to tell that there is a crisis; he does not play it safe by simply passing the message to General Barnes and waiting for orders. He persists in learning what the message is and takes the initiative by responding immediately. (Vincent's brigade included the now-famous 20th Maine Infantry Regiment led by Colonel Joshua Chamberlain, the hero of the novel *The Killer Angels* and of the movie based on the book *Gettysburg*, in which Vincent is also portrayed.) The Confederate regiment that repeatedly attacked, and came closest to defeating, Chamberlain's 20th Maine was the 15th Alabama, led by former lawyer Colonel William Oates.

20. Pfanz *supra* note 1 at p. 410.

21. Stephen Sears, Gettysburg 320–21 (Houghton-Mifflin 2003).

22. Pfanz *supra* note 1 at pp. 413–14.

23. The Minnesotans were neither down nor out. The 47 survivors were later joined by two of their companies (about another 100 men), which had been on duty as military police, and the next day they took their revenge by participating in the repulse of Pickett's Charge, capturing more than 1,000 Confederates and causing an uncounted number of casualties.

24. Of these eight officers, three would be killed or die of their wounds in Pickett's Charge (Allen, Williams and Patton), and the other five wounded (Kemper, Hunton, Carrington, Mayo and Aylett).

25. Haskell's Account of the Battle of Gettysburg at Par. 101 (The Harvard Classics, 1909–1914), at http://www.bartleby.com/43/3501.html.

26. *Id.* at Par. 104. Haskell criticized the performance of some Pennsylvania troops, leading to a denunciation published by the survivors of the Philadelphia Brigade in 1910 titled The Battle of Gettysburg: How General Meade Turned the Army of the Potomac Over to Lieutenant Haskell.

27. Five of Patton's brothers also served in the Confederate Army. One of them was Colonel George S. Patton, Sr., also a lawyer and already a father, who would be killed in 1864. His grandson would be General George S. Patton, Jr., of World War II fame.

28. New Yorkers Barlow and Sickles had interesting, if contrasting, postwar careers. Barlow blamed the collapse of his division entirely on its

immigrants, mostly Germans, and got himself transferred to the Second Corps. He was a noteworthy prosecutor and a founder of the American Bar Association. Sickles, on the other hand, took credit for his unauthorized advance, claiming that by doing so he saved the rest of the army and helped to win the battle. A lot of historians are still puzzling over whether this is true. Sickles had a long post-war career as an army officer, diplomat, congressman, sheriff, politician and public servant, wafting the aroma of scandal almost everywhere he went. His final scandal was to embezzle the money raised for his own memorial that was to be placed in a New York monument at Gettysburg. The monument stands today but without Sickles' bust in it. http://en.wikipedia.org/wiki/Daniel_Sickles.

29. Brands, *supra* note 10.

30. There is a legend that Holmes was on duty at Fort Stevens while Early's Confederates were preparing to attack it. President Lincoln drove up from the White House to see a real battle in person and was standing on the parapet of the fort, a conspicuous target (Lincoln was 6' 4" and even taller with his stovepipe hat). An officer next to Lincoln was shot and killed, and Holmes yelled at Lincoln (perhaps not realizing who he was), "Get down, you fool!" Lincoln obeyed and commented to Holmes, "Captain, I'm glad you know how to talk to a civilian." (Catherine Drinker Bowen, Yankee From Olympus 194 (Atlantic, Little Brown 1944).) By this time, many soldiers of Holmes' age were colonels or even generals, and it is odd that Holmes did not reach higher rank than captain after three years of service. The answer is probably that his wounds required lengthy convalescences, which kept him from exercising leadership and catching the eyes of his superiors; but it may also be that Holmes' genius was more of the observer and thinker rather than that of the leader.

31. Max Lerner, The Mind and Faith of Justice Holmes 16 (Little, Brown & Co., 1943).

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BY DAVID PAUL HOROWITZ

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"A Dangerous Intersection"

Introduction

Statutory provisions and mandates are not always "clear on their face." Statutes may be poorly drafted, cross-reference other statutes or rules and, of course, rely upon judicial decisions to explain ambiguities and fill in gaps or outright omissions left by the drafters of the statute. A difficult task is often compounded when two statutes, not cross-referenced or otherwise linked to one another, must be considered in tandem.

This was the case in *Norex Petroleum Ltd. v. Blavatnik*.[1] Presented with a matter of first impression, a trial court in New York County and, on appeal from that court's ruling, the First Department, addressed the intersection of CPLR 202 and CPLR 205(a).[2] For the plaintiff, it turned out to be a dangerous intersection indeed.

The Borrowing Statute

CPLR 202, referred to as the "borrowing statute," provides:

> § 202. Cause of action accruing without the state.
>
> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Hardly a paradigm of clarity in drafting, the statute is designed to prevent forum shopping by out-of-state plaintiffs whose claims accrue outside New York State where the statute of limitations governing the claim in the alternative foreign jurisdiction(s) has expired:

> In sum, we conclude that CPLR 202 requires that a court, when presented with a cause of action accruing outside New York, should apply the limitation period of the foreign jurisdiction if it bars the claim. Only where the cause of action accrues in favor of a New York resident is this rule rendered inapplicable.[3]

Accordingly, applying the borrowing statute first requires a determination as to whether a foreign plaintiff's cause of action accrued outside New York. If the claim accrued outside New York, then the statute of limitations, including all tolls and extensions, in both the foreign jurisdiction(s) and New York State, must be ascertained. If the statutes of limitations are different, the action must be commenced in the New York court within the shorter of the two statutes of limitations, so that if the statute of limitations has expired in either jurisdiction, the claim cannot be brought in New York.

Preventing forum shopping by out-of-state plaintiffs is not the only purpose behind the borrowing statute:

> In addition, although deterrence of forum shopping may be a primary purpose of CPLR 202, it is not the only purpose. As part of this State's procedural code, CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants. This equally important purpose of the borrowing statute is frustrated by a rule that would limit its application to cases where a defendant is amenable to suit in another State. Such a rule would lead to results that are anything but uniform or certain.[4]

Whether the holdings in *Norex* "add clarity to the law and . . . provide the certainty of uniform application to litigants" will be discussed below.

The Saving Statute

CPLR 205(a),[5] referred to as the "saving statute," provides, in pertinent part:

> § 205. Termination of action
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

If you feel a slight tension in your temples while reading the statute, you are not alone. Fortunately, in 1915, Judge Cardozo cogently explained the purpose of the saving statute[6] in *Gaines*

v. New York.[7] Speaking for a unanimous Court of Appeals he wrote:

> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction, stands on the same plane as any other mistake of law.[8]

Judge Cardozo traced the history of the saving statute back to 1623:

> As re-enacted in the present Code (section 405) its scope was broadened. . . . We think that whatever verbal differences exist, the purpose and scope of the present statute are identical in substance with its prototype, the English act of 1623.[9]

Whether the decisions in *Norex* acknowledge the statute's "broad and liberal purpose" will also be discussed below.

The Facts and Holding in *Norex*

The trial court in *Norex* incorporated CPLR 202 in calculating whether the plaintiff's second action was timely commenced under CPLR 205(a):

> In "embrac[ing] all the laws that serve to limit time within which an action may be brought," this court must embrace Alberta law, which does not allow for any tolling due to a prior action. Otherwise, the policy "to protect a non-resident defendant against an action in New York, which was timely because of the tolling provision of [the New York statute], but had become barred elsewhere" would be defeated.
>
> In taking into account all of the Alberta law that would limit Norex's commencement of an action, as is required under CPLR § 202, it appears that the latest that Norex could have commenced an action against the non-BP defendants would be February 26, 2004, two years after filing its federal action. Unquestionably, by that time, Norex had a cause of action against defendants, and knew it, so the cause of action had accrued under Alberta limitations law. With respect to BP, the cause of action accrued no later than December 21, 2005, when Norex amended its complaint in the federal action to add BP. Thus, the claim against BP was barred after December 21, 2007. This action was commenced in 2011. Under Alberta law, it was clearly untimely, and therefore must be dismissed.[10]

Affirming the trial court's dismissal, the First Department set forth the facts in *Norex* and its holding on the issue of whether the second action was timely commenced:

> On February 26, 2002, plaintiff, a resident of Alberta, Canada, commenced an action against all but one of the instant defendants (BP) in the United States District Court for the Southern District of New York, asserting violations of the Racketeer Influenced and Corrupt Organizations Act.
>
> Plaintiff amended the complaint, on December 21, 2005, to add BP as a defendant and to add two claims under Russian law, although not as against BP.
>
> The instant action, which plaintiff commenced in 2011, is barred as untimely under Alberta law, which limits the time to bring claims for the torts alleged by plaintiff to within two years from the date on which the claimant first knew or should have known that an injury had occurred, that the injury was attributable to defendants, and that the injury warranted bringing a proceeding, and which, more importantly, does not have a provision that would toll the limitations period in favor of a previously filed action.
>
> 28 USC § 1367, which gives the federal courts supplemental jurisdiction over all other claims related to the claims in a federal action and, for any of those claims that are dismissed, tolls the limitations period for 30 days after they are dismissed, "unless State law provides for a longer tolling period," is not applicable to this action, because New York law provides for a tolling period of six months. CPLR 205(a) could not save plaintiff's claims in any event, because New York's borrowing statute requires the courts to apply Alberta's limitations period. Alberta's limitations periods for plaintiff's state law and Russian-law claims expired, at the latest, in 2004 and 2007, respectively.[11]

Norex also involved determinations on several other points of law not pertinent to the discussion herein.[12]

The sole authority cited in *Norex* by the First Department for considering CPLR 202 when applying CPLR 205(a) was *Global Financial Corp. v. Triarc Corp.*,[13] where the Court of Appeals answered the "long-simmering question: where does a nonresident's contract claim accrue for purposes of the Statute of Limitations?"[14] The answer? "[W]e agree that plaintiff's cause of action accrued where it sustained its alleged injury."[15]

The Court touched briefly on CPLR 205(a) in explaining the procedural history of the action before it:

> On November 9, 1995, plaintiff commenced an action in the United States District Court for the Southern District of New York to recover its commissions and fees. Because both parties were Delaware corporations, however, on April 10, 1996 the court dismissed the complaint for lack of subject matter jurisdiction. Three months later, plaintiff brought a substantially similar suit across the street, in Supreme Court, New York County. The parties do not dispute that this action is timely if the Federal action was timely when commenced on November 9, 1995.[16]

Thus, in *Global*, the parties were in agreement that it was the date the underlying action was commenced that controlled whether a second

action brought pursuant to the saving statute was timely.

In explaining the effect of the borrowing statute, the Court of Appeals in *Global* broke no new ground:

> When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations.[17]

After a discussion of the development of the borrowing statute, the Court returned to its analysis of the definition of, and place of accrual of, various claims.

Absent from the discussion and analysis in *Global*? Any further mention of the saving statute.

Norex Eschews Both "Clarity" and a "Broad and Liberal Purpose"

There was no "forum shopping" by *Norex* in commencing its second action pursuant to CPLR 205(a) since the plaintiff had already timely commenced its first action in New York; thus, the first, and primary, goal of the borrowing statute was not implicated.

However, the other goal of the borrowing statute articulated by the Court of Appeals in *Insurance Co. of North America v. ABB Power Generation*, to wit, that "CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants,"[18] is not furthered by the holding in *Norex*. In addition to having to ascertain other jurisdictions' statutes of limitations and tolls, litigants and courts will now have to determine the existence of, and any limitations on, saving statutes in those other jurisdictions.

Every non-resident plaintiff complying with the borrowing statute and commencing a timely action in a New York court on a cause of action accruing outside New York will now have to factor into the commencement calculus the following: "What if my timely commenced action is dismissed for any reason not statutorily excluded from CPLR 205(a)'s saving provision?"

The answer to that question will depend upon the answer to yet another question. "Does the foreign jurisdiction have a saving statute and, if so, what is it and what impact will that have on any future dismissal of my action?" The answer to the second part of the last question will depend on when, not if, the initial action is dismissed, since if the initial action is dismissed while the shorter of the statute of limitations of both jurisdictions is open, the existence or non-existence of a borrowing statute in the foreign jurisdiction is of no moment. Only if the statute of limitations has expired will the New York court scrutinize the law of the foreign jurisdiction to determine whether the second action is timely.

The resulting inexorable diminution in the clarity of the borrowing statute is overshadowed by the impact of *Norex* on the "broad and liberal purpose" to be afforded the saving statute. Returning to Judge Cardozo's decision in *Gaines v. New York*:[19]

> We construe the statute broadly in the light of its history and purpose. If the first action had resulted in a judgment for the plaintiff, and the defendant had prevailed upon appeal, it would be a strained use of language to say that no action had ever been begun. A suitor who invokes in good faith the aid of a court of justice and who initiates a proceeding by the service of process, must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum. . . . The rule of the statute was enacted to meet the exigencies of the ordinary rather than the exceptional case, to save the rights of the honest rather than the fraudulent suitor. There is no suggestion of bad faith in the plaintiff's selection of the City Court. We think his error ought not to bar the prosecution of his action.[20]

Norex certainly invoked the jurisdiction of a New York court in commencing the first action in good faith, and therefore, following Judge Cardozo's holding, "commenced (the) action within the meaning of [CPLR 205(a)]." To engraft the absence of a foreign court's saving statute in determining the timeliness of the second action is not required by a plain reading of CPLR 202, and is contrary to the goals of CPLR 205(a).

Conclusion

Once an action is timely commenced in a New York court, the borrowing statute's role, by its express terms limited to determining the applicable limitations period, is over. Following that initial timely commencement, if the action is dismissed, the saving statute permits the plaintiff to commence a second action, except where the basis for dismissal is specifically proscribed by the statute. Because the saving statute is only invoked where the statute of limitations has expired, there is no need to consider the borrowing statute because the saving statute trumps the statute of limitations.

Rest assured, if the Court of Appeals decides *Norex*, a future column will tell the tale.

Until that time, as you peruse this column with Memorial Day fast approaching, and memories of a long winter a distant memory, a long, languorous, and restorative summer to all. Just be wary of dangerous intersections. ■

1. 105 A.D.3d 659 (1st Dep't), *lv. granted*, 21 N.Y.3d 865 (2013).

2. *Norex* is scheduled to be argued in the Court of Appeals in early summer and, barring a last-minute resolution of the case or withdrawal of the appeal, a final determination by that Court will conclusively settle the matter.

3. *Ins. Co. of N. Am. v. ABB Power Generation*, 91 N.Y.2d 180, 187–88 (1997).

4. *Id.* at 187 (citations and parentheticals omitted).

5. The remainder of CPLR 205(a) addresses dismissals for neglect to prosecute, and the statute contains two additional subsections:

> (b) Defense or counterclaim. Where the defendant has served an answer and the action is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the plaintiff or his successor in interest, the assertion of any cause of action or defense by the defendant in the new action shall be timely if it was timely asserted in the prior action.

CONTINUED ON PAGE 55

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Deal-of-the-Day Coupons

The Ethics of Discount Marketing by Lawyers

By Devika Kewalramani, Amyt M. Eckstein and Valeria Castanaro Gallotta

Legal Service Coupon Marketing

Deal-of-the-day and coupon marketing have gained in popularity with retailers, being offered via email, websites and other promotional tools. Lawyers seeking to access both broader and more targeted audiences are looking to promote their practices by offering discounted legal services and adopting group coupon marketing strategies as a way to reach new consumers seeking legal services. While there are differing views regarding the propriety of deal-of-the-day advertising[1] and the types of legal services best suited to discount marketing, the reality is that coupon programs for legal services are already widespread in certain marketplaces and regions. While lawyers may seek clients through these new marketing vehicles, they should be mindful of their professional and ethical responsibilities before engaging in this type of advertising activity. In addition, as technology and offer techniques evolve, new considerations arise.

Deal-of-the-Day

What's the Deal?

Group coupon marketing programs allow retailers to market products and services at a discount to consumers via websites that receive a portion of the retailer's profit. The retailer and the website separately negotiate the discounts to be applied. Subscribers to the website usually receive the offer via an email promoting currently available deals, noting certain restrictions or conditions, and providing the caveat that most deals are available for a limited time. Subscribers purchase the deal and are able to redeem a voucher or coupon provided by the website. Often, the offer is valid only if a certain minimum number of subscribers purchase the coupon. Typically, the website collects the cost of the coupon by credit card from the consumer, deducts a percentage of the gross receipts as its compensation and pays the balance to the participating retailer.

Legal Industry Coupon Programs

There are two types of popular legal industry coupon arrangements. The first is an ordinary coupon scenario where the subscriber buys a coupon for discounted legal services at the advertised rate with the promise that the rate applies to a specified number of hours of legal work. The subscriber separately pays the lawyer rendering services for the number of hours worked at the discounted rate. For example, the subscriber buys a $50 coupon that entitles him or her to receive five hours of a lawyer's time at a reduced rate. The second, and far more common, is the prepaid coupon scenario where the subscriber pays the website up front for the entire value of the coupon for discounted legal services, regardless of whether the hours are actually worked or if the coupon is ever redeemed. For example, a lawyer offers an hourly rate discount of 50% for up to five hours, so the subscriber pays the full amount of $750 in advance.

Ethical Obligations in Legal Service Advertising

Legal services group coupon marketing implicates a broad range of ethics issues under the New York Rules of Professional Conduct[2] (the Rules) and the American Bar Association (the ABA) Model Rules of Professional Conduct (the Model Rules). The following Rules are some of the significant ones to consider:

- Rule 1.1 requires lawyers to provide competent client representation;
- Rule 1.5 prohibits lawyers from charging an excessive legal fee;
- Rule 1.7 requires lawyers to avoid conflicts of interest with current clients;
- Rule 1.10(e) mandates conflicts checking for new engagements against existing clients and previous engagements;
- Rule 1.15 proscribes commingling of client funds, requires segregation of client accounts and the safeguarding of client funds and other property;
- Rule 1.16(e) requires withdrawing lawyers to promptly refund any legal fees paid in advance but not yet earned;
- Rule 1.18 governs lawyers' duties to prospective clients;
- Rule 5.4 proscribes lawyer-nonlawyer sharing of legal fees and prohibits nonlawyers from regulating the professional judgment of lawyers whom they pay to render legal services for another;
- Rule 7.1 bars false, deceptive or misleading attorney advertising;
- Rule 7.2(a) forbids lawyers from compensating persons or organizations for a client referral;
- Rule 7.3 regulates solicitation of prospects by lawyers; and
- Rule 7.4 governs lawyers' identification of practice areas and specialties.

Structuring the Ethical Deal

State bar association ethics committees around the country are increasingly placing legal services coupon marketing programs under the ethics microscope. N.Y. State Bar Op. 897 (2011) (NY Opinion) concludes that it is permissible for lawyers to participate in daily deal websites but cautions lawyers to use such advertising carefully to avoid potential ethical pitfalls.[3] While several other states have approved lawyers' use of deal-of-the-day websites – subject to various limitations and conditions – some states prohibit legal service coupon marketing. For example, North Carolina, South Carolina and Maryland permit the use of properly structured legal services group coupon marketing deals, whereas Alabama, Arizona and Pennsylvania have found legal service group coupon marketing to be unethical and, as Indiana Bar Op. 1 put it, "fraught with peril."[4]

Recently, the ABA issued Formal Op. 465 (2013) (ABA Opinion), advising lawyers on using deal-of-the-day marketing programs while complying with the Model Rules.[5] Although the ABA Opinion provides warnings and guidelines regarding many of the same ethics issues analyzed by the NY Opinion, the ABA Opinion examines the issues under two different categories of group coupon arrangements, characterized as either "coupon" or "prepaid." The ABA Opinion concludes that while "coupon" deals can be structured to comply with the Model Rules, it identifies numerous issues associated with "prepaid" deals and is "less certain" that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules. The particular ethics issues triggered by deal-of-the-day marketing websites are discussed below.

Improper Referral Payment, Fee-Splitting or Advertising Cost?

New York Approach

Rule 7.2(a) prohibits a lawyer from compensating a person or entity to recommend or obtain employment, or as a reward for having made a recommendation resulting in employment. Comment [1] to Rule 7.2 notes, however, that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules. . . . " So, when a website collects the cost of a coupon from consumers of legal services and at the close of the deal-of-the-day deducts a percentage of the gross receipts as its compensation and pays the balance to the participating lawyer, does this constitute improper payment for a referral?

The NY Opinion found no violation of Rule 7.2 and agrees with South Carolina Bar Op. 11-05, which concludes that the money retained by the website is payment for "the reasonable cost of advertisements." The NY Opinion reasons that deal-of-the-day advertising does not run afoul of Rule 7.2(a) due to the lack of any individual contact between the website and the coupon pur-

chaser, other than collection of the cost of the coupon by the website. The website takes no action to actively refer a potential client to a particular lawyer but merely charges a fee for carrying an advertisement, crafted by the lawyer, to interested consumers. The NY Opinion assumes that to the extent the percentage amount retained by various websites is a reasonable payment for this form of advertisement, there is no violation of Rule 7.2.

money directly to the website rather than the lawyer paying fees for advertising out of already earned fees.

Returns, Refunds and Retainers

New York Position

The NY Opinion observes that after a coupon is purchased, circumstances can arise where the coupon holder is unable to receive the full benefit of the legal services to which the coupon is entitled, thereby implicating Rule 1.5, barring excessive legal fees. For example, after the lawyer is paid by the website but before the purchaser receives the service, if the lawyer is unable to perform the work due to a conflict of interest under Rules 1.7 and 1.10(e) or lack of competence under Rule 1.1, then the lawyer must provide a full refund to the purchaser (including the portion retained by the website unless otherwise disclaimed). Similarly, where the buyer decides not to pursue the lawyer's services and discharges the lawyer, the lawyer must provide a full refund, subject to any quantum meruit claim for legal services performed prior to termination.[6] The NY Opinion also notes that in situations where a subscriber purchases a coupon but allows it to expire either by never seeking to use it or failing to use it before it expires or attempts to do so thereafter, the lawyer is "entitled to treat the advance payment received as an earned retainer for being available to perform the offered service in the given time frame."

State bar association ethics committees around the country are increasingly placing legal services coupon marketing programs under the ethics microscope.

View of the ABA and Other States

The ABA Opinion reaches a conclusion similar to that of the NY Opinion, concluding that marketing companies that retain a percentage of payments obtain no more than payment for advertising and processing services rendered to lawyers who market their legal services, especially where lawyers structure the transaction as a "coupon" deal, since no legal fees are collected by the marketer. The ABA Opinion observes that the marketer's deducting payment up-front rather than billing the lawyer later for providing the advertised services does not convert the nature of the lawyer-marketer relationship from an advertising arrangement into a fee-sharing arrangement in violation of the Model Rules. The ABA Opinion caveats that the percentage retained by the marketer must be reasonable under Model Rule 7.2(b)(1).

The ABA Opinion also notes that many state bar associations have found lawyers' use of deal-of-the-day marketing arrangements to be permissible – that is, such promotions do not constitute fee-splitting with nonlawyers in violation of Model Rule 5.4. The underlying purpose of Model Rule 5.4 is to protect a lawyer's independent professional judgment by limiting the influence of nonlawyers on the attorney-client relationship. For example, North Carolina State Bar, Formal Op. 10 (2011) concludes that the portion of a fee retained by the website is merely an advertising cost, because "it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee." However, Alabama State Bar, Formal Op. 2012-01 (2012), takes a contrary position, finding that the percentage taken by the website is not tied in any manner to the "reasonable cost" of the advertisement. Thus the use of such websites to sell legal services is in violation of Rule 5.4, because legal fees are shared with a nonlawyer. Similarly, State Bar of Arizona, Formal Op. 13-01 (2013), observes that even if the portion retained by the website is reasonable, it constitutes improper fee sharing, because the consumer pays all the

Treatment by the ABA

The ABA Opinion agrees with the NY Opinion that the lawyer may retain the proceeds where coupon deals are purchased but never used. However, the ABA Opinion disagrees that lawyers must always return the entire amount of the purchase price, including any portion retained by the website, if legal services are not rendered for any reason whatsoever.[7] The ABA Opinion notes that while some states have concluded that retaining funds from an unredeemed deal constitutes an excessive fee under Model Rule 1.5, it differs with these states to the extent that lawyers had offered a "coupon" deal and disclosed that, as part of the offer, the cost of the coupon will not be refunded.[8] However, the ABA Opinion agrees that monies paid as part of a "prepaid" deal likely need to be refunded in order to avoid violating the Model Rules prohibiting unreasonable fees.

Contrasting "coupon" and "prepaid" deals, the ABA Opinion notes that for coupon deals, where the lawyer

properly discloses as part of the offer that there is no right to obtain a refund of the purchase price of the coupon if the subscriber later has a change of heart, the right to compel a refund has been waived; whereas, for prepaid deals where the subscriber decides prior to its expiration not to proceed, the lawyer likely must refund unearned advance fees to avoid collecting unreasonable fees.

> Legal service coupon marketing must comply with Rule 7.1's strictures on attorney advertising.

The ABA Opinion observes that where a lawyer cannot perform legal services required by the deal (either in coupon or prepaid deals) due to a conflict or other ethical impediment, the lawyer must provide a full refund to avoid receipt of an unreasonable fee. This duty to refund cannot be avoided through disclosure. Such a refund must be for the entire amount paid (i.e., including website fee), regardless of whether the lawyer is entitled to recoup any portion of the website fee. The ABA Opinion reasons that it would be unreasonable to withhold any portion paid by the purchaser if the lawyer's inability to render services is not the fault of the buyer. However, if a lawyer is not obligated to give a refund but chooses to, such as when a buyer allows a coupon deal to expire, the lawyer may refund only the portion of the payment received, provided this limitation is clearly disclosed at the time of purchase.

Avoid False or Misleading Advertising

New York View

The NY Opinion concluded that legal service coupon marketing must comply with Rule 7.1's strictures on attorney advertising: the daily deal advertisement must not be false, deceptive, or misleading (Rule 7.1(a)(1)); a written statement describing the scope of the service advertised for a fixed fee must be made available (Rule 7.1(j)); lawyers must render the service for the advertised fixed fee if the coupon buyer seeks that service within the specified time frame (Rule 7.1(l)); the offered discount must not be illusory and must represent an actual discount for the advertised service (e.g., an advertisement offering discounted services for five hours of legal work at $100 an hour for a total of $500 would be misleading under Rule 7.1(a)(1) if such lawyer's standard rate is $100);[9] the advertisement must include the label "Attorney Advertising" on the webpage and in the subject line of any related email (Rule 7.1(f)); and if the advertisement is "targeted" to a specific group, it becomes a solicitation and must comply with the rules on solicitation (Rule 7.3).

ABA Approach

The ABA Opinion notes that lawyers who choose to use deal-of-the-day marketing programs must properly supervise the accuracy of the content of the offers made to ensure they are not misleading or incomplete, in violation of the Model Rules. The ABA Opinion draws a distinction between advertising a "coupon" and a "prepaid" deal, observing that the latter likely presents greater obstacles because the public, particularly first-time or unsophisticated consumers of legal services, may not easily understand what legal services they require or are covered in an offer for "prepaid" deals for a specified service. The ABA Opinion cautions lawyers who offer "prepaid" legal services deals to carefully draft advertisements that clearly define the scope of the legal services offered, including whether court costs or expenses are excluded. In addition, the ABA Opinion advises that for both "coupon" and "prepaid" deals, lawyers should be explicit about the circumstances that may require a refund of the purchase price of a deal, to whom, and in what amount.

Absence of Attorney-Client Relationship

New York Perspective

The NY Opinion warns that because purchase of a coupon entitles the buyer to the described legal service, there is a risk that such an arrangement could be viewed, prematurely and improperly, as the formation of a client-lawyer relationship, before the lawyer has had any opportunity to check for conflicts of interests, determine if the described services are appropriate for the consumer, and if the lawyer is competent to render such services. The NY Opinion agrees with South Carolina Op. 11-05 that such a problem could be avoided with proper logistical arrangements and disclosures. The lawyer's advertisement on a deal-of-the-day website must disclose as part of the coupon offer that it is subject to a number of conditions: (1) before such a relationship is created the lawyer will check for conflicts and determine his or her competence to render services that are appropriate to the consumer; (2) if the lawyer decides that the client-lawyer relationship is untenable for such reasons, the lawyer must give the coupon purchaser a full refund; and (3) the lawyer must supply any other information preventing the offer from being misleading in any way. The NY Opinion adds that to the extent the client-lawyer relationship is actually formed, the lawyer must promptly describe the scope of the services to be performed and the fee arrangement pursuant to Rule 1.5(b).

Treatment by the ABA

The ABA Opinion alerts lawyers that they must be prudent and communicate the nature of the relationship formed, if any, by the purchase of a deal, in order to avoid creating any duties of confidentiality or to check for conflicts that may be owed to a "prospective client" (i.e., who consults about the possibility of forming a client-lawyer

relationship regarding a matter) under Model Rule 1.18.[10] However, the ABA Opinion observes that the mere purchase of a deal for legal work does not automatically transform the buyer into a prospective client or a current client, entitled to the attendant duties owed by the lawyer. It notes that the lawyer's advertisement should explain that, until a consultation takes place, no attorney-client relation exists and no such relationship may ever be established if there is a conflict or the lawyer is unable to provide the representation. The ABA Opinion suggests disclosing on the website the use of a retainer agreement if the lawyer will require the potential client to execute one. It advises that the legal services promotions and other materials marketing the lawyer's services should contain language cautioning any consumer to review all purchase terms on the website, including whether the coupon is transferable. The ABA Opinion observes that not all legal services are appropriate for transfer or gift giving (such as "prepaid" deals), thereby obligating lawyers to properly evaluate the deal structure and the website to determine whether the offered legal service may be transferable.

Competence and Diligence

The ABA Opinion advises lawyers to limit legal services offered in such promotions to those they are competent to take on, and they should clearly disclose in the coupon offer any restrictions on the types of matters handled so that consumers can make informed decisions about purchasing the deal. Lawyers should also disclose that the matter covered by the coupon may become more complex than originally expected and may exceed the number of hours allotted under the coupon. The ABA Opinion adds that if the matter will require more time than is offered under the coupon, the lawyer must state how long it will take and at what rate, and be careful to limit the number of deals to be sold in order to avoid situations where the lawyer cannot manage matters promptly, diligently and competently.

Handling Advance Legal Fees

The ABA Opinion observes that deal offers are usually made through websites that collect payments, retain a portion thereof for their advertising services, and transfer the remainder to the lawyer, generally in a lump sum, reflecting the number of deals sold, without identifying individual buyers. So, whether this lump sum constitutes "legal fees . . . paid in advance" within the meaning of Model Rule 1.15(c) depends on the nature of the deal.

The ABA Opinion notes that for coupon deals, the coupon purchase merely establishes the discount applicable to the cost of future legal services. Therefore, no legal fees are involved unless and until a client-lawyer relationship is created, time is spent and the discounted legal fees are collected directly by the lawyer. Hence, the funds collected and forwarded by the website to the lawyer from the coupon sale are not legal fees and may be deposited into the lawyer's operating account. In contrast, with prepaid deals, the funds the lawyer receives from the website constitute advance legal fees because the website collects all the money the lawyer will be entitled to as set forth in the deal. Advance legal fees need to be deposited into a trust account and identified by the buyer's name. The ABA Opinion cautions that, in order to avoid improper handling of trust funds and fee sharing, lawyers should explain to the buyer of any "prepaid" deal what percentage paid is not a legal fee and will be retained by the website. In addition, lawyers who choose to offer a "prepaid" deal must make appropriate arrangements with the website to obtain adequate information about deal purchasers to properly comply with their duties to manage trust funds. The ABA Opinion cautions that despite the practical difficulties associated with tracking deal buyers and accounting for prepaid fees, even where lawyers use a website, they are still responsible for properly handling advance legal fees.

Avoid the Raw Deal

Clearly, legal services coupon programs trigger several important ethical issues. There may be new and different types of coupon arrangements that emerge, posing additional ethical concerns not yet identified. State bar associations thus far have taken divergent views on the propriety of such coupon programs. In light of these factors and other considerations, lawyers must carefully design and structure deal-of-the-day coupon offers to ensure any ethics issues are properly addressed. ■

1. Krista Umanos, *Ethics, Groupon's Deal-of-the-Day, and the "McLawyer,"* 81 U. Cin. L. Rev. 1169, 1182–83 (2013).

2. 22 N.Y.C.R.R. §§ 1200 *et seq.*

3. New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, Marketing of legal services by use of a "deal of the day" or "group coupon" website (2011).

4. North Carolina State Bar, Formal Op. 10 (2011); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011); Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012); Alabama State Bar, Formal Op. 2012-01 (2012); State Bar of Arizona, Formal Op. 13-01 (2013); Pennsylvania Bar Ass'n, Advisory Op. 2011-27 (2011); Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012).

5. ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 465, Lawyer's Use of Deal-of-the-Day Marketing Programs (2013).

6. *See* Rule 1.16(e); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 599 (1989).

7. *See* State Bar of Arizona, Formal Op. 13-01 (2013).

8. *See* North Carolina Bar, Formal Op. 10 (2011); Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012).

9. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 563 (1984).

10. *See* Model Rule 1.18 and Comment [1] to Model Rule 1.18 ("Prospective clients, like clients, may . . . place documents or other property in the lawyer's custody . . ."); Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012) (the court could reasonably find that a person who has deposited money with the lawyer or lawyer's agent to form a client-lawyer relationship qualifies as a prospective client under Rule 1.18).

The New York Non-Profit Revitalization Act

A Summary and Analysis

By Frederick G. Attea and Kelly E. Marks

A group of actors and playwrights want to form a new not-for-profit theatre company to produce and perform literary dramas in a small upstate New York community that has no active theatre companies. The draft certificate of incorporation under the N.Y. Not-for-Profit Corporation Law (NFPCL) provides that the corporation is a "type B" not-for-profit corporation, and that it does not have members. The Secretary of State rejects the attempt to file the certificate of incorporation and requires that the certificate of incorporation be revised to designate the corporation as a "type C" not-for-profit corporation, which requires the corporation to have members.

A New York not-for-profit social services agency needs additional office space to better serve its clients. The agency identifies an ideal space after evaluating a number of proposals. If acquired, the new space would represent no more than 2% of the assets of the agency. The purchase agreement for the new space must be approved by two-thirds of the agency's entire board, which is the same approval requirement that would apply if the agency sold substantially all of its assets.

These are just two examples of traps for the unwary that exist under the current NFPCL, which as of July 1, 2014, will undergo a major revision as a result of the enactment of the Non-Profit Revitalization Act (the Act).

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History and Overview

The last significant changes to the NFPCL were made some 40 years ago. About 10 years ago, the Corporations Law Committee of the New York State Bar Association's (NYSBA) Business Law Section initiated a process of review of the NFPCL with the goal of modernizing the law. As the committee delved into the current law, reviewed model acts and other states' laws, and solicited insights from practitioners and not-for-profits about working with the current NFPCL, it became apparent that the committee needed to recommend more than a modernization of the law. The NFPCL needed both procedural and substantive changes not only to take into account changes in technology and to simplify procedures but also to improve governance functions. NYSBA's proposed legislation addressed many of these concerns and contributed to discussion on issues under the NFPCL. Many of NYSBA's proposals were reflected in the Attorney General's bill, which eventually became the Act. The New York State Legislature passed the Act, which revised both procedural and substantive provisions of the NFPCL, on June 21, 2013, and Governor Andrew Cuomo signed the Act into law on December 18, 2013.

This article will explore the Act's changes to the NFPCL, which generally will become effective July 1, 2014 (subject to certain exceptions noted in this article), and will make some suggestions for future clarifications and improvements.

Procedural Changes

Types

Currently, formation of not-for-profit corporations and amendments to and restatements of the certificates of incorporation of existing corporations often pose unexpected ministerial problems. The example at the beginning of this article illustrates one common problem with current law and its interpretation. Under the current NFPCL, a certificate of incorporation must set forth the "type" of corporation that is being formed. A type A corporation generally includes trade or business associations, fraternal societies, social clubs, and others.[1] A type B corporation includes (but is not limited to) charitable, educational, religious, scientific, literary, and cultural organizations.[2] A type C corporation is one "formed for any lawful business purpose to achieve a lawful public or quasi-public objective."[3] A type D corporation includes corporations that may be formed under other New York corporate law for purposes specified under that law.[4] In the case of a type C corporation, there is very little guidance about what constitutes "a lawful public or quasi-public objective" and what the differences are between a type B or type C corporation. In addition, type A, C and D corporations must have members.

The Secretary of State frequently rejected certificates of incorporation in which the corporation was designated as a type B corporation because the Secretary viewed the corporation as a type C corporation, resulting in significant governance changes. A corporation that had no members was now required to have members – changes its founders never expected.

The Act amended the NFPCL to remove the four types and to provide for two types of not-for-profit corporations – charitable corporations and non-charitable corporations. Charitable corporations are those formed for purposes including charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to animals.[5] Corporations formed before the effective date of the Act that are type B or type C corporations will be deemed to be charitable corporations. All other not-for-profit corporations, such as those formed for civic, patriotic, social, fraternal, or athletic purposes, or the purpose of operating trade or business associations, are non-charitable corporations under the Act.[6] Charitable corporations may, but are not required to, have members, while non-charitable corporations must have members.

Regulatory Consents and Pre-Approvals

Under current law, regulatory agency consent or approval is required to file a certificate of incorporation or amendment or restatement to a certificate of incorporation that changes the corporate purposes or powers, if those purposes or powers could be subject to regulatory oversight by a New York State agency.[7] It was often the case that the organization was not undertaking any activity that would require agency oversight, but the organization was still required to receive agency consent before a certificate of incorporation or amendment or restatement could be filed. Under the Act, an organization in that situation can include a statement in its certificate of incorporation providing that the corporation's purposes and powers do not include those requiring regulatory agency oversight.[8] This statement will satisfy the regulatory notice and approval requirements.

Corporations that had purposes or powers that were related to education but did not include the operation of a school, college, post-secondary education program, library, museum, or historical society had to seek the consent of the Commissioner of Education to file or amend or restate a certificate of incorporation. This consent is no longer needed. Instead, the organization must simply provide its certificate of incorporation or amendment or restatement to the Commissioner of Education within 30 business days of receiving notice of filing by the Secretary of State.[9]

Approvals for Transactions and Changes of Purposes and Powers

Under the current law, a not-for-profit corporation's participation in real estate transactions generally required the approval by a two-thirds vote of the entire board even when the real estate represented a small amount of the corporation's assets.[10] The Act provides that the pur-

chase, sale, lease, mortgage, exchange, or other disposition of real property must be approved by the majority of the board or authorized board committee unless the real property constitutes all or substantially all of the assets of the corporation.[11] In that case, the approval of two-thirds of the entire board is generally required unless the board comprises 21 or more directors, in which case the transaction need only be approved by a majority vote.

The sale, lease, exchange or other disposition of all or substantially all of the assets of a type B or type C not-for-profit corporation currently requires both Attorney General consent and state Supreme Court approval. Under the Act, a charitable corporation need only seek either Attorney General or Supreme Court approval, not approval of both.[12]

Under current law, both Attorney General consent and Supreme Court approval are required if a type B or C corporation seeks to merge, consolidate or change a corporate purpose or power. Under the Act, a charitable corporation has the option of seeking either Attorney General or Supreme Court approval.[13]

Dissolutions currently require both Supreme Court and Attorney General approval. The Act will require only Attorney General consent to dissolutions of charitable corporations or non-charitable corporations with assets required to be used for a specific purpose. Supreme Court approval would be required for a dissolution if the Attorney General does not approve the dissolution or if the Attorney General believes Supreme Court approval is appropriate.[14]

Miscellaneous Technology Updates

Because the current NFPCL had not been updated in a number of years, there were concerns that using modern technology for (i) members meeting notices, (ii) member and board written consents and (iii) meetings may not be permissible. The Act expressly provides that notices of member meetings and waivers for member and board meetings may be sent electronically. In addition, the Act allows for proxy designations and unanimous written consents to be made electronically. The Act provides rules for what constitutes a valid notice, waiver, proxy designation and consent if effectuated electronically. The Act expressly authorizes participation in board and committee meetings by video conference, provided that all meeting attendees can hear each other and can participate in the meeting.[15]

Governance, Oversight and Fiduciary Duties

Committee Structure

Under current law, a not-for-profit corporation may have standing and special committees of the board in addition to committees of the corporation.[16] The Act eliminates the concept of standing and special committees and clarifies that committees include committees of the board and committees of the corporation. The Act expressly states that committees of the corporation, which may include non-board members, cannot bind the board.[17]

The Act adopts enhanced audit oversight requirements for charitable corporations required to file an independent certified public accountant's audit report with their annual Attorney General filings.

Officers

The Act prohibits an employee from serving as board chair or in an officer's position with similar duties. This provision of the Act takes effect January 1, 2015.[18]

Audit Oversight

The Act adopts enhanced audit oversight requirements for charitable corporations required to file an independent certified public accountant's audit report with their annual Attorney General filings. For charitable corporations that had annual revenues of less than $10 million for the last fiscal year ending before January 1, 2014, the audit oversight provisions of the Act are effective as of January 1, 2015.

These audit oversight requirements will apply to charitable corporations registered in New York to make charitable solicitations and filing CHAR 500 if they have gross revenues of more than $500,000 (until June 30, 2017, $750,000 from July 1, 2017, through June 30, 2021, and $1 million thereafter). For those charitable corporations, the board, or a committee of the board, in either case composed solely of independent directors, must oversee the accounting and financial reporting process and audit of the corporation's financial statements. The board or designated audit committee must also annually retain, or renew the retention of, the independent auditor to conduct the audit and review with the auditor the results of the audit and any management letter related to the audit.[19]

For charitable corporations that had in the prior fiscal year or expect to have in the current fiscal year gross revenues exceeding $1 million, the Act will impose additional audit oversight responsibilities on the board or designated audit committee.[20] These responsibilities include reviewing with the independent auditor the scope and planning of the audit prior to its commencement; review-

ing and discussing with the independent auditor material risks and weaknesses in internal controls identified by the auditor, any restrictions on the scope of the auditor's activities or access to requested information, any significant disagreements between the auditor and management, and the adequacy of the corporation's accounting and financial reporting processes; and annually considering the performance and independence of the auditor. If a committee undertakes these duties, that committee must make a report of its findings to the board.[21]

The independent directors of the board or a committee composed solely of independent directors is also charged with oversight, adoption, and implementation of and compliance with any conflict of interest or whistleblower policy adopted by the corporation.

In an effort to reduce the administrative burden of the new audit oversight rules, the Act provides that for charitable corporations that are controlled by another charitable corporation as part of a group, the controlling corporation's board or designated audit committee can undertake the controlled corporation's audit oversight functions. This rule should reduce the administrative burden of audit oversight compliance for hospital and healthcare systems and larger social services agencies, which typically operate in a controlled corporate group structure.

Key to the new audit oversight rules is the concept of an independent director. The Act defines an independent director as a director who

1. is not, and has not been within the last three years, an employee of the corporation or any of its affiliates, and does not have a relative (which includes an individual's spouse or domestic partner and ancestors, brothers and sisters, children, grandchildren, great-grandchildren and their spouses or domestic partners) who is, or has been within the last three years, a director or trustee, president or chief executive officer, chief operating officer, treasurer or chief financial officer and other persons exercising substantial influence (known as key employees) over the corporation or any of its affiliates;
2. has not received, and does not have a relative who has received, more than $10,000 of direct compensation per year from the corporation or any of its affiliates in any of the last three fiscal years; and
3. is not a current employee or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity which in any of the last three fiscal years has made payments to, or received payments from, the corporation or any of its affiliates for property or services exceeding the lesser of $25,000 or 2% of the corporation's gross revenues.[22]

This definition of independent director will require that charitable corporations subject to the audit oversight rules thoroughly screen candidates for board service, and that current board and audit committee members make sure the corporation has a sufficient number of independent directors to undertake the oversight function. In connection with that screening, attorneys for charitable corporations should review current conflict of interest policies and conflict of interest questionnaires to make sure the policies conform to the audit oversight rules (and other requirements discussed below), and that the questionnaires elicit appropriate information to determine whether a director is independent within the meaning of the Act.

Charitable corporations should also undertake a review of their vendors, consultants, and service providers, and payments made to or received from those entities, to confirm that no current or proposed director is a current employee or owner of an entity (or has a relative who is a current officer of or has a substantial financial interest in an entity) that made payments to the charitable corporation or received amounts from the charitable corporation in excess of the payment thresholds. It is possible that employees of utility companies, insurance brokers, public relations firms, banks, and health insurers may be unable to serve as independent directors of a charitable corporation merely because the corporation purchases goods and services from their employers in the normal course of business. This is of particular concern in upstate New York where there are both a limited number of individuals interested in serving on boards and a limited number of professional service providers.

Related Party Transactions

The Act also provides new rules for related party transactions. A not-for-profit corporation (either a charitable or non-charitable corporation) may not enter into a related party transaction unless the board determines the transaction to be fair and reasonable and in the best interest of the corporation.[23]

The Act broadly defines a related party transaction as "any transaction, agreement or any other arrangement in which a related party has a financial interest and in which the corporation or any [of its] affiliates is a participant." A related party is (i) any director, officer or key employee of the corporation or any of its affiliates; (ii) a relative of a person listed in clause (i); or (iii) any entity in which a person listed in clause (i) or (ii) has a 35% or more ownership or beneficial interest or in the case of a partnership or professional corporation, a direct or indirect ownership interest greater than 5%.[24]

The Act also provides procedural rules with respect to related party transactions. Directors, officers or key employees with a financial interest in a related party transaction must disclose to the board or authorized committee the material facts concerning that interest.

In addition, if a charitable corporation is to be involved in a related party transaction, and the related party has a substantial financial interest in the transaction, before entering into the transaction, the board or authorized committee must consider alternative transactions; approve the transaction by at least a majority vote of the directors or committee members present at the meeting; and, concurrently, document in writing the basis for the determination and the consideration of alternative transactions. Finally, although the related party may present information to the board or authorized committee about the transaction and answer questions about the transaction, the related party is prohibited from participating in any deliberations or vote on the transaction.[25]

The related party transaction rules provide the Attorney General with substantial enforcement powers. These powers include the right to bring an action to enjoin, void, or rescind a related party transaction that violates the provisions of the Act "or is not reasonable or in the best interest of the corporation at the time the transaction was approved," seek restitution, and remove directors or officers of the corporation. In case of intentional or willful misconduct, the Attorney General can seek from any person or entity up to double the amount of the benefit provided to the related party. Notably, following the approval procedure described above does not appear to insulate a board from the Attorney General's enforcement action if the Attorney General believes the related party transaction violates the NFPCL or is not reasonable or is not in the best interest of the corporation.[26]

The policy behind the related party transaction rules is sound: the activities and assets of not-for-profit corporations are supposed to benefit the public. Accordingly, no private person should benefit from a transaction that could financially harm a not-for-profit corporation. That said, the related party transaction provisions as currently drafted raise a number of concerns and could reach transactions that would rarely cause financial harm to the corporation. Therefore, legislators may want to consider whether transactions involving a *de minimis* amount should be excluded from the definition of a related party transaction.

In addition, the Act does not define financial interest or substantial financial interest, and those terms, when read in the context of the related party and related party transaction definitions and rules, may lead to unexpected results. For instance, a literal reading of the related party transaction definitions and rules would suggest that a director of a not-for-profit theatre must disclose the material facts about his purchase of a ticket to a play produced by the theatre even though the director has paid the same price as the general public. That director has a financial interest in the ticket because he paid for it with his own money. Similarly, would a hospital board be required to pre-approve emergency medical treatment it provides to the daughter of one of its directors because the daughter is a private pay patient or has a high deductible insurance plan?

The Act was probably not intended to reach transactions involving the services provided by the not-for-profit corporation if the related party receives those services on the same price, terms and conditions as the public. In those cases, the not-for-profit corporation is not harmed. Moreover, as a practical matter, it would be virtually impossible to pre-approve certain transactions, such as the provision of emergency medical care, because of the interplay of health information privacy laws and laws governing the provision of emergency medical treatment. Accordingly, the definition of a related party transaction should be revisited to possibly exclude transactions, agreements or arrangements involving a related party and the not-for-profit corporation or its affiliates in which the related party receives goods or services from the corporation or its affiliates at the same price and on the same terms as the public.

For those not-for-profit corporations that regularly follow the "rebuttable presumption" rules for approving excess benefit transactions provided under federal tax law, the Act's related party transaction rules may require some changes to processes used in the past. By way of background, federal tax law imposes an excise tax on various parties involved in a transaction between tax-exempt charitable organizations (and other types of tax-exempt organizations) and certain persons if those persons receive benefits in excess of the value of property, goods or services provided to the organization.[27] The tax law provides for an approval process that allows a board to invoke a rebuttable presumption that the transaction does not result in excess benefits to those persons. That approval process permits the transaction to be approved in accordance with the process by the governing body of the organization (i.e., its board); a committee of the board, provided that state law permits a committee to approve the transaction; or any parties authorized by the board to approve the transaction provided that state law permits such parties to act on behalf of the board.[28]

In small and midsize not-for-profit corporations and even some larger not-for-profit corporations, boards may have delegated the authority to approve compensation for other officers or employees to the president or chief executive officer of the corporation. To the extent that those other officers or employees are included in the definition of related party under the Act, their compensation can no longer be approved by the president or chief executive officer. Effective July 1, 2014, New York State law will permit the board or an authorized committee of the board to approve compensation for officers and employees who are treated as related parties.

In addition, the Act's definition of a related party includes a key employee of the not-for-profit corporation or its affiliates. The Act further defines a key employee as "a person who *is* in a position to exercise

substantial influence over the affairs of the corporation, as referenced in 26 U.S.C. § 4958(f)(1)(A) and further specified in 26 CFR § 53.4958-3(c), (d) and (e)."[29] Those federal tax law provisions define a disqualified person for purposes of excess benefit transaction excise taxes. The federal tax law includes in its definition of disqualified person a person who "*was* . . . in a position to exercise substantial influence over the affairs" of the organization at any time during the five-year period ending on the date of the transaction.[30] The definitions used in the Act suggest that a key employee for related party transaction purposes includes only individuals who currently exercise substantial influence over the corporation's affairs. The Act appears to reference federal tax law in order to incorporate the positions and titles of individuals who are deemed to have substantial influence, and who are therefore key employees. It is unclear, however, whether the definition of a key employee under the Act includes those persons who were in a position to exercise substantial influence over the organization during the five-year lookback period. In other areas, the Act has explicitly set forth a lookback period, such as for the definition of an independent director. If the Act's definition of a key employee does not encompass the five-year lookback period, organizations must consider whether a transaction with a former director or officer is subject to the excess benefit transaction rules, although the transaction is not subject to the Act's related party transaction rules. Guidance would be welcome on whether the five-year lookback rule should be read into the Act's definition of a key employee.

Conflict of Interest Policy

The Act generally requires every not-for-profit corporation, other than certain state and local authorities, to adopt a conflict of interest policy "to ensure that its directors, officers and key employees act in the corporation's best interest and comply with applicable legal requirements." The Act requires certain provisions to be included in a conflict of interest policy. The policy must provide (i) a definition of a conflict of interest; (ii) disclosure procedures; (iii) prohibitions against the conflicted person (a) being present or participating in any board or committee deliberation or voting on the matter from which the conflict arises and (b) attempting to "influence improperly the deliberation or vote" on that matter; (iv) "that the existence and resolution of the conflict be documented in the corporation's records"; and (v) "procedures for disclosing, addressing and documenting related party transactions."[31]

The policy also must require that each director complete and submit a signed written statement with respect to director and officer positions and employment with and ownership of other entities "with which the corporation has a relationship" and "any transaction in which the corporation is a participant and in which the director might have a conflicting interest" prior to the initial election of the director and for each year thereafter. That statement must be submitted to the secretary of the corporation, who, in turn, must provide the statement to the chair of the audit committee or board if there is no audit committee.[32]

> The related party transaction rules provide the Attorney General with substantial enforcement powers.

Adoption of conflict of interest policies had never been a requirement for not-for-profit corporations prior to enactment of the Act. The required provisions generally conform to best practices for dealing with conflict of interest transactions. That said, the requirement that the conflicted person not influence improperly the deliberation or vote on the matter raises concern about what constitutes improper influence.

Whistleblower Policy

Under the Act, not-for-profit corporations (other than certain state and local authorities) with at least 20 employees and, in the prior fiscal year, annual revenues exceeding $1 million must adopt a whistleblower policy. The policy must prohibit retaliatory actions against a person who "in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation." In addition, the policy must contain procedures for reporting actual or suspected violations of laws or corporate policies; require that the person designated to administer the policy report to the audit committee or another committee comprising independent directors or in the absence of such committees, the board; and require "that a copy of the policy be distributed to all directors, officers, employees and volunteers who provide substantial services to the corporation."[33]

Conclusion

The Act makes welcome procedural and substantive changes to the NFPCL; however, some provisions should be clarified and improved. The New York State Legislature has already begun the process of making technical corrections to the Act. The New York State Bar Association has encouraged the Legislature to continue such

review with respect to the statutory sections on related party transactions, the independent directors definition, the imposition of enhanced fiduciary duties on non-charitable corporations, and conflict of interest policies, among others. The Act's codification of fiduciary duties does not take into account evolution in best practices and may require frequent revisions. Therefore, consideration should be given to making those rules more flexible. ■

1. N.Y. Not-for-Profit Corp. Law § 201(b).
2. *Id.*
3. *Id.*
4. *Id.*
5. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 29.
6. *Id.*
7. NFPCL § 404.
8. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 49.
9. *Id.* § 48
10. NFPCL § 509.
11. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 53.
12. *Id.* § 54.
13. *Id.* §§ 82, 83, 89.
14. *Id.* § 89.
15. *Id.* §§ 62, 63, 65, 68.
16. NFPCL § 712.
17. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 70.
18. *Id.* § 73.
19. *Id.* § 72.
20. *Id.*
21. *Id.*
22. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 29.
23. *Id.* § 74.
24. *Id.* § 29.
25. *Id.* § 74.
26. *Id.*
27. 26 U.S.C. § 4958.
28. Treas. Reg. § 53.4958-6.
29. Non-Profit Revitalization Act, 2013 N.Y. Sess. Laws ch. 549, § 29 (emphasis added).
30. 26 U.S.C. § 4958(f)(1)(A) (emphasis added).
31. Non-Profit Revitalization Act, 2013 N.Y. Sess. Law ch. 549, § 75.
32. *Id.*
33. *Id.*

Estate Planning and Will Drafting in New York

Completely updated, this is a comprehensive text will benefit those who are just entering this growing area. Experienced practitioners may also benefit from the practical guidance offered.

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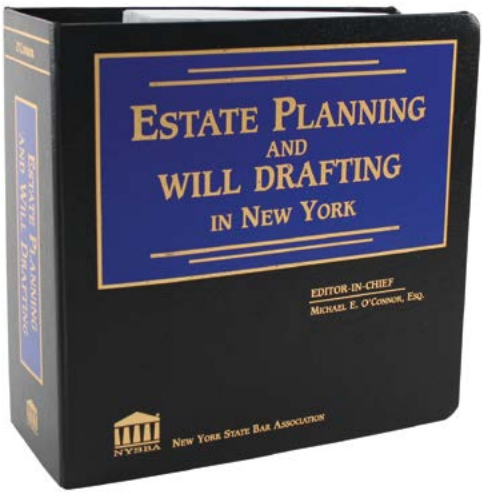

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Hearsay Testimony Through the Expert Witness

State of New York v. Floyd Y.

By Elliott Scheinberg

> *It is a basic tenet of the law of evidence that in order to be admissible, evidence must be relevant, material and competent.*
> – *People v. Dixon*, 149 A.D.2d 75, 80 (2d Dep't 1989).

> *Legally sufficient evidence [is] defined as "competent evidence" . . . meaning evidence not subject to an exclusionary rule, such as the prohibition against hearsay.*
> – *People v. Swamp*, 84 N.Y.2d 725, 730 (1995).

McCormick on Evidence, citing Wigmore, defines hearsay as "a tale of a tale" or "a story out of another's mouth."[1] Hearsay contemplates two witnesses: "The 'in-court' witness can be tested for perception, memory, narration, and sincerity, the out-of-court declarant cannot."[2] There is a "well-established preference for cross-examination of hearsay declarants."[3]

Wagman v. Bradshaw[4] emphasized that

> [t]he rules of evidence are the palladium of the judicial process. . . . The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience. Venerable rules of evidence should not be casually discarded to accommodate convenience and speed in the gathering and presentation of facts or evidence.[5]

There is a wealth of "venerable time-tested" precedence from the state's highest court, dating back over a century, regarding hearsay testimony through the expert witness (now called the professional reliability rule). Yet the three most recent pronouncements from the Court on this issue – *State v. Floyd Y.*,[6] *Hinlicky v. Dreyfuss*,[7] and *People v. Goldstein*[8] – treat it as though it had never been reviewed and firmly resolved. *Floyd Y.* and *Goldstein* pursue complicated courses of conflicting reasoning only to be ensnarled in the psychological interaction between the expert's testimony and the psyche of the factfinder.

Experts' formulaic recitation that the information from the unvetted out-of-court declarant is commonly relied upon within that profession is often seen as sufficient to bypass the hearsay rule.[9] However, precedent authority mandates that "professional reliability" be construed to read that reliability derives exclusively from a professional source: to wit, the learning/data-pool from within the expert's discipline. A contrary interpretation opens the floodgates for all manner of impermissible hearsay. Unvetted data in any discipline is irresponsible science that could never withstand peer review.

What follows is an in-depth review of the Court's precedent decisions.

Opinion Evidence

Wagman summarized the four sources of opinion evidence: (1) personal knowledge of the facts upon which the opinion rests; (2) where the expert does not have personal knowledge, the opinion may derive from facts and material in evidence, real or testimonial; (3) material not in evidence provided that the out-of-court material derives from a witness subject to cross-examination; and

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(4) material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion, and the out-of-court material is accompanied by evidence establishing its reliability.[10] Experts also may not reach conclusions by assuming material facts not supported by evidence.[11] Cross-examination is "the greatest legal engine ever invented for the discovery of truth"[12] and is the exclusive litmus test. The expert's availability for cross-examination does not cure the ills of incompetent hearsay because an expert's opinion is only as sound as the facts upon which it is based.[13]

Expert Opinion, an "Authorized Encroachment"

Expert opinion may rely on data that is ordinarily incompetent hearsay only if it helps clarify issues calling for professional, scientific/technical knowledge, or skill possessed by the expert and beyond the ken of the typical juror/factfinder.[14] "Expert opinion is often used in partial substitution for the jury's otherwise exclusive province to draw conclusions from the facts. It is a kind of authorized encroachment in that respect."[15] Determination of credibility is, however, within the ability of the average person.

Strait, Keough, and *Samuels*

Historically, admissibility through expert testimony of extrajudicial statements by non-testifying out-of-court declarants has been governed by age-tested wisdom: in *People v. Strait*,[16] *People v. Keough*,[17] and *People v. Samuels*[18] the appeals court, speaking of psychiatrists, warned that the witness, a psychiatrist, "was an expert on the diseases of the mind, but not an expert on determining the facts, where such facts had to be obtained from the statements of others."[19]

Strait added:

> It was essential that the jury should be informed as to the facts upon which the expert based his conclusions in order to determine whether they were well founded. If the facts were not disclosed, his conclusions could not be controverted. He might have been deceived by a false statement prepared for the occasion, and for the purpose of making him a valuable witness upon the trial.[20]

Strait cited then precedent authority:

- "In Abbott's Trial Evidence, 117, it is said that a medical witness must give the facts on which his opinion is founded . . . If those facts . . . include information given him by the attendants of the patient, his opinion is not competent, for those communications are hearsay.'"[21]
- "In *People v. Hawkins* (109 N. Y. 408, 410) . . . '[t]he witness was permitted to testify as an expert concerning the mental condition of the [prisoner], and his opinion would be of value only when founded on facts observed by himself or proved by other witnesses under the obligation of an oath . . .'"[22]

In *Keough*, the Court echoed and expanded its holding in *Strait*:

> [Expert] opinions based in whole or in part upon statements other than those of the person whose sanity is in question related to the expert . . . are not admissible. . . . The ultimate decision . . . rests with the jury, and, in general, must be based upon facts presented before it and not opinions. An exception, however, is made in the case of experts, because "The opinion of the witness may be based upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury, and it is because the facts are of such a character that they cannot be weighed or understood by the jury that the witness is permitted to give an opinion as to what they do or do not indicate." Where his opinion . . . is based upon statements of third persons not in the presence of the jury, the latter not only is in ignorance of what these statements contain, but also has no opportunity to pass on the truth and probative force of the statements or to determine whether the statements were not concocted to reproduce a desired result.[23]

Keough, Samuels, and *Strait* are among the forerunners of *De Long, Cronin*, and *Santi*.[24]

People v. Sugden

People v. Sugden[25] is popularly deemed to have birthed the term "the professional reliability rule." *Sugden* simply reaffirmed the soundness of *Strait, Keough*, and *Samuels,* which permit the expert to opine "upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury,"[26] while simultaneously requiring extrajudicial declarants to undergo the scrutiny of cross-examination. *Sugden* states, "The significance of the requirement, that the person, whose statement has been used by the expert, testify at the trial, is obvious. The quality and content of the statement is exposed to cross-examination upon the trial and all of the evils of hearsay are obviated."[27]

The *Sugden* Exceptions

The Court of Appeals juxtaposed *Sugden* and *People v. Stone*[28] to offer "two exceptions to the prohibition for which the *Samuels* and *Keough* cases once stood."[29] An expert may rely on material of out-of-court origin:

- "if it is of a kind accepted in the profession as reliable in forming a professional opinion and . . . distinguish[es] between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely"; and
- "[h]e may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial."[30]

These "exceptions," however, were neither novel nor groundbreaking. Rather, they were continued time-

honored principles allowing experts to apply their science as an exception to the hearsay rule.[31] The discretely honed language of each "exception" proves that the exclusive pathway into evidence of out-of-court statements is by cross-examination and that the professional reliability rule refers only to "generally accepted" doctrines within the expert's discipline. Subsequent authority from the Court does not permit a contrary interpretation. *Sugden* only repackaged prior authority with a different ribbon.

In re Leon RR

In *In re Leon RR*,[32] the Court further insulated the professional reliability rule by stating that inadmissible hearsay "raises a substantial probability of irreparable prejudice . . . for there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact. Nor is notice or an opportunity to respond afforded."[33]

This has roots in *Samuels*:[34]

> Nor can the error be regarded as trivial or harmless. . . . [I]f the exhibits were at all admissible, they should have been submitted to the jury; if it was improper that the jury should see them, they should not have been received in evidence as a basis for the experts' opinions.

The "Double Duty" Rule

Leon RR engaged the "double-duty" rule in *Johnson v. Lutz*[35] – that is, to constitute an exception to the hearsay rule "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct [to report and enter] or the declaration must meet the test of some other hearsay exception."[36] *Leon RR* cautioned that the truth or reliability of the underlying statement is not "guaranteed" simply because an expert who is under a duty has written it down because so doing would "open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy – cross-examination and impeachment of the declarant."[37]

Hambsch v. New York City Transit Authority

In *Hambsch v. New York City Transit Authority*,[38] the Court of Appeals hermetically sealed the professional reliability rule: "to qualify for the 'professional reliability exception' there must be evidence establishing the reliability of the out-of-court material."[39] Since material from professional databases had already long been an exception to the hearsay rule, *Hambsch* could only have been referring to out-of-court statements.

Borden v. Brady,[40] cited in *Hambsch*, held that "the modification of the strict *Keough* rule . . . was not intended to carve out such a new exception to the hearsay rule."[41] The concurring opinion emphasized that "reliability of the material is the touchstone."[42]

People v. Wernick: *Sugden* Means Only Data That Satisfies *Frye v. United States*

People v. Wernick,[43] citing *People v. Angelo*,[44] *Hambsch*, and *People v. Jones*,[45] held that hearsay is inadmissible under the professional reliability rule unless it passes the *Frye* test.[46] *Frye*, not *Daubert*,[47] is the standard of admissibility for scientific matters in New York. *Wernick* confirmed that the professional reliability exception only refers to scientific data from within the discipline:

> That [*Frye*] protocol requires that expert testimony be based on a scientific principle or procedure which has been "'*sufficiently established to have gained general acceptance in the particular field in which it belongs.*'"[48]

These *Sugden* exceptions "'*specifically incorporate the customary admissibility test for expert scientific evidence – which looks to general acceptance of the procedures and methodology as reliable within the scientific community.*'"[49]

To satisfy *Frye*, the Court, in *People v. Wesley*,[50] established a three-tiered methodology, couched in language of scientific formulae capable of repetition and of netting scientifically predictable results and conclusions: "The test pursuant to *Frye* . . . poses the more elemental question of (1) whether the accepted techniques, (2) when properly performed, (3) generate results accepted as reliable within the scientific community generally."[51] Once the general reliability concerns of *Frye* are satisfied, the court will consider whether there is a proper foundation "for the reception of the evidence at trial."[52]

Sugden is popularly deemed to have birthed the term "the professional reliability rule."

In light of *Wernick* and *Wesley*, extrajudicial statements can never satisfy any of the three criteria. This is due to the varied human dynamics and foibles that render quantifiable accuracy – or even predictability – impossible: undetectable bias on the part of the out-of-court declarant or even by the expert who may be desirous of a particular outcome; flawed recollection; misperception or miscomprehension of events; inability to offer an accurate narrative of event(s); and weaknesses of the expert, including intelligence and aptitude. State of mind may be affected as well, by illness, distraction or overconfidence, etc.

People v. Goldstein

People v. Goldstein[53] is an arduously unclear decision hampered by dictum. The defendant pushed a woman to her death in front of a train; his principal defense was insanity. The dispute before the Court focused on the prosecution's psychiatrist, Angela Hegarty, whose testimony contained information derived from interviews of third parties (including multi-tiered hearsay).

The purpose of forensic psychiatry, Hegarty testified, is "to get to the truth," and interviews of people with firsthand knowledge are an important way of achieving that goal. The defendant argued that Hegarty's testimony, recounting statements of interviewees, was inadmissible hearsay pursuant to *Sugden* because the prosecution failed to show that the extrajudicial statements were information of a kind commonly relied on by members of Hegarty's profession, a test it could have never passed under precedent authority, and the admission of the interviewees' statements violated the defendant's constitutional right to confront the witnesses against him under the Sixth Amendment.[54] The Court of Appeals rejected his argument regarding the hearsay but agreed that his "right to confrontation was violated."[55]

The Court, nevertheless, citing the exceptions in *Sugden*,[56] rejected the defendant's argument that Hegarty's testimony was not "accepted in the profession as reliable in forming a professional opinion."[57] The second exception, if the testimony "'comes from a witness subject to full cross-examination on the trial,'"[58] did not apply because the "defendant had no opportunity to cross-examine the interviewees whose statements [we]re in issue."[59]

The Court Supplanted *Frye* With Another Test

Puzzlingly, the *Goldstein* court held that Hegarty satisfied the burden even though she testified that her methodology was accepted by "several researchers," including past presidents of the Academy of Psychiatry and Law.[60] Yet "several researchers" is not "general acceptance" and cannot satisfy *Frye*. By focusing on the reputations of these "several researchers," the Court created a new respect-based test and shifted the burden of proof: "Widespread acceptance by professionals of good reputation is enough." This is a quantum leap from general acceptance:

> The case would be different if the procedures at issue found support only among a faction of outliers not generally respected by their colleagues. But in this case, the trial court had a sufficient basis for finding that the third-party interviews were material of a kind accepted in the profession as reliable, and that therefore Hegarty's opinion was admissible under *Stone* and *Sugden*.[61]

Under *Frye*, the several psychiatrists, irrespective of their reputations, constitute the "faction of outliers."

Goldstein's Rollercoaster Dictum

To avoid any misinterpretation of its holding, the *Goldstein* Court delved into mind-numbing dictum to "point out the existence of a New York law issue that the parties have not addressed and we do not reach"[62] – but the defendant did raise a hearsay objection. The appeals court engaged in an analysis of the professional reliability rule, which is frustratingly unclear and inconsistent with its own precedent authority:

> We have held . . . only that Hegarty's *opinion*, although based in part on statements made out of court, was admissible because those statements met the test of acceptance in the profession. Both parties seem to assume that, if that test was met, Hegarty was free, subject to defendant's constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based. That is a questionable assumption.[63]

The above paragraph loses sight of a century's worth of precedent authority that the acceptance-in-the-profession test refers only to science within the discipline. It is, therefore, not at all "questionable"; the answer is a resounding "no" because the factfinder must be made aware of the facts through admissible evidence, not by way of the expert where no out-of-court-declarant had been cross-examined. This should not have been buried under the headstone of dictum.

The dictum warned that "there should be *at least some limit* on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay.'"[64] "Some limit" is like somewhat pregnant – tainted "facts," irrespective of how minimal, poison the well and produce tainted verdicts and decisions because the smallest amount of hearsay can tip Wigmore's scale as to burden of proof. "Some limit" suggests that modulated and tempered hearsay is tolerable; however, under this scheme it is the expert who tempers and modulates the hearsay, which the factfinder then believes to be thorough and accurate. *Keough*, *Strait*, and *Samuels* require the factfinder to hear all the information synthesized by the expert, conditioned upon its independent admissibility.

Goldstein added that "*Sugden* and *Stone* were concerned with the admissibility of a psychiatrist's opinion, not the facts underlying it. There is no indication in either case that the prosecution sought to elicit from the psychiatrist the content of the hearsay statements he relied on."[65] This is counterintuitive because the expert's opinion and the facts meld and are perceived as inextricably intertwined. Irrespective of any direct effort to elicit the content of the hearsay, the Court, in both cases, emphasized the importance of having the expert "distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely,"[66] which indubitably elicits the hearsay through the backdoor.

The Court's stare decisis evidences this issue's intense review dating back before 1896. Yet the *Goldstein* court stated that

> the distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it, when offered by the proponent, has received surprisingly little attention in this state. . . .

> We have found no New York case addressing the question of when a party offering a psychiatrist's opinion pursuant to *Stone* and *Sugden* may present, through the expert, otherwise inadmissible information on which the expert relied.[67]

To cite one precedent, in *People v. Jones*,[68] (post-*Sugden*), the Court held:

> Authorized use of facts from outside the evidentiary record does not [] alter "the basic principle that an expert's opinion not based on facts is worthless" . . . because "[a]n expert's opinion is only as sound as the facts upon which it is based."[69]

And years earlier, in *Keough*, the Court had warned:

> Where [the expert's] opinion . . . is based upon the statements of third persons not in the presence of the jury, the [factfinder] not only is in ignorance of what these statements contain, but also has no opportunity to pass on the truth and probative force of the statements or to determine whether the statements were not concocted to produce a desired result.[70]

In *Strait*, the Court had issued the same admonition that without proper disclosure of the facts, controverting the expert's conclusions is impossible:

> "Juries are to judge facts, and, although the opinions of professional gentlemen on facts submitted to them have justly great weight attached to them, yet they are not to be received as evidence, unless predicated upon facts testified either by them or by others." . . . [T]he opinion of a physician as to the insanity of the defendant could not be received in evidence where it was based upon declarations made to him by third persons . . .[71]

It is, therefore, surprising that *Goldstein* presented the issue as a "questionable assumption."

The Psychological Impact of Expert Opinion: What Did the Factfinder Think It Heard?

Albeit within its analysis of the defendant's Sixth Amendment right to confront his accuser, the *Goldstein* court emphasized the pervasive psychological dynamics that lurk throughout this issue:

> [T]he interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty's opinion, and thus were not offered to establish their truth…We do not see how the jury could use the statements of the interviewees to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . . The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context, . . . ["(T)he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition."].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.[72]

When an expert hears unvetted extrajudicial statements, the dilemma is its unquantifiability as a pollutant in the expert's conclusions and its imperceptible transmission to the factfinder. Once the expert states an opinion, actual facts become almost irrelevant to the factfinder because of the perception that experts do not base opinions on inaccurate facts. It is a *post hoc, ergo propter hoc* process.

As noted in *Wagman*, "with no opportunity to cross-examine . . . or offer his own evidence or expert testimony to rebut it or controvert . . . the potential exist[s] for a jury to give undue probative weight to out-of-court material."[73] This usurps the role of the factfinder and erodes the judicial process.

Pressing questions persist: (1) if Hegarty's opinion was hearsay because the testimony was submitted for its truth, then the Court should not have dismissed the defendant's objection on hearsay grounds; and (2) in light of *Hambsch*, that "to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material,"[74] how did *Goldstein* conclude that Hegarty's testimony, based on unvetted information from third parties, was or could even be of a kind relied upon by experts?

Wagman v. Bradshaw

In *Wagman*, the Appellate Division remanded for a new trial due to "prejudicial error" because the treating chiropractor testified as to the contents of an inadmissible written report. The report interpreted an MRI prepared by another doctor, who did not testify, from which the chiropractor formed plaintiff's diagnosis. The MRI was not in evidence and there was no proof that the report was reliable. Inasmuch as the written report was inadmissible, testimony as to its contents was similarly inadmissible.

Wagman held that without receipt in evidence of the underlying out-of-court evidence, "a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness."[75] In addition to CPLR 4532-a, *Wagman*, citing *Sugden*, detailed the foundational failures of the written report and rejected the applicability of the first "exception" of sufficient reliability within the profession as the pathway to the admissibility of the MRI. *Wagman* emphasized that expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation is unproduced.

Wagman further reversed prior decisions that "have not limited application of the 'professional reliability'

basis for opinion evidence to permit an expert witness to testify that he or she relied upon out-of-court material which is of a type ordinarily relied upon by experts in the field to formulate an opinion, and have not required proof that the out-of-court material was reliable."[76]

If proof of reliability of the expert's reliance upon out-of-court material to form an opinion renders it receivable in evidence, the desired testimony as to the express contents of the out-of-court material should be likewise admissible.

Hinlicky v. Dreyfuss

Hinlicky v. Dreyfuss[77] involved a medical malpractice action where the decedent suffered a heart attack and died 25 days later, after otherwise successful surgery: "One question predominated: were defendants negligent in not obtaining a preoperative cardiac evaluation to insure that decedent's heart could tolerate the surgery?"[78]

Dr. Aleph testified that he followed clinical guidelines published by the American Heart Association in association with the American College of Cardiology, which he incorporated into his practice because they help determine whether patients need a prep-op cardiac evaluation or can proceed directly to the operating room.

> There is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact.

Hinlicky stated that the algorithm would only be "classic hearsay" if offered to prove the truth asserted therein. Aleph offered the algorithm only as a demonstrative aid to help the jury understand the process he had followed; it was, therefore, unrelated to the question of whether it is of the type of material commonly relied on in the profession.

Citing *Goldstein*, *Hinlicky* added, "[W]hether evidence may become admissible solely because of its use as a basis for expert testimony remains an open question . . . we have acknowledged the need for limits on admitting the basis of an expert's opinion to avoid providing a 'conduit for hearsay.'"[79]

Wagman and at least one other decision that it reversed[80] might well have been decided differently had *Hinlicky* already been handed first.

State of New York v. Floyd Y.

Floyd Y.[81] narrowed the issue to "whether, and to what extent, a court may admit hearsay evidence when it serves as the underlying basis for an expert's opinion in an article 10 proceeding."[82] The majority reversed and remanded for a new trial because "the Due Process Clause protects against the admission of unreliable hearsay evidence, where such hearsay is more prejudicial than probative, regardless of whether it serves as the basis for an expert's properly proffered opinion testimony."[83]

While the concurring opinion is far better reasoned, offering multiple foundational arguments to either entirely obviate or severely restrict *Floyd Y.*'s precedential value, neither majority nor concurrence addressed the professional reliability rule: that the only data an expert may tap into is information from within the expert's discipline. Significantly, much of the hearsay in *Floyd Y.* came from his treatment records, which finds ready exception under a variety of theories, including *Hinlicky*'s algorithm of psychiatric treatment, and *People v. Ortega*,[84] below.

Facts in *Floyd Y.*

Floyd was convicted of sexual abuse and of endangering the welfare of a child. Prior to his release from prison, he was transferred to a psychiatric facility where he was diagnosed with pedophilia. He was treated by Dr. Catherine Mortiere and also examined by Dr. Michael Kunz.

The parties heavily contested the extent to which the state could present hearsay evidence through the testimony of these doctors. Floyd argued that their opinions were inadmissible because they relied on unproven, unreliable accusations, and that the testimony would include impermissible hearsay. The Supreme Court admitted both the opinion testimony and the underlying basis hearsay. The Appellate Division affirmed.

Mortiere testified as to the great likelihood of Floyd's recidivism based on the affidavits of victims who did not testify, police reports, court records, three reports by Kunz and one by Floyd's expert, and her own personal therapeutic relationship as Floyd's treating psychologist. Some of her testimony also concerned unproven sex offenses.

Mortiere lacked personal knowledge of certain events but, nevertheless, detailed sexual abuse against nine individuals. Kunz, who agreed with Mortiere, based his testimony on personal interviews with Floyd, clinical records, and written reports concerning Floyd's sex crimes. Kunz also testified about previous incidents of sexual abuse, including several uncharged instances. Mortiere testified that experts in her field "'rely heavily upon witness statements, affidavits, [and] victim statements . . . because in treatment there are issues of confronting a sexual offender with exactly what happened.'"[85]

The concurrence compares Hegarty (in *Goldstein*) to Mortiere/Kunz, stating that *Goldstein* discussed but did not decide whether statements like those recounted by Hegarty (and concomitantly by Mortiere/Kunz) fall within an exception to the hearsay rule, that the unanswered question is whether this exception permits the proponent of the expert's testimony to elicit not only the opinion, but also the underlying hearsay statements. However, the distinction between Hegarty and Mortiere/Kunz is stark. Hegarty's extrajudicial statements were

gleaned through sleuthing for testimonial purposes, "to get at the truth." Mortiere/Kunz relied on data from hospital treatment records that are deemed inherently "trustworthy as they are 'designed to be relied upon in affairs of life and death.'"[86]

The Majority, Article 10 Proceedings

As in *Goldstein*, the majority and the concurrence conflate century-old settled law, which has etched the parameters of the professional reliability rule around discipline-specific science, and continues to describe as undecided the issue of the admissibility of an expert's underlying basis information, even though it consists of hearsay otherwise subject to exclusion.

The majority's maze-like review of due process combined with its finessing of the hearsay rule in Article 10 proceedings overarch and overwhelm the rules of evidence:

- "In many cases, including article 10 trials, the admission of the hearsay basis is crucial for juries to understand and evaluate an expert's opinion. An inflexible rule excluding all basis hearsay would undermine the truth-seeking function of an article 10 jury by keeping hidden the foundation for an expert's opinion";
- "Basis hearsay does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions," "in order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field"; and
- "Factfinders in article 10 trials cannot comprehend or evaluate the testimony of an expert without knowing how and on what basis the expert formed an opinion."[87]

That said, the majority, nevertheless, shares the concurrence's concern, raised in *Goldstein*: (1) over the "high risk that jurors will rely on unreliable material only because it was introduced by an expert";[88] and (2) that allowing admission of hearsay statements simply because an expert testifies to them as the basis for the expert's opinion "'might effectively nullify the hearsay rule by making [an] expert [into] a conduit for hearsay.'"[89] Extrajudicial basis statements can likely influence the outcome "by undue probative weight."[90]

The concurrence:

- queries, à la *Goldstein*, the absence of explanation for the theory that, if they do not come in for their truth, how do the victims' statements "possibly bolster the State's experts' opinions if the jury did not accept the statements as true";[91] and
- stresses that "[r]eliance on inadmissible evidence is a weakness, not a strength, in an expert's opinion; an opinion that a jury cannot 'understand and evaluate' without hearing inadmissible evidence is a worthless opinion"[92] (consonant with *People v. Jones*[93] and *Caton v. Doug Urban Construction Co.*[94]).

The majority states that "even if the jury 'might' accept basis evidence as true, that is not a problem because the respondent in an article 10 case may present 'a competing view' by calling his own expert."[95] The concurrence rejects this theory: "doctors who testify at article 10 trials are not experts in veracity. They cannot tell a jury whether an alleged victim's statement is true or false – and if they could, the hearsay rule does not permit the substitution of an expert's opinion for cross-examination,"[96] per *Strait, Keough* and *Samuels*.

The majority's solution cuts against the grain of the rules of evidence: that even if the factfinder accepts basis evidence as true, Article 10 allows the respondent "to challenge the State's expert by presenting a competing view of the basis evidence through the testimony of the respondent's expert."[97] The financial incursion of retaining a pricey expert is highly prejudicial, and is avoidable by properly precluding improper hearsay. This writer has found no other decision where the Court of Appeals has imposed the burden, financial or otherwise, of going forward to defend the indefensible. *Wagman* captured it well:

> [Without the underlying evidence], a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the [evidence], through his or her own expert witness.[98]

Leon RR also pined over the "substantial probability of irreparable prejudice" from inadmissible hearsay because "there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact."[99] Similarly, in *Samuels*:[100]

> Nor can the error be regarded as trivial or harmless . . . [I]f the exhibits [evidence] were at all admissible, they should have been submitted to the jury; if it was improper that the jury should see them, they should not have been received in evidence as a basis for the experts' opinions.

The concurrence aptly summed up:

- The basic point of the hearsay rule is that a party is entitled to test by cross-examination a statement that is presented to the jury as true, and for the jury to determine its reliability;
- Reliability should ordinarily be determined through cross-examination;
- Cross-examination tests whether an apparently reliable statement is as good as it looks; and
- "Why could not the State call the victims as witnesses, and let Floyd's lawyer cross-examine them? [N]o one wants to subject victims to inconvenience or unpleasantness. But that is what usually happens when the State wants to incarcerate someone."[101]

Even limiting or curative instructions cannot substitute for what is undoubtedly percolating in the

factfinder's mind: how was the expert shepherded through his reasoning process? The factfinder spackles the gaps with facts, speculative at best, not with evidence.

The Concurring Opinion

Both concurring judges concluded that *Floyd Y.* would have resolved on hearsay grounds without implicating a constitutional issue or a "special rule" to relax the hearsay rule in Article 10 cases. They compellingly challenge the admissibility of basis hearsay because there is nothing inherently trustworthy about it:

> In general, exceptions to the prohibition on hearsay have been recognized only when the hearsay fits within a class of statements (e.g., excited utterances, business records, dying declarations) in which the risk of error or wilful misrepresentation – and hence the need for cross-examination of the declarant – is relatively small. But there is nothing about basis hearsay that makes it inherently trustworthy. And the authorities confirm the conclusion that this reasoning suggests. Basis hearsay, when offered by the proponent of the expert's testimony, is generally considered inadmissible.[102]

Despite the precedential value of *Hambsch*, et al., the concurrence only cited *Wagman*[103] and *New York Evidence Handbook*[104] and no other precedent.

People v. Ortega

The majority's desire to relax the hearsay rule in Article 10 proceedings, which involve therapeutic and diagnostic treatment, neither needed to venture into new territory to carve out a fresh exception nor to relax the rule because the Court had already laid the foundation in *People v. Ortega.*

Ortega was groundbreaking because it expanded public policy to amplify the role of diagnosis, safety plans, and treatment of domestic-violence victims as a basis to modify the rule that had until then excluded such statements in hospital records from the business record rule:

> The references to "domestic violence" and to the existence of a safety plan [in medical records] [a]re admissible under the business records exception. Not only were these statements relevant to complainant's diagnosis and treatment, domestic violence was part of the attending physician's diagnosis in this case. . . . In this context, a doctor faced with a victim who has been assaulted by an intimate partner is not only concerned with bandaging wounds. In addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment. Developing a safety plan, including referral to a shelter where appropriate, and dispensing information about domestic violence and necessary social services can be an important part of the patient's treatment.[105]

Worry over Floyd's diagnosis as a violent sexual offender and his institutionalization, rather than release, following incarceration similarly constitutes society's potential "safety plan," diagnosis and treatment for violent sex offenders.

Conclusion

Inexplicably, notwithstanding a history of firmly evolved authority dating back to the 19th century and affirmed throughout the 20th, the Court has entered the first decade of the new millennium struggling for a solution that lies in its archives. The epicenter of this issue is appeals-court precedent, which demarcates admissibility of extrajudicial statements to discipline specific science as necessary to facilitate comprehension of matters outside the factfinder's ken. Other extrajudicial statements must be subjected to cross-examination because a party is guaranteed a trial by a judge or jury, not an expert.

The majority in *Floyd Y.* aims to relax the standard of basis hearsay in Article 10 proceedings, which leaves the following query: has the majority crafted different standards of admissibility for hearsay depending on the nature of the litigation, i.e., hearsay in an Article 10 proceeding gets a preponderance-of-the-evidence standard? In which cases does hearsay get a "clear-and-convincing" standard or "beyond-a-reasonable-doubt" standard? Caution should be exercised before citing this ruling broadly.

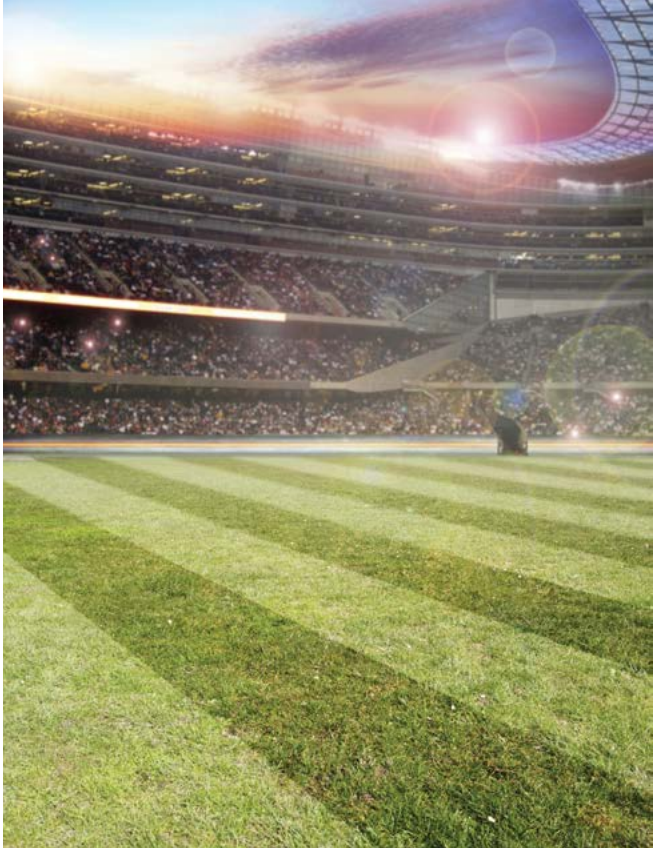
The wisdom of *Wagman* fixes the compass that the fuel driving the expert-opinion engine must be of a high reliability octane because "rules of evidence are the palladium of the judicial process"; they derive from "common sense and experience"; and their violation "destroys the vitality of that judicial process." ■

1. 2 Broun, McCormick on Evidence § 244 (7th ed.)
2. 2 Broun, § 245.
3. *People v. Buie*, 86 N.Y.2d 501 (1995).
4. 292 A.D.2d 84 (2d Dep't 2002).
5. *Id.* at 91.
6. 22 N.Y.3d 95 (2013).
7. 6 N.Y.3d 636 (2006).
8. 6 N.Y.3d 119 (2005).
9. *See, e.g., Greene v. Robarge*, 104 A.D.3d 1073 (3d Dep't 2013).
10. 292 A.D.2d at 86–87.
11. *Quinn v. Artcraft Constr., Inc.*, 203 A.D.2d 444 (2d Dep't 1994).
12. Wigmore, 5 Evidence § 1367 (3d ed., 1940).
13. *People v. Jones*, 73 N.Y.2d 427 (1989).
14. *De Long v. Erie Cnty.*, 60 N.Y.2d 296 (1983); *People v. Cronin*, 60 N.Y.2d 430 (1983); *see People v. Santi*, 3 N.Y.3d 234 (2004).
15. *People v. Drake*, 7 N.Y.3d 28 (2006); *People v. Miller*, 91 N.Y.2d 372 (1998).
16. 148 N.Y. 566 (1896).
17. 276 N.Y. 141 (1937).
18. 302 N.Y. 163 (1951).
19. *Id.*

20. 148 N.Y. at 570.
21. *Id.* at 570–71.
22. *Id.* at 571–72.
23. 276 N.Y. at 145–46.
24. *See De Long*, 60 N.Y.2d 296; *Cronin*, 60 N.Y.2d 430; *Santi*, 3 N.Y.3d 234.
25. 35 N.Y.2d 453 (1974).
26. *Keough*, 276 N.Y. at 145.
27. *Sugden*, 35 N.Y.2d at 459.
28. 35 N.Y.2d 69 (1974).
29. *Id.* at 460.
30. *Id.* at 460–61.
31. *See Strait*, 148 N.Y. 566; *Keough*, 276 N.Y. 141; *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
32. 48 N.Y.2d 117 (1979).
33. *Id.* at 122.
34. *People v. Samuels*, 302 NY. 163, 172 (1951).
35. 253 N.Y. 124 (1930).
36. 48 N.Y.2d at 122.
37. *Id.* at 123.
38. 63 N.Y.2d 723 (1984).
39. *Id.* at 724. *See Scanga v. Family Practice Assocs. of Rockland, P.C.*, 27 A.D.3d 547 (2d Dep't 2006); *Kovacev v. Ferreira Bros. Contracting*, 9 A.D.3d 253 (1st Dep't 2004); *Erosa v. Rinaldi*, 270 A.D.2d 384 (2d Dep't 2000).
40. 92 A.D.2d 983 (3d Dep't 1983).
41. *Id.* at 984.
42. *Id.*
43. 89 N.Y.2d 111 (1996).
44. 88 N.Y.2d 217 (1996).
45. 73 N.Y.2d 427 (1989).
46. 293 F. 1013; *see Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013); *People v. Oddone*, 22 N.Y.3d 369 (2013); *People v. LeGrand*, 8 N.Y.3d 449 (2007).
47. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
48. *Wernick*, 89 N.Y.2d at 115 (emphasis in original).
49. *Id.* at 117 (emphasis in original).
50. 83 N.Y.2d 417 (1994).
51. *Id.* at 422.
52. *Id.* at 429; *see People v. LeGrand*, 8 N.Y.3d 449 (2007).
53. 6 N.Y.3d 119 (2005).
54. *Crawford v. Washington*, 541 U.S. 36 (2004).
55. *Goldstein*, 6 N.Y.3d at 124.
56. *Id.* at 124: "As we explained in *Sugden*, a psychiatrist 'may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion,' or if it 'comes from a witness subject to full cross-examination on the trial.'"
57. *Id.*
58. *Id.*
59. *Id.* at 125.
60. *Id.*
61. *Id.*
62. *Id.* at 126.
63. *Id.*
64. *Id.*
65. *Id.*
66. *People v. Stone*, 35 N.Y.2d 69, 76 (1974): "In evaluating the worth of [the psychiatrist's] opinion, the jury should be informed of his sources and how he evaluated those sources in arriving at his conclusion. On cross-examination, the validity of his reasoning process may be probed and any 'shaky factual basis' of the opinion exposed." *People v. Sugden*, 35 N.Y.2d 453, 459–61 (1974): "It is important that the expert witness distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely."
67. *Goldstein*, 6 N.Y.3d at 126.
68. 73 N.Y.2d 427 (1989).
69. *Id.* at 430.
70. *People v. Keough*, 276 N.Y. 141, 145–46 (1937).
71. *People v. Strait*, 148 N.Y. 566, 572 (1896).
72. *Goldstein*, 6 N.Y.3d at 127–28.
73. *Wagman v. Bradshaw*, 292 A.D.2d 84, 89 (2d Dep't 2002).
74. *Hambsch v. N.Y. City Tr. Auth.*, 63 N.Y.2d 723 (1984).
75. *Wagman*, 292 A.D.2d at 87; *see In re Leon RR*, 48 N.Y.2d 117 (1979).
76. *Wagman*, 292 A.D.2d at 90.
77. 6 N.Y.3d 636 (2006).
78. *Id.* at 639.
79. *Id.* at 648.
80. *Peag v. Shahin*, 237 A.D.2d 271 (2d Dep't 1997).
81. *State of N.Y. v. Floyd Y.*, 22 N.Y.3d 95, 98 (2013).
82. *Id.*
83. *Id.; see* McCormick on Evidence, § 252, (Broun, 7th ed.):

> The constitutional issues related to admission of hearsay focus primarily on the Confrontation Clause of the Sixth Amendment [which] . . . requires "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . Due process has an impact on hearsay admission and the right to cross-examine, but a far less significant role.
>
> * * *
>
> One of the major issues in the debate . . . has been whether confrontation recognizes the validity of the traditional hearsay rule – whether it effectively accords hearsay exceptions constitutional status or stands independent of the hearsay rule and imposes its own limits on what hearsay is covered and excluded by the Clause.

84. 15 N.Y.3d 610 (2010) (citing *Williams v. Alexander*, 309 N.Y. 283 (1955)).
85. *Floyd Y.*, 22 N.Y.3d at 107.
86. *Ortega*, 15 N.Y.3d 610; *see also Williams*, 309 N.Y. 283; 6 Wigmore, Evidence § 1707, at 36 (3d ed. 1940).
87. *Floyd Y.*, 22 N.Y.3d at 107–08.
88. *Id.* at 106.
89. *Id.* at 107.
90. *Wagman*, 292 A.D.2d at 89.
91. *Floyd Y.*, 22 N.Y.3d at 117.
92. *Id.* at 116.
93. 73 N.Y.2d 427 (1989).
94. 65 N.Y.2d 909 (1985).
95. *Floyd Y.*, 22 N.Y.3d at 117.
96. *Id.*
97. *Id.* at 108.
98. *Wagman*, 292 A.D.2d at 87.
99. *In re Leon RR*, 48 N.Y.2d 117, 122 (1979).
100. 302 N.Y. at 172.
101. *Floyd Y.*, 22 N.Y.3d at 118.
102. *Id.* at 112–13.
103. 292 A.D.2d at 85–86: "[W]hile the expert witness's testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible."
104. Martin, Capra and Rossi, § 7.3.4, 625 (2d ed. 2003).
105. *People v. Ortega*, 15 N.Y.3d 610, 619 (2010).



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Level the Playing Field

Enact a Standing *Brady–Giglio* Rule Throughout the Second Circuit

By Jay Goldberg and Alex S. Huot

Within the Second Circuit, the U.S. District Courts of Vermont, Connecticut and the Northern District of New York have enacted a standing *Brady–Giglio* rule, but despite years of pressure, the Western, Eastern and Southern Districts of New York have not. The failure to provide for consistency means that, in some districts, a defendant must rely solely on the beneficence of an adversary. In those districts the lack of a *Brady–Giglio* rule unduly prejudices a defendant's right to a fair trial, because there is no assurance that a trial will proceed on a level playing field.

For over a half century, since May 1963, courts have promised that the prosecution and defense would, as far as possible, engage on a level playing field. It was a "battle" between two fully armed gladiators and would best serve the ends of justice by enabling the jury to make an informed judgment, putting both sides in a position to present material information going to the question of guilt or innocence. To be sure, the opinion in *Brady v. Maryland*[1] was, oddly enough, criticized by Justice White, who opined that the Court was creating "in constitutional form a broad rule of criminal discovery." A reading of the majority opinion, however, made clear that the Court did not shy away from being so criticized. One cannot read the language of the opinion without having the hope that the rule will do just what disturbed Justice White.

When we write of *Brady*, we include *Giglio v. United States*,[2] which would require disclosure of evidence that impeaches the credibility of government witnesses.

Nine years before *Brady*, in an opinion in *United States v. Smith*,[3] written by Judge (later Justice) Charles Whittaker, it was opined that the legislative history justified a more liberal attitude by the courts in requiring the government to furnish bills of particulars.[4]

The hoped-for result was that exculpatory evidence that might otherwise never be revealed would now be given to the defense, and that a full and fair adversarial testing would promote a fair and just verdict.[5] Criminal defense practitioners do not have the power to haul a witness before the grand jury or to their office, seek immunity for recalcitrant witnesses, or have their investigators designated as "Special Agents" (e.g., FBI, IRS-Criminal Division). In other words, criminal defense practitioners lack the tools the government employs to "convince" witnesses to answer questions or give testimony prior to the bringing of a charge or the commencement of a trial.

As our own Second Circuit Court of Appeals has observed, there is an informational gap that exists between the defense and the prosecution.[6] These observations are close to a decade old – but what has been done about closing the gap? Is there a way to assure that we will not be informed one night on the news that some innocence project has found that a defendant was wrongly convicted? For those districts without a *Brady–Giglio* rule in place, the defense must rely on the prosecutor's discretion to share information. Unfortunately, the attitude among many trial attorneys is not so much whether justice was served but whether the result was a "win." And some prosecutors are not immune to that feeling. Action should be taken, and must be taken, to level the playing field, lest our criminal justice system be thought by the public to be fraught with miscarriages of justice.

History

The Framers had hoped that grand juries would provide a degree of independence and afford protection to one

accused of a crime. They expected grand juries to sift through the evidence to determine whether there was probable cause to bring a charge against a citizen. The history of the grand jury is glowingly described as "rooted in the common and civil law, extending back to Athens, pre-Norman England and the Assize of Clarendon, promulgated by Henry II."[7] (To be sure, a mouthful.) The Supreme Court, in *United States v. Mandujano*, has stated: "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law . . . as a basic guarantee of individual liberty."[8]

However, it may come as a surprise to my fellow members of the bar, but the English had the good sense to abolish the grand jury in 1933,[9] because it was viewed as an unjustifiable "tool" of the prosecution, not an impartial sifter and evaluator of evidence. (The allusion to a grand jury as prepared to indict a ham sandwich if the prosecutor so desires is well known.)

Any hope that the grand jury could fulfill the Framers' intentions was dashed in *Costello v. United States*,[10] which ruled that the court is without power to review the sufficiency of evidence before the grand jury. The exclusionary rule is inapplicable in grand jury proceedings, with the result that a witness called before a grand jury may be questioned on knowledge obtained through the use of illegally seized evidence.[11] As far back as 1884, the Court held that, with respect to the role of the grand jury, the Fifth Amendment was not applicable to the states either through due process or through the Fourteenth Amendment.[12]

The grand jury proceeding affords no real protection to a citizen/accused, so it is up to the criminal defense bar to invoke the promise of *Brady–Giglio* that criminal proceedings will be conducted on an equal footing.

Defining "Materiality" in *Brady*

While the *Brady* decision gave criminal defendants the right to the disclosure of material information, the decision failed to define a standard of "materiality." This led to uncertainty and to reliance on the prosecutor's discretion to determine what is in fact material, as well as a narrowing of what was considered *Brady* material. In *United States v. Agurs*,[13] materiality as it relates to disclosure of evidence was defined as when "the omitted evidence creates a reasonable doubt that did not otherwise exist." Then, in *United States v. Bagley*,[14] materiality was defined as "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ten years later, the standard was changed again, by the decision of *Kyles v. Whitley*,[15] to "whether in [the undisclosed evidence's] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Finally, following the Supreme Court's 1999 ruling in *Strickler v. Greene*,[16] which went back to the reasonable probability of a different result test, the Second Circuit, in *United States v. Coppa*,[17] left solely to the discretion of the prosecutor whether material should be turned over under the *Brady* obligation: "[T]he nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a *result-affecting test* that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made."[18]

Prosecutors who are convinced that their assessment of the facts and theory of guilt is the correct one find it difficult to perceive a defense theory of how the information would be able to be used. Further, a court may not be in the best position to judge how a particular criminal defense lawyer may be able to use to her or his client's advantage a piece of evidence that was withheld. The *Coppa* theory, founded on Supreme Court precedent, leads to assumptions, uncertainty and a lack, perhaps, of inclination to disturb a verdict once rendered. With respect to a post-conviction analysis by a court, it is well to keep in mind the words of Circuit Judge Jerome Frank, dissenting in *United States v. Farina*:[19] "What influences juries, courts seldom know."

We successfully argued as far back as 1969 in *United States v. Agone*[20] that *Brady* turnover should not be left to the judgment of a prosecutor as to what and when a piece of evidence, developed by the prosecution, should be turned over to the defense.[21] *Brady* compliance should not depend on the particular proclivities of a judge to whom the defendant's case is assigned.

The U.S. District Court for the District of Massachusetts commissioned a detailed study of problems presented by what appeared to be endemic violations of the *Brady* rule and what it perceived to be miscarriages of justice, and articulated what should be done to remedy the failings that had occurred and would likely continue to occur in the absence of a standing rule of court. The Boston Bar Association formed a Task Force to address those issues and in 2009 released a report titled "Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts."[22] For a comprehensive review of all district courts that have enacted a standing *Brady* rule, see "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies."[23]

What Can Be Done?

The Second Circuit Court of Appeals has specifically recognized the informational gap.[24] The criminal defense bar has taken steps to pressure the courts and the legislatures to correct what has been a problem in the prosecution of criminal cases affecting fundamental rights owed to an accused.

In 2003, the American College of Trial Lawyers proposed amending FRCrP 11 and 16 so as to codify *Brady* to clarify the "nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information."[25] The Department of Justice opposed such codification, stating that *Brady* obligations are "clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule." True, *Brady* had been around for decades, but those decades have seen a reworking and redefining of what exactly *Brady* meant – the courts have not simply been applying a clearly defined rule to the cases brought before them. Rather than codify *Brady*, the DOJ favored making changes to the US Attorney Manual, and so it was done, thereby leaving all the power and discretion in the hands of the prosecutor.

More recently, the May 2013 edition of *The Champion*, a publication of the National Association of Criminal Defense Lawyers, was devoted entirely to detailing the basic constitutional rights owed to everyone accused of a crime and recommending steps to be taken to correct what appeared to be endemic violations of the *Brady* rule.[26]

Recommendations

Bar groups should review the following articles that favor open-file discovery, and make a push for open-file discovery to be the norm in federal courts: (1) "Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery";[27] (2) "*Brady* Is the Problem: Wrongful Convictions and the Case for 'Open File' Criminal Discovery";[28] and (3) "The New Russian Roulette: *Brady* Revisited."[29]

Each district court should issue an ethical rule order, enabling the defense bar to take direct action against a prosecutor who deserves to be sanctioned.[30]

There are myriad things to be done; each district has its own rule-making committee, the FRCrP provides a mechanism for rules to be amended or added to, and courts may, if need be, become more sensitive to the government's *Brady* obligations. What is done will depend on the particularities of each jurisdiction, but it is imperative that changes are made to the apparent hold prosecutors have on the sharing of evidence.[31]

Courts have an obligation to do a better job of monitoring prosecutors' constitutional obligation to provide discovery. While courts need to take a more active policing role, bar associations and the Federal Bar Council must as well take a vigorous role to ensure that all persons having exposure to the criminal justice system enjoy a level playing field. ■

1. 373 U.S. 83, 93 (1963) (separate opinion of White, J. concurring in the judgment).
2. 405 U.S. 150 (1972).
3. 16 F.R.D. 373 (W.D. Mo. 1954).
4. Federal Rules of Criminal Procedure 7(f) (FRCrP).
5. The fact is that strictly speaking, what is involved in a criminal case is testing the government's proof to see whether it can overcome the defendant's right to the presumption of innocence. And, truth is measured by whether the government has met its burden of proof.
6. *U.S. v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005); *U.S. v. Jackson*, 345 F.3d 59 (2d Cir. 2003).
7. Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Or. L. Rev. 101 (1931).
8. *U.S. v. Mandujano*, 425 U.S. 564, 571 (plurality opinion) (1976).
9. Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 Am. Inst. Crim. L. & Criminology 3 (Summer 1938).
10. 350 U.S. 359 (1956).
11. *U.S. v. Calandra*, 414 U.S. 338 (1974). In *Gelbard v. U.S.*, 408 U.S. 41 (1972), the Court interpreted the Federal Wiretap Statute to prohibit utilization of unlawful wiretap information as a basis for questioning witnesses before grand juries.
12. *Hurtado v. Cal.*, 110 U.S. 516 (1884).
13. 427 U.S. 97, 112 (1976).
14. 473 U.S. 667, 682 (1985).
15. 514 U.S. 419, 434 (1995).
16. 527 U.S. 263 (1999).
17. 267 F.3d 132 (2d Cir. 2001).
18. *Id.* at 142 (emphasis added).
19. 184 F.2d 18 (2d Cir. 1950).
20. 302 F. Supp. 1258 (S.D.N.Y. 1969).
21. *See* Jay Goldberg, *Awaken Defense Bar, Your Client's Brady Rights Are Not Protected*, N.Y.L.J. (Mar. 12, 1998); Jay Goldberg, *The Need for Enforcement of Brady/Giglio Rights*, The Mouthpiece (Mar./Apr. 1998); Jay Goldberg, *Brady/Giglio and the Defendant's Right to Such Material*, The Champion (Aug. 1998).
22. At http://www.bostonbar.org/prs/reports/BBA-Getting_It_Right_12-16-09.pdf.
23. Laura Hooper & Sheila Thorpe, "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies – Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States," Federal Judicial Center (May 31, 2007). http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf.
24. *See U.S. v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005); *U.S. v. Jackson*, 345 F.3d 59 (2d Cir. 2003).
25. Hooper & Thorpe, *supra* note 23.
26. See also the treatise by former prosecutor Professor Bennett Gershman titled *Prosecutorial Misconduct*, which is regularly supplemented and updated with new developments in this area. Few can forget the *Brady* violations that occurred in the prosecution of former Alaska Senator Theodore "Ted" Stevens. The district court appointed a Special Counsel, Henry F. Shuelke III, to detail the *Brady* violations. It took him 514 pages to report on the misconduct of the prosecutors, who seemed out to "win" the case. Attorney General Holder consented to a dismissal of all charges. *See* Henry F. Shuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009 (Shuelke Report) at 99 (at http://www.nacdl.org/discoveryreform).
27. Robert P. Mosteller, 15 Geo. Mason L. Rev. 257 (Winter 2008).
28. Brian Gregory, 46 U.S.F. L. Rev. 819 (Winter 2012).
29. Jannice E. Joseph, 17 Cap. Def. J. 33 (Fall 2004).
30. *See* Model Ethical Rule Order, United States District Court for the District of Massachusetts, which court also has a standing *Brady* rule. The Ethical Rule is discussed by Barry Scheck and Nancy Gertner in "Combatting Brady Violations with an 'Ethical Rule' Order for Disclosure of Favorable Evidence," *The Champion* (May 2013).
31. Too generous an assessment and an oversimplification of the aspirations of a prosecutor to simply do justice is set forth in Justice Sutherland's opinion, writing for the Court, in *Berger v. U.S.*, 295 U.S. 78 (1935).

NEW MEMBERS WELCOMED

FIRST DISTRICT
Sami Nabil Aboulhosn
Joshua Manning Abramson
Jose Acosta
George Bell Adams
Charles D Agoos
Renee Ahlers
Diane Akerman
Gustavo Akkerman
Abdullah Saad Al-Ghamdi
Julie Beth Albert
Jonathan Edgar Alger
Marie-Therese F N Allen
Seth D. Allen
Cheryl L. Allen-Ricciardi
Keith Alexander Alt
Anthony Steven Ameduri
Emily Louise Anderson
John Morgan Anderson
Sania Anwar
Alicia Angela Arana
Isabel Dilcy Araujo
Daniel William Areshenko
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Danielle Alexandra Ash
Sharon Aspis
Roman Asudulayev
Stephanie Marie Atwood
Chelsey Axel
Diana Backhouse
Jamie Ellen Bagliebter
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Heng Wang
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Xiaotang Wang
Ahuva Yael Warburg
Hillary Paige Warren
Elizabeth G Wehrly

In Memoriam

Richard N. Bach
Utica, NY

Kenneth A. Bernstein
Woodbury, NY

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Syracuse, NY

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Joshua Daniel Wohl
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Jo S Brody
Christopher Carfora
Caitlin Elizabeth Carroll
Jessica L. Chirichella
Maureen J. Cunningham
Pouyan Darian
Anthony DiPietro
Joseph Flaherty
Brian Francese
Guillermo Gonzalez
Geoffrey Johnson
Laura Jane Krieger
Jun Li
Todd Christopher McElduff
Jay Y. Oppenheim
Mary E. Raleigh
Vindra Richter
Jose Gabriel Rivera
Christopher Roberta
Robin Younghee Suh
Edem Komla Tsiagbey
Andrew George Wakim
Nicholas Sumner Whipple

TENTH DISTRICT

Anthony James Abruscati
Graham Vincent Amodeo
Victoriya Valerie Baranchuk
Mark R. Basile
Marc Robert Battipaglia
Robert William Berbenich
Michael Andrew Berger
Jillian Nicole Bittner
Bruce A. Blakeman
Robert Matthew Bott
John Joseph Brosnan
Cara Marie Caporale
Michael Cataldo
Jared Alexander Chester
Anthony Joseph Chiofalo
Natasha Chisty
Md Ashfaquzzaman Choudhury
Thomas J. Cicillini
Kimberly Lauren Cioffi
Joshua Alan Clark
John Coco
Sharon Sara Cohen
Ashlee V. Colonna Cohen
Thomas V. Demarco
Caner Demirayak
Nicole Marissa DiGiose
Elizabeth Doyaga
Tara Patricia Dunigan
Kevin John Etzel
Anthony Fasano
Patrick Edward Fedun
Blaire Pamela Fellows
Camille L. Fletcher
Thomas Foley
Melissa Lynn Fox
Tiffany Dawn Frigenti
Darci Marissa Frinquelli
Nicole Leigh Gallo
Mark F. Geraci
Nashwa Gewaily
Michael Robert Gionesi
Sarah Renee Gitomer
Joshua Nathan Gordon
Emily Katherine Gornell
Rachel Graves
Danielle Nicole Guida
Brian Hamm
Brian Robert David Hamm
John Paul Hausser
T. M. Henderson
Steven Thomas Henesy
Jordan Hersch
Alana Rachel Heumann
Heather Claire Hill
Mickheila Neree Jasmin
Eric Andrew Kaufer
Mitchell L. Kaufman
Iole Klis
Seth I. Koslow
Jaclyn Taylor Kramer
Steven Lazar
Michael Charles Liebler
Andrew Alan Lipkowitz
Anthony Peter Luckie
Brian J. McGeough
Emily Dean Miller
Jay Hong Min
Mark Montanaro
Lauren Montes
Deena Lynn Moskowitz
Marsha Mozammel
Adrian John Murphy
Michael Patrick Murphy
Jasmine Narang
Philip Paul Nash
Christopher Carl Oxx
Kristin Elizabeth Pezzuti
Michelle L. Robinson
Jamie A. Rosen
Doron Rosenheck
Daniella Schwartz
Sara Kaye Schwartz
Ali Arda Semiz
Nina Shalshina
Andrei Olegovich Shitkin
Michelle Erica Shneyderov
Michael Thomas Sihksnel
Jenna Nicole Silverman
Matthew W. Silverman
Rebecca Rose Sklar
Eric Small
Dena Eve Smith
Jessica Stoker
Allison Tenenbaum
Shauna J. Tesser-Friedman
Cynthia Meyer Thomas
Christina Diane Van Vort
Carly R. Walas
Stephen Ross Warshavsky
Michele Diane Wieber
Maurice K. Williams

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Luis Alexander Bautista
Rebecca Borges
Janet M. Calvo
Michael Capellupo
Megan Lai-lan Chang
Tierrance Charles
Kristina Chiu
Jihyun Choi
Kerri Elizabeth Cutry
Shruti Dogra
Christina Marie Donnelly
Laura Crowley Eraso
Jessica Theresa Falco
Yasmine Chahkar Farhang
Paul David Furlong
Camille Allison Gray
Chenliang Gu
Rina Gurung
Jerry Hsieh
Thomas John Aaron Humphrey
Marquita Johnson
Danielle L. Jones
Thomas K. Kim
Vincent William Ku
Lixiang Liu
Mariam Magar
Ryan Mainhardt
Christopher Russell Newton
Maria Theresa Paolillo
Heechul Park
Leann Mary Staines
Jean M. Stevens
Danni Tang
Justin Traino
Camile Natoya Tucker
Rachel Vincent
Qianlu Wang
Man Shan Wong
Ye Xiong
Andrew J. Zapata

TWELFTH DISTRICT

James Robert Baez
Crystal Baker-Burr
Steven Daniel Benathen
Jamel Brown
Cassim Abudu Bucary
Ashley Michelle Burrell
Shalena D. Caesar-Williams
Angelica M. Cesario
Triciah Claxton
Natasia Amanda De Silva
Anne Marie Garti
Harjeet Elizabeth Gidha
Samantha Lyn Halpern
Steven T. Hasty
Taneem Kabir
Maxwell Benjamin Kampfner-Williams
Valerie K. Mitchell
David Brown Nathan
Sondah Ouattara
Keriann Eui-jung Pauls
Melissa Romney Perez
Alesha Natalie Powell
Candice Arlene Rivera
Tonya Rodgers
Alicia Ruiz
Jeremiah William Rygus
Vivianna Alexandra Schwoerer
Marianne Stracquadanio
Nathaniel Christian Wenstrup

THIRTEENTH DISTRICT

Louanne Cabe
Bryan S. Dixon
Fara M. Fiore
Daniel Levit
Ann Marie Roesch
Sam Hutchinson Spellman
Akiva Tessler
Sarah Ann Walsh
Robert P. Wilson

OUT OF STATE

Charles Abitbol
Ayse Nil Ada
Ahmad Adam
Olufemi Yewande Adedoyin
David Arash Adhami
Yannick Adler
Emmanuel O. Aideloje
Nilay Akcay
Zaakira Allana
Keith Barrington Allen
Marc Sebastian Allen
Jimmy Almeyda
Jorge Mentor Altamirano
Zahide Altunbas Sancak
Jason Anton
Mark A. Apostolos
Keisha April
Avery Bruno Armas
Brad C. Armstrong
Alexander H Asen
Ama D. Attah-Mensah
Michelle Au
Tony Au
Karine D. Audouze
Daniel Aum
Jessica Aurelien
Augustine N. Ayompe
Aleksejs P. Babics
Melissa Baldwin
Joshua Paul Bandes
Jim J. Barakat
Daphne Bareket
Paul James Ian Barker
William Lloyd Barnard
Elizabeth Deborah Barnes
Samuel Robert Barnett
Jenny Rebecca Barry
Alexandra Basha
Jaseth Maverly Bassaragh
Jessica Leigh Bayles
Andrew Jacob Beatus
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John Patrick Belinga Awomo
Diego Mauricio Beltran
Christopher L. Benevento
Elsbeth Jane Bennett
Alina Gabriela Benoit
Barbara Berasategui Garcia
Jessica Lauren Berg
Stephanie Meta Berger
Marion Bergeret
Robert Matthew Bernstein
Philip R. Berwish
Anthony Scott Bestafka-Cruz
Irena Bettzuege
Alexis Renee Beveridge Lazda
Qihui Bi
Dan Liviu Binisan
Katie Bireley
James B. Blackburn
Ronni Bleich
James Alexander Blum
Stephen Gallardo Bongolan
Leandro Vilarinho Borges
Arielle Miriam Borsos
Christina Maria Borysthen-tkacz
Christopher Samir Boutros
Jessica Lily Boylan
Beth Lynn Braddock
Jacquelyn Bradford
Tracy Branding
Dean Anthony Brazier
Caitlin Brazil
Richard Michael Breen
Jessica Brierly-Snowden
Gary Emanuele Brooks
Bethany Brown
Lauren Ashley Brown
Matthew Jordan Brown
Tricia Lynn Brown
Angelina Louise Bruno-Metzger
Alyssia Janay Bryant
Innis Buggs
Jody Berke Burton
Poppee Emilie Bussiere De Nercy De Vestu
Shawn N. Butte
Linxi Cai
Xiang Cao
Yiyan Cao
Timothy Loren Capria
Timothy Loren Capria
Virginia Jessica Cardenas
Eva Kathleen Carey
Alisha Barbara Carrazza
Thomas Eaton Carter
Alfred M. Caso
Claire Julia Flavie Castinel
Jessica Jeanine Centauro
Geewon Cha
Alma Adriana Chacon
Leah Birk Chacon
Esther Chan
Tiffany Chin-wen Chan
Hao Yeh Chang
Lauren Kawehionalani Chang
Gregoire Alexandre Charlet
Leah Jahan Chavla
Aihua Chen
Chuen Tien Nadine Chen

Chuen Tier Nadin Chen
Hsianghui Chen
Kay Chen
Winnie Wing In Chen
Kathy Cheng
Laurence Cheng
Winnie Wing In Cheng
Bharinee Chestapanich
Angela Chiesi
Philip Michael Chin
Richard Benjamin Ching
Steven Chisholm
Sangmi Cho
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Dae Cheol Choi
Eurie Choi
Pok Yin S. Chow
Arli Christian
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Kyu Hee Chu
Odera Christine Chuke
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Rishikesh Paresh Desai
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Jacopo Roberti Di Sarsina
Mathilde Diana
Ashton Leigh DiDonato
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Dylan Dindial
Ellen Diner
Wenhao Ding
Nicholas V. Ditaranto
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Bayard Dodge
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Amanda Dumville
Maria Carolina Duran-Gomez
Marshall Dworkin
Gregory T. Dziura
Julienne Markrid Eby
Swift Sedgwick Osbourne Edgar
Tabitha Edgens
Tabitha Danielle Edgens
Brittany Edgerley-Dallal
Brigitte Eichner
Noriyuki Ejiri
Michele S. Eken
Adele Marie El-Khouri
Jonathan A. Ellis
Charlotte Emin
Daniel Englander
Andrew Brendan English
Shira Nicole Epstien
Lily Ericsson
Raul Escalante Martinez
Jillaine Evraets
Melissa Frankel Fabian
Alisha Falberg
Emma Patricia Falsey
Samantha Fang
Jane Elizabeth Tavelli Farrington
Dzmitry Fedarkevich
Kayla Feld
Kayla Allison Feld
Jason Benjamin Feldman
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Megan Filoon
Francis Joseph Fiorello
Patrick Joseph Fitzgerald
Elizabeth Karen Fitzgerald-Sambou
Claire Julia Flavie Castinel
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Ying Ying Fok
Odunayo Folorunso
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Marie Francis
Kirsten Rene Fraser
Jayasri Ganapathy
Anthony Mark Garcia
Joshua Garcia
Beatrice Gatti
Karen Gazaryan
Effie George
AnnElyse Gibbons
Megan Gibson
Micaela Lauren Glass
Lindsey K. Goble
Erin M. Goebel
Yi Han Goh
Alexandra Golden
Kimberly Jill Goldfarb
Emily Goldman
Michael Adam Goldstein
Guillermo Jose Gonzalez
Maggie Lauren Gousman
Jeremy P. Gove
Lindsay Joanne Gower
John Dallas Grant
Daniel David Graver
Bryce W. Gray
Andrea Michelle Green
Joshua Green
Elie Greenbaum
Mario James Gregoi
Allana Michelle Grinshteyn
Michael Christopher Groh
Elise Groulx-Diggs
Thomas Lloyd Grove
Deborah Lynn Gruen
Chenliang Gu
Li Guo
Phillip Gustafson
Jonathan Guynn
Roman Guzik
Robyn-Ashley Hall
Samuel Hall
Parhaum Hamidi
Christine Han
Dajin Han
Valentine Han
Elspeth Lynnelle Faiman Hans
Melissa Harclerode
Calvin Harding
Thomas Robert Hares
Merritt Hasbrouck
Meagan Hatcher-Mays
Michael Patrick Hatley
Tyler Hawkins
Kyle J. Hayes
Tracy Hayes
Tongyi He
Kateryna Hebert
Amanjit Heir
Sarah A. Hemmendinger
Evan William Henley
Cassandra C. Heuckroth
Jaime Hewitt
Pamela Aleta Hill
Bradford Alexander Hillman
Brett Andrew Hirsch
William Jospeh Hochul
Jeffrey Dale Holland
Jakob Holldobler
Sang-eun Hong
Seunghee Hong
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Adam B. Horowitz
Karen Rachel Horvitz
Gordon Houseman
Cara Howe
Charlotte Howells
Alice C. Hsieh
Meng-jung Hsieh
Halley Hu
Xiaojing Hu
Zhuozhi Hu
Tian Huang
Guy William Charlton Huber
Tyler Moore Hudgins
Kara Danielle Hughley
Travis R. Hunnings
James K. Hunsberger
Samantha Hynes
Alessandra Iaconetti
Mitchell E. Ignatoff
Chidinma K. Ihemedu
Meghan E. Iorianni
Mai Iwaya
Martinis M. Jackson
William Kyle Jackson
Jennifer Rose Jacoby
Rivkah F. Jaff
Vikas C. Jaitly
Albert Jacques Janet
Elizabeth Jennings-Lax
Krishna Ravindra Jhaveri
Henry Jin
Emmanuel M. Johnson
Katherine Ann Johnson
Marc Jones
Sandra Jorgensen
Timothy Kahn
Catherine Millas Kaiman
Godwin Kakande
Kiyohisa Kamekawa
Ioulia Kampouridi
Loulia Kampouridi
Seon A. Kang
Yeawon Kang
Catherine Healy Kanzler
Jamie Kapalko
Alexander Christos Karampatsos
Ramesh Kasarabada
Naoki Katayama
Michelle Katzman
Kenji Kawahara
Yuko Kawai
Akiko Kawakatsu
Rebecca Ann Kaye
Jason William Keating
Andrew J. Keller
Vasundhara Ketkar
Jeffrey A. Kettle
Sundus Azmat Khan
Laura Kieffer
A Reum Kim
Chan-yong Kim
Changho Kim
Doyeon Kim
Jin Ho Kim
Sanggee Kim
Sora Jennifer Kim
Tae Hun Kim
Tae Hun Kim
Taehyung Kim
Taehyung Kim
Michael Andrew Kippins
Natasha Kirk
Michael Charles Klauder
Alexandra Klingenstein
Darinne Wen Hui Ko
Daniel Wolfgang Koehler
Daniel Brett Kohlhofer
Rebecca Petschek Kohn
Connie Kolb
Ivette Christine Konopka
Amanda Korber
Mayer Kovacs
Geoffrey Kozen
Alicia Kraatz
Jocelyn Alyssa Krieger
Chloe Gray Krouse
Chloe Hall Krouse
Loretta Kuhland
Kathryn Kuhn
Christopher Kurczaba
Melinda E. Kuritzky
Beth E. Kurtz
Joel Kwan
Philip S. Kwon
Christopher Lacaria
Rachel Elizabeth Lackert
Erin Reilly Lafayette
Andrew Wallace Laing
Ali Lakhani
Anita Lam
Alexis Rachel Lamagna
Jessalee Landfried
Parker D. Langley
Brynn Lapszynski
Kim Uralovich Latypov
Robert Matthew Lazar
Alexis Renee Beveridge Lazda
Evan Marc Lazerowitz
Janet Lee
Misung Lee
Sang Won Lee
Seung Hee Lee
Seung Yo Lee
Peter Christopher Legreca
Jose M Leon
David L. LeRoy
Jennifer A. Lesny
Jenna Gail Leventoff
Daniel Efram Levisohn
Yonatan Levy
William Bee Ravenel Lewis
Kefei Li
Runze Li
Yeheng Li
Zhide Li
Daniel Max Lieberman
Anastasia Likhanskaya
Pei Zhen Erynne Jane Lim
Chun Jung Lin
Xiaohong Lin
Youjun Lin
Carlos Alfredo Lindo
Eric Linge
Stephanie Beth Lipstein
Haibin Liu
Song Ji Liu
Zhiwei Liu
Nancy Livak
Steven Llanes
James Gardner Long
Eliberty Lopez
Aurelien Loric
Michael J. Lueptow
Jennifer Xinrong Luo
Patrick John Lynch
Jessica Lynd
Julia Elizabeth MacDonald
Michael T. Madaio
Benjamin David Maggin
Ethan Magid
Shweta Mahajan
Mark M. Makhail
Michael Patrick Maloney
Mitchell Arlen Manger
Reiko Manoh
Lucia Josefa Marin Cano
Samuel Marll
Christopher Berrigan Martin
James Richard Martin
Michael Massey
Edwige Mathieu
Katsuya Matsumoto
Kathryn Mayer
Natalie Mazur
Nadine Mbu-Akamentuku
Thomas McCabe
Katherine Ross McDonnell
Blair McGraw
Justine Marie McGuire
Jessica Marie McHale
Amelia McKeithen
Barbara Treasa McNulty
Jennifer C. McRlroy
Melissa Melesse
Fanming Meng

Jacob Merrill
Jessica Alma Michaels
Elise Micheli
Arrielle Millstein
Gabriel Milton-Job
Andrey Milvidskiy
Svetlana Minevich
William Minion
William Michael Minion
Matthew Vincent Minnella
Mirela Emilova Missova
Natalie Mitchell
Joshua Mitts
Miwa Mizushima
Amanda Joy Mollo
Stefan Monaghan
Priscilla H. Monico
Megan Monson
Sophie Anne Marie Montagne
Alexander War Mooney
Mercedes Morno
Sarah Mortazavi
Gregory Stephen Mortenson
Colin Charles Most
Francis Martin Mule
Keigan Tyler Mull
Danica Mullarkey
Ryan P. Mulvey
Gabriela Munoz
Gabriela Munoz
Michael Murali
Lauren Elizabeth Musarra
Jacqueline Muttick
Adrian Joseph Albert Myers
Han Eri Myung
Liyana Naydenov
Jasmine A. Negron
Eric K. Ng
Mengshuang Ni
Noam Noked
Mark E. Norgaard
David Sean Norris
Krystal Dawn Norton
Andrew Notini
Jasmine Nouri
Ashley Elizabeth Nummer
Xavier Nunez
John Odle
Heather Oh
Ayuko Okamori
Kenichi Okishima
Olanrewaju Okunnuga
Katrina A. Olsen
Lorna Orak
Asli Orhon
Mariloly Orozco
Erik Ortega
Difie Osborne
Reuben Oswald
Yui Ota
Yasuharu Otawa
Kaoru Otawara
Nadia Grace Oviedo Maradiaga
Patrina Alesia Ozurumba
Alberto Pacchioni
Wonsun Paek
Matthew Pallay
Laurel Palluzi
Michael S. Palmisciano
Jason Anthony Pan
Abhisha Parikh
Jungwoo Park
Seung-Ho Park
Soo Yzon Park
Sun Jung Park
Mathew Francis Pascarella
Andrei Pascariu
Kunal Patel
Rahoo Patel
Anika Patterson
Nicholas Patullo
Juliana Pavageau
Juan Jose Pedroza
Jian Peng
William P. Perelli
Daniel Arturo Perez
Shantel Iris Perez
Marie Francoise Anne Perrault
William Paul Perrelli
Logan Elloitt Pettigrew
Whitney Phelps
Anthony L. Picarelli
Michael John Pisko
Chloe Pitoun
Douglas Pivnichny
Douglas James Pivnichny
Jared Placitella
Tara N. Pomparelli
Matthew Charles Porter
Andrew Poye
Ingrid Louise Price
Jonathan Azar Pride
Jonathan Azer Pride
Pamela Tammy Aquino Prieto
Bianca Eva Prikazsky
Allision Leigh Pristash
Paulina Ewa Prochownik
Renuka Pujari
Paola Pujlos Mayer
Paola Pujols-Mayer
Daniel Pulecio-Boek
Tetteh Quaynor
Akeel Qureshi
Aaron Stein Rabinowitz
Roxane Rad-Serecht
Amer Yasin Raja
Michael Joseph Raskys
Naheed Rasul
Giacomo Reali
Edgar L. Redding
Adam Reich
Elissa Catherine Reidy
Lauren Repole
Christine Nicole Restrepo
Naushad Reza
Siranya Rhuvattana
Amadeu Carvalhaes Ribeiro
Natalie Rice
Camilo Alfredo Rincon Camacho
Camilo Rincon-Camacho
David Einar Rod
Stephanie Rodriguez
Justin David Roller
Tatiana Romanov-Koffman
Aleksei Romanovski
Diego Orlando Romero
Jill Daitch Rosenberg
Courtney Ross
Timothy John Ross
Andrew Rothstein
Paul Rozenberg
Katelyn Amanda Ruiz
Kelley M. Rutkowski
Jessica Rutter
Aminat Sabak
Christopher Saddock
Jaclyn Saffir
Jaclyn Danielle Saffir
Aneil K. Sahota
Sarah Saladini
Melissa Salazar
Jean N. Samedi
Mark Samra
Pablo Sanchez Iglesias
Clark Michael Sarkisian
Emma Sarkisyan
Ludmilla Savelieff
Emily Mann Savner
Lindsey Scannell
Heather Marie Schlemm
Sarah R. Schmidt
Steven Schmulenson
Nora Elisabeth Schneider
Rachel L Schneider
Thomas Scopelitis
Brian Scott
Eric Sega
Anastasia Seliankina
QianLi Sha
Sana Shah
Sagi Shaked
Robert Timothy Sharkey
Can Shi
Jinjing Shi
Hsiu-Hua Shih
Hiroshi Shimuta
William B. Shipley
Randi Dale Shirvan
Volodymyr Shkilevych
Jacqueline Shulman
Teresa Sia
Diego Ignacio Sierra Laris
Thomas S. Silverstein
Ian Alastair Simmons
Nirajan Singh
Rohini Singh
Nga Yee Ellie Siu
David E. Sklar
Callan Slavin
Caitlin O'Keefe Smith
Lindsay Alaina Smith
Ciara Patricia Smyth
Kevin Snell
Ilana Snyder
Lauren Eckhardt Snyder
Emily Gale Sobiecki
Lauren Michelle Solari
Jessica Soley
Adam H. Solomon
Benjamin Solomon-Schwartz
Brenna Alice Sparks
David Spunzo
Rona Ssozi
Christopher P. Stanislowski
Jaclyn Stark
Danielle Lee Steele
Barry A. Steiber
Laura Stoffel
Laura Ann Stogdill
Alexander L. Stout
Daniel S. Strashun
Daniel Streim
Mayra P. Suazo-Aquino
Dougmin Suk
Fangchen Sun
Jeong-ho Sun
Joeng-Ho Sun
Danielle E. Sunberg
Naim S. Surgeon
Alexander Taggart-Scarff
Yulieika Tamayo
Nicholas M. Tamburri
Wei Kwan Tang
Katie Lynn Taylor
Kathryn Frances Theobald
Nancy Ann Thompson
John Francis Thomson
Rebecca L Tingstrom
Charles Toland
Robert Toll
Akiko Tomioka
Christopher Anthony Tommarello
Peter Traisak
Prem Murthy Trivedi
Cheryl Trovato
Matthew Turtoro
Andrew Timothy Tutt
Masatsugu Umemura
Monica Uribe
Yoshiya Usami
Heather Vail
Drew Valentine
Elias Valerio Vargas
Eleonor Velasquez
Helen Vera
Louis Joseph Verde
Bradley W. Tyler Vermeersch
James A. Vezeris
Ema Vidak Gojkovic
Iana Assenova Vladimirova
Aviva Jacqueline Vogelstein
Jonathan Mark Volinski
Igor Volynets
Zachary a. Waksman
Adam Shere Wallwork
Christine Elizabeth Walters
Carol H. Wang
Chu Wang
Chun Wang
Nari Wang
Shanshan Wang
Yihan Wang
Yu Wang
Zhan Wang
Zheqiong Wang
Bartosz P. Wasiak
Kacey Leigh Weddle
Rachel Weidler
Alexandria Weininger
Brian C. Weintraub
Jennifer Weitz
Scott Michael Welfel
Darinne Ko Wen Hui
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Margaret Weston
Margaret Blum Weston
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James Woodson
Ashley Nicole Wright
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Chung-hua Wu
Derek Wu
Sijie Wu
Yichen Wu
Shuchang Xiao
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Serezha Yakubov
Bin Yan
Andrew H. Yang
Lin Yang
Rui Yang
Yilan Yang
Yue Yang
Francis A. Yankey
Junli Ye
Yu Yokosawata
Gaku Yoneyama
Gie Whan Yoon
Yuki Yoshida
Nicholas James Young
Fatima Younus
Michael D. Zahler
Romain Zamour
Irina Zamyatin
Alex Zenerovitz
Jenny Zhang
Xin Zhang
Xuesong Zhang
Yinuo Zhang
Yinuo Zhang
Yun Zhang
Lijuan Zheng
Jia Zhou
Lilu Zhou
Yao Zhou
Yi Zhou
Xingluo Zhu
Yi Zhu
Gadi Hy Zohar
Kyle Zrenda
Jessica Zurlo
Sarah Zybert

MEMBERSHIP TOTALS

New Regular Members
1/1/14 - 4/7/14 _____ 2,848

New Law Student Members
1/1/14 - 4/7/14 _____ 92

Total Regular Members
as of 4/7/14 _____ 59,536

Total Law Student Members
as of 4/7/14 _____ 1,319

Total Membership as of
4/7/14 _____ 60,855

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I graduated law school last year and was just admitted to the bar. With very few job prospects out there for young attorneys, I decided to hang out my own shingle. Lately I have encountered judges and counsel who give me strange looks when they see me in court or at a meeting. I have also lost a few clients and have come to realize, I am not sure why, that this may have something to do with my appearance. I never really understood the need for attorneys to dress formally. So I dress pretty much the way I did in law school. I don't wear a tie when I am in court. I usually enjoy sporting a nice pair of expensive jeans and then top them off with some brightly colored shoes. Some of the judges that I have appeared before have openly commented not only on my informal dress but also my piercings and a few visible tattoos. To me, the way I dress is an expression of my basic rights to free speech. It is the quality of my arguments that should count, not the way I dress that should be important. I am the first member of my family to become a lawyer and do not have any mentors to help me. Do I have a professional obligation to wear a suit and tie when I am in court? What about meetings with clients or other lawyers?

Sincerely,

N.O. Fashionplate

Dear N.O. Fashionplate:

We all remember the famous scene in *My Cousin Vinny* where Vincent LaGuardia Gambini, Esq., makes his first appearance before the Honorable Chamberlain Haller wearing a leather jacket. When asked by the judge what he is wearing, Vinny says "I don't get the question," and answers "Um, I'm wearing clothes." In the iconic colloquy that follows, Judge Haller sternly sets us all straight about proper dress in the courtroom:

> Judge Haller: When you come into my court looking like you do, you not only insult me, but you insult the integrity of this court!
>
> Vinny: I apologize, sir, but, uh . . . this is how I dress.
>
> Judge Haller: The next time you appear in my court, you will look lawyerly. And I mean you comb your hair, and wear a suit and tie. And that suit had better be made out of some sort of . . . cloth. You understand me?
>
> Vinny: Uh yes. Fine, Judge, fine.

Hopefully, we all "get" what Judge Haller was saying to Mr. Gambini: appropriate dress is part of professional responsibility, especially when we go to court.

In the past two decades, the business community has experienced many changes in how people dress at the office and in other professional settings. Some attribute this to the technology sector (*see* Claire Cain Miller, *Techies Break a Fashion Taboo*, N.Y. Times, Aug. 3, 2012), which is almost completely dominated by younger entrepreneurs who believe that, like the typewriter, the "suit and tie" for men and business suits for women are relics of a foregone era. While many law offices have adopted business casual as the norm, the legal profession has held the line when it comes to traditional business attire in a professional setting, even though, more often than not, clients are more likely to dress in business-casual attire when meeting with their counsel.

We know that this may seem old-fashioned, but we should not overlook the fact that court proceedings are serious business. They are forums that address our basic freedoms and countless economic issues. How we dress in the courtroom is a sign of respect that should be consistent with the seriousness of what we do when we appear in court. Believe it or not, attorneys have shown up in court wearing jogging suits and sneakers; we can only wonder what they were thinking.

We attorneys should not dress in a manner that unnecessarily calls attention to ourselves or adopts a casual attitude about the importance of what we do and the judicial process. Former Chief Judge Judith S. Kaye put it best when she said that "[one's] dress should not be noticed [and we] should stand out for the quality of our presentation." *See* Ann Farmer, *Order in the Closet – Why Attire for Women Lawyers Is Still an Issue*, American Bar Association, Perspectives, Vol. 19, No. 2 (Fall 2010). Although Chief Judge Kaye's comments were focused on female attorneys, proper dress in the courtroom is *not* a gender issue, and *all* attorneys should follow her sage advice.

Perhaps anticipating what Judge Haller would say a few years later in *My Cousin Vinny*, a Florida court took on the issue in *Sandstrom v. State*, 309 So. 2d 17 (Fla. Dist. Ct. App. 1975), *cert. dismissed*, 336 So. 2d 572 (Fla. 1976), when a lawyer showed up in court wearing what appeared to be a white leisure suit (probably similar to what John Travolta wore in *Saturday Night Fever*), no tie and exposed chest hair. The court opined in *Sandstrom* that proper attire in the courtroom is an integral part of our judicial system. In the words of the court:

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

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

> The wearing of a coat and necktie in open court has been a long honored tradition. It has always been considered a contribution to the seriousness and solemnity of the occasion and the proceedings. It is a sign of respect. A "jacket and tie" are still required dress in many public places. The Supreme Court of the United States by "Notice to Counsel" advises that appropriate dress in appearing before that court is conservative business dress. Would anyone question that includes a coat and necktie?
>
> In our judgment the court's order requiring appellant to wear a tie in court was a simple requirement bearing a reasonable relationship to the proper administration of justice in that court. Appellant's dogged refusal to comply demonstrated a total lack of cooperation by counsel and was hardly befitting a member of the bar.

Id.

But how does one know what is appropriate, and what is not? While that may be a relatively easy task when we are talking about men wearing a suit and tie to court, we should also understand that appropriate standards are not always written in stone and, in fact, often change with the times. And, what is acceptable to some may not be acceptable to everyone. *Peck v. Stone*, 32 A.D.2d 506 (4th Dep't 1969), is a great example. In *Peck*, the trial court order prohibiting a female attorney from wearing a miniskirt in court resulted in a reversal by the Appellate Division. The court in *Peck* found that:

> [T]he record fail[ed] to show that petitioner's appearance in any way created distraction or in any manner disrupted the ordinary proceedings of the court. There is no suggestion that petitioner's dress was so immodest or revealing as to shock one's sense of propriety. Neither is it urged by respondent that the continued appearance by petitioner, so garbed, would create any distraction. In fact, with understandable candor, respondent's counsel admitted that no such claim was made, and, further that her appearance did not create a disruptive condition. Furthermore the record demonstrates that during appellant's colloquy with the court she was at all times respectful, reserved and at no time could her demonstrated attitude in any manner be considered contrary to her ethical responsibilities as an officer of the court.

Id.

In re De Carlo, 141 N.J. Super. 42 (1976), is another example. Citing *Peck* and distinguishing *Sandstrom*, the appellate court reversed the lower court's contempt order that chastised a female attorney who wore gray wool slacks, a matching gray sweater and a green open-collared blouse in court, finding such attire "w[as] not of the kind that could be fairly labeled disruptive, distractive or depreciative of the solemnity of the judicial process so as to foreclose her courtroom appearance." *Id.* The following decade, a California appellate court held that the standard for appropriate courtroom attire was based on the test as to "whether it interfere[d] with courtroom decorum disrupting justice, that is, whether it tend[ed] to cause disorder or interference with or impede the functioning of the court." *See Jensen v. Superior Court*, 154 Cal. App. 3d 533 (1984) (reversal of lower court's refusal to permit plaintiff's attorney, who wore a turban, to appear at a hearing, unless the attorney showed he wore the turban for some "legitimate" purpose).

An opinion of the New York County Lawyers' Association Committee on Professional Ethics (the NYCLA Opinion) is also instructive and expresses the view that the Code of Professional Responsibility (the precursor to the current Rules of Professional Conduct (the RPC)) did not prohibit female attorneys "from wearing appropriately tailored pants suits or other pant-based outfits in a court appearance." *See* NYCLA Eth. Op. 688, 1991 WL 755944 (1991). In support of this view, the NYCLA Opinion cited to former Disciplinary Rules 1-102(A)(3) and (5) as well as 7-106(C)(6), respectively. Both of these rules are now codified (though slightly revised) as Rules 8.4(b)–(d) and 3.3(f)(2) of the RPC. Rule 8.4(d) of the RPC provides that "a lawyer . . . shall not engage in conduct that is prejudicial to the administration of justice." Furthermore, Rule 3.3(f)(2) of the RPC states that "[i]n appearing as a lawyer before a tribunal, a lawyer shall not engage in undignified or discourteous conduct."

More recently, at a Seventh Circuit Bar Association Meeting in 2009, a judge declared that for women "titillating attire was a huge problem, [and] a distraction in the courtroom" and that "[one should not] dress in court as if it's Saturday night and you're going out to a party." The same judge also frowned upon men "who sported loud ties, some with designs like smiley faces." *See* John Schwartz, *At a Symposium of Judges, a Debate on the Laws of Fashion*, N.Y. Times, May 22, 2009.

With all due respect to what you say is your need to express your rights of free speech, when it comes to proper dress there are some things best left at the door when you enter a courthouse. As officers of the court and members of the bar, we all have both a professional and an ethical obligation to dress in a professional manner when appearing in court. That means a suit and tie for men and an appropriate business suit for women. With regard to your tattoos and piercings, we would suggest that you do your best to remove any distracting jewelry before you appear before any judge, because such accessories cause unnecessary distraction and potentially interfere with courtroom decorum. *See, e.g.*, *Peck*, 32 A.D.2d at 507–08; *see also Jensen*, 154 Cal. App. 3d at 537. It is hard to help you with your tattoos which may not be so easy to hide. We suggest that the next time you appear in court, you would be wise to make every effort to hide the more potentially distracting tattoos so that a judge may focus more closely on what you are saying rather than what you look like. For better or worse, human beings have a natural inclination to focus on

what people look like, so based on how you describe yourself, we believe that you should limit how many visible tattoos people can see when you are in court.

As for your question concerning proper dress when meeting with clients or other lawyers, hopefully your own common sense should guide how you present yourself in those particular settings. As your client's counsel, you are in the best position to gauge your client's expectations. If, for example, you happen to represent a client who also shares your interest in piercings and tattoos, then it may be acceptable in limited circumstances to dress informally in the manner as you have described. However, when meeting with other lawyers (and potentially adverse parties) we strongly advise that you dress as if you were going to court. Many times an adversary and his or her client will scrutinize how the opposing party and lawyer present themselves, and you do not want to dress in a way that could potentially compromise the manner in which you would advocate for your client.

Remember, people rarely get criticized for overdressing, a view that was recently embraced by one notable pop culture figure. *See* Justin Timberlake, "Suit & Tie," on *The 20/20 Experience* (RCA Records 2013). However, those who dress down often face the risk of having their choice of clothing overshadow what they might be saying. To that end, use your best judgment deciding what to wear when you meet with a client. But when you go to court you have an obligation to present yourself in a respectful manner (which means appropriate business attire).

That said, we should all remember that the standards for appropriate dress are never stagnant and are likely to change with the times. It would be interesting to put this Forum in a time capsule and open it in 20 years. Will judges still wear robes, and will lawyers still wear business suits in court? We think so, but only time will tell.

Sincerely,

The Forum by
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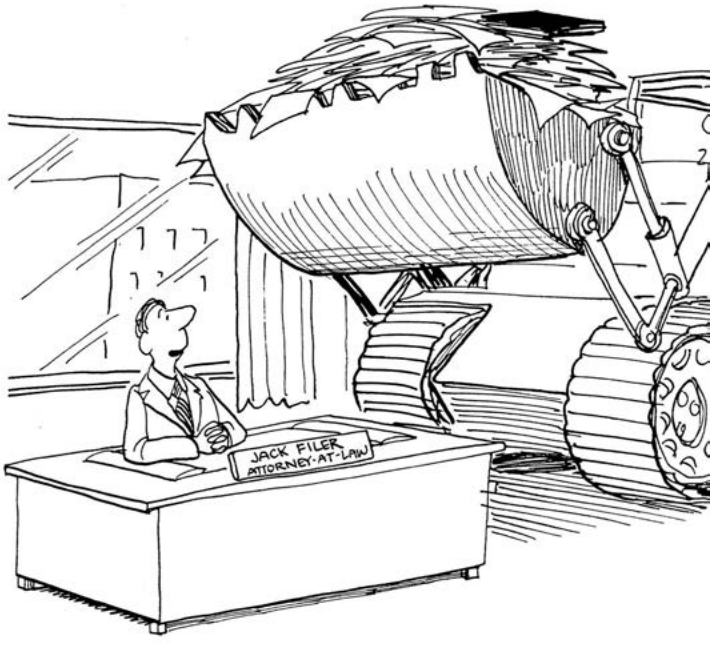

"I'm in a paper work mood, let 'er rip."

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

The news in recent months is full of stories on data security and the risks that must be addressed for businesses to protect their electronic information. As attorneys, I know we all have certain obligations to preserve the confidential information of our clients. I am well aware that much of the electronic information on our firm's networks is made up of confidential information arising from client matters. I am the lucky partner tasked by my colleagues to help implement firmwide data security policies. What ethical obligations come into play on this issue? Do the attorneys at my firm have an obligation to both advise and coordinate data security policies with our non-attorney staff?

Sincerely,
Richard Risk-Adverse

The Burden of Proof

Continued from Page 22

(c) Application. This section also applies to a proceeding brought under the workers' compensation law.

6. Addressing a predecessor to CPLR 205(a), Code Civ. Pr. § 405.

7. 215 N.Y. 533 (1915).

8. *Id.* at 539.

9. *Id.* The statute to be construed (Code Civ. Pr. § 405) has its roots in the distant past. By the English Limitation Act of 1623 (21 Jac. 1, c. 16, s. 4). . . . The section was copied into our own laws by a statute enacted in 1788 (L. 1788, ch. 43) and again in 1801 (1 R. L. 186, sec. 5). It then passed into the Revised Statutes (2 R. S. [1st ed.] 298, § 33).

10. *Norex Petroleum Ltd. v. Blavatnik*, 2012 N.Y. Slip Op. 33181(U), 10–11 (Sup. Ct., N.Y. Co. June 13, 2012) (citation omitted).

11. *Norex Petroleum Ltd.*, 105 A.D.3d 659–60 (citations omitted).

12. They included, *inter alia*, the application of a federal analog to CPLR 205(a), 28 U.S.C. § 1367(d), whether the dismissal of the federal action was on the merits, and whether certain claims in the second action related back to the original filing.

13. 93 N.Y.2d 525 (1999).

14. *Id.* at 526.

15. *Id.* at 527.

16. *Id.* (citation omitted).

17. *Id.* at 529 (citation omitted).

18. 91 N.Y.2d 180 (1997).

19. 215 N.Y. 533 (1915).

20. *Id.* at 540–41 (citation omitted).

• Unlawfully practicing law or assuming to practice law.[18]

• Disobeying or resisting a court's lawful mandate involving labor disputes.[19]

Courts not of record have the power to punish for civil contempt only if a statute grants that power.[20] Bring your application to punish for contempt in Supreme Court or County Court if your forum doesn't have that power. Courts of record have the power to punish for civil contempt for the following people who commit the following conduct:

• Attorneys and others who perform judicial or ministerial service and who misbehave in office, willfully neglect duty, or disobey a lawful mandate.[21]

• A party who places a fictitious bail or surety or who deceives or abuses a court mandate or proceeding.[22]

• A party, an attorney, or any other person who disobeys a lawful court order, including nonpayment of money where "by law execution can['t] be awarded for the collection of such sum."[23]

• A person who acts as an attorney or a court officer (an impostor); a person who "rescues" property or persons in court custody, prevents witness testimony, or unlawfully interferes with court proceedings.[24]

• A subpoenaed witness who refuses or neglects to obey a subpoena or to appear, be sworn, or to testify.[25]

• A jury candidate who improperly converses or communicates with a party or a person who attends and acts or attempts to act as a juror in place of the person duly notified to attend.[26]

• "An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court."[27]

You may move for contempt if a person has failed to pay maintenance or support under a matrimonial decree.[28]

Disobeying a judicial subpoena will also subject you to a contempt penalty.[29]

Although contempt isn't the most direct way to enforce a money judgment, contempt is the remedy for CPLR's Article 52 enforcement devices. Judiciary Law Article 19 explains the procedure for punishing for contempt. Under CPLR 5251, the following behavior constitutes contempt:

> The level of willfulness associated with the conduct is what escalates civil contempt to criminal contempt.

• Refusing or willfully neglecting to obey a CPLR 5224 disclosure subpoena or "false[ly] swearing upon an examination or in answering written questions."[30] The subpoenas mentioned in CPLR 5224 don't include all the disclosure devices under CPLR Article 31. The subpoenas CPLR 5251 contemplates are deposition subpoenas, subpoenas duces tecum, and information subpoenas.[31]

• Refusing or willfully neglecting to obey a CPLR 5222 restraining notice.[32] A judgment creditor's attorney or a court clerk issues a restraining notice.[33] A restraining notice is served on the judgment debtor or a garnishee.[34] A restraining notice enjoins the person served from turning over property except to the sheriff (or a marshal) or pursuant to a court order.[35]

• Willfully defacing or removing notices of upcoming sales of property "before the sale"[36] of the property "in conjunction with levies and sales of personal property or real property."[37]

• Willfully disobeying any Article 52 order: (1) a CPLR 5225 delivery order (property or money sought) or a CPLR 5227 order (debt owed to the judgment debtor); (2) a CPLR 5226 installment-payment order; (3) an order directing property to be surrendered to a receiver appointed under CPLR 5228; (4) a prejudgment order directing an examination or restraint under CPLR 5229; and (5) a CPLR 5240 protective order.

Only the courts listed in CPLR 5221(a) may punish for contempt of CPLR's Article 52 devices.

Equity judgments — injunctions, for example — are enforceable by contempt.[38] You may move for contempt if you're seeking to enforce a preliminary injunction or a temporary restraining order (TRO).[39]

You may move for contempt to enforce a court's judgment that directs a person or entity to pay money into court.[40]

You may also move for contempt if a trustee or other fiduciary,[41] such as a decedent's personal representative, a committee or conservator, a guardian, an escrowee,[42] or a corporate official,[43] fails to pay money because of a willful breach of trust.[44] The judgment you're seeking to enforce by contempt must state "the facts manifesting that the dereliction arises out of the required fiduciary connection."[45]

Even though replevin judgments are "enforcible only by an execution directing the sheriff [or marshal] to seize the chattel and return it to the plaintiff,"[46] you may use contempt to enforce a replevin judgment "if the chattel is unique and the judgment specifically directs the defendant to return it."[47]

You may move for contempt if your adversary violates a stay of the proceedings.[48]

Conduct Punishable Under the Penal Law

Criminal contempt is a crime punishable under Penal Law § 215.50 (criminal contempt in the second degree, a Class A misdemeanor) and Penal Law § 215.51 (criminal contempt in the first degree, a Class E felony).

A person commits a Penal Law § 215.50 crime for "disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence."

A person commits a Penal Law § 215.51 crime by improperly refusing to be sworn before a grand jury, by refusing to answer questions before a grand jury, or by violating an order of protection.

Penal Law §§ 215.50 and 215.51 prosecutions aren't as frequent as Judiciary Law contempt proceedings.

A Judiciary Law § 750(A) criminal-contempt adjudication will bar a Penal Law prosecution for criminal contempt.[49] Prosecuting a defendant for the same offense (the same act using the same evidence) violates the Double Jeopardy clause.[50]

Absent statutory authority, a contemnor adjudicated under the Penal Law doesn't have the right to purge the contempt.[51]

Summary Criminal Contempt

If the contemptuous conduct happens in the court's immediate view and presence, the court may summarily adjudicate the contemnor.[52] Judiciary Law §§ 751 and 755 provide that a court may summarily punish a person for criminal contempt committed "in the immediate view and presence of the court."

A court exercises its summary contempt power when a person's "offensive conduct disrupts or threatens to disrupt proceedings in progress and prompt summary action is required to restore or maintain order."[53] Because the court knows firsthand the facts constituting contempt, the court may adjudicate the person without notice, without an adjournment, without a hearing, and without giving the alleged contemnor the opportunity to prepare a defense or retain a lawyer.

If the contemptuous conduct — by an attorney, party, witness, or spectator — occurs during a jury trial, the court will remove the jury before it exercises its summary-contempt powers.

The court will warn the person that the court is about to hold the person in contempt.[54] A court might be justified in not giving a warning if the contemnor's behavior is immediate and it's unlikely the court could continue to conduct its normal business without restoring order in the courtroom.[55]

Contemnors may make a statement in their defense or in extenuation of their conduct.[56] If the accused provides no explanation or if the court finds the explanation insufficient, the court may summarily hold the person in contempt.

The court will give contemnors an opportunity to purge the contempt. Contemnors may purge by, among other things, apologizing for their contemptuous behavior or by doing the act they had refused to do. If the court determines that the contemnor didn't purge the contempt or that the contemnor insufficiently purged, the court will determine the contemnor's punishment.

Under Judiciary Law § 752, the court must specify in a written order the facts and the punishment for the contempt adjudication. For summary criminal contempt, the court completes and signs a mandate of commitment immediately — if the punishment is jail.[57] The mandate of commitment is null and void if the court doesn't explain the circumstances of the contempt.[58] A court's defective mandate of commitment can't be cured.[59]

The punishment for summary criminal contempt is a fine of not more than $1000 or jail for no more than 30 days, or both.[60]

With some exceptions, a court must punish the contemnor at the time of the summary-contempt adjudication. If the court doesn't do so, an appellate court might find that the court should have exercised only its plenary-contempt powers.[61]

The court might postpone the punishment. If the offender is a party, a party's attorney, or a witness to an action or proceeding and the contemptuous conduct is committed during a jury trial, a court will hold a contempt hearing outside the jury's presence and likely execute the punishment after the jury verdict.[62] A court might also wait to punish the contemnor at the end of the trial, or after the court orders a mistrial, for the contemnor's contemptuous conduct repeatedly committed during the trial.

If the accused is a spectator in court, the court need not wait to impose punishment. The court may so do summarily.

Plenary Contempt

If the court doesn't exercise its summary-contempt power, the accused must be given due process: notice of the contempt accusation (to enable the accused to prepare a defense) and an opportunity to be heard.[63] This is called plenary contempt.[64]

If the contempt occurs in the judge's presence but the judge postpones the contempt adjudication, the First and Second Department rules disqualify a judge from conducting the plenary proceeding if (1) the contemnor "disrespect[ed] . . . or "vituperative[ly] critici[zed]" the judge;[65] (2) the judge's recollection of the testimony is necessary for the contempt determination;[66] or (3) the judge isn't able to decide the issue solely on the evidence adduced at the plenary hearing.[67] The judge must refer the contempt hearing to another judge.

Referral to another judge is appropriate when the contemnor's conduct is personal to the judge, thus making it impossible for the judge to evaluate the contempt circumstances neutrally.

At the plenary hearing or proceeding,[68] the alleged contemnor must receive notice of written charges.[69] Alleged contemnors have the right to counsel.[70] The court may, in its discretion, appoint counsel. Alleged contemnors have the right to compulsory process — to secure witnesses or produce evidence — to defend themselves in court.[71] Alleged contemnors have the right to confront and cross-examine witnesses[72] and to call their own witnesses.

Criminal Contempt

The "level of willfulness associated with the conduct" is what escalates

civil contempt to criminal contempt.[73] Practitioners usually seek to punish for criminal contempt when a party willfully disobeys a lawful mandate.

contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court

NAL CONTEMPT" when they request that remedy.

If your criminal-contempt papers don't contain the required warnings, your papers are jurisdictionally defective; the court won't entertain your criminal-contempt application.[79]

> Your criminal-contempt papers must contain the following on its face, in at least eight-point boldface type in capital letters: WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

Moving for Criminal Contempt

If the alleged contemnor was a party to the action from which the contempt arises, move for contempt by notice of motion or by order to show cause. In explaining the procedure for "punishing for contempt," Judiciary Law § 756 provides that

> [a]n application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court.

Judiciary Law § 750(A)(7) — which covers jury service and subpoenaed witnesses — also mentions moving for criminal contempt by notice of motion or by order to show cause. Although a majority of cases have addressed criminal contempt brought by order to show cause, moving by notice of motion is viable.[74] But most practitioners move by order to show cause, however, because they need to punish contemnors quickly.

No statute specifies how service of process must be made on the accused for criminal contempt. Judiciary Law § 751(1) provides that the alleged contemnor be notified of the accusation and have reasonable time to prepare a defense. Judiciary Law § 761 provides that "[a]n application to punish for

or judge." The consensus in the First Department is that the accused must be personally served.[75]

If you're moving by order to show cause, the court will provide how you must serve the criminal-contempt papers. Serve the papers exactly as the court directs you to serve them. The court might allow you to service the papers on the accused's attorney.

The return date of your contempt motion, if brought by notice of motion, must be no fewer than 10 days and no more than 30 days.[76] If you're moving for criminal contempt by order to show cause, present your order to show cause to the court for the court's signature. The court or the court clerk will set the return date of your order to show cause.

Your contempt papers should include the caption of the action or proceeding "out of which the contempt arises."[77]

Your criminal-contempt papers must contain the following on its face, in at least eight-point boldface type in capital letters: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT**.[78] If the warning isn't in bold, capital letters, and at least eight-point type, the accused will likely oppose the contempt papers by arguing that you failed to comply with the notice requirements. An accused who doesn't object to the notice waives the right to do so.

You must clearly state in your notice of motion or order to show cause that you're seeking to punish for criminal contempt. Practitioners will usually write — in bold, capital letters — that they're seeking to punish for "**CRIMI-**

You'll need to show with evidence that the contemnor's conduct was willful — meaning "intentional"[80] — and unlawful. Your moving papers must give the alleged contemnor sufficient information about the conduct you're seeking to punish so that the contemnor can prepare a defense.

To prevail on a criminal-contempt motion, the moving party must establish that the alleged contemnor willfully disobeyed a clear and unequivocal court order.[81] The burden of proof to establish criminal contempt is beyond a reasonable doubt.[82]

In the next issue of the *Journal*, the *Legal Writer* will continue with criminal- and civil-contempt motions. ■

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1. David D. Siegel, New York Practice § 481, at 835 (5th ed. 2011).
2. 1 Byer's Civil Motions § 19:01, at 219 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.) (citing *Sloan v. Sloan*, 57 Misc. 2d 654, 657, 293 N.Y.S.2d 654, 657 (Sup. Ct. Kings County 1968)).
3. Siegel, *supra* note 1, at § 482, at 838.
4. *Id*. § 482, at 838.
5. *Id*.
6. Byer's Civil Motions, *supra* note 2, at § 19:01, at 220.
7. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337, 397 (1998).
8. Judiciary Law § 751(1).
9. Uniform City Court Act (U.C.C.A.) § 210; Uniform Justice Court Act (U.J.C.A.) § 210.

10. Judiciary Law § 2. The following are New York courts of record: (1) the court for the trial of impeachments; (2) the Court of Appeals; (3) the Appellate Division; (4) the Supreme Court; (5) the Court of Claims; (6) the County Court (outside New York City); (7) Family Court; (8) Surrogate's Court; (9) the City Court (outside New York City); (10) the District Court; and (11) the New York City Civil and Criminal Courts.

11. Judiciary Law § 750(A)(1); *In re Williams v. Cornelius*, 76 N.Y.2d 542, 546, 561 N.Y.S.2d 701, 703, 563 N.E.2d 15, 17(1990).

12. Judiciary Law § 750(A)(2).

13. *Id*. § 750(A)(3).

14. *Id*. § 750(A)(4).

15. *Id*. § 750(A)(5).

16. *Id*. § 750(A)(6).

17. *Id*. § 750(A)(7).

18. *Id*. § 750(B).

19. *Id*. § 751.

20. *Id*. § 753(B).

21. *Id*. § 753(A)(1).

22. *Id*. § 753(A)(2).

23. *Id*. § 753(A)(3).

24. *Id*. § 753(A)(4).

25. *Id*. § 753(A)(5).

26. *Id*. § 753(A)(6).

27. *Id*. § 753(A)(7).

28. Siegel, *supra* note 1, at § 481, at 835.

29. *Id*. § 481, at 836; Ass'n of Justices of the Sup. Ct., St. of N.Y., Bench Book for Trial Judges — New York, at § 8:1, at 365 (2013) [hereinafter Bench Book] (citing CPLR 2308(a); *Tener v. Cremer*, 89 A.D.3d 75, 78, 931 N.Y.S.2d 552, 554 (1st Dept 2011)).

30. David L. Ferstendig, New York Civil Litigation, at § 12.40 n.31, at 12-84, 12-85 (2014) (citing CPLR 5251).

31. *See* The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XXX — Subpoenas*, 86 N.Y. St. B.J. 64, 57 (Feb. 2014); The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XXXI — Subpoenas Continued*, 86 N.Y. St. B.J. 64, 56 (Mar./Apr. 2014).

32. Siegel, *supra* note 1, at § 481, at 836; § 508, at 887; Ferstendig, *supra* note 30, at § 12.40, at 12-84 (citing CPLR 5251).

33. Siegel, *supra* note 1, at § 508, at 887.

34. *Id*.

35. *Id*.

36. Ferstendig, *supra* note 30, at § 12.40, at 12-84, 12-85 (citing CPLR 5251).

37. Siegel, *supra* note 1, at § 523, at 917.

38. *Id*. § 481, at 835.

39. *Id*. § 481, at 836.

40. *Id*. § 481, at 835 (citing CPLR 5105(1)).

41. *Id*. (citing CPLR 5105(2)).

42. *Id*. (citing *In re Avalon E., Inc. v. Monaghan*, 43 Misc. 2d 401, 407, 251 N.Y.S.2d 290, 296–97 (Sup. Ct. N.Y. County 1964)).

43. *Id*. (citing *Gould v. Jacobs*, 44 Misc. 2d 990, 992–93, 256 N.Y.S.2d 20, 23–24 (Sup. Ct. N.Y. County 1964), *aff'd*, 24 A.D.2d 934, 934, 263 N.Y.S.2d 1004, 1004 (1st Dep't 1965)).

44. *Id*. § 481, at 835.

45. *Id*. (citing *National Sur. Corp. v. Silver*, 17 N.Y.2d 477, 479, 266 N.Y.S.2d 983, 984, 214 N.E.2d 162, 163 (1965), *aff'g on dissent*, 23 A.D.2d 398, 402–03, 261 N.Y.S.2d 511 (1st Dep't 1965) (Eager, J., dissenting)).

46. *Id*. (citing CPLR 7109(b)).

47. *Id*. (citing CPLR 7109(b)).

48. *Id*. § 481, at 836 (citing CPLR 2201, 3211(a)(4), 5519); *McCormick v. Axelrod*, 59 N.Y.2d 574, 585, 466 N.Y.S.2d 279, 284, 453 N.E.2d 508, 514–15 (1983).

49. *People v. Colombo*, 31 N.Y.2d 947, 949, 341 N.Y.S.2d 97, 98, 293 N.E.2d 247, 247 (1972) ("[D]efendant was indicted for the same act and offense for which he previously was punished by Justice Barshay for contempt of court pursuant to section 750 of the Judiciary Law. The same evidence proves the Judiciary Law contempt for which defendant was previously punished and the Penal Law contempt charged in the indictment, and the elements of the two contempt charges are the same.").

50. *Id.*, 341 N.Y.S.2d at 98, 293 N.E.2d at 248.

51. Bench Book, *supra* note 29, at § 3:4, at 97–98 (citing *People v. Leone*, 44 N.Y.2d 315, 317–18, 405 N.Y.S.2d 642, 643, 376 N.E.2d 1287, 1288 (1978) ("Thus, once a contempt goes to indictment and prosecution, forgiveness by an individual Judge or court may not be permitted to frustrate the power to punish for the affront to public justice. Purging of the contempt, therefore, is not permissible, at least in the absence of statutory authority."); *People v. Williamson*, 136 A.D.2d 497, 498, 523 N.Y.S.2d 817, 818 (1st Dep't 1988) ("While it is that a true contemnor, once adjudicated in criminal contempt, [may] be allowed to purge . . . by performance of the act required, there is no right to . . . purge order. Rather, whether a contempt should go unpunished, and, if so, on what conditions, is a matter . . . within the discretion of the court.")).

52. Siegel, *supra* note 1, at § 481, at 836 (citing Judiciary Law § 750(A)(1); *Katz v. Murtagh*, 28 N.Y.2d 234, 238, 321 N.Y.S.2d 104, 107–08, 269 N.E.2d 816, 818–19 (1971)); Judiciary Law § 755.

53. Bench Book, *supra* note 29, at § 3:4, at 94 (citing *In re Hart*, 7 N.Y.3d 1, 7, 816 N.Y.S.2d 723, 727, 849 N.E.2d 946, 950 (2006); *In re Mangiatordi v. Hyman*, 106 A.D.2d 576, 576–77, 483 N.Y.S.2d 82, 82–83 (2d Dep't 1984)).

54. 22 N.Y.C.R.R. 604.2(c) (First Department), 701.4 (Second Department); *In re Pronti v. Allen*, 13 A.D.3d 1034, 1035–36, 787 N.Y.S.2d 470, 471–72 (3d Dep't 2004) (vacating contempt order because judge failed to warn defendant before finding him in contempt).

55. *Kunstler v. Galligan*, 168 A.D.2d 146, 150, 571 N.Y.S.2d 930, 932 (1st Dep't) ("[W]e find respondent Justice was justified in instantly responding to restore 'proper order and decorum' in the courtroom, since the petitioner's disorderly, contemptuous, and insolent behavior, displayed in open court, in the immediate view and presence of respondent Justice, resulted in disrupting a calendar call, and tended to seriously 'undermine the dignity and authority of the court in a manner and to the extent that it [appeared] unlikely that the court [would] be able to continue to conduct its normal business in an appropriate way."), *aff'd*, 79 N.Y.2d 775, 777, 579 N.Y.S.2d 648, 648, 587 N.E.2d 286, 286 (1991).

56. *Kunstler*, 79 N.Y.2d at 777, 579 N.Y.S.2d at 648, 587 N.E.2d at 286; Bench Book, *supra* note 29, at § 3:4, at 94 (citing *In re Rodriguez v. Feinberg*, 40 N.Y.2d 994, 995, 391 N.Y.S.2d 69, 69, 359 N.E.2d 665, 665 (1976); *In re Roajas v. Recant*, 249 A.D.2d 95, 96, 671 N.Y.S.2d 459, 461 (1st Dep't 1998)).

57. Judiciary Law § 752.

58. *Briddon v. Briddon*, 229 N.Y. 452, 458, 128 N.E. 675, 676–77 (1920).

59. *In re Carlino v. Downs*, 244 A.D. 801, 801, 279 N.Y.S. 510, 511 (2d Dep't 1935).

60. Judiciary Law § 751.

61. *In re Breitbart v. Galligan*, 135 A.D.2d 323, 325, 525 N.Y.S.2d 219, 220–21 (1st Dep't 1988).

62. Bench Book, *supra* note 29, at § 3:4, at 94.

63. *In re Williams*, 76 N.Y.2d at 546, 561 N.Y.S.2d at 703, 563 N.E.2d at 17; Judiciary Law § 751(1).

64. Bench Book, *supra* note 29, at § 3:4, at 96; *see also* 22 N.Y.C.R.R. 604.2(b) (First Department), 701.3 (Second Department).

65. 22 N.Y.C.R.R. 604.2(d) (First Department), 701.5 (Second Department).

66. *Id.*

67. *Id.*

68. The First and Second Department's rules provide the safeguards and rights that an accused must be afforded. *See* 22 N.Y.C.R.R. 604.2(b), 701.3.

69. Bench Book, *supra* note 29, at § 3:4, at 96.

70. *Id.*

71. *Id.*

72. *Id*. (citing *Ingraham v. Maurer*, 39 A.D.2d 258, 259–60, 334 N.Y.S.2d 19, 21 (3d Dep't 1972)).

73. Byer's Civil Motions, *supra* note 2, at § 19:03, at 221 (citing *McCain v. Dinkins*, 84 N.Y.2d 216, 230, 616 N.Y.S.2d 335, 343, 639 N.E.2d 1132, 1140 (1994)).

74. *In re Dale*, 87 A.D.3d 198, 199, 927 N.Y.S.2d 267 (4th Dep't 2011).

75. Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 22.05, at 864 (6th ed. 2013) (citing *Lu v. Betancourt*, 116 A.D.2d 492, 494, 496 N.Y.S.2d 754, 756 (1st Dep't 1986) (holding that service by mail is sufficient for civil contempt but that landlord should have been personally served for criminal contempt)); *People v. Balt*, 34 A.D.2d 932, 933, 312 N.Y.S.2d 587, 589–90 (1st Dep't 1970); Siegel, *supra* note 1, at § 484, at 842 (citing *Dep't of Hous. Pres. & Dev. v. Arick*, 131 Misc. 2d 950, 953, 503 N.Y.S.2d 489, 491–92 (Civ. Ct. N.Y. County 1986), *rev'd on other grounds*, 137 Misc. 2d 1079, 526 N.Y.S.2d 51 (App. Term 1st Dep't 1988)).

76. Siegel, *supra* note 1, at § 484, at 841.

77. *Id.*

78. Judiciary Law § 756; for more information on type size and font size *see* The Legal Writer, *Document Design: Pretty in Print — Part I*, 81 N.Y. St. B.J. 64, 52 (Mar./Apr. 2009); The Legal Writer, *Document Design: Pretty in Print — Part II*, 81 N.Y. St. B.J. 64, 52 (May 2009).

79. *Ortega v. City of N.Y.*, 11 Misc. 3d 848, 863, 809 N.Y.S.2d 884, 897 (Sup. Ct. Kings County), *aff'd on other grounds*, 35 A.D.3d 422, 824 N.Y.S.2d 714 (2d Dep't 2006), *aff'd*, 9 N.Y.3d 69, 845 N.Y.S.2d 773, 876 N.E.2d 1189 (2007).

80. Gray, *supra* note 7, at 372.

81. *Delijani v. Delijani*, 107 A.D.3d 930, 931, 970 N.Y.S.2d 700 (2d Dep't 2013) (citing Judiciary Law § 750(A)(3); *In re Dep't of Envtl. Prot. of City of N.Y. v. Dep't of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 240, 519 N.Y.S.2d 539, 542, 513 N.E.2d 706, 709 (1987); *Town Bd. of Town of Southampton v. R.K.B. Realty, LLC*, 91 A.D.3d 628, 629, 936 N.Y.S.2d 228, 231–32 (2d Dep't 2012); *McGrath v. McGrath*, 85 A.D.3d 742, 742–43, 924 N.Y.S.2d 805, 805 (2d Dep't 2011)).

82. *County of Rockland v. Civil Serv. Emps. Ass'n*, 62 N.Y.2d 11, 16, 475 N.Y.S.2d 817, 819, 464 N.E.2d 121, 123 (1984).

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: A colleague has just informed me that the word *any* is incorrect when it refers to more than a singular noun. Thus, it is ungrammatical to say "any clients" or "any problems." Is he right?

Answer: No, your colleague is wrong. I am often informed of strange grammatical "rules," but this is a new one for me. *Any* can modify either singular or plural nouns, and all of the following constructions are correct:

Any guests invited are welcome.
Any guest is welcome.
Any damage or loss is covered.
Any damages or losses are covered.

Your colleague's misunderstanding may be caused by his reliance upon the etymology of the word *any*, which is derived from the Old English word *an* ("one"); later the suffix *ig* was added to *an*, then reduced to *y*, giving us the current English word *any*. Because of this progression, *any* currently is without a number of its own and instead takes the number of the word it modifies.

A similar change has occurred with the word *none*, which was also derived from Old English (Anglo-Saxon) centuries ago. Originally the phrase *ne an* merged to become a single negative; now it can be either singular or plural, depending on the user's intent:

All guests are welcome. None is barred . . .
All are welcome. None are barred . . .

Perhaps one caveat should be added: The construction "The witness did not hurt our case any" is still considered colloquial, not standard, English. For standard English, substitute *at all* for *any* or simply say, "The witness did not hurt our case."

The pairs *either/or* and *neither/nor* are similar to *none* in deciding their number. There's no problem when both members of each pair are alike in number. For example, in the statement "Neither the plaintiff nor the defendant *is* lying," use the singular verb *is*. And if both members of each pair are plural, use the plural *are*. But there is a problem when the members of the pairs differ in number. For example:

Either the book or the excerpts of it *are* helpful.
Either the excerpts of the book or the book itself *is* helpful.

The principle governing this choice of the following verb is called "attraction." As you can see from both examples, base your choice on the number of the noun closest to the verb. That principle supersedes both logic and grammar. It has evolved simply because that choice has seemed "natural" by native speakers of English.

Notice how idiom has overcome grammar in some other situations:

Many a recent law school graduate *owes* large debts.
All but one plaintiff *has* decided to end her suit.

As you have noticed the subject of of both sentences – "Many" and "All" – is plural. Yet native speakers prefer a "natural" selection to a grammatical one, choosing singular (idiomatic) verbs – "owes" and "has."

The question of verb number puzzles other readers. Here are two questions readers sent on that subject:

The first page and the editorials of a crusading newspaper are its one/two punch.
The corporation and each of its subsidiaries are duly incorporated.

As native speakers, most people reading these examples are as competent as I to make this decision, so choose your own answer. But I can tell you what I'd do: I would evade the question by making both subjects ("page" and "editorials") singular. So my revised first statement would be "The first page and the editorial page . . ." The second statement would be revised as "Both the corporation and each of its subsidiaries are duly incorporated." (This device is more accurately called "fudging," but it works.)

As you may have noticed, this problem occurs only in present-tense contexts. I have never seen statements like "There has been no occurrences in the past"; or, "There was no excuses for the defendant's conduct."

Potpourri

Speaking of idiom, here's a statement I especially like: "I don't want to go to that restaurant for lunch. Nobody goes there; it's too crowded." Suppose you were a foreign student who has just learned English. Would you understand that comment?

Are you familiar with this designation, sent by a reader in Boston: "To the familiar two possibilities everyone understands (married/unmarried), there's a new one: 'related,' which means 'unmarried but not single.'"

Another reader pointed out a strange metaphor he found in a *New York Times* column, in which the columnist wrote about "the financial crisis that the *housing crisis fueled*." How can a crisis *fuel* anything?

A friend told me about an incident that occurred while she waited in the checkout line at a local supermarket. The young checker was puzzled by an artichoke on the counter in front of her. "What's that?" she asked the customer. "It's an artichoke," the customer replied. The checker slowly studied the price list, as the line of customers lengthened. Finally, she asked, "Artichoke starts with an *r*, right?" Should "texting" be blamed?

As George Bernard Shaw said, "The single biggest problem in communication is the illusion that it has taken place." ■

Gertrude Block (block@law.ufl.edu) is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XXXII — Contempt Motions

In the last issue, the *Legal Writer* concluded its discussion of subpoenas.

We continue the series on New York civil-litigation documents by discussing civil- and criminal-contempt motions.

Contempt: The Basics

CPLR 5104 provides that if a judgment or court order, whether interlocutory or final, isn't enforceable under CPLR's Article 52 or CPLR 5102, you may enforce the judgment or order by moving for civil or criminal contempt.[1] Article 52 discusses how to enforce money judgments. CPLR 5102 explains how to execute on a judgment of possession for real or personal property.

Article 19 of the Judiciary Law governs the procedure to punish for contempt.[2]

The penalty for an offense against "public justice" is criminal contempt.[3] Criminal contempt is "designed to vindicate and uphold the authority of the judiciary."[4]

The penalty for violating a "private right" is civil contempt.[5] Civil contempt is meant to redress a litigant's rights.[6]

Contempt — civil and criminal — is civil in nature. Yet a "criminal contempt proceeding, while civil in nature, has vindication as its objective, not remediation."[7]

Contempt is a crime only under Penal Law §§ 215.50 and 215.51.

A court may summarily punish a person for contempt if the contempt is committed in the court's immediate view and presence. This is called summary criminal contempt.

If the court doesn't exercise its summary contempt power, the court may exercise its plenary contempt power. For plenary contempt, the accused must be given due process: notice of the contempt accusation and an opportunity to be heard.[8]

If your client is aggrieved, you may move for civil or criminal contempt, or both.

The court must decide whether civil or criminal contempt, or both, is appropriate and must determine the punishment. If factual disputes exist about the alleged contemnor's conduct, the alleged contemnor has the right to an immediate trial.

The *Legal Writer* will briefly discuss Penal Law contempt as well as summary criminal contempt but will emphasize civil- and criminal-contempt motions in the civil-litigation context.

Conduct Punishable by Contempt

Judiciary Law § 750 outlines what conduct is punishable by criminal contempt.

Judiciary Law § 753 outlines the conduct punishable by civil contempt. CPLR 5104 and 5251 also outline what conduct can lead to a civil-contempt penalty.

Courts not of record may not punish for criminal contempt unless a statute grants that power.[9]

Courts of record[10] have the power to punish for criminal contempt for the following conduct:

- "[D]isorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence and directly tending to interrupt its proceedings, or to impair the respect due to its authority."[11]
- Breaching the "peace, noise, or other disturbance, directly tending to interrupt proceedings."[12]
- Willfully disobeying a lawful mandate.[13]
- Willfully resisting a lawful mandate.[14]

If your client is aggrieved, you may move for civil or criminal contempt, or both.

- A subpoenaed witness's contumacious and unlawful refusal to be sworn in. Or, after being sworn in, refusing to answer any legal and proper question.[15] "Contumacious" in the criminal-contempt context means willful, perverse, and obstinate. Subpoenaed witnesses may also be punished for civil contempt (see below). When behavior is contumacious and unlawful, criminal contempt is the punishment.
- Publishing a false or grossly inaccurate report of a court's proceedings.[16]
- Jury service and witness testimony: willful failure to comply with Judiciary Law Articles 16, 17, 18, 18-a, and 18-b.[17] This includes refusing to serve as a juror, refusing to be sworn as a juror, and subjecting an employee to discharge or penalty for missing work because of jury duty or for being a witness.

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