MARCH/APRIL 2008
VOL. 80 | NO. 3

NEW YORK STATE BAR ASSOCIATION

Journal

Personal Images

Unauthorized Publicity vs. Public Interest

by James A. Johnson

Also in this Issue

Common-Law Dissolution in New York

Outsourcing and Intellectual Property Rights

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Journal

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PRESIDENT'S MESSAGE

KATHRYN GRANT MADIGAN

"Celebrating Our Diversity"

"We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability." Excerpt from NYSBA Diversity Policy, adopted in 2003.

Our Association's diversity policy defines diversity inclusively: "encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability." We have undertaken aggressive, multifaceted approaches to more effectively identify, nurture and grow a diverse leadership. We recognize that it is not enough to have a diversity policy. Words alone, no matter how well intentioned, will not suffice. Actions, once taken, must be measured and be responsive to changing needs. And we have good news to report. Here are some of the highlights.

Governance Initiatives

Let me take you back to 1983 and my first House of Delegates meeting in Cooperstown. I was 30. And as I gazed with awe at the sea of committed bar leaders, it hit me that I was a minority. Overwhelmingly so. I saw few lawyers of color. A woman here and there. Very few delegates under 35.

Fast forward to today. Our House is just as committed, if not even more collegial, as nearly 25 years ago, but it is now a mosaic: men and women, all ages, races and ethnicities, sexual orientations and disabilities. Dramatic evidence that yes, we are on the right path.

Our key governance initiatives added 12 diversity seats to the House of Delegates and two member-at-large diversity seats to our Executive Committee. But that alone cannot account for the changes in our House and Executive Committee leadership. Our Section and local bar delegates are also far more diverse. From the top-down, we have made it a long-term, indelible commitment.

Committee on Diversity and Leadership Development

This Standing Committee, now in its fourth year, is co- and vice-chaired by a triumvirate of Past Presidents: Lorraine Power Tharp, Ken Standard and Tom Levin, demonstrating our deep commitment to diversity at all levels of the Association. In addition to identifying and nurturing diverse future leaders, this Committee has co-sponsored a series of Regional Diversity Receptions, joining with county, women's, ethnic, minority and specialty bars across the state. Leadership training seminars after our House of Delegates meetings have been a huge draw for members seeking opportunities for leadership. Most important, we are benchmarking and measuring our success. Every two years the Committee on Diversity and Leadership Development administers and reports on the results of our Diversity Report Card, which primarily evaluates the diversity of Section leadership, membership, programs and publications.

2007 Diversity Report Card

The news is good but could be better. Since the last Report Card in 2005, we have an uptick in women Section officers and other Section leadership positions but still lag behind when compared to the percentage of women in the Association overall. Too many Sections have no women officers.

A 3% increase in racial and ethnic minority leadership is encouraging, as is the fact that the number of Section leaders from three racial/ethnic minority groups (Asian/Pacific Islander, black/African American, and Hispanic) has doubled, along with an increase in the number of our Sections with a Diversity Committee and formal diversity plans. Yet most of our Sections have few, if any, minorities within their leadership ranks.

Given the many and varied Section and Committee diversity initiatives, we can expect that our 2009 Diversity Report Card will reveal greater gains.

Section and Committee Diversity Initiatives

Where to begin? From our highly acclaimed CLE offerings such as "Women on the Move" (now in its fifth incarnation), the Commercial and Federal Litigation Section's "Smooth Moves" program for minority in-house counsel, the Minority Fellowship in Environmental Law, our redesigned Web site and meetings signage for the visually impaired, and from our active Senior Lawyers Committee to our new LGBT Committee, we have much to celebrate.

We applaud the many Sections that provide financial support to lawyers of color, government and public service attorneys, young lawyers and other under-represented groups through Section meeting discounts and subsidies. Some Sections now sponsor Minority Scholarships, through restricted gifts to the Bar Foundation. We recently honored Taa Grays for her pioneering efforts with the 2008

KATHRYN GRANT MADIGAN can be reached on her blog at http://nysbar.com/blogs/president.

PRESIDENT'S MESSAGE

Diversity Trailblazer Award during our "Celebrating Diversity in the Bar" Reception, which has become a standing-room-only event and an Annual Meeting week tradition.

Diversity fosters intellectual growth; it allows us to challenge our assumptions and learn from each other. We must grow not only in numbers but in differences, because from our differences flow healthy debate and innovative solutions. Diversity will always be a priority, and we are making genuine progress. And that is reason to celebrate! ■

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NYSBACLE

Partial Schedule of Spring Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Introductory Strategies on Ethics and Civility in Everyday Lawyering

(program: 9:00 am–12:45 pm)

Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism

April 4	Albany; Buffalo; New York City
April 18	Melville, LI
April 25	Rochester

Practical Skills Series: Family Court Practice: Support, Family Offense Proceedings and Ethics

Fulfills NY MCLE requirement for all attorneys (7.5): 2.0 ethics and professionalism; 3.0 skills; 2.5 practice management and/or professional practice

April 8	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Women on the Move 2008 – Clarity, Focus and Action

(program: 12:00–5:10 pm)

Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 skills; 1.5 law practice management; 1.0 professional practice

April 9	Syracuse

A Day in Discovery: Win Your Case Before Trial with Jim McElhaney

Fulfills NY MCLE requirement for all attorneys (7.0): .5 ethics and professionalism; 6.5 skills

IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.

April 17	Tarrytown
April 18	New York City

Representing a Political Candidate (and Winning!): A New York Election Law Primer

(program: 9:00 am–1:00 pm)

April 23	Buffalo
April 25	Tarrytown
May 7	New York City
May 14	Albany
May 16	Melville, LI; Syracuse

Advanced Equitable Distribution: Valuing and Dividing Professional Practices and Closely-Held Businesses

+Fulfills NY MCLE requirement (4.0): 4.0 practice management and/or professional practice

(program: 9:00 am–12:35 pm)

April 25	Tarrytown
May 9	Rochester
May 16	Melville, LI
June 13	Albany
June 20	New York City

Can the Commercial General Liability Policy Survive? Recent Development Affecting Coverage for Bodily Injury Claims Under the CGL Policy

Fulfills NY MCLE requirement for all attorneys (6.5): .5 ethics and professionalism; 6.0 areas of professional practice

April 29	Albany; New York City
May 1	Buffalo
May 2	Syracuse
May 6	Plainview, LI

Meet the Third Department Justices

(program: 3:00–5:00 pm; reception: 5:00–6:00 pm)

April 30	Albany

DWI on Trial VIII

Fulfills NY MCLE requirement for all attorneys (10.5): 7.5 skills; 3.0 professional practice

IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.

May 1–2	New York City

Long Term Care

May 2	New York City
May 9	Albany
May 16	Rochester

Practical Skills Series: Basic Tort and Insurance Law Practice

Fulfills NY MCLE requirement for all attorneys (6.5): .5 ethics and professionalism; 2.5 skills; 3.5 practice management and/or professional practice

May 20	Albany; Buffalo; Melville, LI; New York City; Syracuse; Westchester

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Out the Door, But Not Over the Hill – Options for the Mature Lawyer

(program: 1:00–5:00 pm)

May 6	Albany
May 14	New York City
May 21	Hauppauge, LI

Practical Skills Series: Basics of Intellectual Property Law

Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice

May 8	Buffalo; Hauppauge, LI; New York City; Syracuse

Criminal Motion Practice

TBD	Buffalo
May 15	Albany
May 22	New York City

Immigration Law Update 2008

May 13–14	New York City

Getting Ready in New York: Public Health Emergency Legal Preparedness

May 15	Yonkers

Beyond Medicaid: Alternative Methods for Financing Long-Term Care

May 21	Syracuse
June 4	Hauppauge, LI
June 5	New York City
June 6	Albany; Buffalo
June 17	Tarrytown

+Fourth Annual International Estate Planning Institute

(program: May 27, 2:00–5:30 pm; May 28, 8:15 am – 5:00 pm)

May 27–28	New York City

To register or for more information call toll free **1-800-582-2452**

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Complete Spring CLE Schedule can be found at:
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James A. Johnson (johnsonjajmf@yahoo.com) of James A. Johnson, Esq., in Southfield, Michigan, concentrates on intellectual property licensing with an emphasis on sports- and entertainment-related intellectual property litigation. Mr. Johnson is a Certified NBA Players Agent, litigator, and a member of the Massachusetts, Michigan and U.S. Supreme Court Bars.

Personal Images: The Professional Athlete's Right of Publicity

By James A. Johnson

The First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. This is congruent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.

Distinction of Rights

The right of publicity is a protectable property interest in one's name, identity or persona. Every person – celebrity or non-celebrity – has a right of publicity, which is the right to own, protect and commercially exploit one's identity. The genesis of the legal right of publicity is rooted in and intertwined with the right of privacy.[1]

The right of privacy is a personal right; it is non-assignable and terminates at death. It protects against intrusions upon one's seclusion or solitude to obtain private facts for public disclosure, facts that would be highly offensive, false or embarrassing to a reasonable person. In short, this is a right to be left alone. Privacy and publicity rights become entwined when one's name or likeness is appropriated, without permission, for the benefit of another.[2] To illustrate: a photograph in an advertisement causes injury to a plaintiff. If that injury is to the plaintiff's feelings and dignity, resulting in mental

or physical damages, that implicates the right of privacy. If that injury is infringement upon the plaintiff's legal right to exploit for commercial purposes his or her name, character traits, likeness[3] or other indicia of identity, that comes within the ambit of publicity rights. Depending on state law a caricature,[4] popular phrase ("Here's Johnny"),[5] sound-alike voice,[6] name in a car commercial,[7] animatronic likeness[8] and statistics of professional baseball players,[9] used without consent, have all been held to come within the ambit of publicity rights, constituting infringement.

Proprietary Interest

An individual has the right to control, direct and commercially use his or her name, voice, signature, likeness or photograph. Publicity rights may include the right to assign, transfer, license, devise and to enforce the same against third parties. Today, 18 states have publicity statutes,[10] which differ widely. At least a half dozen other states rely on common law, and 12 states do not recognize the right of publicity.[11]

Constitutional Protection

The reporting of newsworthy events, with nonconsensual use of a name or photo in a magazine, is afforded First Amendment guarantees of freedom of speech and the press.[19] There is no violation of publicity rights; newsworthiness provides constitutional protection. Where a newspaper was selling promotional posters of NFL Quarterback Joe Montana's four Super Bowl Championships,[20] and the posters were reproductions of actual newspaper pages of that newspaper, the California Court of Appeals opined that the posters depicted newsworthy events and the newspaper had a right to promote itself with them.

A prevailing party, in appropriate circumstances, can collect treble damages, costs and attorney fees on Lanham Act claims.

Commercial value together with the commercial exploitation without prior consent triggers a cause of action. The unauthorized use, in a commercial context, engenders money damages or equitable relief by way of an injunction or both. Moreover, as to a celebrity, subject to exemptions, the post-mortem right of publicity extends after death to 70 years in California[12] and 100 years in both Oklahoma[13] and Indiana.[14] New York, with one of the most developed jurisprudence in this area, excludes protection for the persona of deceased celebrities.[15]

Supplemental Jurisdiction

There is no federal statute or federal common law governing rights of publicity, which stands in contrast to other fields of intellectual property law. Nevertheless, federal claims of unfair competition and false advertisement or false endorsement under the Lanham Act,[16] together with a state claim of right of publicity, can be asserted in federal court under supplemental jurisdiction. A prevailing party, in appropriate circumstances, can collect treble damages, costs and attorney fees on Lanham Act claims by establishing unfair competition, dilution or the likelihood of public confusion.[17]

Monetary relief in establishing liability for infringement of one's right of publicity is measured by the commercial value of the person's name, likeness or persona. In the absence of actual loss of money as a result of the defendant's unauthorized use, the "going rate" or compensatory damages is the appropriate measure of damages. Where the defendant's activities are also in willful disregard of the plaintiff's rights, punitive damages are warranted.[18]

The plaintiff Tony Twist,[21] a former professional "enforcer" hockey player, sued the creator of a comic series who used the name Anthony "Tony Twist" Twistelli as a fictional Mafia character. Twist claimed association with the comic book thug damaged the endorsement value of his name. The Missouri Supreme Court adopted a predominant purpose test and held that the use and identity of Twist's name was predominantly a ploy to sell comic books rather than an artistic or literary expression. Under these circumstances, free speech must give way to the right of publicity. Because of improper jury instructions, however, the verdict of $24.5 million in the plaintiff's favor was set aside. A second trial in 2004 resulted in a $15 million jury verdict. On June 20, 2006, in a 3-0 opinion, a three-judge panel of the Eastern District Appeals Court upheld the $15 million jury verdict against the comic book creator Todd McFarlane and his company, Todd McFarlane Productions Inc.

A publisher of an artist's work depicting Tiger Woods's likeness, titled "The Masters of Augusta," is afforded First Amendment protection based on its being "fine art,"[22] despite the fact that 5,250 copies of the print had been sold. The court found that the print was not a mere

CONTINUED ON PAGE 14

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CONTINUED FROM PAGE 12

poster or item of sports merchandise, but rather an artistic creation seeking to express a message. Further, the right of publicity does not extend to prohibit depictions of a person's life story in a television miniseries,[23] book[24] or film.[25]

In *Gionfriddo v. Major League Baseball*,[26] the First Amendment protected Major League Baseball's use of names and statistics of four former players on MLB's Web sites, media guides, and programs for All-Star and World Series games. The California Court of Appeal held that those uses were of substantial public interest and not commercial speech.

New York's highest court extended such rights to a magazine that used a 14-year-old girl's picture, without her consent, to illustrate a magazine column on teenage sex and drinking. The New York Court of Appeals ruled that publishers cannot be held liable, so long as the photograph bears a genuine relationship to a newsworthy article and is not an advertisement in disguise,[27] despite the fact that the plaintiff's photo was used in a substantially fictionalized way and may by implication make the plaintiff the subject of the article. "[W]hen a plaintiff's likeness is used to illustrate a newsworthy article, the

NATIONAL BASKETBALL ASSOCIATION UNIFORM PLAYER CONTRACT

THIS AGREEMENT made this ___ day of _____ is by and between _____ (hereinafter called the "Team"), a member of the National Basketball Association (hereinafter called the "NBA" or "League") and _____, an individual whose address is shown below (hereinafter called the "Player"). In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows:

1. TERM.

The Team hereby employs the Player as a skilled basketball player for a term of Two (2) year(s) from the 1st day of September 2005.

2. SERVICES.

The services to be rendered by the Player pursuant to this Contract shall include: (a) training camp, (b) practices, meetings, workouts, and skill or conditioning sessions conducted by the Team during the Season, (c) games scheduled for the Team during any Regular Season, (d) Exhibition games scheduled by the Team or the League during and prior to any Regular Season, (e) if the Player is invited to participate, the NBA's All-Star Game (including the Rookie-Sophomore Game) and every event conducted in association with such All-Star Game, but only in accordance with Article XXI of the Collective Bargaining Agreement currently in effect between the NBA and the National Basketball Players Association (hereinafter the "CBA"), (f) Playoff games scheduled by the League subsequent to any Regular Season, (g) promotional, and commercial activities of the Team and the League, as set forth in this Contract and the CBA, and (h) any NBADL Work Assignment in accordance with Article XLII of the CBA.

3. COMPENSATION.

(a) Subject to paragraph 3(b) below, the Team agrees to pay the Player for rendering the services and performing the obligations described herein the Compensation described in Exhibit 1 or Exhibit 1A hereto (less all amounts required to be withheld by any governmental authority, and exclusive of any amount(s) which the Player shall be entitled to receive from the Player Playoff Pool). Unless otherwise provided in Exhibit 1, such Compensation shall be paid in twelve (12) equal semi-monthly payments beginning with the first of said payments on November 15th of each year covered by the Contract and continuing with such payments on the first and fifteenth of each month until said Compensation is paid in full.

* * *

12. PROHIBITED ACTIVITIES.

The Player and the Team acknowledge and agree that the Player's participation in certain other activities may impair or destroy his ability and skill as a basketball player, and the Player's participation in any game or exhibition of basketball other than at the request of the Team may result in injury to him. Accordingly, the Player agrees that he will not, without the written consent of the Team, engage, in any activity that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury including, but not limited to: (i) sky-diving, hang gliding, snow skiing, rock or mountain climbing (as distinguished from hiking), rappelling, and bungee jumping; (ii) any fighting, boxing, or wrestling; (iii) driving , or riding on a motorcycle or moped; (iv) riding in or on any motorized vehicle in any kind of race or racing contest; (v) operating an aircraft of any kind; (vi) engaging in any other activity excluded or prohibited by or under any insurance policy which the Team procures against the injury, illness or disability to or of the Player, or death of the Player, for which the Player has received written notice from the Team prior to the execution of this Contract; or (vii) participating in any game or exhibition of basketball, football, baseball, hockey, lacrosse, or

plaintiff may not recover under sections 50 and 51 [of the Civil Rights Law] even if the use of the likeness creates a false impression about the plaintiff."[28]

The New York ruling begs the question: Would the result have been different if a high-profile celebrity's picture was used without permission? Should any and all purported newsworthy uses provide a safe haven for authors and publishers? If § 50 of the Civil Rights Law provides a criminal misdemeanor penalty and § 51, civil damages, then when do they really become actionable? Moreover, how is it that celebrities may prevent the use of their visual and audio images, yet cannot stop authors from writing about them? The courts do not draw a clear path between commercial exploitation and protected expression. In this morass, questions abound and answers elude.

In *Cobb v. Time, Inc.*,[29] Randall "Tex" Cobb, a former professional boxer, sued *Sports Illustrated* for an article describing his alleged participation in drug use and a fixed boxing match. The Sixth Circuit affirmed summary judgment of the district court based on the actual malice standard, because Cobb was a public figure.

Consider the Ninth Circuit's reversal of $1.5 million in compensatory damages and $1.5 million in punitive

other team sport or competition. If the Player violates this Paragraph 12, he shall be subject to discipline imposed by the Team and/or the Commissioner of the NBA. Nothing contained herein shall be intended to require the Player to obtain the written consent of the Team in order to enable the Player to participate in, as an amateur, the sports of golf, tennis, handball, swimming, hiking, softball, volleyball, and other similar sports that a reasonable person would not recognize as involving or exposing the participant to a substantial risk of bodily injury.

13. PROMOTIONAL ACTIVITIES.

(a) The Player agrees to allow the Team, the NBA, or, a League-related entity to take pictures of the Player, alone or together with others, for still photographs, motion pictures, or television, at such reasonable times as the Team, the NBA or the League-related entity may designate. No matter by whom taken, such pictures may be used in any manner desired by the Team, the NBA, or the League-related entity for publicity or promotional purposes. The rights in any such pictures taken by the Team, the NBA, or the League-related entity shall belong to the Team, the NBA or the League-related entity, as their interests may appear.

* * *

(c) Upon request, the Player shall consent to and make himself available for interviews by representatives of the media conducted at reasonable times.

(d) In addition to the foregoing, and subject to the conditions and limitations set forth in Article II, Section 8 of the CBA, the Player agrees to participate, upon request, in all other reasonable promotional activities of the Team, the NBA, and any League-related entity. For each such promotional appearance made on behalf of a commercial sponsor of the Team, the Team agrees to pay the Player $2,500 or, if the Team agrees, such higher amount that is consistent with the Team's past practice and not otherwise unreasonable.

14. GROUP LICENSE.

(a) The Player hereby grants to NBA Properties, Inc. (and its related entities) the exclusive rights to use the Player's Player Attributes as such term is defined and for such group licensing purposes as are set forth in the Agreement between NBA Properties, Inc. and the National Basketball Players Association, made as of September 18, 1995 and amended January 20, 1999 and July 29, 2005 (the "Group License"), a copy of which will upon his request, be furnished to the Player; and the Player agrees to make the appearances called for by such Agreement.

(b) Notwithstanding anything to the contrary contained in the Group License or this Contract, NBA Properties (and its related entities) may use, in connection with League Promotions, the Player's (i) name .or nickname and/or (ii) the Player's Player Attributes (as defined in the Group License) as such Player Attributes may be captured in game action footage photographs. NBA Properties (and its related entities) shall be entitled to use the Player's Player Attributes individually pursuant to the preceding sentence and shall not be required to use the Player's Player Attributes in a group or as one of multiple players. As used herein, League Promotion shall mean any advertising, marketing, or collateral materials or marketing programs conducted by the NBA, NBA Properties (and its related entities) or any NBA team that is intended to promote (A) any game in which an NBA team participates or game telecast, cablecast or broadcast (including Pre-Season, Exhibition, Regular Season, and Playoff games), (B) the NBA, its teams, or its players, or (C) the sport of basketball.

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damages in *Hoffman v. Capital Cities/ABC, Inc.*[30] The Ninth Circuit disagreed with the district court's conclusion that a magazine article which featured a digitally altered photograph of Dustin Hoffman together with a fashion spread was pure advertisement and commercial speech. Instead, the court opined, the fashion article's purpose was not to propose a commercial transaction.[31] *Los Angeles Magazine* was fully protected by the First Amendment and could not be subjected to liability unless, under *New York Times v. Sullivan*,[32] the magazine intended to mislead its readers. Thus, the court raised the burden of proof to clear and convincing evidence that the magazine acted with constitutional "actual malice."

To keep the jump shot and other indicia of identity "pure," the individual's consent should be secured.

Is it now time for a uniform federal statute governing the rights of publicity? In 2004, the ABA Section of Intellectual Property Law proposed for consideration the following recommendation:

> That the American Bar Association supports the enactment of federal legislation to protect an individual's right of publicity to the extent the individual's identity is used for commercial purposes in "commerce," as that term is defined in Section 45 of the Lanham Act, 15 U.S.C. § 1127, and to prospectively preempt inconsistent state and territorial laws.

Post-mortem Rights

Two central issues in any right-of-publicity statute: (1) To whom does the right of publicity extend, to any person or just celebrities? And what elements of personality are protected – name, signature, voice? (2) Is a post-mortem property right provided? Not only do the publicity statutes in the 18 states vary widely, but so do the post-mortem protections. For example: in Kentucky post-mortem rights last 50 years; in Ohio, 60 years; in Tennessee, 10 years with a potential perpetual right, so long as there is no nonuse for two consecutive years. New York does not recognize a post-mortem right of publicity.

On September 7, 2007, the California Senate passed an act to amend § 3344.1 of the Civil Code, relating to deceased personalities: testamentary instruments. The legislative intent as set out in the Legislative Counsel's Digest is as follows:

> Existing law establishes a cause of action for damages on behalf of specified injured parties for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness for commercial purposes within 70 years of the personality's death, except as specified. Existing law provides that the rights recognized under these provisions are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person in whom the rights vest under these provisions or the transferees of that person.
>
> This bill would provide, instead, that the above property rights are freely transferable or descendible by contract or by means of any trust or any other testamentary instrument executed before or after January 1, 1985. It would provide that those rights shall be deemed to have existed at the time of death of any person who died prior to January 1, 1985, and shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death, except as specified. The bill would provide that, in the absence of an express provision in a testamentary instrument to transfer these rights, a provision in the instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights.

Senate Bill No. 771 was signed into law by the Governor on October 10, 2007.

Right to Use Persona

To keep the jump shot and other indicia of identity "pure," and to avoid a violation of the right of publicity, the individual's consent should be secured. Most professional athletes, as part of their employment, in their individual contracts and through the relevant collective bargaining agreements, give their consent to the team and league to broadcast their pictures, attributes and use of their names for promotional purposes. (*See* sidebar, page 14: NBA Uniform Player Contract #13 Promotional Activities and #14 Group License.) Absent expressed or implied consent, the most effective way is to obtain a release, endorsement agreement or a license. The appropriate instrument should transfer, in whole or in part, specific rights setting forth, at a minimum, the scope, term, representations, warranties, fees, choice of law and a morals clause. A morals clause permits a team, league, product developer or licensee to terminate the player or the agreement for engaging in criminal conduct or acts involving moral turpitude. (*See* sidebar, page 18: Sample Endorsement Agreement.)

Conclusion

Not all commercial unauthorized uses of identity violate the right of publicity. Violations turn on how the identities are used in a commercial context. Is the use solely to promote, sell or endorse products and services, or is it a

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Endorsement Agreement

_____ AGREEMENT made this _____ day of _____, by and between _____, a Delaware Corporation having its principal place of business at Minneapolis, Minnesota (Licensee) and _____, an individual residing in New York City (Licensor).

WHEREAS, Licensee wishes to use Licensor's name and likeness in Licensee's _____ forthcoming print marketing and advertising campaign, entitled _____ (The "Campaign") in connection with _____ _____ (the "Products");

WHEREAS, Licensee and Licensor desire to establish the terms of such use.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, Licensee and Licensor hereby agree as follows:

1. License

Licensee shall have the right, but not the obligation, to use the name and likeness of Licensor as attached as Exhibit A, in connection with the Campaign, for print advertising, out-of-home media, in-store marketing and direct mail in connection with the Product and for public relations materials, in any media, produced and distributed by Licensor to promote the Product and/or the Campaign, throughout the world, in any language and in multiple languages. Licensor agrees that Licensor will not use or license the likeness attached hereto as Exhibit A for use by any third party, in any print advertising or in-store or out-of-home media marketing or direct marketing for the duration of this Agreement applicable to in-store usage.

2. Term

_____ Licensee's rights under this Agreement shall terminate _____ months from first publication for print advertising and/or first out-of-home media usage for both print _____ _____ advertising and out-of-home media usage, and _____ _____ months from first in-store usage and/or public relations usage for all other uses. Licensee has the option to extend _____ use for print advertising and/or out-of-home media usage for an additional _____ months, to total _____ months from first use (of print and/or out-of-home media), upon payment of an additional use fee as set forth below.

3. Fees

Licensee shall pay Licensor $_____ upon first publication of the image, first out-of-home media usage or in-store usage, or first public relations usage, _____ _____ whichever comes first. Licensee shall pay Licensor an additional fee of $_____ upon Licensee's election by written notice to Licensor to exercise its option to extend the term for print advertising and/or out-of-home media.

4. Advertising and Marketing

All copy appearing on or with Licensor's image must be submitted to Licensor for written approval which approval may not be unreasonably withheld or delayed.

5. Representations and Warranties

Licensor represents and warrants that Licensor has the exclusive right to grant this license to use the likeness attached hereto as Exhibit A and that the rights granted will not infringe or violate any copyright, patent, trademark, trade name, service mark, trade dress or other personal property or proprietary right of any person or entity. Licensor agrees to indemnify and hold Licensee harmless against any and all claims, damages and expenses arising directly or indirectly from the breach of the foregoing representation and warranty.

6. Choice of Law

This Agreement shall be governed and constructed in accordance with the laws of the State of New York without regards to conflicts of laws. The parties agree the sole jurisdiction and venue for any disputes or actions arising under this Agreement shall be the jurisdiction of the Supreme Court of the State of New York or the United States District Court for the Southern District of New York.

7. Termination for Cause

Licensee may terminate this agreement upon written notice to the licensor, upon the Licensor's death, disability, suspension and for cause. Cause shall mean, the arrest, indictment or conviction for the commission of a crime by licensor or any other conduct, public or private, involving moral turpitude on which has or may reasonably be expected to have a material adverse effect on Licensee, its business, reputation or interests.

8. Entire Agreement

This Agreement, including all Exhibits hereto, constitutes the entire agreement between the parties relating to this subject matter and supersedes any and all prior or simultaneous representations, discussions, negotiations, documents and/or agreements, whether written or oral.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first set forth above.

LICENSOR
By:
Name:
Title:
LICENSEE
By:
Name:
Title:

CONTINUED FROM PAGE 16

fair use? The ultimate answer is based on the facts and circumstances of each case.

The value of endorsements is astronomical. With the advent of the Internet and sophisticated computer technology, we can expect the value of commercial endorsements by celebrities to go literally off the charts. As of July 2005, America's highest paid professional athletes for endorsements[33] were as follows:

Tiger Woods, golf	$80 million
Andre Agassi, tennis	$44.5 million
Lebron James, basketball	$24 million
Phil Mickelson, golf	$21 million
Dale Earnhart Jr., auto racing	$20 million

Fame is valued. The right of publicity protects the professional athlete's proprietary interest in the commercial value of his or her identity from exploitation by others.[34] Advertising is the quintessential commercial speech and a violation of the right of publicity is a tort that quintessentially consists of advertising. The crux of the right of publicity is the commercial value of human identity. In order to lawfully and properly exploit this legitimate proprietary interest, it is just like the game itself – one must know the rules. ■

1. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (rejected the common law right of publicity which led to the enactment of the New York privacy law, codified in the N.Y. Civil Rights Law §§ 50–51); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (first state to recognize a personal privacy right against unauthorized commercial exploitation); *Pallas v. Crowley Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911(1948) (Supreme Court of Michigan recognizes a right of publicity where invasion of privacy was pleaded in preventing the nonconsensual use of a model's photograph in a local department store advertisement. The plaintiff was not a nationally known celebrity. Michigan recognizes publicity rights through a derivative privacy right at common law); *Janda v. Riley-Meggs Indus.*, Inc., 764 F. Supp. 1223 (E.D. Mich. 1991). *Haelan Labs. v. Topps Chewing Gum* is the seminal case that coined the term right of publicity. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

2. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (1986) (demonstrates the labyrinth of intellectual property rights in publicity issues such as copyright infringement and trademark dilution).

3. *Newcombe v. Coors*, 157 F.3d 686 (9th Cir. 1998). Brooklyn Dodger pitcher Don Newcombe's stance and windup displayed in a drawing in *Sports Illustrated* created a triable issue of fact whether Newcombe is readily identifiable as the pitcher in the beer advertisement. (It is interesting to note that Don Newcombe, Cy Young Award, MVP and Rookie of the Year, is the only player in major league history to have won all three awards.)

4. *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989).

5. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

6. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Waits v. Frito Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

7. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

8. *Wendt v. Host Int'l Inc.*, 125 F.3d 806 (9th Cir. 1997); *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395 (9th Cir. 1992); 989 F.2d 1512 (9th Cir. 1993).

9. *Uhlaender v. Hendricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

10. California: Cal. Civ. Code § 3344.1; Florida: Fla. Stat. Ann. § 540.08; Illinois: 765 Ill. Comp. Stat. § 1075/30; Indiana; Ind. Code 32-36-1-1; Kentucky: Ky. Rev. Stat. Ann. § 391.170; Massachusetts: Mass. Gen. L. Ann., ch 214, § 3; Nebraska: Neb Stat. §§ 20-201–20-211 and 25-840.01; Nevada: Nev. Stat. §§ 597.77–597.810; New York: N.Y. Civ. Rights L. §§ 50–51, N.Y. Gen. Bus. L. §397; Ohio: Ohio Rev. Code Ann. § 2741.04; Oklahoma: 21 Okla. Stat. §§ 839.1–839.3; 12 Okla. §§ 1448–1449; Rhode Island: R.I. Gen. Laws § 9-1-28; Tennessee: Tenn. Code Ann. §§ 47-25-1101–47-25-1108; Utah: Utah Code Ann. § 45-3-1; Virginia: Va. Code Ann. §§ 8.01-40, 18.2-216; Washington: Wash. Rev. Code §§ 63.60.030–63.60.037; Wisconsin: Wis. Stat. Ann. §§ 895.50; in Texas the tort of misappropriation protects a person's persona and the unauthorized use of one's name, image or likeness. *Brown v. Ames*, 201 F.3d 654 (5tth Cir. 2000) (post-mortem right of publicity); Tex. Prop. Code §§ 26.001–26.015.

11. Alaska, Arizona, Idaho, Louisiana, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Vermont and Wyoming.

12. Cal. Civ. Code §3344.1(g).

13. Okla. Stat. Ann. tit. 12, § 1448(g).

14. Ind. Code Ann. § 32–36-1-8.

15. *Stephano v. News Group Publ'ns*, 64 N.Y.2d 174, 485 N.Y.S.2d 220 (1984).

16. Lanham Act § 43(a), 15 U.S.C. § 1125(a).

17. Lanham Act § 35(a), 15 U.S.C. § 1117(a).

18. *Frazier v. South Fla. Cruises, Inc.*, 19 U.S.P.Q. 2d (BNA) 1470 (E.D. Pa. 1991) (defendant placed a full-page unauthorized advertisement in Ring Magazine inviting the public to cruise with former world heavyweight champion, Smokin' Joe Frazier. Cecil Fielder, three-time MLB All-Star, in 2003 won over $400,000 against a design firm for using his name without permission in commercial ads).

19. *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976); *see Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995 (Col. 2001) (Colorado Sup. Ct. recognizes the tort of invasion of privacy by appropriation of name or likeness subject to First Amendment privilege where the use involves publication of matters that are newsworthy or of legitimate public concern).

20. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995); *see, e.g., Hogan v. Hearst*, 945 S.W.2d 246 (Tex. App. 1997) (exemplifying the breadth of the newsworthy exception in negating a claim of invasion of privacy based on disclosure of highly embarrassing facts, obtained from a public record); *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888 (Mass. App. Ct. 1999) (defense summary judgment on basis of newsworthiness to a statutory private facts claim).

21. *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

22. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *see Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (a T-shirt artist's realistic drawing of the Three Stooges was not sufficiently transformative to defeat a claim of California's publicity rights statute).

23. *Ruffin-Steinbeck v. Depasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000).

24. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (applying Texas law).

25. *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (applying Pennsylvania law).

26. 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).

27. *Messenger v. Gruner & Jahr Printing & Publ'g*, 94 N.Y.2d 436, 706 N.Y.S.2d 52 (2000).

28. *Id*. at 447.

29. 278 F.3d 629 (6th Cir. 2002).

30. 255 F.3d 1180 (9th Cir. 2001).

31. *Id*. at 1184–86.

32. 376 U.S. 254 (1964).

33. Kortney Stringer, *Winning Isn't Everything*, Detroit Free Press, Mar. 20, 2006, at C1.

34. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (involving famed Heisman Quarterback and Philadephia Eagle, case opened the door to the professional athlete's right of publicity).

BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury attorney in New York City. He teaches New York Practice at New York and Brooklyn Law Schools, is a member of the Office of Court Administration CPLR Advisory Committee, the author of the LexisNexis Answerguide *New York Civil Disclosure*, and is a frequent lecturer and writer on these and other civil practice topics.

"Old Dogs, Old Tricks"

In the fall of 2006 two columns were devoted to the then "new" deposition rules. Following the effective date of October 1, 2006, I sat back confidently and waited for a tsunami of cases invoking the new rules. As of this writing, 16 months later: nary a tsunami, and barely a trickle.[1] The first of the earlier columns, after discussing an assortment of deposition misbehavior the new rules were designed to curb, ended with a question:

> Can an old dog learn new tricks? Only time will tell. Are the new rules, despite their clear pronouncements, destined to be followed more in the breach, as has been the case with the existing body of case law on deposition practice and sanctions and penalties related to depositions? Again, only time will tell. If you are a poster child for bad behavior at depositions, is it time to reconsider your ways? You bet!

One could infer from the paucity of reported cases that the new rules have, by and large, been incorporated into practitioners' tool kits, and are being followed. One, a bit more cynical, might infer that the conduct of attorneys at depositions, and the concomitant reluctance to seek judicial redress by those aggrieved by misbehavior, continues. Since most deposition problems are worked out informally, with or without a call to the court, anecdotal evidence and personal experience will best inform the reader of the efficacy of the new rules in any given region in the state.

Still and all, it is worth reviewing the trickle of cases to learn how some of our colleagues are conducting themselves under the new rules.

"Objection, No Foundation. Don't Answer; But If You Do Answer, Allow Me to Suggest . . ."[2]

The first of two cases reported,[3] *Simmons v. Minerley*,[4] dated August 24, 2007, decided a motion to strike the plaintiff's complaint based upon the conduct of plaintiff's counsel in defending the plaintiff's deposition.

In addition to constant interruptions by plaintiff's counsel, the movant sought redress for two nefarious deposition techniques: directing the witness not to answer questions without a proper basis, and coaching the witness on how to answer questions.[5]

The court annexed the relevant portions of the transcript to its decision, and directly quoted two exchanges in the body of the decision:

> BY [Plaintiff's Counsel]:
> From an eighth of a mile?
> BY [Defense Counsel]:
> No. You have to stop interrupting –
> BY [Plaintiff's Counsel]:
> Can you picture an eighth of a mile?
> BY [Defense Counsel]:
> Judge, I hope when you read this that you listen to what this lawyer is doing.
> BY [Plaintiff's Counsel]:
> Can you picture an eighth of a mile?
> BY [Defense Counsel]:
> He didn't say he couldn't picture an eighth of a mile.
> BY [Plaintiff's Counsel]:
> He just said it.
> BY [Defense Counsel]:
> He didn't say he couldn't picture an eighth of a mile.
> BY [Plaintiff's Counsel]:
> He just said it.
> BY [Defense Counsel]:
> All right. Wait one second here.
> BY [Plaintiff's Counsel]:
> What are we waiting for?
> BY [Defense Counsel]:
> I'm going to call up Judge Pagones right now.[6]

In another portion of the transcript, the following exchange took place:

> [After acknowledging his signature on the notice of claim] plaintiff was then asked by defendants' counsel:
> "In that Notice of Claim, did you allege that there was an obstructed view of the intersection? Yes or no?"
> At that point, [plaintiff's counsel] stated:
> "I will not allow him to answer that because what's in the Notice? There's no testimony that he's read it and knows what's in it, so there's no foundation for that question. What the document says and what he knows it says may be two different things."
> [Defense counsel] stated:
> "I know that. We're not supposed to say any of this. We can do it outside of the presence of the witness."[7]

Justice Pagones examined the attorney's conduct within the context of the new rules:

> [Plaintiff's counsel's] apparent objection to the question was that there was "no foundation. [Plaintiff's counsel's] obligation pursuant to § 221.1(a) was to make his objection and to permit the plaintiff to answer the question. It is significant to note that [plaintiff's counsel's] first response when the question was asked was not to object but to immediately direct his client not to answer, although there was no assertion of a permissible basis as set forth in § 221.2. [Plaintiff's counsel] compounded his error by not-so-subtly instructing his client as to the response that he should give. The defense counsel advised [plaintiff's counsel] of the impropriety of his directions to no avail. As the transcript unequivocally indicates, during the portion of the deposition at issue, [plaintiff's counsel] repeatedly directed his client not to answer; repeatedly interrupted the deposition; and repeatedly provided instructions in his statements as to how the witness should respond.[8]

The court held that the plaintiff's attorney failed to comport with the spirit of the CPLR, and violated specific provisions of both Article 31 and 22 N.Y.C.R.R. Part 221 (the new rules).

The court declined to strike the plaintiff's complaint, reasoning it would unfairly punish the plaintiff for the conduct of the attorney. Instead, citing a Second Department case from 2006,[9] the court imposed a sanction of $2,500, payable to defense counsel, to compensate for the time expended and costs incurred as a result of plaintiff's counsel's conduct.

"I Am 'Not Aware of Any Rule of Law Which Requires Civility Between Counsel'"

In the second case, dated December 5, 2007, *Laddcap Value Partners, LP v. Lowenstein Sandler*,[10] defense counsel

moved for a court-appointed referee to supervise future depositions, and for an order directing that future depositions be held at the courthouse.

Justice Edmead began her decision with a quote from plaintiff's counsel in opposition to the motion (reproduced in the headnote of this section), and explained that "[t]he genesis of this application is a claim of contumacious, abusive, and strident conduct by counsel during a deposition."[11]

In this day and age, one imagines both Fred Flintstone and Archie Bunker would cringe at a male attorney calling a female attorney "hon."

The court gave a summary of plaintiff's counsel's conduct during the deposition of the plaintiff's representative:

> [Plaintiff's counsel] repeatedly directed the witness not to answer certain questions posed to him, followed by inappropriate, insulting, and derogatory remarks against [defense counsel] concerning her gender, marital status, and competence. Although both counsel agreed that all objections, except those as to form, were preserved, [plaintiff's counsel] made numerous speaking objections, and threatened to leave the deposition in response to such "leading" questions. [Defense counsel] also contends that [plaintiff's counsel] asked her several times, off the record, whether she was married.

The motion alleged that the conduct complained of was intended to intimidate questioning counsel and interfere with her ability to zealously defend and conduct further depositions, and claimed violations of a number of statutes and rules, including the new deposition rules.

In this day and age, one imagines both Fred Flintstone and Archie Bunker would likely cringe at a male attorney calling a female attorney "hon," advising her that if she tried the case she would be "one sorry girl," and referring to her having a "cute little thing going on."[12] Driving home the point that such conduct has long been eschewed, Justice Edmead quoted a 15-year-old New York County case where

> [plaintiff's counsel] directed to his colleague the following comments: "I don't have to talk to you, little lady"; "Tell that little mouse over there to pipe down"; "What do you know, young girl"; "Be quiet, little girl"; "Go away, little girl." [Defense counsel] states these comments "were accompanied by disparaging gestures . . . dismissively flicking his fingers and waving a back hand at me." The transcript contains the remarks and an attorney for another party corroborates the description of the gestures. The affidavit in opposition justifies the comments as "name-calling."[13]

Justice Edmead recited what was considered a given in 1992: "Given the rules applicable to professional conduct, any reasonable attorney must be held to be well aware of the need for civility, to avoid abusive and discriminatory conduct, to conduct proper depositions, to eschew obstructionist tactics, and to generally abide by the norms of accepted practice."[14]

The court granted the motion, finding violations of both the duty of civility and the duty to engage in gender-neutral conduct, and concluded:

> If such objectionable conduct has merited sanctions, which [defense counsel] does not even seek in this instance, surely guarding against future objectionable conduct by appointing a referee to essentially monitor [plaintiff's counsel] would not constitute improvident exercise of this Court's discretion. That [plaintiff's counsel] claims that he knows of no rule requiring attorneys to be civil is baffling and the Court is not swayed by [plaintiff's counsel's] pledge to behave at future depositions.[15]

In addition to the appointment of a referee, the court directed that future depositions be held at the courthouse. What I find remarkable about this case is that the aggrieved attorney exercised restraint and did not request sanctions under Rule 130, which the court clearly signaled would have been warranted.

Conclusion

While the majority of practitioners may well have incorporated the new rules into their deposition practice, at least a stubborn few have not. The example of the few, however, should instruct the many that judicial tolerance is low, and corrective action and/or punishment a near certainty.

So come on, you old dogs, learn and, more important, follow the "new" deposition rules. ■

1. Assuming two cases may actually constitute a trickle.
2. This is not a quote from counsel in any of the reported cases.
3. "Reported" being used a bit broadly, since the second case appeared in the *New York Law Journal*, but, as of this writing, did not appear online in either Lexis or Westlaw.
4. 16 Misc. 3d 1128(A), 847 N.Y.S.2d 905 2007 (Sup. Ct., Dutchess Co. 2007) (Pagones, J.S.C.)
5. The court also had to address a cross-motion for recusal made by the attorney defending the deposition, based upon the claim by the questioning attorney, after stating that he was going to call Justice Pagones, that "Judge Pagones is a friend of mine," followed by the explanation "[w]hen I say that he is a friend of mine I mean that every judge in this district is a friend of mine and officer of the court. And I assume that every judge is a friend of yours and your law firm's as well." *Id.* at 3. The court denied the request for recusal: "I am not a "good friend" of the defendants' counsel and am merely acquainted with him from his occasional appearance at trial over the years. It is the only basis for our interaction." *Id.* at 5.
6. *Simmons*, 16 Misc. 3d at 2.
7. *Id.*
8. *Id.* at 6.
9. *O'Neill v. Ho*, 28 A.D.3d 626, 814 N.Y.S.2d 202 (2d Dep't 2006).
10. 2007 WL 4901555 (Sup. Ct., N.Y. Co. 2007) (Edmead, J.S.C.).
11. *Id.*
12. *Id.*
13. *Principe v. Assay Partners*, 154 Misc. 2d 702, 586 N.Y.S.2d 182 (Sup. Ct., N.Y. Co. 1992) (Lebedeff, J.).
14. *Laddcap Value Partners*, 2007 WL 4901555.
15. *Id.*

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The Contours of Common-Law Dissolution in New York

By Philip M. Halpern

New York's Business Corporation Law § 1104-a (BCL), which became effective on June 11, 1979, creates a statutory cause of action in New York for the dissolution of a closely held corporation by a shareholder owning 20% or more of the outstanding shares of the corporation.[1] The statute provides for the presentation of a petition for dissolution on (1) the grounds of illegal, fraudulent or oppressive actions by directors or those in control of the corporation toward the complaining shareholder; or (2) the looting, waste or diversion of corporate property or assets by the corporation's directors, officers or those in control of the corporation.[2]

As a result of this legislation, shareholders owning at least 20% of the voting stock have had available to them in New York, since 1979, recourse for corporate malfeasance in the form of statutory dissolution.[3] However, shareholders of a closely held corporation owning less than 20% of the voting shares have no recourse pursuant to § 1104-a.

Shareholders in that situation have had, and continue to have, recourse in the form of common-law dissolution. Common-law dissolution, which predates BCL § 1104-a[4] is an equitable cause of action which permits shareholders below the 20% ownership threshold to seek dissolution of a private corporation under certain circumstances of malfeasance. Although common-law dissolution cases are relatively rare in New York, a body of case law has evolved (and continues to evolve) that sheds light on this cause of action, the burden of proof necessary to sustain such a cause of action, and the available remedies if liability is found to exist.

Burden of Proof for Common-Law Dissolution

The decision to dissolve a corporation is typically left in the hands of the directors and majority shareholders. The Legislature in New York has constituted these individuals as guardians of the corporation's welfare and, in the normal course, they determine whether dissolution is in the best interest of all shareholders.[5] With this power, however, comes responsibility.

As guardians of the corporate welfare, directors and majority shareholders are cast in the role of fiduciaries and must exercise their responsibilities "with scrupulous good faith."[6] If they "so palpably breach the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute," New York's common-law permits minority shareholders to sue for a judicially ordered dissolution.[7]

The "palpable breach of fiduciary duty" is the standard a plaintiff must satisfy to sustain the burden of proof for common-law dissolution. Courts in New York have universally cited to this standard – grounded in clear violations of the fiduciary relationship – when considering common-law dissolution causes of action.[8]

Although the "palpable breach" standard is the articulable standard that applies in New York, its vagueness begs the question as to what type and degree of breach must be shown to sustain the dissolution cause of action. Stated differently, at what point does the majority "so palpably breach" its fiduciary duty that its exclusive power to dissolve is relinquished to a judge sitting in equity? Several courts in New York have pinpointed two specific

circumstances warranting dissolution: (1) looting of the corporation by the majority so as to impair the capital of the corporation and (2) continuing the existence of the corporation for the sole or special benefit of the majority at the expense of the minority.[9]

Although these are indeed examples of palpable breaches which rise to the level sufficient to sustain a dissolution cause of action, they are not the only categories of misconduct which warrant equitable relief. The implicit argument set forth in the appellate case law that these two circumstances – and only these two – must occur to sustain a common-law dissolution cause of action is overly narrow, and ignores the broader nature of the "palpable breach" standard.

It also ignores the fact that New York's Court of Appeals has never defined the "palpable breach" standard as limited to these two circumstances. The determination of whether a sufficient showing has been made is adjudicated on a case-by-case basis considering all of the circumstances pertaining to the particular case in question. The cause of action arises in equity, where there are no bright-line rules for automatically sustaining or rejecting such a claim. The court, acting in equity, has the discretion and authority to do what is appropriate and fair, given all of the circumstances of the case.

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The universe of cases in New York concerning common-law dissolution is not large and a review of these cases confirms that the narrow approach as to what constitutes the necessary "palpable breach" is not in favor. For example, in *Leibert v. Clapp*,[10] the plaintiff, who owned a small number of shares in the defendant Automatic Fire Alarm Co., complained that those in control of the company were engaged in a conspiracy to manipulate and depress the market of the shares of the company, and squeeze out the minority shareholders. It was alleged that the conspiracy included siphoning off the income and profit of the company to a parent corporation and, rather than declare dividends for the benefit of all shareholders, the majority caused a huge earned surplus to be accumulated and diverted to the parent corporation. This in turn depressed the value of the shares of the company and allowed the majority to increase their shareholdings and control of the company.

The plaintiff in *Leibert* alleged not only looting of corporate assets and the continuation of the corporation for the sole benefit of the majority, but also that the majority was attempting to force minority shareholders to sell their holdings to them at a sacrifice and to freeze them out of the corporation. The Court of Appeals held, in the context of a motion to dismiss the *Leibert* complaint, that the allegations, if true, would establish that the directors and majority shareholders "so palpably breached the fiduciary duty they owe to the minority shareholders" and reversed dismissal of the dissolution cause of action.[11]

The plaintiffs in *Kroger v. Jaburg*[12] also made allegations beyond that of "looting" and "sole benefit" fact patterns. *Kroger* involved a corporation that had been unsuccessful and unprofitable since its inception, and because of changes in the trade, could not be made profitable for the future. Despite this circumstance, the president of the corporation, who was inexperienced and incompetent to run the company, used his stock control to increase his salary substantially and prevent the corporation from being dissolved. The plaintiffs alleged that the business at issue was unprofitable and could not be made profitable in the future; the corporation's capital was being impaired; its property was being wasted and dissipated; no dividends were being paid on its common stock; a default in dividends existed on its preferred stock; and the corporation had become obsolete. The court, reversing dismissal of the plaintiffs' first cause of action for common-law dissolution, recognized that "in courts of equity directors of a corporation are accountable as such for fraud, bad faith, and other breaches of trust," concluding that "the first cause of action sets forth facts sufficient to constitute a cause of action."[13]

Lewis v. Jones[14] involved a plaintiff who was the sole minority shareholder of each of the defendant corporations, and who was also an employee of said corporations. The plaintiff alleged that those in control engaged in a conspiracy designed to freeze him out including failing to pay him a salary, failing to pay dividends, and accumulating excessive earnings – beyond those needed for foreseeable projects. The purpose of the scheme was to force the plaintiff to sell his shares to the majority at prices vastly below their value, otherwise he would be permanently prevented from receiving any return on his investments.

The plaintiff's allegations of fraud, misappropriation and use of corporate assets for personal gain were viable for dissolution, said the court. Affirming denial of defendant's motion to dismiss, the court concluded that the plaintiff was not limited to a shareholder's derivative suit and that the complaint was sufficient to state a cause of action for common-law dissolution.

Fedele v. Seybert[15] involved a successful food market venture. The minority shareholder plaintiff brought his action for dissolution because the majority shareholders, who also owned a competing food market, were allegedly diverting business opportunities to the competing market, and creating phony financial statements to cover up their wrongdoing. The majority also attempted to amend

the bylaws of the shareholder's agreement to divest the minority shareholder of his management responsibilities, and took other steps to exploit the company to the detriment of the minority shareholder – *e.g.*, executed secret, unauthorized promissory notes, wrote checks drawn on the company's account, hired an employee whose salary was in excess of $50,000 – without the minority shareholder's consent. The court in *Fedele* recognized that beyond "looting" and "sole benefit" allegations, the plaintiff had alleged a pattern of "illegal, unfair and oppressive conduct" which severely prejudiced the plaintiff, and that the cause of action should properly proceed as a common-law dissolution cause of action.[16]

In re Charleston Square, Inc.[17] involved two corporations whose primary purpose was to purchase unimproved land and build houses thereon for profit. The plaintiffs were minority shareholders, one of whom was also employed by the corporations to build and sell houses. It was agreed that the employee-plaintiff would receive compensation for each house constructed, as well as a real estate commission for each house he sold. The plaintiffs ultimately had a falling out with the majority and asserted causes of action for common-law and statutory dissolution. In support thereof, they made allegations that the majority usurped corporate opportunities by selling undeveloped plots of land to other corporations (one of which was wholly owned by a majority defendant), wrongfully terminated the employee-plaintiff, failed to compensate the employee-plaintiff for services rendered, and failed to distribute dividends. In effect, the minority plaintiffs were squeezed out and deprived of the benefits of their investment. The court agreed with the lower court that the corporations at issue should be dissolved, and affirmed the order dissolving same.

The case law associated with the burden of proof in New York will continue to evolve as more common-law dissolution cases are litigated. However, the case law to date, as referenced above, indicates that "palpable breaches of fiduciary duty" can run the gamut of a broad range of corporate malfeasance.

It is important to remember, in assessing actionable dissolution conduct based upon the sparse holdings to date, that for such conduct to be actionable it must injure the minority shareholders specifically, and not just the corporation. The factual foundation for any common-law dissolution case is that the majority engages in conduct injurious to the minority and that the conduct of the majority will continue into the future. Contrariwise, conduct injurious to the corporation as a whole can only be remedied by a derivative action.

When misconduct targeted at the minority exists, the law in New York is clear that the minority is not relegated

to the exclusive remedy of a derivative suit. This dichotomy makes sense because a derivative action would only ultimately serve to place any monetary recovery back in the hands of the corporation, an entity controlled by the majority wrongdoer(s) and would not remedy the minority shareholders' issues prospectively. In *Leibert*, the Court of Appeals expressly rejected the notion that the remedy of a derivative suit under such a circumstance would be sufficient. The Court stated, in relevant part:

> In light of the serious charges of persistent corporate abuses by the directors and the majority shareholders, it would be inadequate and, therefore, inappropriate to remit the minority shareholders to the exclusive remedy of a derivative suit. . . . [T]o restrict the minority shareholders to a derivative suit would be to commit them to a multiplicity of costly, time consuming and difficult actions with the result, at most, of curing the misconduct of the past while leaving the basic improprieties unremedied. It is the traditional office of equity to forestall the possibility of such harassment and injustice.[18]

Limiting a claim to a recovery by the corporation when that entity, by its majority, is breaching its duties to the minority is precisely what the doctrine of common-law dissolution seeks to avoid.

If a plaintiff meets the burden of proof and establishes liability for common-law dissolution, the court must next turn to the question of a proper remedy.

Available Remedies

If a plaintiff meets the burden of proof and establishes liability for common-law dissolution, the court must next turn to the question of a proper remedy. Although a plaintiff asserting a cause of action for common-law dissolution, by definition, seeks dissolution of the corporation, the court is not limited to awarding such extreme relief. In fact it should consider less drastic and intrusive relief, which would nonetheless make the plaintiff whole.[19]

Judge Fuld, in rendering the Court's majority opinion in *Leibert*, discussed the issue of the proper remedy, stating,

> [I]f the plaintiff does prove those allegations [establishing entitlement to common-law dissolution], the Court should grant either the relief of dissolution which the plaintiff seeks or, alternatively, such other relief as might seem more appropriate once the actual facts and circumstances are ascertained.[20]

Judge Fuld expanded upon this thought less than two years later, in his dissenting opinion in the *Kruger* case, and stated:

> Although the Court would be empowered to direct that the stock (the asset of the venture) be voted for dissolution, such an extreme step may not be necessary to accomplish a fair result. For example, a practical solution might be found in a procedure under which either interest may purchase the shareholdings of the other at an appraised value found by the Court and upon terms set by it. Flexibility of remedy, tailored to all the facts and circumstances of the case, including the good faith of the parties on both sides, their conflicting interest and motivations, if any, is the key.[21]

Stock Buy-out Alternative

In *Kruger*, Judge Fuld specifically identified a practical alternative to dissolution in that case: a buy-out of a stockholder's shares at an appraised value determined by the Court. This buy-out remedy has been acknowledged in New York as a viable alternative to dissolution, and is currently incorporated in New York's Business Corporation Law applicable to statutory claims for dissolution. The statutory remedy and related case law is instructive in the common-law context, particularly because the statutory remedy has its origins in the common law.

Section 1118 of the BCL, which became effective on June 11, 1979, provides that in any statutory dissolution proceeding brought pursuant to BCL § 1104-a, any other shareholder or shareholders of the corporation can elect to buy out the petitioning shareholder at fair value upon such terms and conditions as may be approved by the court.[22] Courts in New York have applied the § 1118 buy-out concept in statutory cases and have expanded the concept beyond that of a mere election to be exercised at the whim of a shareholder.

The Court of Appeals addressed a BCL § 1104-a statutory dissolution cause of action in *In re Kemp & Beatley, Inc.*[23] The court in *Kemp* affirmed an order of dissolution conditioned upon permitting the corporation to purchase the petitioning shareholders' stock at fair value. The Court of Appeals ultimately concluded that dissolution was the appropriate remedy but, citing to BCL § 1118, stated that the order of dissolution must be conditioned upon first providing the corporation with a 30-day buy-out option.[24] Relying on the *Kemp* decision, the Appellate Division, Third Department, in *In re Dissolution of Wiedy's Furniture Clearance Center Co.*,[25] a statutory dissolution case, affirmed the remedy of a court-ordered buy-out at fair value. Here, however, the Appellate Division did not order dissolution conditioned upon a buy-out option. It acknowledged the lower court's power to order a buy-out in lieu of dissolution, regardless of whether the corporation elected to avail itself of a buy-out option.

This went well beyond the buy-out election provided for in BCL § 1118. In other words, the court applied a common-law buy-out alternative in a statutory case, separate and apart from the strictures of the BCL statute.

The viability of the buy-out remedy does not depend on whether dissolution is sought under the BCL statute or at common law. New York courts determining statu-

tory BCL cases have the discretion to require a fair value buy-out, as in *Wiedy*, or, at a minimum must, according to *Kemp*, provide the option of a buy-out prior to dissolution proceeding forward. This is wholly consistent with Judge Fuld's conclusion in the common-law *Kruger* case that "[f]lexibility of remedy, tailored to all the facts and circumstances of the case . . . is key."[26]

In fact, the buy-out remedy makes even more sense in the common-law context where the stock holdings of the plaintiff do not reach the 20% threshold of stock ownership necessary for statutory dissolution. It allows the larger majority of shareholders to continue the existence of the corporation if they so desire, while providing a fair and just return to the "below 20%" minority plaintiff. It is also less of a burden for a company to buy out a shareholder owning less than a 20% interest as compared to a shareholder owning a larger stake, and who is able to pursue statutory dissolution.

Legislative History

The legislative history of BCL §§ 1104-a and 1118 further confirms the viability of the fair value, buy-out remedy in a common-law dissolution action. The incorporation of this remedy into the BCL statutory framework came directly from the common law.

To understand the genesis of the BCL § 1118 buy-out provision, the legislative history of that provision reveals a number of telling facts. Contained in the bill jacket is a letter dated May 29, 1979, from William B. Finneran of the New York State Assembly to then Governor Hugh L. Carey recommending approval of the legislation. In support of the legislation, Assemblyman Finneran submitted a section of a legal treatise with his letter. He stated:

> I am enclosing a section of F. Hodge O'Neal's esteemed work *"Squeeze-Outs" of Minority Shareholders (Expulsion or Oppression of Business Associates)*. Note Chief Judge Fuld's strong advocacy on page 591.

O'Neal addresses the buy-out alternative in this treatise section and explains its use at common law. He states:

> In many situations a court can offer quarreling shareholders one or more alternatives to dissolution. . . . A court order compelling one faction of shareholders to buy-out the other faction is another possible solution of a shareholder conflict. In an Idaho case, the court, as an alternative to dissolution, gave majority shareholders a reasonable time to reduce the corporation's capital so as to enable it to pay the complaining shareholder his pro rata share of corporate assets in exchange for his stock. Along a similar line, a practical solution might be found in a procedure under which either shareholder may purchase the holdings of the other at an appraised value found by the court and upon terms set by it. Flexibility of remedy, tailored to all the facts and circumstances of the case, including the shareholders' conflicting interests and motivations, is the key.[27]

O'Neal points to two cases in the common law as the basis for the buy-out remedy. The Idaho case he references is *Riley v. Callahan Mining Co*.[28] The Supreme Court of Idaho, relying on equitable principles, fashioned a buy-out remedy in *Riley*. The court stated in relevant part as follows:

> From its very nature, and in order to attain its objects, equity must often act without specific statutory authority and sometimes without legal precedent. Each case must stand on its own facts, and the degree of relief applied must be commensurate with the wrong to be remedied. As remarked by Mr. Justice Field in *Sharon v. Tucker*, 144 U.S. 533, 12 S. Ct. 720, 36 L. Ed. 532, in quoting from Pomeroy's treatise on Equity Jurisprudence: "It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases." We shall not in this case compel the dissolution of the defendant corporation, but we conclude that plaintiffs are at least entitled to such a measure of equitable relief as will require the defendant corporation to reduce its capital stock to the extent required in order to enable it to distribute among plaintiffs, in exchange for the surrender and cancellation of their share certificates, a proportionate share of the corporate assets, after all the corporate obligations are paid. The stockholders will at once take the proper statutory proceedings to reduce the capital stock accordingly. If

> they prefer to dissolve the corporation altogether, they may of course exercise their statutory rights in that respect, but it is not the purpose of this decision to force them to do so.[29]

After citing the Idaho case, O'Neal cites the New York case of *Kruger v. Gerth*[30] and Judge Fuld's dissenting opinion therein. Expanding on the thoughts he expressed in the majority opinion in *Leibert*, Judge Fuld offered the buy-out remedy as a practical, alternative solution to dissolution, and stressed that "[f]lexibility of remedy, tailored to all the facts and circumstances of the case including the shareholders' conflicting interests and motivations is the key."

As noted, Assemblyman Finneran, in his letter to Governor Carey, specifically directed the Governor's attention to Judge Fuld's thinking as set forth in the O'Neal treatise ("Note Chief Judge Fuld's strong advocacy"). BCL § 1104-a and BCL § 1118 (buy-out provision) became effective on June 11, 1979, less than two weeks after Assemblyman Finneran wrote to Governor Carey.[31] The letter gives insight into the rationale behind BCL § 1118, namely the O'Neal legal treatise and its citation to common law advocating the buy-out alternative. There can be no question that such alternative is a creature of equity and the common law, and the practical nature of such an alternative spurred its incorporation into the statutory framework of the BCL in June 1979. Judge Fuld's "strong advocacy" of this alternative remedy is as relevant today as it was in 1965 and 1979. A court, exercising its equitable powers, can and should consider the alternative remedy of a buy-out at fair value when the facts and circumstances warrant such alternative. Flexibility of remedy is indeed the key.

Choices for the Court

The objective of a common-law dissolution cause of action is to assure recovery of a minority plaintiff's interest in the corporation at issue, and prevent further malfeasance by the majority, who have control over the corporation. The court, in exercising its equitable power, can accomplish this objective by choosing from a number of possible remedies.

The most obvious possible remedy is that of dissolution. The court may order that the corporation in question be dissolved, that pursuant to such dissolution the assets of the corporation be sold, and that each shareholder receive his or her share of the proceeds based upon the shareholder's percentage ownership of the corporation. The remedy satisfies the objective of assuring a fair recovery by the plaintiff and preventing further majority malfeasance; however, there are downsides. Dissolution is the nuclear option, and would prevent the corporation from continuing in existence. The dissolution process itself takes time. The costs associated with the process can be high and will be borne by all shareholders including the plaintiff. For example, a receiver needs to be appointed to marshall the assets of the corporation, liquidate those assets which can be sold, address existing liabilities of the corporation and ultimately distribute the remaining cash and assets to the corporation's shareholders.[32] Furthermore, dissolution may create substantial tax liabilities for all shareholders including the plaintiff.

A second possible remedy is a required, court-ordered buy-out of the plaintiff's interest. The court may hold a hearing to determine the limited issue of the fair value of the plaintiff's interest, and then order the corporation to buy out the plaintiff's interest at that fair value within a fixed period of time. This remedy is similar to the remedy ordered in *Wiedy*, described above. The attractive feature of such a remedy is that it allows the existence of the corporation to continue for its remaining shareholders; avoids the time, costs and potential tax liabilities associated with dissolution; and accomplishes the objective of the plaintiff's cause of action – assuring the plaintiff a fair recovery upon his or her minority interest and preventing majority abuses against the plaintiff in the future.

A third possible remedy is a court order providing for dissolution conditioned upon first offering the corporation a buy-out option, to be exercised within a fixed period of time, for example, within 30 days. This is identical to the remedy ordered in *Kemp*. This type of remedy gives a corporation the flexibility to determine its best alternative once the minority shareholder is gone.

A fourth possible remedy is a buy-out variation involving an aliquot share distribution of the corporation's assets. The corporation "buys out" the minority shareholder by distributing to the plaintiff his or her proportionate share of the company's assets (rather than cash only) in exchange for the plaintiff's stock. This form of remedy could be used in the situation where the corporation's assets are easily divisible.

In all, a court confronted with a common-law dissolution claim has a wide variety of reasonable alternatives to consider short of dissolution.

Conclusion

Common-law dissolution, albeit rare, is alive and well in New York. A plaintiff satisfies the burden of proof if he or she establishes that the majority "so palpably breached their fiduciary duties" that the majority by its own conduct has relinquished the exclusive power to dissolve the corporation. If liability is established, the court must then turn to the issue of the appropriate remedy.

The court, in equity, must consider all the facts and circumstances of the case and fashion a remedy that is fair and reasonable to all. A practical alternative to the extreme remedy of dissolution is a buy-out of the plaintiff's interest by the corporation.

The buy-out remedy can be fashioned in a variety of ways. The important point to bear in mind is, the court

has broad discretion to choose the most appropriate remedy and should attempt to balance the needs of the parties in fashioning the most equitable solution. ■

1. Public corporations and corporations registered as investment companies under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64, are not subject to § 1104-1 dissolution. *See* BCL § 1104-a(a).
2. BCL § 1104-a(a)(1), (2).
3. Many states other than New York also have statutory dissolution provisions. *See, e.g.*, Conn. Stock Corp. Act § 33-382(b); Dist. Columbia Business Corp. Act § 90; Fla. Gen. Corp. Act § 607.274; Il. Business Corp. Act § 86; In. Gen. Corp. Act § 25-242; Md. Gen. Corp. Law § 4-602; Me. Business Corp. Act § 1115; Mn. Business Corp. Act § 301.50; N.H. Gen. Corp. Law § 294.97; N.C. Business Corp. Law § 55-125; Pa. Business Corp. Law § 1107; R.I. Business Corp. Law § 7-1.1-90; Tenn. Gen. Corp. Law § 48-1008; W.V. Corp. Act § 31-1-134.
4. Before the passage of § 1104-a, common-law dissolution was the avenue by which *all* shareholders, those owning 20% or more of the voting shares and those owning less than 20%, could seek dissolution of a private corporation.
5. *See Leibert v. Clapp*, 13 N.Y.2d 313, 316, 247 N.Y.S.2d 102 (1963). *See also* BCL §§ 1001, 1103.
6. *Leibert*, 13 N.Y.2d at 317, 247 N.Y.S.2d at 105.
7. *Id.* at 317. "Palpable" is commonly defined as tangible, easily perceptible, noticeable. *See, e.g.*, Webster's Ninth New Collegiate Dictionary (Merriam-Webster, Inc. 1988).
8. *See Kroger v. Jaburg*, 231 A.D. 641, 248 N.Y.S. 387 (1st Dep't 1931); *Leibert*, 13 N.Y.2d 313; *Nelkin v. H.J.R. Realty Corp.*, 25 N.Y.2d 543, 307 N.Y.S.2d 454 (1969); *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799 (1984); *In re Dubonnet Scarfs, Inc.*, 105 A.D.2d 339, 341, 484 N.Y.S.2d 541 (1st Dep't 1985); *Lewis v. Jones*, 107 A.D.2d 931, 932, 483 N.Y.S.2d 868 (3d Dep't 1985); *Fedele v. Seybert*, 250 A.D.2d 519, 521, 673 N.Y.S.2d 421 (1st Dep't 1998); *Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 128, 132–33, 726 N.Y.S.2d 679 (2d Dep't 2001).
9. *See, e.g., Kruger v. Gerth*, 22 A.D.2d 916, 255 N.Y.S.2d 498 (2d Dep't 1964), *aff'd w/o opinion*, 16 N.Y.2d 802, 263 N.Y.S.2d 1 (1965); *Shapiro v. Rockville Country Club, Inc.*, 22 A.D.3d 657, 802 N.Y.S.2d 717 (2d Dep't 2005).
10. 13 N.Y.2d 313.
11. *Id.* at 317.
12. 231 A.D. 641, 248 N.Y.S. 387 (1st Dep't 1931).
13. *Id.* at 643, 645.
14. 107 A.D.2d 931, 483 N.Y.S.2d 868 (3d Dep't 1985).
15. 250 A.D.2d 519, 673 N.Y.S.2d 421 (1st Dep't 1998).
16. *Id.* at 520–24.
17. 295 A.D.2d 425, 743 N.Y.S.2d 170 (2d Dep't 2002).
18. *Leibert*, 13 N.Y.2d at 317.
19. *See, e.g., In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 74, 484 N.Y.S.2d 799 (1984) ("Every order of [statutory] dissolution, however, must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value").
20. *Leibert*, 13 N.Y.2d at 318.
21. *Kruger*, 16 N.Y.2d at 807.
22. BCL § 1118.
23. 64 N.Y.2d 63, 484 N.Y.S.2d 799 (1984).
24. *Id.* at 75.
25. 108 A.D.2d 81, 487 N.Y.S.2d 901 (3d Dep't 1985).
26. *Kruger*, 16 N.Y.2d at 807.
27. O'Neal, "Squeeze Outs" of Minority Shareholders (Expulsion or Oppression of Business Associates) (Callaghan & Co. Chicago, Il.).
28. 28 Idaho 525, 155 P. 665 (Sup. Ct., Idaho 1916).
29. *Riley*, 28 Idaho at 591.
30. *Kruger v. Gerth*, 22 A.D.2d 916, 255 N.Y.S.2d 498 (2d Dep't 1964), *aff'd w/o opinion*, 16 N.Y.2d 802, 263 N.Y.S.2d 1 (1965).
31. New York was not alone in adopting the buy-out remedy as part of its statutory scheme. At that time several other states had already adopted similar legislative provisions. *See, e.g.*, S.C. Code Ann. § 12-22.23(a)(4) (Supp. 1968); Md. Gen. Corp. Law § 4-603 (1967); W. Va. Code Ann. § 31-1-80 (1966); Conn. Gen. Stat. Rev. §§ 33-117 (1958); Ca. Corp. Code § 4658 (1955).
32. *See, e.g.*, BCL § 1005(a)(3)(A), (B).

Intellectual Property Considerations in the Outsourcing Industry

By Poorvi Chothani

Most outsourcing transactions involve the licensing of one party's intellectual property (IP) to another. An ancillary problem is the issue of ownership of intellectual property created as part of an outsourcing contract. Intellectual property laws are country-specific and apply within the geographic borders of the nation except where international treaties have made some aspects of member-nation's laws consistent. Therefore, it is imperative that the many differences are addressed when outsourcing work to an entity abroad. An IP owner cannot rely on an umbrella grant of an IP right because the governing laws are not harmonized worldwide. These problems are mitigated, to some extent, as certain offshore jurisdictions are becoming signatories of international treaties such as the Berne Convention, the Paris Convention and the Trade-Related Aspects of Intellectual Property (TRIPS) under the World Trade Organization (WTO).

Service providers in India are generally wholly owned subsidiaries of foreign entities (captive), or third-party providers where work is contracted out to third-party vendors, or joint ventures, which are collaborative initiatives with local entities with joint control of the service provider. The most commonly used form is the third-

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party model, which can be established in a short span of time and offers flexibility in growth, termination and scale. But, as the day-to-day operations are managed by a third party that would have access to sensitive data and IP, there are significant risks. A captive service provider, on the other hand, requires more time to establish and provides less flexibility, but it ensures control of sensitive data and IP. In contrast, joint venture units provide more speed and control but give rise to, among others, issues of joint IP ownership. No matter which model is chosen, IP issues need to be addressed carefully.

India's IP laws are based on common law and Indian courts often refer to British and U.S. case law when considering an issue that may not have been addressed by Indian statutes or Indian courts. However, there are some significant differences between Indian and British or U.S. IP law. It is important that an outsourcer is aware of these differences when entering into outsourcing contracts with an Indian service provider. This article examines some of the provisions that are relevant to the outsourcing industry and unique to India.

Patents

In India, the law protecting patent rights is the Patent Act, 1970. This act has undergone several amendments. The present act dealing with this subject is Patents (Amendment) Act, 2005. Earlier, India only protected process patents, which deterred the research and development of inventions and innovations. The new law extended the term to 20 years from 14 years, and the recent amendments provide for patents for drugs and chemical products as well as software-related inventions but not software *per se.*

The differences in the patent laws of different countries can be significant, and one needs a clear understanding of the laws of the country where the patent is to be used or will require protection. For instance, India, unlike the United States, follows a first-to-file system. As a result, India does not provide for a process to determine priority of invention in the case of objections. The first-to-file system also raises the issue of adequately documenting proof of invention or innovation. Indian service providers may not be aware of the importance of this in view of the first-to-invent system of the U.S. patent system. This could be mitigated by clearly defined contractual provisions ensuring adequate documentation, training and implementation of systems. Please note that an assignment of a patent has to be in writing and registered in India otherwise it is invalid.[1]

In addition, though these apply only to certain healthcare KPOs (knowledge process outsourcing companies), India's patent laws provide the government with powers to grant a "compulsory license."[2] Under this provision, a third party may make an application for a compulsory license on the grounds that the "reasonable requirements of the public" have not been satisfied, or that the patented product is not available at a "reasonably affordable price," or that the patented invention is "not worked in the territory of India." India's patent laws also provide for "research and experimental use" enabling the use of a patent for experimental use even if it is for commercial purposes.[3] Further, under Indian patent law, applications for patents for inventions in India or involving an inventor who is a resident of India, must first be filed in India, unless the Indian Patent Office has granted a "foreign filing license."[4]

Joint Ownership Rules

New IP products are often created during an outsourcing relationship, thus raising IP ownership issues. Unless the parties clearly and expressly define the terms of joint ownership, the parties involved in the project are likely to face joint ownership problems and ensuing conflicts. In India, for instance, a joint owner of a patent can commercially exploit the patent only after obtaining consent from the co-owner and is required to provide an accounting to the co-owner for all transactions pertaining to the patent.[5] The Controller of Patents has the statutory power to intervene and pass directives in certain circumstances.[6]

Copyrights in India

Under Indian Copyright Law,[7] copyright subsists in original literary work, in original dramatic work and its adaptation, in original musical work, in a software program, in a painting, in a film, in a sculpture, in a drawing as well as a diagram, map, chart or plan, in an engraving or a photograph, whether or not any such work possesses artistic quality. Copyright also subsists in an architectural work of art and any other work of artistic craftsmanship.

Copyright, in India, subsists for a period of 60 years, for a literary work, from the beginning of the year following the year of death of the author; for broadcaster rights, 25 years from the year following the first broadcast; for photographs, cinematographs and sound recordings, 60 years from the beginning of the calendar year following the year in which each is first published. Authorized adaptations, derivatives, versions, etc., would be entitled to separate copyright provided the new work qualifies for copyright independently under the Copyright Act.

Software in different jurisdictions can be protected as a patent, granted copyrights or secured as a trade secret. As a member of the WTO, India, as required by Article 10 of TRIPS, protects computer programs under copyright law as a literary work. TRIPS does not specifically require patent protection for computer programs. Under Indian law software or computer programs *per se* are not patentable. Computer programs that show technical effects are arguably patentable. However, this theory, to our knowledge, has neither been examined in the patent office nor in the Indian courts of law.

Inalienable Rights

Indian copyright laws provide for inalienable "moral rights," which attach to authors of copyrighted work providing protection against distortion or modification of work if it could bring the author "disrepute."[8] These rights do not transfer along with an assignment of the copyright in a work but, in limited circumstances, a customer may seek a waiver of such moral rights from the author upon assignment of all copyrighted materials to ensure that the customer is not restrained from creating future versions of copyrighted materials, if the author believes such versions may bring the author disrepute. However, this provision of moral rights does not apply to computer software, which may be modified by a customer who acquires the rights to adapt the software.

Fair Use or Fair Dealing

Under Indian law "fair use exceptions" strive to strike a balance between the rights of authors and interests of society. Section 52 of the Indian Copyright Act provides for Fair Dealing and enumerates instances where use of copyright-protected material is not considered to be an infringement. Under this provision, certain uses of computer programs without the copyright owner's permission, including for "non-commercial personal use," are deemed "fair use" and do not constitute infringement. Furthermore, Indian copyright law does not require that any payment be made to the copyright owner for such use. In view of this a foreign customer should clearly set out the permitted uses of software, source code, or other copyright protected work to avoid disputes arising out of ambiguity.

Work for Hire

Subject to certain exceptions, the general rule of copyright is that the author is the owner of the copyright. Indian copyright law recognizes the doctrine of "Work for Hire" and extends it to employee-created inventions but not to contractor-created work.[9] As a result the legal owner of the work under Indian law will be the contractor who developed the work unless otherwise provided in written contracts. Foreign customers often rely on general "work for hire" principles, which may not transfer IP rights that are a result of the work outsourced to an Indian service provider. Therefore, if the customer wishes to retain ownership of any IP that is created during and under the subsistence of its KPO contract, it is necessary to include comprehensive and valid assignment provisions transferring the copyright to the customer. These provisions should flow down into agreements with the Indian service provider's employees and sub-contractors. If the Indian service provider is likely to subcontract the work then the foreign customer is likely to ask for additional precautions to ensure control and ownership of IP rights.

Version Recordings

One "fair use" provision significant to the entertainment industry is the right to make "version recordings." This provides a statutory license to make a sound recording of an existing musical work by engaging independent artists to create the same music and use identical lyrics, provided the "version recording" is made two years after the original sound recording and is subject to certain conditions. This has spawned a significant amount of "remixes" which in some instances undermine the value of the original works.

Compulsory Licensing

The Copyright Board may grant a compulsory license to use a work on the grounds that the work is withheld from the public because the owner has refused to republish, to allow the republication of the work or to allow the performance of the work in public. A compulsory license may also be granted if the owner has refused to allow the communication to the public by broadcast of such work, as in the case of a sound recording.

Assignments and Licensing

An assignment under Indian copyright law is limited to the territory of India and a term of five years, unless the copyright license or assignment states otherwise.[10] Also, unless a copyright assignment provides otherwise, the assignment lapses if the assignee does not "exercise" its rights within one year from the date of assignment.[11] It is important to consider these issues carefully because even if the contract provides for non-Indian law as the applicable law, Indian law may be used to determine IP ownership and infringement pertaining to IP transferred to, created in, or licensed from, India.

Remedies and Law Enforcement

The Copyright Act provides various remedies. First, it is possible to file a suit to obtain an injunction, which is a court order forbidding the infringers from distributing any more copies of the infringing work. Second, the copyright owner is entitled to actual damages. Actual damages are what harm the copyright owner suffered from the infringement. These damages are usually next to nothing unless the owner proves that the value of the copyrighted material has been diminished by the infringer's version. Perhaps the most significant remedy is the award of profits. The copyright owner is entitled to the profits the infringer earns from the infringing use of the copyrighted material. In addition, criminal penalties have substantially increased and the Copyright Act provides for a minimum jail term of seven days, which can be extended up to three years, and fines ranging from INR 50,000 to 2,000,000 (approximately US $1220 to US $4878)[12] depending on the nature and frequency of the offense.

India's Copyright Office under the Ministry of Human Resources, Department of Secondary and Higher Education in its Study on Copyright Piracy in India reports that though the law authorizes a police officer to seize without warrant, "many police officers may refrain from implementing their powers because of the clause 'if he is satisfied.'" The study also refers to allegations and counter-allegations regarding the role of police personnel: the police admit that infringement of copyright protection does not merit the same attention as murders, rapes, or law-and-order problems. The study finds that the police blame rights holders for "not coming forward to either lodge a complaint formally or failing to produce necessary proof/document before the court."[13]

Indian law requires all owners of a patent or copyright to be parties in an infringement lawsuit.[14] This affects the enforcement of rights of a joint owner against a third party. Indian law does not provide for a joint owner's responsibilities with regard to filing, prosecution, maintenance or enforcement of IP rights.

Despite the statutory provisions to protect copyrights, the enforcement of these provisions is still inadequate. As per the U.S. Trade Representative Special 301 review,[15] "[t]here have been few criminal convictions under the criminal provision under Section 63B of the Copyright Act since January 2000 – reportedly five for movie piracy, none for software piracy and only a few for music and book piracy."

Trade Secrets

India follows common-law principles in these matters, often relying on British precedents but has not adopted any civil or criminal statutes or specific laws relating to trade secrets. India offers protection for trade secrets and confidential information including but not limited to formulas, product specifications, manufacturing techniques, drawings, diagrams, pricing, supplier details, customer lists, management know-how, strategic business plans, etc. All remedies are available – injunctive relief, damages, accounting of profits, and the return of all property containing the trade secret information. An *ex parte* seizure order can be obtained in civil actions to search a defendant's premises in order to obtain the evidence to establish the theft of trade secrets at trial.

Parties routinely enter into contracts that provide for trade secret protection, especially in an outsourcing transaction. Foreign customers should address use of existing trade secrets, in writing, to prohibit the use of a third party's trade secrets to avoid legal action by a third party alleging trade secret misappropriation, and should prohibit the disclosure of its own trade secrets. This is best achieved by clearly identifying specific trade secrets and prohibiting their use, misuse and/or modification. It is also necessary to allocate ownership of new trade secrets. On the one hand, the developer may not want to give up rights to new ideas, algorithms, and processes created during the tenure of the outsourcing transaction. On the other hand the customer would not want the service provider to use and/or benefit from using the new trade secrets for its own purposes or those of other third parties.

Data Security and Privacy Considerations

Data security and privacy are other very significant issues in an outsourcing transaction. India does not have specific laws governing trade secrets and confidential information.

Judicial interpretation suggests that the Constitution of India provides an implied "right to privacy" but this right may be invoked only in disputes between a citizen and the state involving the exercise of governmental power resulting in an "invasion of privacy" – such as telephone tapping, police surveillance, and like actions. But there is no case law in India that supports the notion of a private entity enforcing a right to privacy against another private entity. However, the Indian government is considering enacting a new law, which may be similar to the EU Data Protection Directive. Service providers are often required to deal with an individual's confidential data, including personal information. Privacy and data security issues also affect intellectual property, corporate secrets, confidential customer health and financial information, as well as personal identifiable information such as addresses, national identifying numbers, and credit-card information, among many others. The Information Technology Act 2000 (the "IT Act")[16] covers issues of privacy and data loss or misuse in a very limited and indirect way.

The IT Act provides some protection against "computer offences" pertaining to the unauthorized access to data on computers and networks, unauthorized downloading or copying of data, or introduction of viruses or other damage to computer systems. The IT Act provides for both civil and criminal remedies, ranging from imprisonment for up to seven years to fines of up to INR 1 crore

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(approximately US $240,000 under current exchange rates) as well as for the creation of a special appellate court to expedite the disposition of claimed violations of the IT Act. Contractual provisions may be enforced under the Specific Relief Act, 1963. Early last year, the Indian government approved an amendment to the IT Act to expressly provide data protection and privacy measures. This new bill, if enacted by parliament as it is, would impose a liability on organizations for negligence in implementing and maintaining "reasonable security practices" to safeguard sensitive personal data that resides in a computer resource owned or operated by the organization and disclosing personal data acquired from an individual to any other person without the concerned individual's consent and with an intent to cause injury to the individual. Under the bill, parties can contractually agree to adapt "reasonable security practices" but if no such agreement was reached the reasonableness of security practices will be determined by the adjudicating authority.

Firms that do not factor these concerns into their plans expose themselves to vast losses.

In addition to relief under the IT Act, it might be possible to obtain limited relief against data security violations under the Indian Penal Code, 1860, and the Indian Criminal Procedure Code, 1973, which provide for prosecution of crimes involving theft, breach of trust and fraud. However, as these laws only extend to offenses against "corporeal" property, they may be pertinent only when the data is housed in a physical object or medium, making it possible to prosecute the theft of the object or medium. It would also be possible to prosecute fraud that is a result of the misuse of data. In addition, it is possible to avail of common law remedies and injunctions against contractually bound parties or those that are in a position of trust for breach of confidence.

Self-Imposed Regulation

The Indian IT and outsourcing industries are cognizant that they need to provide an environment that protects data to obtain offshore client work. Therefore, in addition to legislative efforts, the Indian IT and outsourcing industries have implemented their own initiatives to alleviate the data security concerns of foreign clients. Indian companies implement international standards, such as BS7799 and ISO 17799, to strengthen data security, including network security, information security, physical security, documented procedures for storage and access, personnel security, business continuity and disaster recovery. To verify the credentials of employees, the National Association of Software and Service Companies (NASSCOM) has launched an employee registry that compiles a national database of IT and BPO professionals in the outsourcing industry. This registry, managed by a third party, includes employees in the database after conducting background checks. NASSCOM is involved in several initiatives to improve the standards of the industry and the law enforcement agencies. It undertakes several initiatives to train KPO aspirants, employees and police staff, and conducts some training that is open to the public. NASSCOM, in conjunction with the Technology Law Forum in Mumbai, regularly hosts events of knowledge sharing and interaction between the legal professionals and members from the industry and public, where legal aspects of the industry, its problems and solutions are discussed.

Recent Developments

Recently, an Intellectual Property Appellate Board was established as a specialized IP body to carry out the expeditious adjudication of appeals. The board was first set up in 2003, but did not commence work at that time due to a lack of technical experts to hear matters. Until recently, the board has adjudicated only on trademark matters. The latest amendments to the Patent Act provide that the board is the adjudicator of patent appeals, but did not provide for an effective date for this provision. As a result, no steps were taken till April 2, 2007, when the Indian government issued a notification ordering the transfer of all appeals against orders or decisions from the Controller of Patents to the board. It is expected that this new independent IP dispute resolution body will reduce the delays that plague the judicial system.

Further, NASSCOM conceptualized and established the Data Security Council of India (DSCI), as an independent self-regulatory body, to provide organizational support to the already prevalent self-regulatory mechanisms to protect data adopted by the IT industry. The DSCI will be initially funded by NASSCOM and later it will generate its own funding.

Recommendations

Very often in outsourcing contracts businesses erode the value of their IP rights: their IP rights have not been assessed or protected, their IP rights may already be compromised or at risk, or they fail to allocate realistic budgets for IP protection. Firms that do not factor these concerns into their plans expose themselves to vast losses. Legal remedies may be largely ineffectual and post-loss compensation moot because the IP is already lost, thus affecting future earnings. Before retaining an outsourcing service provider, the foreign customer should conduct a thorough check to assess the vulnerability of its IP in the

outsourcing transaction and then provide for protective measures for data and IP. This will help mitigate the risks and protect the business's or project's critical IP rights, which may be at the core of the entire process or business.

Another significant issue is the ownership of IP that is developed during the subsistence of the outsourcing relationship. A service provider typically can claim ownership, unless there is an agreement to the contrary, and the customer can use the new IP under "license," which may be at a cost. Further problems can occur when the service providers use the services of third parties or subcontractors; in India, ownership of the IP usually rests with the creator unless it is created within the scope of employment terms. It is best to clarify these issues in the contractual terms so that any IP that is developed by the service provider at the customer's request belongs to the customer.

When the IP consists of data, configurations, formulas, trade secrets, confidential information or other sensitive information, it is a good idea to fragment the work among several service providers so no single service provider has access to the entire information. In addition, contractual provisions to ensure that the service provider will use "reasonable efforts" to protect the data should specify that the sensitive information will be clearly identified, access to physical areas where the data is housed will be restricted, and the employees of the service provider will be educated and sensitized to the confidential nature of and potential risks to the information. The customer should also ensure that all third parties involved with the transaction adhere to these requirements. Regular monitoring of the entire process will enhance the effectiveness of IP protection measures.

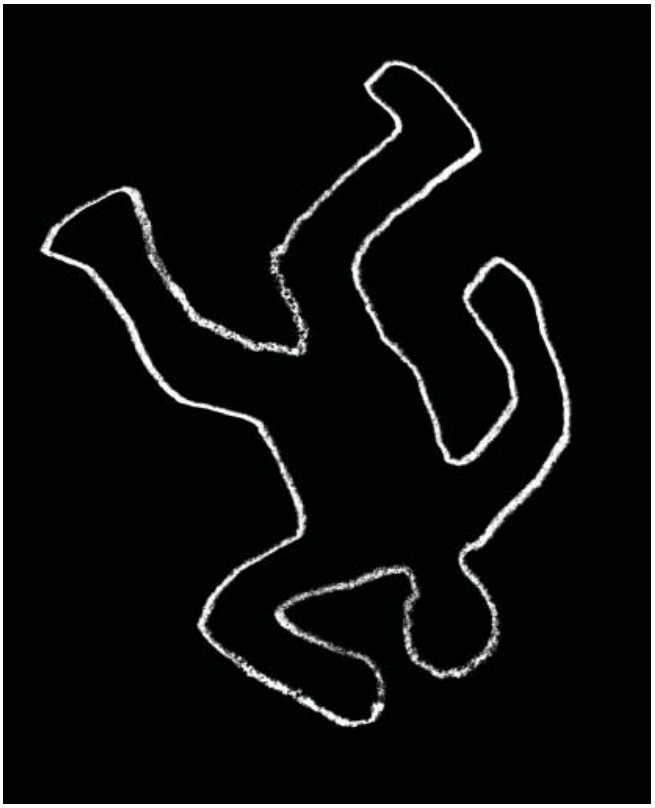
To be successful, any outsourcing arrangement – whether on shore, near shore or off shore – must have clear and unambiguous contracts to support the project. India has a codified Contract Act[17] governing all Indian contracts. The outsourcing contracts should carefully allocate responsibility of the service provider and the enterprise customer for violations of the rights by third parties and liability for punitive damages. Comprehensive and effective contracts must include provisions for scope service definitions, sub-contracting rights and obligations, governance structure, data protection provisions, IP ownership and responsibilities, legal compliance obligations, ongoing monitoring and audit rights, term and termination, termination assistance and transition, obligations, assignment, protection and ownership of intellectual property rights and well-defined dispute resolution mechanism.

Conclusion

Unfortunately, IP infringement and data breaches occur in many parts of the world, whether developed or not. The government of India diligently responds to the concerns raised about data security issues, and steps have been taken to minimize damages, punish the offenders and deter future offenses. The variations in IP regulation and protection in different jurisdictions make it imperative that the customer has a complete understanding of the differences and factors them into the contractual terms. A customer should insist on comprehensive contractual terms and internal security measures to protect sensitive personal data that is used or processed in India. ■

1. Patents Act § 68 (1970).
2. Patents Act § 84 (1970). Under this section, a third party may make an application for a compulsory license on the grounds that the "reasonable requirements of the public" have not been satisfied, or that the patented product is not available at a "reasonably affordable price," or that the patented invention is "not worked in the territory of India."
3. Patents Act § 47 (1970).
4. Patents Act § 8 (1970).
5. Patents Act § 50 (1970).
6. Patents Act § 51 (1970).
7. Copyright Act (1957); Copyright Rules (1958).
8. Copyright Act § 57 (1957).
9. Copyright Act § 17 (1957).
10. Copyright Act §§ 19, 30A (1957).
11. Copyright Act § 19 (1957).
12. US $1 = INR 41.
13. http://www.copyright.gov.in/maincpract6.asp#top#top (last visited on Feb. 14, 2008).
14. Copyright Act § 61 (1957).
15. United States Trade Representative 2007 Special 301 Report, *available at* www.ustr.gov.
16. Proposed Amendments to the IT Act.
17. Indian Contract Act (1872).

"I'd like to be your attorney but my attorney is advising me against it."



Enhancing Victims' Rights

Crime Victims Compensation

By Benedict J. Monachino

September 11, 2007, marked the sixth anniversary of the terrorist attack that annihilated the Twin Towers in New York City, resulting in more than 3,000 deaths. The events of that tragic day will never be forgotten. Not to be forgotten, either, is the assistance provided to bewildered victims and their families in the immediate aftermath of the 9/11 attack through the enforcement of a little-known statute by an equally little-known agency called the Crime Victims Board.

Crime Victims Board

In 1965 the New York Legislature, recognizing that survivors of homicide victims were also victims of a violent crime, sought to find a way to compensate such innocent victims – including surviving dependents – who also suffer.[1] Assisting victims and their families would help to restore balance to a criminal justice system in which rehabilitative programs for those convicted of crime captured public funds, and little or no help was provided to victims and their survivors.[2] The answer was the creation, in 1966, of the crime victims compensation program (the "Program") administered by the Crime Victims Compensation Board under Article 22 of the Executive Law. This article summarizes the genesis of victims compensation and provides a road map to understanding the provisions of Article 22.

Victims Compensation vs. Restitution Compensation

State crime victims compensation has been regarded as a primary victim-oriented remedy and is often compared with court-ordered restitution, another victim-oriented remedy.[3] Crime victims compensation is distinct from restitution, however. As a form of punishment, restitution is by no means a new approach to crime and justice. Ancient civilizations required criminal offenders to settle with the victims and their families.[4] These societies believed retaliation by the victim could create a continuous cycle of violence and revenge,[5] and that by requiring restitution the threat of retaliation would diminish.[6] This wide use of restitution in both violent and property crimes is recorded in the Old Testament.[7] It not only made the victim whole, but it helped restore community peace. Many pre-colonial African societies also believed that the response to crime should address the damage caused to victims.[8]

Today, the remedy of restitution is achieved when prosecutors seek court-ordered compensation to the victim by the offender as a part of sentencing. Every state court has the authority to order criminal offenders to pay restitution to their victims; however, not every state makes restitution mandatory.[9] New York State, for example, leaves the ordering of restitution to a court's discretion, but courts will not consider restitution unless the victim requests it.[10] Compensation under restitution

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can consist of the return of a sum of money or the value of an object that the offender took in the course of committing the crime, funeral expenses, lost wages, support and payment of medical expenses.[11] Similarly, many of these expenses are reimbursable to a victim under a crime victims compensation program.

One primary benefit of restitution is that it requires the offender to directly compensate the victim, placing the consequences of the crime on the criminal rather than on the public in the form of state victim compensation awards.[12] Still there are barriers to restitution. In reality, once the convicted offender stands before the bench for sentencing, he or she has a great incentive to promise to comply with almost any form of restitution to avoid jail time or receive a lighter sentence. Once the threat of serious incarceration is gone, the offender may totally disregard his or her obligations toward the victim, making collection questionable.[13] When there is no leverage in sentencing, as in the case of a required minimum sentence, even the defendant's pretense of cooperation is absent. Other common reasons why courts fail to order restitution are a victim's failure to request restitution, the belief that restitution is inappropriate when incarceration is imposed, a defendant's inability to pay, and the unwillingness of some courts to enter an order of restitution without sufficient evidence of the victim's financial loss.[14] As a result, restitution is frequently not awarded in sentencing proceedings. Consequently, the costs of crime continue to be borne by the victims.

Restitution is frequently not awarded in sentencing proceedings. Consequently, the costs of crime continue to be borne by the victims.

Because of the problems associated with effecting restitution, crime victims compensation has become a significant alternative for reimbursement of expenses incurred from injuries inflicted by the criminal activity of others. Indeed, it often is the only remedy available. Under New York's Program, there is another alternative for such reimbursement, although not as regular victim compensation. The "Son of Sam" law provisions in Article 22 (discussed further below) allow the victim or dependent survivors to seek and recover damages from any source of money the convicted person receives. As a primary remedy, victims compensation is available to crime victims regardless of whether the court has ordered restitution.

State compensation to victims of crime is one of the earliest forms of victims' rights. For thousands of crime victims each year, it serves as the primary source of financial aid in the aftermath of victimization. In 1964, Great Britain and New Zealand established the first modern-day compensation programs. In 1965, California's became the first such program established in the United States; New York followed in 1966, Hawaii in 1967, and Massachusetts, Maryland and the Virgin Islands in 1968. Today all 50 states, the District of Columbia, and the Virgin Islands operate victim compensation programs.[15]

Overview of Article 22 of the Executive Law: Crime Victims Board

As with other states' programs, New York's Program provides financial assistance to victims of nearly every type of violent crime, including rape, homicide, robbery, assault, sexual abuse, and domestic violence. The purpose of the Program is to compensate innocent victims of crime or their surviving dependents for un-reimbursed out-of-pocket expenses.[16] This Program is established under Article 22, § 620 of the Executive Law.

Powers and Duty of the Board

The New York State Crime Victims Board (the "Board"), which administers New York's Program, consists of five full-time members appointed by the Governor, with the advice and consent of the New York Senate.[17] Terms are staggered and run for seven years.[18] The Governor names a chairperson from among the five Board members.[19] Among its more important powers, the Board has the authority to determine awards, order medical examinations of victims, issue subpoenas compelling attendance, request documents, make grants to community-based advocacy programs, schedule and hear appeals, and advise the Governor on establishing policies to address the needs of crime victims.[20]

When a claim is filed, the claim is assigned to a Board member who makes the final determination as to whether the claim meets the criteria for payment.[21] Conviction of the perpetrator is not a prerequisite to compensation. The claim is determined without regard to whether the alleged criminal has been arrested or prosecuted; rather, the focus is on the victim.[22]

Persons Eligible

Persons eligible for financial assistance are (1) a victim of a crime; (2) a surviving spouse, parent, child, or stepchild of a victim of a crime who died as a direct result of such crime; and (3) any person dependent for his or her "principal support" upon a victim of a crime who dies as a direct result of such crime.[23] Also eligible is any person who has paid for the burial expense of a victim of a crime,

as well as a "Good Samaritan" (one who acts to aid a law enforcement officer in the apprehension of an offender or to prevent the commission of a crime).[24] Awards are made to such persons for their out-of-pocket expenses, and lost earnings or support resulting from the injury.[25]

Victim of a Crime – Eligibility Criteria

While the Board's investigative staff corresponds and sometimes meets with victims or their surviving dependents to determine whether such individuals are encountering obstacles to eligibility, the Program requires that to qualify as a victim of a crime, the individual must satisfy the following criteria:

- Be a victim of a crime.[26] A "crime" means an act committed in New York State which would, if committed by a mentally competent criminally responsible adult, who has no legal exemption or defense, constitute a crime as defined in New York's Penal Law.[27] Also included as a "crime" is an act of terrorism committed outside the United States against a New York resident.[28] The term "victim" means a person who suffers physical injury as a direct result of a crime.[29] Physical injuries resulting from an accident, as opposed to a crime, are not compensable.
- Sustain physical injury or death resulting directly from the crime,[30] unless the victim meets one of the exceptions set forth below under the heading "Exceptions to Physical Injury."
- Be an innocent victim.[31] The victim cannot be engaged in criminal activity or in contributory conduct (not necessarily criminal). Contributory conduct could result in total or partial denial of the claim at the discretion of the assigned Board member. This could have serious effects on the victim's family. The eligibility of a victim's dependents rests largely on the eligibility of the victim. For example, if a homicide victim was engaged in criminal activity at the time of his or her death, and such activity played a part in the homicide, the dependents would not be eligible for benefits.
- Within one week, report the criminal incident to law enforcement or another criminal justice agency such as the District Attorney's Office. In cases involving sex offenses, the report may be made to the Family Court, a child or adult protective service agency,[32] or, in the case of a rape or sexual assault victim, he or she may simply seek a forensic medical examination.[33] New York's Program has a "good cause" exception for those victims who can demonstrate a good-faith basis or other special circumstance for not filing within the specified time.[34] Victims of sex crimes must only file within a "reasonable time considering all the circumstances, including the victim's physical, emotional and mental condition, and family situation."[35]
- Cooperate with police and prosecutors in the investigation and prosecution of the case.[36] A Board member has the discretion to deny a victim's claim for compensation if it is shown that the victim did not fully cooperate with the appropriate law enforcement agencies. This requirement is intended to assist the police in the apprehension of the offender, as well as to help the prosecuting attorney to obtain a conviction. Victims subject to a forensic medical examination who have not filed a police report are exempted; the Board does not require such victims to come forward with information concerning the incident for which the examination was sought.[37] Also, the Board takes into consideration possible impediments to cooperation, including apprehension about personal safety and fear of retaliation by the assailant or others. For example, some victims are reluctant to cooperate with the police after receiving threats of violence against them and their families from assailants. The Board also recognizes that age, cultural and language barriers may influence a victim's willingness to cooperate with law enforcement.

Claimant – Eligibility Criteria

Whether a victim, surviving dependent or family member, a claimant must comply with the following procedures and meet the following criteria to be eligible for reimbursement:

- Submit a claim application to the Board within one year after the crime, subject to a "good cause" exception.[38] If the claimant is under the age of 18 or incompetent, a relative, guardian, or other legal representative must file the claim within the applicable time period.[39]
- Be a living natural person.[40] A claimant who dies before an award is made has no vested benefits, and such person's estate has no claim to any award.[41]
- Suffer financial difficulty if compensation is not awarded.[42] This applies to cases involving $5,000 or more in compensation benefits.
- First use medical insurance and public funds, if available, on any bill for payment. All states' compensation programs are "payers of last resort,"[43] requiring the claimant to exhaust all other sources of insurance or government benefits that could pay for medical treatment, counseling, or funeral expenses before receiving compensation. Similarly, a compensation award will be reduced by the amount of any payments received by a claimant resulting from a civil recovery or restitution.[44]

Under New York's Program, a member of the criminal offender's family is eligible.[45] However, the award may be reduced or structured in such a way as to eliminate the economic benefit or unjust enrichment to the offender.

The claim may even be denied.[46] This is intended to prevent the person who is criminally responsible for the crime from benefiting from the victim's claim.

Physical Injury Benefits

All state compensation programs cover the same types of expenses with varying specific limits. The New York Program covers medical expenses (unlimited); mental health counseling for the victim (unlimited); lost support for surviving dependents of homicide victims (up to $30,000 total); lost earnings for victims unable to return to work because of a crime-related injury (up to $600/week, up to $30,000 total);[47] and counseling for family members of a homicide victim (includes spouse, child, parents, stepparents, grandparents, guardians, stepchild, brothers, sisters and in the case of a minor victim, the child's parent, stepparent, grandparent, guardian, sibling and stepsibling).[48] If the victim has sustained a physical injury, counseling for the victim's spouse, children or stepchildren is reimbursed.[49] Property losses, however, are compensated only for essential personal property and property lost by a Good Samaritan as a result of a crime (discussed further below).

In addition, New York compensates for other essential expenses resulting from a violent crime including felonies, sexual assault and domestic violence. These include:

- Essential personal property necessary and essential for the victim's health, welfare or safety (up to $500 with a cash limit of $100).[50] This also applies to the child of a domestic violence victim. Good Samaritans are covered for up to $5,000 for all personal property.[51] Essential personal property may include such items as clothing, bedding, eyeglasses, personal hygiene items, as well as prosthetic devices such as an artificial limb or false teeth.
- Travel expenses for necessary court appearances and for medical or psychotherapy treatment.[52] The Board usually requires a letter from the district attorney or a medical professional, stating mandatory dates for court appearances or transportation needs of the victim where the provider is located far from the victim's home or when other special circumstances exist.
- Home or vehicle modifications for victims disabled as a result of violent crime and rehabilitation which may include physical or job therapy, wheelchairs, specialized mechanical beds, and ramps for paralyzed victims.[53]
- Moving or relocation expenses when a victim is in immediate physical danger, or when relocation is medically necessary following the crime.[54] A letter from a counselor, doctor, or district attorney is usually required explaining the need for relocation.[55]
- Crime scene clean-up to a maximum of $2,500.[56]
- Cost of installing certain security devices, if considered necessary for the victim's health or welfare.[57] Maintenance fees, however, are not compensable.
- Emergency awards up to a maximum of $2,500 in cases of extreme hardship such as the deposit on a funeral bill, immediate assistance for lost earnings, and to cover the cost of HIV prophylaxis for sexual assault victims.[58]
- Attorney fees for services related to processing the victim's claim and representing the victim before the Board on appeal of the denial of a claim (up to $1,000 with affidavit of service).[59]
- Cost of sheltering battered spouses and children.[60]
- Rehabilitative occupational training for job retraining.[61]

New York does not compensate for pain and suffering. The Board pays for out-of-pocket costs actually incurred by the victim or surviving claimant. Counseling and therapy, however, are compensable in situations where there is physical injury, or, as discussed below, in stalking-related crimes. New York does not recognize "emotional trauma" as a "physical injury" and it is, therefore, not compensable.

Exceptions to Physical Injury

Domestic Violence Victims

Victims who have not sustained a physical injury may nevertheless be eligible for compensation benefits if

they are victims of certain stalking-related crimes. These crimes include: menacing, harassment, criminal contempt (violating an order of protection), and four degrees of stalking that were recently added to the Penal Law.[62] Each of these crimes place victims in fear of actual harm and are often committed by those whom the victim knows well.[63] The injuries sustained as a result of domestic violence often include emotional abuse,[64] job loss or career impediments,[65] in addition to physical injury.

Program benefits payable to victims of domestic violence crimes include: lost earnings if they lose their job or are unable to work; the un-reimbursed cost of repair or replacement of essential personal property; the un-reimbursed cost for security devices to enhance the personal protection of such victims; transportation expenses incurred for necessary court appearances in connection with the prosecution of such crime; the un-reimbursed cost of counseling provided to such victims due to mental or emotional stress resulting from the crime; and occupational or job training.[66] With the expansion of the anti-stalking laws, more domestic violence victims have qualified for compensation.

Non-domestic Violence Victims

For victims of Unlawful Imprisonment in the First Degree and Kidnapping in the First and Second Degrees, the Program compensates for lost earnings and counseling for the emotional abuse resulting from the incident.[67] These crimes are not specifically intended for victims of domestic violence, but rather apply to all victims in general who have not been physically injured as a direct result of the crime.

Elderly, Disabled and Child Victims

Another physical injury exception exists for the elderly, the disabled, and children. Innocent victims who are (1) at least 60 years of age, (2) under 18 years of age (child victims), or (3) disabled[68] may qualify for compensation.[69] Compensation benefits for the elderly and disabled are limited to the following:

- replacement or repair of lost or damaged essential personal property;
- transportation expenses for necessary court appearances; and
- counseling for the victim, provided that in the case of the elderly and disabled, treatment must begin within one year of the crime.[70]

Compensation benefits for child victims, including those who are witnesses to a crime, are not so limited. Child victims and their families are eligible for all categories of compensation without regard to physical injury.[71]

Death Benefits

The Program provides additional compensation in the event of death of the victim. The Program provides up to $6,000 in funeral expenses, together with compensation to the surviving dependents for lost support and crime scene clean-up.[72] Police officers and firefighters are covered for reasonable burial expenses (not limited to $6,000) when they die from injuries received in the line of duty as a result of a crime.[73] Additionally, the Program provides compensation for counseling for the spouse, grandparent, parent, guardian, siblings, stepsiblings, children, or stepchildren of a homicide victim.[74]

The Sexual Assault Reform Act created significant reform in New York's sexual assault and child sexual abuse laws, advancing the rights of victims of sexual assault.

Denial of Claims

Within 30 days after a decision by a Board member denying compensation, the claimant may request an appeal before the Board for reconsideration of the decision. Three members of the Board, not to include the Board member who rendered the underlying decision, review the record and affirm or modify the decision of the original Board member. The claimant may appear at the hearing with or without an attorney in support of the appeal, and may bring any supporting documents and anyone to testify on the claimant's behalf. The decision of the three-member appeal board is final, subject to appeal pursuant to an Article 78 proceeding under the Civil Practice Law and Rules.[75]

Impact of the Sexual Assault Reform Act

On October 19, 2000, Governor George Pataki signed into law the Sexual Assault Reform Act (SARA or the "Act"),[76] which took effect February 1, 2001. SARA created significant reform in New York's sexual assault and child sexual abuse laws, advancing the rights of victims of sexual assault. The Act created new classes of crimes under the Penal Law, enhanced protection for victims of sex offenses with enhanced protection for child victims, and increased penalties for offenders. One of the Act's provisions significantly eased the Program eligibility requirements. Now, a victim who has sought a forensic rape examination from a medical facility authorized to perform such exams is deemed to have "reported" the crime without having to report to a criminal justice

agency as previously required by statute.[77] Consequently, such a victim more easily satisfies the Program's reporting eligibility requirement.

In keeping with the purpose of SARA, the Board will compensate victims of sexual assault for the cost of a forensic rape examination. These victims remain eligible for all categories of Program compensation for which they would otherwise be eligible.

SARA effected other changes in the law that do not directly impact the Program, but which have a complementary effect of enhancing the rights of crime victims. For example, in creating new classes of crimes, SARA broadens the scope of sexual assault victims that qualify for compensation.

Impact of Amendment to "Son of Sam" Law

Victims' rights under the Program were further enhanced with the passage of the 2001 amendment to New York's "Son of Sam" law.[78] Originally enacted in 1977 because of outrage over possible book and movie deals offered to New York serial killer David Berkowitz, known as the "Son of Sam," it was the first state law designed to prevent convicted criminals from profiting from their crimes. The law authorized the Board to seize a criminal's windfall when it appeared to come from "selling" his or her story; to determine in an administrative hearing whether such income was in fact the proceeds from the sale of the criminal's story; and if that was found, to hold the income in escrow for distribution to any victims, who had a five-year window in which to file with the Board.

In 1991, the United States Supreme Court struck down the law because it focused exclusively on profits made from "speech" activity.[79] The N.Y. Legislature responded with a revised "Son of Sam" law that covered *all* profits of a crime, not just those generated by speech activity. The new law also removed the Board's administrative power to hold and escrow targeted funds, relegating the Board's role to notifying victims of potential profits of a crime, and facilitating a victim's rights in the courts.

Effective January 2001, a subsequent amendment expanded the law to allow victims and their families to recoup damages from a convicted person's funds. This amendment allows victims and their families to sue a person convicted of certain crimes[80] for all funds and property received from any source, including lottery earnings, inheritances, gifts, investment income or judgments in civil lawsuits with the exceptions of earned income and child support. Under the prior law victims could not reach assets obtained by criminals that were not related to the underlying crime.

Taken as a whole, victims and their families now have a greater ability to sue their attackers. Consequently, the new law fills the void created when restitution is not imposed on criminals as part of their prison sentence, helping to ensure that the financial consequences of crime are placed on the criminal who caused the harm.

Crime victims compensation has become a vibrant force in advancing the rights of victims.

Relief for Livery Cab Drivers

On July 12, 2000, in response to a rash of livery cab homicides and severe assaults in New York City, Governor Pataki signed into law an act that enabled the Board to grant expedited compensation awards to livery operator victims and family members.[81] The law empowers the Board to provide immediate assistance for lost earnings by livery operator victims and for lost support for surviving family members ($500 weekly to a total of $20,000 regardless of the actual income)[82] without a reduction for any applicable workers' compensation benefits.[83] In the past it has taken the Workers' Compensation Board over six months to determine workers' compensation benefits,[84] which has delayed the Board's ability to pay in view of its status as "payer of last resort."

Conclusion

Thinking back to the horrors of that September morning six years ago, the rationale for crime victims compensation is clear. Whether the victim of a terrorist attack, rape, or homicide, victims or their survivors often need immediate financial assistance as a consequence of that crime.

The Board encourages attention to the needs of crime victims, and often provides a remedy where none would otherwise exist. As such, crime victims compensation has become a vibrant force in advancing the rights of victims. Each time compensation benefits are expanded, crime victims are another step closer to restoring balance to the criminal justice system. As United States Supreme Court Justice Benjamin N. Cardozo wrote, "Justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[85] The New York Legislature in 1966 thought so, too. ■

1. Bill Memorandum filed with Assembly Bill, Intro. No. 5335, Pr. No. 7172, Chapter 894, S. Pr. No. 6124 entitled: "An Act to amend the Executive law, in relation to the creation of the crime victims compensation board in the executive department, prescribing the powers and duties thereof and making an appropriation therefore." (1966) (proposing a program for the compensation of victims of violent crime to be administered by a Crime Victims Compensation Board).

2. *Id*. at 3 (containing remarks by Governor Nelson Rockefeller explaining the need to form a special committee to develop a program to compensate victims of violent crime).

3. Frank Carrington & James A. Rapp, Victims' Rights: Law and Litigation 3-1 (Matthew Bender 1991).

4. Daniel Van Ness & Karen Strong, *Restitution to Rehabilitation: How and Why Victims Were Removed From the Criminal Justice Process*, Crime Victims Rep., vol. 4, no. 6, Jan./Feb. 2001, p. 81, col. 1.

5. *Id.* at 92.

6. *Id.*

7. *Id.*

8. *Id.* at 93.

9. *Ordering Restitution to the Crime Victim (11/2002)*, Office for Victims of Crime, U.S. Department of Justice, p. 1.

10. Penal Law § 60.27(1).

11. *See* Carrington & Rapp, *supra* note 3, p. 3-8.

12. *Id.* at 3–5.

13. *Id.*

14. David Beatty, Susan Howley and Dean Kilpatrick, *Statutory and Constitutional Protections for Victims Rights*, Arlington, Va., National Center for Victims of Crime, p. 95.

15. National Association of Crime Victim Compensation Boards, *Program, Directory* (2002), National Association of Crime Victim Compensation Boards.

16. Exec. Law § 620.

17. Exec. Law § 622(1).

18. Exec. Law § 622(2).

19. Exec. Law § 622(3).

20. Exec. Law § 623.

21. Exec. Law § 627(1), (5).

22. Exec. Law § 627(3).

23. Exec. Law § 624(1)(a), (b), (c).

24. Exec. Law §§ 624(1)(d), 631(5)(c).

25. Exec. Law § 626(1).

26. Exec. Law § 631(1)(a).

27. Exec. Law § 621(3)(a).

28. Exec. Law § 621(3)(c).

29. Exec. Law § 621(5).

30. Exec. Law § 631(1)(b).

31. Exec. Law § 631(5)(a).

32. Exec. Law § 631(1)(c).

33. *Id.*

34. *Id.*

35. *Id.*

36. The Board has discretion to determine whether a victim has a legitimate reason for not pursuing prosecution. Also, the Federal Guidelines for crime victim compensation encourages each state to develop its own standards for "reasonable cooperation."

"Point taken. There's no need to get all constitutional on me."

37. Exec. Law § 631(1) simply requires victims of sexual offenses as contained in Penal Law art. 130 or of incest as defined in Penal Law § 255.25 to report to and receive treatment from a hospital that provides forensic rape exams.

38. Exec. Law § 625(2).

39. Exec. Law § 625(1).

40. *Gryziec v. Zweibel*, 74 A.D.2d 9, 426 N.Y.S.2d 616 (4th Dep't 1980) (actual crime victim, if he or she is living, or a person dependent for principal support upon a victim including a surviving spouse, parent or child of the deceased victim are claimants under § 624 and not estates or other impersonal entities in view of § 621 which defines claimant as the person filing the claim).

41. *Id.* at 13–14.

42. Exec. Law § 631(6)(a).

43. Exec. Law §§ 626, 631(4)(c) (the Board interprets these provisions to provide that compensation will be paid only after the claimant exhausts all sources of collateral funds).

44. Exec. Law § 631(4).

45. Exec. Law § 624(2).

46. *Id.*

47. Exec. Law § 631(2), (3).

48. Exec. Law § 626(1), (2).

49. *Id.*

50. Exec. Law § 631(2), (9).

51. Exec. Law § 631(5)(c).

52. Exec. Law § 631(8), (10), (12).

53. Exec. Law § 631(2), (12).

54. Exec. Law § 626(1) (moving and relocation expenses are compensated as medical expenses).

55. Required by Board policy.

56. Exec. Law § 631(2).

57. Exec. Law § 631(12) (the Board will pay for all victims with a letter from the District Attorney's Office stating the need for victim's welfare).

58. Exec. Law § 630(1).

59. Exec. Law § 626(1).

60. *Id.*

61. Exec. Law § 631(2).

62. Exec. Law § 631(12).

63. Elizabeth Schneider, Battered Women and Feminist Lawmaking 3–4 (Yale Univ. Press 2000).

64. *Id.* at 65.

65. Lucy Freedman & Sarah Cooper, *The Cost of Domestic Violence*, New York, Victim Services Research Dep't (1987).

66. Exec. Law § 631(12).

67. Exec. Law § 631(11).

68. Exec. Law § 621(9), (10), (11).

69. Exec. Law § 624(1)(e), (f), (g).

70. Exec. Law § 631(8).

71. Exec. Law §§ 621(11), 624(1)(g), 626(2), 631(2) (considered collectively, the Board interprets these provisions to provide all categories of compensation to child victims without regard to physical injury).

72. Exec. Law § 631(2)

73. Exec. Law § 631(5)(e)

74. Exec. Law § 626(1), (2).

75. Exec. Law § 628(1), (2), (3).

76. 2000 N.Y. Laws ch. 1.

77. *Id.* at § 28, amending Exec. Law § 631(1).

78. Exec. Law § 632-a.

79. *Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd.*, 502 U.S. 105 (1991).

80. Exec. Law § 632-a.

81. Exec. Law § 627(6)(a).

82. Exec. Law § 627(6)(b).

83. Exec. Law § 631(4).

84. It normally takes at least six months to receive a worker's compensation decision letter.

85. *Snyder v. Mass.*, 291 U.S. 97, 122 (1934).

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What's a Distributee to Do? Renunciation and the Dead Man's Statute

Many estate practitioners are aware that a renunciation can eliminate the application of the Dead Man's Statute at trial, but may not realize that its utility is not uniform and may, in fact, be dependent upon whether the person renouncing is a legatee or a distributee.[1] The lesson to be learned from the distinction may prove critical to the strategy of an estate litigation.[2]

The Dead Man's Statute

The Dead Man's Statute provides, in pertinent part:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person . . . , or a person deriving his title or interest from, through or under a deceased person . . . , by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person, except where the executor, administrator, survivor, . . . or person so deriving title or interest is examined in his own behalf . . . concerning the same transaction.[3]

As defined by the provisions of CPLR 4519, the Dead Man's Statute bars the testimony of "any person interested in the event" regarding a transaction or communication with a decedent. Specifically, the statute prohibits testimony by (1) a party, (2) a person "interested in the event,"[4] or (3) a person from whom such a party or interested person derives his or her interest, regarding transactions or communications with the decedent when such person or party is examined in his or her own behalf or interest[5] against (a) the executor, (b) the administrator, (c) the survivor of a deceased person or (d) a person deriving his or her title or interest from, through or under a deceased person.[6]

The statute is wide-ranging and captures within its preclusive net any conversations, observations and even writings with or about a deceased person. Courts typically explain that "[t]he underlying purpose of the [Dead Man's Statute] is to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court."[7] On the other hand, it has been considered by practitioners to be an unwieldy evidentiary burden and an impediment to the fact-finding process.[8]

Given these evidentiary hurdles, estate litigators often find themselves confronted with the choice of navigating within the confines of the statute or strategizing a means of avoiding its application. It is not surprising that many of them choose to steer clear of the statute. Renunciation – divestiture of a witness's financial "interest" in the event or subject matter of the litigation – offers one such means. The problem is that while a renunciation by a legatee will eliminate the legatee's statutory disqualification as an interested witness, a renunciation by a distributee may not produce the same result.

Eliminating a Witness's "Interest"

A witness's incompetence under the Dead Man's Statute may be circumvented if such witness renounces his or her "interest in the event," as observed

above.[9] "In order to be disqualified, the witness' interest in the event must exist at the time of the proposed testimony. Therefore, a potential witness' divestiture of his or her interest before testifying generally will restore the witness' competency,"[10] as the witness will no longer be a person "interested" within the scope of the statute.[11]

Although the law is clear that this result will apply if the interest is rooted in a legacy, this is not necessarily the case if it is rooted in an intestate share. The distinction, which, indeed, can be significant to the trial of a proceeding, may be best understood through an examination of renunciations under both the common law and statute.

Renunciation of a Legacy Under the Common Law

As compared to the case of a distributee, the common law has always allowed a legatee to renounce an interest in an estate on the theory that such interest did not automatically vest in the legatee at the moment of death.[12] Although on the face of the Dead Man's Statute the renouncing legatee appears to be "a person from, through or under whom . . . [the] interested person, [*i.e.*, the remaining legatee,] derives his interest or title,"[13] under the circumstances, the legacy is deemed to pass to the remaining testamentary beneficiaries from the testator, and not from the renouncing legatee.[14] This is true despite the fact that the renunciation will have enhanced the interests of any remaining residuary legatee in whose favor the renouncing legatee may be testifying. A leading commentator states:

> A legatee who has released the legacy is competent to testify to transactions with the testator to support the will. As a result of the release, the witness is no longer a person interested in the event, and while it is true that the release has enlarged the interest of the residuary legatee, the increment is deemed to flow from the testator and not from the releasing legatee.[15]

Therefore, under the common law, a legatee rendered incompetent to testify under the Dead Man's Statute may cure such incompetence by renouncing his or her interest derived under the will.

Renunciation of an Intestate Share Under the Common Law

Unlike a legatee, the common law does not allow a distributee to renounce his or her interest in an estate.[16] Instead, any attempt to disclaim by a distributee is deemed a gift of his or her intestate share to the other distributees of the decedent.[17] The common law views the interest of a distributee as vesting on the date of the decedent's death, thus making a purported renunciation by a distributee ineffective.[18]

A case often cited for this proposition is *In re Aievoli's Will*,[19] a probate proceeding in which objections to probate were filed by a beneficiary who was both a legatee and distributee. The proponent objected to the beneficiary's testimony at trial on the basis of the Dead Man's Statute. The beneficiary argued that he was not incompetent to testify under the statute because he had executed a document under which he purportedly waived his rights as a legatee and distributee.

The trial court ruled that the document did not amount to such a waiver, found the beneficiary incompetent, and his testimony was stricken. In affirming on appeal, the Second Department observed that the proponent did not argue that the beneficiary's purported waiver was ineffective in releasing the beneficiary's interest as a distributee. However, the court explained, in dicta, that, even if the beneficiary could waive his intestate share, he nevertheless would have been incompetent to testify at trial under the Dead Man's Statute, since his testimony would

Nevertheless, the debate as to the import of a distributee's renunciation continues.

have benefited someone who succeeded to his interest.[20]

Surrogate Nathan Sobel's decision in *In re Fienga*[21] provides a helpful historical examination of the renunciation statute and a rationale for the distinction drawn between renunciations of a legacy and those of an intestate share. The court explained:

> [P]rior to any statute, a legatee or devisee could always renounce his testamentary disposition. A distributee could not. The theory was that a testamentary disposition was regarded as an "offer" by the testator which the legatee or devisee could accept or reject. A distributive share in intestacy on the other hand vested by force of law in the distributee at date of death. An attempt by the distributee to relieve himself of his vested share or to shift it to others occasioned possible gift tax consequences [and] the vested share remained subject to the claims of the renouncing distributee's creditors. In contrast, because a testamentary disposition was an "offer" which the legatee or devisee could accept or reject, a renunciation of a testamentary disposition had no gift or creditor consequences.[22]

Therefore, in light of the foregoing, a distributee could not utilize a renunciation in order to eliminate his or her incompetence to testify under the Dead Man's Statute, as the distributee was deemed to be a person "from, through or under . . . whom . . . an interested person derives his interest or title by assignment or otherwise."[23] Curiously, despite the enactment of legislation dealing with renunciations, discussed below, a number of treatises and commentaries continue to acknowledge this view.[24]

Does the Distinction Continue?

The common-law distinction between a renouncing legatee and a renouncing distributee may have been rendered obsolete by virtue of the provisions of New York's renunciation statute, EPTL 2-1.11. In pertinent part, the statute requires that an effective renunciation of an interest in an estate be made within nine months of the decedent's death.[25] The statute makes no distinction between a renunciation by a legatee and a distributee.[26] Indeed, the statute specifically provides that a renunciation has the same effect with respect to the renounced interest as though the renouncing person had predeceased the decedent.[27]

Renunciations Within the Nine-Month Period

Section 2-1.11 of the EPTL appears to place a legatee and a distributee who renounce within nine months of the decedent's date of death on equal footing in that it allows each of them to "reject" the vesting of title.[28] Since title never vests, neither should be deemed someone "from, through or under whom" a "person interested in the event . . . derives his interest or title by assignment or otherwise."[29] This suggests that common law principles regarding vesting of an intestate share no longer apply to a distributee who renounces within the statutory period, thus clearing the way for a distributee's testimony, even in the face of the Dead Man's Statute.[30]

Nevertheless, despite the foregoing, the debate as to the import of a distributee's renunciation continues. As mentioned above, many of the leading commentators continue to cite pre-statutory opinions, like *In re Aievoli's Will*, for the proposition that a distributee's renunciation does not cure his or her incompetence under the Dead Man Statute.[31] On the other hand, more than one commentator has questioned the durability of these opinions. Professor Vincent Alexander, author of McKinney's Practice Commentaries, states the following:

> Why this result has never been corrected by subsequent decisions or by explicit legislative action is a mystery. An argument in opposition to *Aievoli* might be based on § 2-1.11(d) of the Estates, Powers & Trusts Law, which provides that a person who duly renounces a distributive share is to be treated as having predeceased the decedent. The increase in the other distributees' shares, therefore, should not be deemed to flow from the renouncing distributee.[32]

Similarly, *Richardson on Evidence* remarks, "It should be noted, however, that EPTL 1.11 may be interpreted to change the ruling in *Matter of Aievoli*."[33]

In sum, it is not certain that a distributee's renunciation within the statutory period will render the distributee competent to testify at trial under the Dead Man's Statute.

Renunciations Outside of the Nine-Month Period

A distributee who is incompetent to testify under the Dead Man's Statute will face even more uncertainty when a renunciation is attempted outside of the nine-month "deadline" imposed by EPTL 2-1.11(b)(2). Under EPTL 2-1.11(h), the statute provides that it "shall not abridge the right of any beneficiary or any other person to assign, convey, release or renounce any property or interest therein arising under any other section of this chapter or other statute or under common law."[34] As Surrogate Roth explains, paragraph (h) "may be invoked only in those situations which the statute did not contemplate, such as . . . where a witness orally renounces on the stand in order to avoid the exclusion of his or her testimony under CPRL 4519, the dead man's statute."[35]

Clearly, paragraph (h) would be helpful to a legatee who seeks to renounce after the statutory nine-month period, since the common law does not restrict a legatee's ability to renounce.[36] However, it seems that it may not be helpful to distributees who find themselves in the same situation for the converse reason: the common law does not afford a distributee the ability to renounce.

What's a Distributee to Do?

As Weinstein, Korn & Miller's treatise *New York Civil Practice* laments, "Reconciliation of the legatee-devisee cases may leave the reader slightly unsettled."[37] Indeed, even with the enactment of a statute that explicitly allows distributees to renounce their interest in an estate, questions abound regarding its relation to the Dead Man's Statute. Legislative action may be warranted. ■

1. CPLR 4519.

2. While the Dead Man's Statute is most often invoked in Surrogate's Court proceedings, it is applicable in any action or proceeding when testimony by a "person interested" regarding a transaction or communication with a decedent is offered at trial.

3. CPLR 4519.

4. A party or person is interested in the event has been defined as someone who "will either gain or lose by the direct legal operation and effect of the judgment" (Prince, Richardson on Evidence, 11th ed., § 6-124(a) (quoting *Hobart v. Hobart*, 62 NY 80, 83 (1875))).

5. One testifies in one's own behalf when one benefits from one's own testimony (Prince, Richardson on Evidence, 11th ed., § 6-125).

6. *See* CPRL 4519.

7. *See, e.g., Sepulveda v. Aviles*, 308 A.D.2d 1, 10, 762 N.Y.S.2d 358 (1st Dep't 2003) (internal quotation marks and citations omitted).

8. *See generally* Alexander, McKinney's Practice Commentary, CPLR 4519 (2007).

9. 40 NY Jur. 2d § 1231 (2007) ("Generally, if a witness releases his or her interest and thereby removes himself or herself from the class of persons deemed disqualified from testifying, the limitations of the dead man's statute are thereby overcome.") (citing *In re Wilson's Will*, 103 N.Y. 374 (1886); *In re Keegan's Will*, 114 N.Y.S.2d 217 (Sur. Ct., Westchester Co. 1952)).

10. Alexander, McKinney's Practice Commentary, CPLR 4519 at 4519:2(c) (2007).

11. *See* 25A Carmody-Wait 2d § 149:566; Alexander, Practice Commentary, CPLR 4519 at 4519:2(c) (2007).

12. *See In re Fienga*, 75 Misc. 2d 233, 347 N.Y.S.2d 150 (Sur. Ct., Kings Co. 1973).

13. CPLR 4519.

14. *See, e.g.*, 25A Carmody-Wait 2d § 149:566.

15. Prince, Richardson on Evidence, 11th ed., § 6-124(b) (citing *In re Lefft Estate*, 44 N.Y.2d 915, 408 N.Y.S.2d 1 (1978); *In re Wilson Estate*, 103 N.Y. 374 (1886); *Loder v. Whelpley*, 111 N.Y. 239 (1888)); *see* 25A Carmody-Wait 2d § 149:566; 40 NY Jur. 2d § 1231 (2007).

16. *In re Fienga*, 75 Misc. 2d at 233–34.

17. *Id.*

18. *Id.*

19. 272 A.D. 544, 74 N.Y.S.2d 29 (2d Dep't 1947).

20. *See also In re Bourne's Estate*, 206 Misc. 378, 133 N.Y.S.2d 192 (Sur. Ct., Suffolk Co. 1954).

21. 75 Misc. 2d at 233–34.

22. *Id.*

23. CPLR 4519; s*ee also In re Aievoli's Will*, 272 A.D. 544.

24. *See* 9 Warren's Heaton on Surrogate's Court Practice § 116.05[2][b] ("The Dead Man's Statute has been applied differently . . . to the disclaiming distributee [as compared to the disclaiming legatee]. Waiver of his rights in the estate by a distributee has been deemed to have enlarged the proportionate share of the other distributees and consequently the disclaiming distributee has been held to be a person from, through, or under whom the interest of the other distributees is derived."); 40 NY Jur. 2d § 1231 (2007) (citing *In re Aievoli's Will*, 272 A.D. 544 and *In re Bourne's Estate*, 206 Misc. 378); 25A Carmody-Wait 2d § 149:566) (citing *In re Bourne's Estate*); 2 Harris NY Estates: Probate Admin. & Litigation § 19:187 (2006) (citing *In re Aievoli's Will*).

25. EPTL 2-1.11(a)(2), (b)(2).

26. EPTL 2-1.11(a)(1), (b).

27. EPTL 2-1.11(d).

28. *See* EPTL 2-1.11(a)(1), (b).

29. *See* CPLR 4519.

30. *See, e.g.*, Prince, Richardson on Evidence, 11th ed., § 6-124(b).

31. S*ee* 9 Warren's Heaton on Surrogate's Court Practice § 116.05[2][b] ("The Dead Man's Statute has been applied differently . . . to the disclaiming distributee [as compared to the disclaiming legatee]. Waiver of his rights in the estate by a distributee has been deemed to have enlarged the proportionate share of the other distributees and consequently the disclaiming distributee has been held to be a person from, through, or under whom the interest of the other distributees is derived."); 40 NY Jur. 2d § 1231 (2007) (citing *In re Aievoli's Will*, 272 A.D. 544, 374 N.Y.S.2d 29 (2d Dep't 1947) and *In re Bourne's Estate*, 206 Misc. 378, 133 N.Y.S.2d 192 (Sur. Ct. Suffolk Co. 1954)); 25A Carmody-Wait 2d § 149:566) (citing *In re Bourne's Estate*); 2 Harris NY Estates: Probate Admin. & Litigation § 19:187 (2006) (citing *In re Aievoli's Will*).

32. Alexander, McKinney's Practice Commentary, CPLR 4519 at 4519:2(c) (2007).

33. Prince, Richardson on Evidence, 11th ed., § 6-124(b).

34. EPTL 2-1.11(h).

35. *In re Chofeng Lin Fee*, N.Y.L.J., Oct. 19, 1992, p. 29, (Sur. Ct., N.Y. Co.).

36. *See generally id.*

37. 1 Weinstein, Korn & Miller – New York Civil Practice: CPLR 4519.12 (Matthew Bender 2006).

BY WILLIAM MICHAEL TREANOR AND MARK A. KEURIAN

Honoring the Past

The Judges of the New York Court of Appeals: A Biographical History
Albert M. Rosenblatt, Editor in Chief, copublished with The Historical Society of the Courts of the State of New York (2007)

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The Judges of the New York Court of Appeals: A Biographical History, edited by Judge Albert Martin Rosenblatt, provides a masterful history of the individuals who have served on the New York Court of Appeals. Written by an extraordinary range of authors – with contributions from former law clerks to grandchildren five generations removed – Judge Rosenblatt's book offers illuminating biographies of the judges of a court that has contributed immeasurably to both New York State and the nation. It is a fascinating and important work and this analysis of the lives of the judges of the New York Court of Appeals is long overdue.

Opening its doors on September 8, 1847, the New York Court of Appeals from its inception was one of the most important courts in the country, and it has continued to maintain this great stature. Its prominence is due, in part, to the significance of its docket. Equally important, its prominence is due to the quality of the Court's decision making. The Court has produced countless landmark decisions, and with such legal minds as Henry R. Selden, Benjamin N. Cardozo, and Judith S. Kaye, among a long list of giants, it is hardly surprising that this court, and the judges who have composed it, is one of the most cited in the country.

Despite the Court's effect on the history of the nation and development of law, no book has ever presented the biographies of all of the judges. While the lives of some are well-known, such as Cardozo and Judge (and Senator) Kenneth Keating, other judges who have made important contributions to the law have been largely forgotten to history. No more. Judge Rosenblatt has unearthed their stories. The history of the Court, through the biography of its judges, is told thoroughly and fairly. Judge Rosenblatt's contributors do not shy away from discussion of low points in the Court's history, such as the vilification of the Court during the Boss Tweed era or the scandal surrounding the appointment of Judge Isaac Horton Maynard. At the same time, the effect of the book will certainly be to increase awareness of the extraordinary contributions the Court has made in its history.

In her Foreword, Chief Judge Kaye aptly describes the book as "a labor of love" by Judge Rosenblatt. It is the latest achievement in a public career of remarkable achievements. Judge Rosenblatt's dedication to the legal system has marked his career since he began his studies at Harvard Law School. Appointed as acting district attorney of Dutchess County in 1968 by Governor Nelson Rockefeller, Rosenblatt would soon be elected district attorney. Due to his success as district attorney, and the respect he garnered in his position, he would become the president of the New York State District Attorneys Association only five years later. At the age of 39, in 1975, Judge Rosenblatt first entered the judiciary, having been elected a Dutchess County judge. In 1981, Judge Rosenblatt was elected to the New York Supreme Court. A man dedicated to promoting ethical practice, Judge Rosenblatt was appointed the state's chief administrative judge in 1987, where he helped create the New York State Advisory Committee on Judicial Ethics, which would help guide the 3,300 New York state judges on ethical questions. After Judge Rosenblatt's term as the state's chief administrative judge, in 1989, Governor Mario Cuomo designated him as an associate justice of the Appellate Division, Second Department. With such an impressive and distinguished background, Judge Rosenblatt was a logical choice for New York's highest court. Named to the Court in December 1998, following his nomination by Governor George Pataki, Judge Rosenblatt would serve the Court with the same extraordinary honor, distinction, and dedication that he had shown throughout his life. Judge Rosenblatt sat on the Court of Appeals from 1999 to 2006, when he reached the mandatory retirement age of 70. Over the course of his 18 years as an appellate judge, Rosenblatt participated in approximately 10,000 decisions. His impressive body of opinions reflects a powerful combination of commitment to legal craftsmanship, sensitivity to practical realities, and dedication to using the law as an instrument of justice. For example, in *People v. Darling*, a case in which the defendant petitioned to suppress evidence obtained from a wiretap of a phone, where the number was changed after the wiretap warrant was issued with the old number, Judge Rosenblatt, in affirming that the letter of the law was followed in acquiring and executing the warrant, stated that "'strict compliance' does not entail hypertechnical or strained obedience, nor is common sense its enemy." Judge Rosenblatt, in *Linda R. v. Richard E.*, was one of the earliest judges to insist that the law be blind about gender, in this instance, a custody case. Further, in *People v. Sanchez*, Judge Rosenblatt wrote a passionate dissent in which he criticized the extension of the depraved indifference murder statute.

Given his wealth of experience and accomplishments, Judge Rosenblatt is an excellent gatekeeper for the lore of the Court's judges. Among Judge Rosenblatt's countless achievements, *The Judges of the New York Court of Appeals* must rank as one of his highest. Nowhere is the history of the Court, told through the lives of its judges, more accessible. By bringing the lives of these judges to the forefront, Judge Rosenblatt provides an important contribution to legal history.

To give a sense of the book, I will focus on three of the biographies from the book: Chief Judges Denio, Parker, and Loughran. Focusing on their histories gives a sense of the important (if sometimes largely forgotten) lives the book highlights.

Judge Hiram Denio served on the Court of Appeals from 1853 to 1865, an extremely long tenure for that time. He was the first in the Court's history to serve two different terms as chief judge, in 1856 to 1857, and again in 1862 to 1865. Judge Denio, a Democrat, was notably the only Democrat to vote with the majority in *Lemmon v. The People*, a case whose facts were similar to facts found in the Supreme Court's earlier *Dred Scott* decision, but the outcome of which was dramatically different. Judge Denio authored the 5–3 decision, affirming the grant of the writ of habeas corpus by New York and holding that the slaves who traveled from Virginia were properly freed by New York statute. Unlike *Dred Scott*, *Lemmon* was a model of progressive thinking and judicial self-restraint, in which only the questions before the Court were decided. Judge Denio was also a strong proponent of reform for the fledgling court. In 1857, he wrote to the Assembly Judiciary Committee asking for change in the selection process of judges, persuasively arguing that it was difficult to preserve a consistent course of decisions with such high turnover. Indeed, because one judge's term would expire every two years, in its first 23 years of existence the Court had 19 regular members. Judge Denio's dream was realized in 1869, when the voters approved a new constitutional article that provided for a court of seven judges elected statewide, for 14-year terms, with mandatory retirement at age 70.

Another giant in the Court's history was Chief Judge Alton Brooks Parker, who served on the Court of Appeals (Second Division) in 1889–1892, and then as the Chief Judge of the Court of Appeals from 1898–1904. In 1889, then Supreme Court Judge Parker was appointed to the newly created Second Division of the Court of Appeals – a temporarily established court to resolve the problem of calendar congestion. In 1897, Parker was elected Chief Judge. Most famously, he is remembered for penning two key opinions, one a landmark case that has inspired more than a century of controversy, and the other, a decision seen as too progressive by the United States Supreme Court (although history would side with Parker).

The first case, *Roberson v. Rochester Folding Box Co.*, an invasion of privacy case, involved a young woman whose photograph had been used, without her permission, to advertise flour. Judge Parker, without the aid of existing precedent, held that no such right existed under New York law. The New York State Legislature would respond, passing a statute allowing for such a private right of action. To this day, scholars continue to debate if the right of privacy should be recognized. In the second case, *People v. Lochner*, the Court upheld a maximum-hours law for employees as being validly within the Legislature's police power to "promote and protect the health of the people." In a time when workers' rights were being defined, the Court of Appeals, through *Lochner*, would once again be at the forefront of a national issue. Likewise, in *National Protective Ass'n of Steam Fitters and Helpers v. Cumming*, decided before *Lochner,* the Court would uphold workers' right to strike. Judge Parker would remain a friend of labor after leaving the bench.

In 1904, Chief Judge Parker was asked to be a Democratic candidate for President of the United States, to face the unenviable task of challenging incumbent Theodore Roosevelt. Parker, while allowing the party to consider him as a candidate for its nomination, held steadfast to the position that it was inappropriate for a sitting judge to express his own personal political views publicly. He thus did not campaign for his own nomination, even after immense party pressure to do so. On July 6, 1904, the Democratic Party selected Chief Judge Parker as its candidate. On August 5, Parker resigned as Chief Judge and accepted the party nomination five days later. The only Court of Appeals judge to ever run for President of the United States, he would go on to a resounding defeat.

In the years after, he continued to make important contributions to the legal history of both New York and the United States itself. Parker would be active in bar groups, as a founder and director of the American Bar Association, twice serving as its president, as well as serving as the president of the New York State Bar Association. He would also serve for several years as a special lecturer and adjunct faculty member at Fordham University School of Law, from the time of its founding in 1905. Judge Parker's contributions to the legal field cannot be understated, and Judge Rosenblatt's book does an excellent job of reintroducing a man to those scholars and practitioners in New York that otherwise would not know of him or his importance in history.

Judge John Thomas Loughran sat on the Court of Appeals from 1934 to 1953, as Chief Judge from 1945 to 1953, during both the Great Depression and World War II. An avid scholar and teacher, Judge Loughran always remained active within the community. He taught at Fordham Law School for 18 years before being appointed to a 14-year term on the Court of Appeals. So great was Judge Loughran's capability and understanding of the law,

CONTINUED ON PAGE 61

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am litigation counsel to a business client that has expressly directed me to settle whenever possible, and as early as possible. Management is so strongly averse to litigation that, in my experience, this company will take a substantial loss rather than litigate – even when it is clearly in the right.

Unfortunately, in attempting to implement my client's policy I frequently have been confronted with opposing counsel who will resist any suggestion of settlement. On occasion, my suspicion that certain lawyers are refusing to discuss settlement because they simply want to maximize their own billings has been confirmed by the attorneys themselves. Of course, when we get before a judge, the judge also attempts to expedite a settlement, but such efforts can be thwarted by counsel who insist that their client believes right is on his side. Counsel demands "justice," even when the weakness of the client's case is apparent to everyone.

I believe Ethical Considerations, if not Disciplinary Rules, are being violated in such circumstances, but am unsure as to what I can do. I also would like to know what the court's responsibilities are when it is clear that a lawyer is not serving the interests of his or her client, but is perpetuating litigation for the lawyer's own benefit. Finally, how do I explain this predicament to my own client, who is also being prejudiced by the other attorney's behavior?

Sincerely,

Doing a Slow Burn

Dear Slow Burn:

Your predicament raises a number of important issues in this age of an ever-increasing concern for the "bottom line."

Before addressing the conduct of your adversaries, it seems reasonable to examine first your concern about your own client's instructions, which to a large extent have placed you in the position you now occupy. You are clearly troubled by your client's desire to settle because, in your judgment, it is sometimes unreasonable and/or unnecessary. Your concern highlights the long-recognized tension between a client's right to make substantive decisions and the exercise of a lawyer's professional judgment regarding strategy and procedure. You should rest assured that under the Code of Professional Responsibility, a lawyer is obligated "to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules." DR 7-101(a)(1). The duty of zealous advocacy has been called the "fundamental principle of the law of lawyering."[1] EC 7-7 provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer."

A lawyer should "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations." EC 7-8. So long as you are advising your client of your concerns, it would appear that your client's directive to settle does not fall outside a legal objective, and is a perfectly acceptable course of action, even if you do not agree with it. However, if you feel that your client's desire to settle at all costs renders it unreasonably difficult for you to carry out employment effectively, then you should share your concerns with your client. Indeed, you may consider substitution of counsel, or you can seek permission from the court to withdraw as attorney of record. DR 2-110(c)(1)(d). All of your concerns must be part of your conversation with your client. If you seek to withdraw, then permission from the court is required. This cannot be accomplished if there is any material adverse effect on the interests of your client. DR 2-110(c).

However, assuming that you will stay with this client and will continue to follow management's instructions, you correctly identify problems with the response of some of your adversaries, as outlined in your question. Your belief that they are violating a number of Ethical Considerations and Disciplinary Rules is well founded. At the outset, the conduct of a lawyer who refuses to discuss settlement so as to maximize billing is nothing less than egregious. In placing his own economic interests over those of his client, an attorney clearly violates EC 5-1 and DR 5-101. EC 5-1 states, "The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely* for the benefit of the client and free of compromises, influences and loyalties" (emphasis added).

An adversary's statement that his client believes right is on his side, and demands "justice" in the face of a weak case, is troubling. However, this does not seem to rise to the level of a Disciplinary Rule violation. A lawyer must represent his client zealously but within the bounds of the law. EC 7-1. A lawyer may not, however, assert a position to harass or maliciously injure another (DR 7-102(a)(1)), advance a claim that is unwarranted

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.

under existing law (DR 7-102(a)(2)) or knowingly make a false statement of law or fact (DR 7-102(a)(7)). Standing alone, the assertion that a client wants "justice," or that right is on his side, appears to be sufficiently general in nature and would not warrant sanctions. This analysis assumes, of course, that opposing counsel has stated the position of his client accurately after fully informing his client of your willingness to discuss settlement. The outcome would be quite different, for example, if your adversary were working under directives similar to yours, that is, to settle whenever possible and as early as possible. If your adversary had been told to explore settlement, but was refusing to do so, then he would not only be placing his interests above those of his client, but also would also be making significant misrepresentations of fact to the court and counsel, in violation of a number of provisions found at DR 1-102.

It appears from your question that you have made it abundantly clear to opposing counsel and to the court that your client is willing to discuss settlement. In the future, it may be advantageous to reduce this willingness to a firm settlement offer. The client, and not the attorney, decides whether or not to accept, and an attorney informed of such an offer is bound to communicate it to his client. EC 7-7.

You must next consider whether you have any obligation to report an adversary whose refusal to discuss settlement is motivated by a desire to continue billing his client. Clearly, such conduct violates a Disciplinary Rule and calls into question your adversary's fitness as a lawyer. DR 5-101(a) states, "A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interests." Because you have knowledge of that conduct, you have an affirmative obligation to report it under DR 1-103(a).

Although the judge may have suspicions about why opposing counsel is unreasonably refusing to discuss settlement, he or she likely is not privy to counsel's remarks confirming that this refusal is based on a desire to maximize billings. It is your obligation to inform the court of your adversary's conduct under EC 1-4. Pursuant to Cannon 3 of the Code of Judicial Conduct (22 N.Y.C.R.R. § 100.3(D)(2)), a judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility is required to take appropriate action. The judge is authorized to look into the matter, and to report your adversary's conduct as well. Appropriate action may include direct communication with the lawyer who committed the violation, or some other direct action, if available – and reporting the violation to the appropriate authority or agency or body.

An adversary who focuses on the bottom line to the extent you indicate has compromised fully his or her client's interests. You now have an excellent opportunity to preserve the integrity of the legal profession by not only informing your client of these developments, but by reporting your adversary's conduct to the court and local grievance committee.

The Forum, by
Dennis P. Glascott
Goldberg Segalla LLP
Buffalo

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I devote a large part of my law practice to commercial real estate, including lease negotiation on behalf of a client who owns office buildings in the vicinity of my own office. Recently, I received a signed letter of intent from a broker engaged by my client outlining the terms of a new lease to an accountant, covering approximately 1,500 square feet for general office use.

I prepared the lease. As is often the case, the letter of intent provided the name and current address of the tenant, but did not include the name of an attorney representing the tenant. I called the broker who confirmed that no attorney had been identified by the tenant and, as I customarily do in such instances, I e-mailed the draft lease directly to the tenant. In my covering message, I requested that after review by him and counsel, he ask his attorney to call me to discuss the draft.

The following week I received a call from the prospective tenant. He asked me if he really needed an attorney to review the lease. Before I could even respond, he told me that he did not want to pay an attorney to do the work; that the cost of moving his office and preparing and furnishing the new space was taxing enough; and that colleagues who already rented space from my client assured him that he ran an efficient building and did not gouge his tenants. He then stated that he read the lease and asked if I could just answer a few questions.

Although I did not know my exact ethical and professional obligations in this situation, my antennae did go up so I punted and told him that I would get back to him. I grabbed my portable Code of Professional Responsibility and began to leaf through the applicable sections, but I am still not 100% sure what to do. I do not want to kill this deal by being overcautious and refusing to talk to this tenant (as I know the space has been empty a long time), but on the other hand, I do not want to compromise my allegiance to my client or do what is ethically or professionally improper. Please advise.

Signed,
Lost in Leaseland

1. Monroe Freedman, *The Errant Fax*, Legal Times 26 (Jan. 23, 1995) (quoting Geoffrey C. Hazard, The Law of Lawyering).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please comment on the following language, which is common among trial lawyers. In my opinion, it is ungrammatical:

> The defendant should have moved the court to strike the request rather than to dismiss the complaint.

Answer: The correspondent, who is not a lawyer, objected to the construction "moved the court." That statement, she maintained, implied that courts could be "moved" by lawyers or by any group other than building contractors with heavy equipment.

She argued that the verb *move* is a transitive verb that requires an object. One can move books, furniture, even (figuratively) "heaven and earth," but one cannot move "courts." She argued that the word *that* should not have been omitted, and that the sentence should be re-drafted to read:

> The defendant should have moved that the court strike the request rather than to dismiss the complaint.

The correspondent is, of course, factually correct. But the construction "move the court" is "legal English." It is in wide use, and clear and familiar to members of the legal profession. It is also briefer than the statement it replaces. That kind of shorthand is often used by professions, trades, the media, and the general public. The following sentence, for example, is from the *Wall Street Journal*:

> After nearly a decade of reviewing [diet] pills, the Food and Drug Administration has done little but mull the problem.

You can "mull over" a problem, but you cannot "mull" a problem; however, the omission of "over" is idiomatic and probably confuses nobody. Nor can you "fly an airport," but a large sign at the entrance of the local airport urges travelers to "Fly Gainesville Airport." Money is said to "talk," but can a person "talk money"? Apparently, for the expression, "You're talking money," is widely understood to mean "You're talking about a large amount of money." What is happening is that prepositions like *over*, *from*, and *about* are being omitted, and almost nobody is confused about the meaning of the truncated statement.

On the other hand, while we have dropped some prepositions, we have added others. How about the redundant *on* in the statement, "Continue *on* with your work"? Or "I'm going to hose *down* the car"? Or "Please reply *back* at once"? Without the unnecessary prepositions, the meaning remains the same.

Readers have also written to object to another addition, a second *that*, which when unnecessarily added makes a sentence both redundant and ungrammatical. The following illustrates what they are criticizing (emphasis added):

> His lawyer said *that*, if we pursued the case, *that* he was prepared to represent his client in court.

The second *that* probably would have been omitted had the sentence been edited. Nor would the speaker/writer have added the second *that* had he had been taught grammar by an old-fashioned English teacher who taught her elementary students to "parse" sentences. Probably the strong influence of spoken English upon written English due to pervasive electronic media is responsible for this ungrammatical construction. Speaking or writing informally, the individual forgets that he or she has already put in one *that*, so in goes another.

From the Mailbag:

In the February "Language Tips," a reader asked the following question: Isn't it incorrect for a lawyer who is not a member of the corporate law department of a corporation, but who was hired by the human resources department as a vice-president of compliance, to send out memoranda and e-mails both internally and externally, identifying himself as "Esq."?

I answered that it seemed inappropriate for me to comment on a question about professional etiquette on which only the opinion of fellow lawyers should carry weight. So I invited readers to respond with their comments. A number of e-mails have arrived. Many readers wrote that they had been taught and still believe that it is never appropriate for professionals to apply a title or honorific to themselves. For that reason the self-application of "Esq." is offensive in itself.

Other readers responded that the use of "Esq." by a corporate officer might be considered misleading and therefore unethical because it suggested that the officer had more authority or knowledge than was actually the case. For example, the statement that "we will bring legal action" might be considered to be more threatening coming from a lawyer who presumably had the authority to bring the action than from a corporate lawyer who had no such authority. Therefore these readers suggested that a corporate lawyer should use only his or her corporate title (for example, "Vice President for Compliance"), perhaps adding his degree (J.D.).

Several lawyers wrote that in the communities in which they practice it is commonplace for lawyers to add the title of "Attorney" to their names. They said that lawyers refer to other lawyers and to themselves in that manner. Television advertisements contain that title, and even judges identify lawyers to juries with that title.

But the lawyers who acknowledged that the practice is common also wrote that they consider it inappropriate. One lawyer commented, "Teachers don't identify themselves as 'Teacher Jones'; architects don't identify themselves as 'Architect Smith.'" So he asked, "Why should lawyers give themselves that title? Why shouldn't we be called just 'Mrs.,' 'Ms.,' or 'Mr.'?"

Gertrude Block 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., 2004).

NEW MEMBERS WELCOMED

FIRST DISTRICT
Kenneth M. Abell
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Elkan Jonathan Adler
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Kwaku Affawua Akowuah
Anne-Laure Allehaut
Tami Jean Alpert
Camila Ferreira Do Amaral
Amanda Jane Ambrose
Virginia Eve Anello
Patricia Arce
William Belitsky
Maria Isabel Beltrani
Renee Fawn Bergmann
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Ronald Joshua Bliss
Kari Darlene Boston
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Marzio Ciani
Oreste Cipolla
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Steven M. Cohen
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Matthew Karlisle Cowherd
Carrie Crane
Kathleen Renee Cronin-Furman
Janet Leslie Cullum
Carol Daniel
David Wesley Decker
Yuta Nicole Delarck
Gamaliel Benjamin Delgado
Christopher James Desmond
S. Lynn Diamond
Adrienne Louise Dicerbo
Sean Michael Donovan
Cody Adrian Doran
James Doty
Jon Sterling Drumwright
Elizabeth Marie Dugan
Jacqueline Duval
Paul Eberhard
Kenneth Nji Ebie
Faye Neiman Eisen
Nakia Monique Elliott
Jill Amy Ellman
Donna Erez
Andre Michael Espinosa
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Dara Lynne Gelbtuch
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Michael J. Gilbert
Alison Joan Glusman
Michael David Goldfarb
Sari R. Goldmeer
Jonathan Charles Goldstein
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Shari Aviva Katz Graham
Jesse Luke Green
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NEW REGULAR MEMBERS 1/1/08 - 2/8/08	606
NEW LAW STUDENT MEMBERS 1/1/08 - 2/8/08	219
TOTAL REGULAR MEMBERS AS OF 2/8/08	72,537
TOTAL LAW STUDENT MEMBERS AS OF 2/8/08	2,786
TOTAL MEMBERSHIP AS OF 2/8/08	75,323

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"provided that," "regardless of," and "usually." *Examples:* "Although she was sick, Ms. Jones finished the trial." "If the defendant appears this morning, we'll continue the trial."

Use commas to set off tag questions. *Examples:* "She finished cross-examining the witness, didn't she?" "She's an eloquent attorney, don't you think?"

Use commas to separate coordinate adjectives. *Examples:* "He's a meticulous, efficient attorney." "After winning the trial, Joe bought a new, trendy convertible." Because noncoordinate adjectives carry equal weight, don't use commas to separate them.

Two tips to figure out whether the adjective is coordinate or noncoordinate: (1) Reverse the order of the adjectives to see whether the sentence makes sense. Or (2) insert "and" between the adjectives to see whether the sentence makes sense. If the adjectives pass test 1, they're coordinate adjectives and need commas. If the adjectives pass test 2, they're coordinate adjectives and need commas. If the adjectives pass neither test, the adjectives are noncoordinate and won't need commas.

Using the examples above for tests 1 and 2: "He's an efficient, meticulous attorney." (Sentence makes sense when you reverse the adjectives.) "He's a meticulous and efficient attorney." (Sentence makes sense when you insert "and.") "After winning the trial, Joe bought a trendy, new convertible." (Sentence makes sense when you reverse the adjectives.) "After winning the trial, Joe bought a trendy and new convertible." (Sentence makes sense when you insert "and.")

Consider this: "The firm bought three new affordable computers." Using test 1 to reverse the adjectives: "The firm bought new three affordable computers." "The firm bought affordable three new computers." "The firm bought affordable new three computers." "The firm bought new affordable three computers." The sentences make no sense regardless which test you use. The adjectives are noncoordinate; they don't need commas. Using test 2 to insert "and": "The firm bought three and new and affordable computers." (No sense.)

Use a comma to separate two parts of a double-comparative. *Correct:* "The sooner, the better." "The more, the merrier."

Put a comma before a coordinating conjunction ("and," "but," "for," "nor," "or," "so," "yet") that joins two independent clauses. Don't put a comma before a conjunction if the conjunction joins a dependent clause: a sentence that has no subject, verb, or both can't stand on its own as a sentence. *Examples of conjunction joining two independent clauses:* "She lost her first trial, but she won every trial since then." "The court attorney studied in the law library, and while there he drafted an opinion." *Examples of conjunction joining a dependent clause:* "She won her first trial but never won again." "The court attorney studied in the law library and drafted an opinion there." If the two independent clauses are short, don't insert a comma except to emphasize the second clause. *Example:* "Lawyers speak and judges listen." *Or:* "Lawyers speak, and judges listen."

Use commas to enclose appositives: nouns or pronouns that rename or explain the nouns or pronouns that follow. *Examples:* "Lawyer A, who practices in state court, and Lawyer Z appeared in federal court." (Note the absence of a comma after "Lawyer Z.") "Harry argued before the Supreme Court, Appellate Division, Third Department." "Anne, the celebrated trial attorney, answered questions from the press." "The defendant, according to witnesses, shot the victim three times in the chest."

If a conjunctive adverb ("accordingly," "again," "also," "besides," "consequently," "finally," "for example") joins two independent clauses, use semicolons or periods, not commas, to set off the clauses. *Incorrect:* "The court denied petitioner's summary-judgment motion, consequently, the court set the matter for trial next week." *Correct:* "The court denied petitioner's summary-judgment motion; consequently, the court set the matter for trial next week." *Or:* "The court denied petitioner's summary-judgment motion. Consequently, the court set the matter for trial next week." Using a comma instead of a semicolon or a period will create a comma-splice run-on sentence.

> "Where's the beef jerky?" Don't use a comma unless you mean "Where's the beef, jerky?"

Separate a series of three or more words or phrases by putting a comma between them. The last comma in the series — the serial comma — is optional but preferred. (More on serial commas will appear in the Legal Writer's forthcoming column on legal-writing controversies.) *"And" example:* "To prepare for trial, Mike drafted the opening, Mary drafted the closing, and I prepared the exhibits." *"Or" example:* "After he leaves the courthouse, John eats at Forlini's Restaurant, Bagel Place, or Peking Duck House." *Exceptions:* Don't add commas if you join all the words, phrases, or statements with "and." *Example:* "To prepare for trial, Mike drafted the opening and Mary drafted the closing and I prepared the exhibits."

Don't use a comma before an ampersand in a firm or organization's name unless the firm or organization's name uses a comma. *Examples:* "Mr. White works for Johnson, Brown & Roe LLP." "Howard, Doe & Jones, P.C., represents the plaintiff in the lawsuit."

Never put commas after exclamation points or question marks following a quotation. *Incorrect*: "I declare a mistrial!," the judge said. *Correct:* "I declare a mistrial!" the judge said. *Incorrect:* "Are you finished with this witness?," the judge asked. *Correct:* "Are you finished with this witness?" the judge asked.

Don't use a comma after a "that" before quotation marks when the "that" precedes a quotation. *Incorrect:*

The judge found that, "the witness is incredible." *Correct:* The judge found that "the witness is incredible." *Or (without a "that"):* The judge found "the witness . . . incredible."

Don't use a comma when other material precedes and follows the quotation. *Correct:* "The judge's repetitions of "Stop arguing like children" didn't pacify the attorneys.

Use a comma to introduce a quotation only (1) when the quotation is an independent clause and (2) when what precedes the quotation is inapposite to the quotation or to replace a "that" or a "whether" before the quotation. If you wouldn't add a comma if the sentence had no quotation marks, don't add a comma before the quotation marks just because there are quotation marks. *Example when the quotation is an independent clause:* The witness stated, "I was walking down Centre Street when I noticed the defendant." *Example of what precedes the quotation is inapposite to the quotation:* "The attorney worked as an associate at Roe & Doe, "and for three years he never tried a case." *Examples of a comma replacing "that":* Judge Doe ruled, "The case must be dismissed on jurisdictional grounds." "As Judge Doe explained, "The case must be dismissed on jurisdictional grounds." *Example of a comma replacing "whether":* The issue is, "City Court had the authority to order petitioner to write a reference letter for respondent."

Use commas to set off parenthetical expressions, or unimportant comments or information. *Example:* "His argument is, in my opinion, frivolous and weak."

Put commas after parentheticals, not before them. *Incorrect:* "The attorney attended New York University School of Law, (NYU) graduating summa cum laude in 2001." *Correct:* "The attorney attended New York University School of Law (NYU), graduating summa cum laude in 2001.

Use commas to set off nonrestrictive phrases. A phrase is nonrestrictive when it isn't essential to the meaning of a sentence. Nonrestrictive phrases are nondefining: They don't identify which things or people the clause refers to. "Which" often precedes nonrestrictive phrases. If you remove a nonrestrictive phrase from a sentence, the sentence will retain its meaning. Restrictive phrases don't need commas. A phrase is restrictive when it's essential to the meaning of the sentence. Restrictive phrases are defining: They identify which things or people the clause refers to. "That" often precedes restrictive phrases. *Example of a nonrestrictive phrase:* "The car, which was light blue, slammed into the pedestrian." That example presupposes that one car among others on the road hit the pedestrian. *Example of a restrictive phrase:* "The courtroom that seats 250 occupants had a back room for special events." That example presupposes the existence of more than one courtroom.

Use a comma to omit an elliptical word, a word a reader can replace immediately. *Example:* "He picked juror number 4; she, juror number 6." The comma replaces "picked."

Never use a comma before a verb. *Incorrect:* "Knowing when to use commas, creates problems for lawyers." Eliminate that comma.

Don't use a comma before "because" unless the sentence is long or complex. *Example of an unnecessary comma:* "The associate was late, because she had a flat tire." *Example of a necessary comma:* "I knew that James would be promoted to partner that morning, because Fred's sister worked in the same firm and she called me with the news." The comma is necessary here because the reader might believe that James was promoted because Fred's sister worked in the same firm.

Never use a comma after a compound subject. *Incorrect:* "Court attorneys use Westlaw, Lexis, and Loislaw, nearly every day." *Correct:* "Court attorneys use Westlaw, Lexis, and Loislaw nearly every day."

Use commas to eliminate confusion. *Example:* "You're a better attorney than I, Mary Beth." Include the comma unless you mean "I Mary Beth." *Example:* "Where's the beef jerky?" Don't use a comma unless you mean "Where's the beef, jerky?" *Incorrect:* "How's your wife Samantha?" Leaving out the comma in this example would be correct if the person has more than one wife. *Correct:* "How's your wife, Samantha?" (But even that example can be a miscue. Is the reader discussing Samantha, or is Samantha the person's wife?)

In Bluebook and ALWD format, put commas after citations when citing in text:[3] "The court in *X v. Y*, 99 F.4th 99 (14th Cir. 2002), held that . . . ." This issue doesn't arise under the Tanbook, which requires that parentheses enclose a citation in the text and forbids commas to surround the parentheses: "The court in *X v Y* (99 F4th 99 [14th Cir 2002]) held that . . . ."[4]

According to ALWD, the Bluebook, and the Tanbook, don't put commas after signals.[5] *Incorrect: Accord, But see, Compare, Id., See, See also,*. In Bluebook format, use a comma before and after "e.g." when you use it with other signals.[6] *Example:* "*See, e.g.,*" "*But see, e.g.,*"

Put commas inside quotation marks. *Example:* "I have no further questions for this witness," the attorney said.

9. Hyphens. Hyphens divide single words into parts or join separate words into single words.

Use hyphens ("-") to divide words between syllables from one line to the next. Put the hyphen after the last letter on the first line, not at the beginning of the second line. Don't put any spaces before or after the hyphen.

Never use a hyphen to divide a one-syllable word.

Hyphenate names if the individual uses that style. *Example:* "Ms. Smith-Green."

Words evolve. Long ago, we said "tele phone," not-so-long-ago we said "tele-phone," and now we say "telephone." With frequent use, compound words join to become single words. *Examples:* "backpack," "bumblebee," "copyright," "deadlock," "headlight," "weekend." Other compound words haven't become single words; they've kept their hyphens. *Examples:* "simple-minded," "well-being." Some

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are spelled as separate words: "lame duck," "mountain range." Always check a dictionary to see whether a word takes a hyphen or whether it's become a single word.

Some writers oppose combining words with hyphens to form compound adjectives. The Legal Writer recommends hyphenating to avoid confusion and miscues. *Example:* "He's a small claims arbitrator." If you don't hyphenate, readers might believe that he's a claims arbitrator who's short. *Correct:* "He's a small-claims arbitrator." *Or:* "He's a Small Claims arbitrator."

Some tips: Hyphenate a compound adjective appearing before a noun. *Examples:* "The attorney had a chocolate-colored briefcase." "He's a criminal-defense practitioner." Don't hyphenate when the compound adjective appears after the noun. *Examples:* "The attorney's briefcase was chocolate colored." "He practices criminal defense." Don't use a hyphen to join an adverb ending in "ly" to another word. The modifier "ly" already trips off the tongue. *Incorrect:* "The jury found him guilty of criminally-negligent homicide." *Correct:* "The jury found him guilty of criminally negligent homicide."

Hyphenate uppercased nonproper-noun adjectival phrases. *Example:* "Legal-Writing Seminar." Don't hyphenate capitalized proper-noun adjectival phrases. *Incorrect:* "Off-Centre-Street Jam, Inc." *Correct:* "Off Centre Street Jam, Inc."

Don't insert a hyphen in a compound predicate adjective whose second element is a past or present participle. *Incorrect:* "The effects were far-reaching." *Correct:* "The effects were far reaching." *But:* "The judge's opinion had far-reaching effects."

Don't hyphenate foreign words used in an adjectival phrase. *Incorrect:* "Mens-rea element." *Correct:* "Mens rea element."

Some writers recommend against hyphenating a two-word modifier if the first word is a comparative ("first," "greater," "higher," "lower," "upper") or a superlative ("best," "better," "more"). The Legal Writer recommends hyphenating. *Example:* "The law textbooks were the highest priced books." *Becomes:* "The law textbooks were the highest-priced books." *Example:* "New York State judges are no longer in the upper income bracket." *Becomes:* "New York State judges are no longer in the upper-income bracket." *Example:* "He was the best qualified candidate for Surrogate's Court." *Becomes:* "He was the best-qualified candidate for Surrogate's Court."

Hyphenate compound numbers from twenty-one to ninety-nine under the Bluebook.[7] Under the Tanbook, use figures for the figure 10 and higher.[8]

Use hyphens to write fractions: "one-fourth."

Hyphenate after "well" when you use "well" in an adjectival phrase. *Examples*: "He's a well-known attorney." "The firm's summer interns are a well-matched team." Otherwise, hyphenate after "well" if the phrase doesn't mean the same thing if it's flipped around. *Example:* "Judge Roe is well-read." Hyphenate because Judge Roe can't be read well, unless he has lots of tattoos.

Hyphenate suspension adjectival phrases. *Examples:* "First-, second-, and third-year associates will attend the holiday party."

Some writers don't hyphenate titles denoting a single office. *Examples:* "Attorney at law," "editor in chief," "vice president." The Legal Writer, like the Tanbook,[9] recommends that you hyphenate. *Becomes:* "Attorney-at-law," "editor-in-chief," "vice-president."

Hyphenate a title that precedes "elect." *Examples:* "Treasurer-elect," "President-elect."

Hyphenate to join words thought of as one expression. *Example:* "Secretary-treasurer."

Hyphenate prefixes, or letters added to the beginning of a word, when omitting the hyphen will confuse the reader. *Examples:* "pre-judicial" versus "prejudicial," "re-sign" versus "resign," "re-count" versus "recount," "re-cover" versus "recover," "re-sent"versus "resent."

Hyphenate when not hyphenating is visually troubling, such as when the prefix ends with the same letter that begins the word. *Example:* "anti-injunction," "anti-intellectual," "de-emphasize." *Exceptions:* "coordinate," "cooperate," "unnatural."

Hyphenate when the base is a proper noun. *Examples:* "anti-Nixon," "pro-Washington."

Hyphenate when using the words "all," "ex," "quasi," or "self." *Example of "all":* "all-inclusive." *Example of "ex":* "an ex-court attorney." But consider "ex-patriot" versus "expatriot." *Example of "quasi":* "quasi-contractual," "quasi-complete." *Examples of "self":* "self-control," "self-defense," "self-employed." Don't hyphenate when adding "self" to a suffix, or letters added to the end of a word: "selfless."

On your computer keyboard, the "hyphen" key is next to the "symbol" keys, usually after the "zero" key. Don't press the "Shift" key; if you do, you'll insert an underscore "_" instead of a hyphen "-".

The Legal Writer continues with punctuation in the next column. ■

1. The Bluebook: A Uniform System of Citation R. 6.2(a)(vii), at 73 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).
2. Association of Legal Directors (ALWD) Citation Manual R. 4.2(h)(1), at 31 (3d ed. 2006).
3. Bluebook R. 10.2, at 81; ALWD R. 43.1(c) (3), at 318.
4. New York Law Reports Style Manual (Tanbook) R. 1.2(b), at 2 (2007), *available at* http://www.nycourts.gov/reporter/New_Styman.htm (html version) and http://www.nycourts.gov/reporter/NYStyleMan2007.pdf (pdf version) (last visited Dec. 11, 2007).
5. ALWD R. 44.6(a), at 325; Bluebook R. 1.2, at 46-47; Tanbook R. 1.4(a), at 6.
6. Bluebook R. 1.2 (a), at 46.
7. Bluebook R. 6.2(a), at 73 ("[S]pell out the numbers zero to ninety-nine in the text and in footnotes . . . .").
8. Tanbook R. 10.2 (a)(1), at 72 (2007).
9. *Id.* app. 5, at 127.

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

that he was appointed a temporary chief judge of the Court of Appeals by the Republican Governor Thomas E. Dewey, who crossed party lines to appoint the Democrat Loughran. The next year, he was endorsed by both parties to a new 14-year term as chief judge. Judge Loughran truly had a masterful understanding of the law, so much so that many of his opinions were collected by Judge Francis Bergan in *Opinions and Briefs: Lessons from Loughran*, to be used as a teaching tool for generations of practioners. Judge Loughran had a "pragmatic understanding of peoples' needs" at a time when the people needed the courts the most.

In 1999, when taking his seat in the Court of Appeals, Judge Rosenblatt began his work with the sentiment "I hope I have the wisdom. I know I have the will." Judge Rosenblatt certainly proved his wisdom and will in not only his decisions, but in compiling and creating this fine work. Written with the same passion that these distinguished judges wrote about the law, *The Judges of the New York Court of Appeals* should be on the shelves of every New York practitioner, and anyone who cares about the law of the country and the history of the state. ■

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BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II

In the last column, the Legal Writer discussed seven punctuation issues in legal writing. We continue with two more.

8. Commas. Commas are meant to slow down language or replace words. To create a pause, add a comma.

Put commas after salutations in informal writing. *Example:* "Dear Grandma Jane," Use colons in formal writing. *Example*: "Dear Mr. Johnson:" In formal and informal writing, use commas after closing. *Examples:* "Sincerely," "Very truly yours,"

Put commas before titles. *Examples:* "Jane Smith, Esq." "Bob Jones, Ph.D." "Tom Roe, M.D." In a sentence, put commas after titles. *Example:* "Sam Smith, Ph.D., conducted the psychiatric evaluation." Insert commas before "Jr." or "Sr." only if the person uses a comma. If the person uses a comma, use commas before and after. *Examples:* "Judge John Smith, Jr., is presiding." "Judge John Smith, Sr., is presiding."

Don't use commas to separate nouns from restrictive terms of identification. *Example:* "Alexander the Great."

Use commas to set off dates. *Example:* "The deposition is scheduled for Wednesday, October 31, 2007." Don't put a comma between a month and the year. *Correct:* "July 2008 will be her sixth anniversary since she passed the bar exam."

A controversy exists about whether to put a comma after the date if the date appears within a sentence. The comma is optional, but the Legal Writer recommends it. *Example:* "On August 29, 2007, she started law school."

Use commas to separate parts of an address and after the address. *Correct:* "The attorney has worked at 123 Justice Avenue, Elmhurst, New York 11373, since 2001." Don't use commas between the state and the zip code. In typing, add two spaces after the state and before a zip code. *Example:* "New York, New York_10013."

Use commas to separate digits. The Bluebook tells writers to insert commas only in figures containing five or more digits.[1] The Association of Legal Writing Directors (ALWD) Citation Manual instructs writers to insert commas in numbers containing four or more digits.[2] The New York State Official Style Manual (Tanbook) doesn't discuss the issue. The Bluebook: "4500." Insert a comma only when the number exceeds four digits: "45,000." ALWD: "4,500."

Use commas to contrast or emphasize words. *Example*: "Jane deposed three, not five, witnesses." "William met his client in Ithaca, not Schenectady."

Set off interruptive phrases or transitional expressions with commas. The most common interruptive phrases or transitional expressions are the conjunctive adverbs "additionally," "for example," "however," "moreover," "therefore," and "thus." *Examples*: "The attorney, however, spent too much time asking the witness irrelevant questions." "The attorney, for example, asked the witness what she ate for breakfast." "The plaintiff, therefore, failed to prove negligence."

A controversy exists about introductory commas. Use introductory commas to clarify an introductory word, clause, or prepositional or participial phrase or subordinate clause, to avoid ambiguity or miscues, and after a lengthy introductory clause. A clause has a subject and a verb. A phrase has a subject or a verb, but not both. *Introductory word examples:* "Honestly, I remember nothing about the accident." Writers often omit introductory commas. *Incorrect:* "Thanks Bob." *Correct*: "Thanks, Bob." *Correct:* "Therefore, the plaintiff failed to prove negligence." *Also correct (without the comma):* "Therefore the plaintiff failed to prove negligence." *Introductory phrase example:* "In Quebec City and Montreal, students read and write in French." *Introductory clause:* "Although Jane wrote the appellate brief, Mary argued it on appeal." *Ambiguity or miscue:* "After the house blew up Mary sued." Without the comma, the house is a homicide bomber that blew Mary up. *Correct:* "After the house blew up, Mary sued."

"After the house blew up Mary sued." Without the comma, the house is a homicide bomber that blew Mary up.

Use commas to set off introductory phrases that add nonessential information to a preceding clause. Introductory phrases will begin with words like these: "although," "according to," "after," "despite," "first," "if," "including," "irrespective of," "particularly," "perhaps," "preferably," "probably,"

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