NEW YORK STATE BAR ASSOCIATION

Journal

NOVEMBER/DECEMBER 2014
VOL. 86 | NO. 9

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By Jim D. Sarlis

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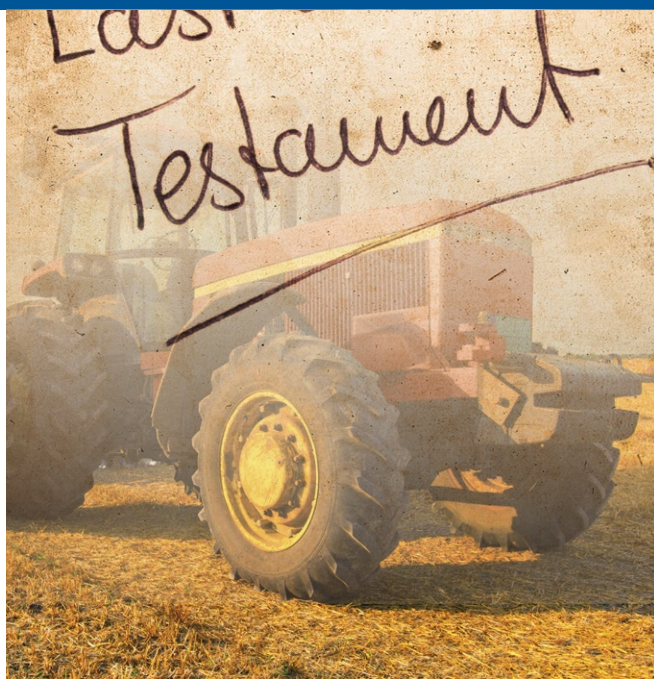

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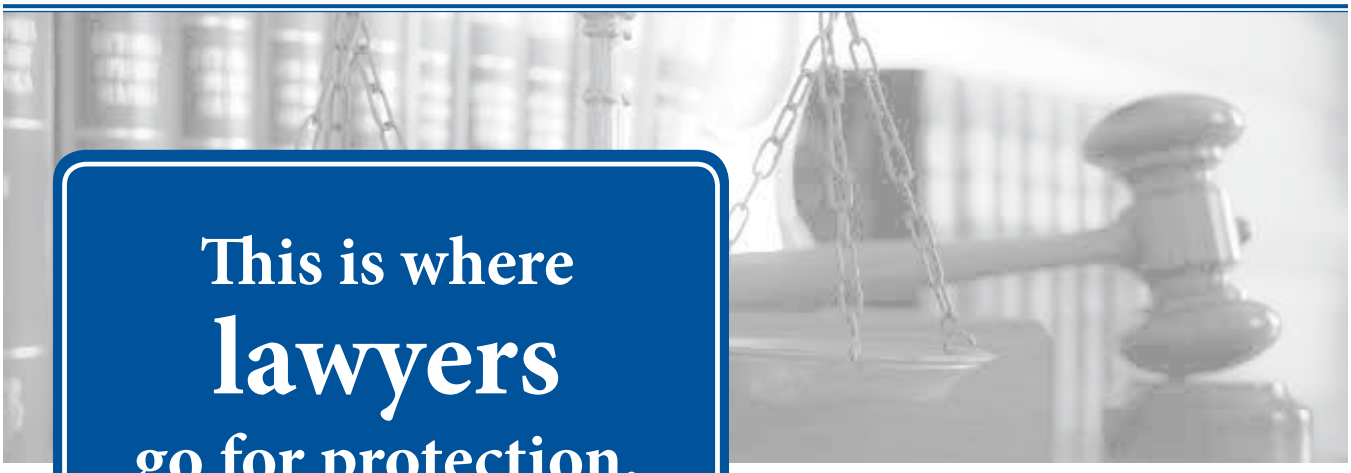

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GLENN LAU-KEE

Educating Citizens for the 21st Century

This fall has brought more news of world unrest: refugees in Syria, continued turmoil in the Ukraine and the Gaza strip, and students in Hong Kong holding mass protests for a more open election system. All of these unfolding world events are further reminders of how our country's citizens enjoy lives of relative security and certainty. The bedrock of our greater stability is our country's long-standing adherence to the rule of law and to our constitutional framework. Our election season is now behind us and offices from Capitol Hill to the State Capitol are undergoing the process of peaceful change.

The United States, after all, is a country of laws, not of men, as was famously said by one of our founders, John Adams. I am deeply grateful to have been able to raise my family and work as an attorney in our country of laws. Still, I am increasingly concerned that too many students graduate from high school today without a solid, core knowledge about our country's foundation and how our government works. Without this knowledge, these students lack the context to really understand the rights we enjoy as Americans, rights that separate our country from so many others in the world.

The world that today's students experience – often at their fingertips on hand-held devices – is a far more globally connected and technologically advanced world from the one I entered into after graduating from high school, many years ago. It is understandable and laudable that our government and political leaders want our students to be capable, skilled and ready to participate in this changed world. My worry is that the recent emphasis on teaching STEM subjects – science, technology, engineering and math – has brought with it an unintended consequence that is jeopardizing our students and our country: a de-emphasis on social studies and civics educations. Because both time and money are limited resources, the boost in STEM programs and funding has brought cuts in humanities and civics education in the public school system. In New York, in 2010, the Board of Regents ended its long practice of testing fifth and eighth graders on social studies material, including the New York State and U.S. constitutions.

In October, the Board of Regents voted unanimously to give its provisional approval to new alternative graduation pathways – including programs in STEM, Career and Technical Education (CTE), the Arts, Biliteracy and the Humanities; as part of this plan, for the first time, the Regents is making the 10th grade Global History Regents optional. The Regents' goal here is to address the low rate, or 37.2%, of the state's graduates who are deemed ready for college or careers. As we prepare our state's students for 21st century job opportunities, we cannot forget our obligation to teach them the core of knowledge about our government and country that prepares them to be 21st century citizens and engaged members of their communities. The Board of Regents is expected to give its final approval for this new approach in January.

Civics education sounds dusty and abstract. The term makes me think of my fifth grade teacher and No. 2 pencils. But civics education covers the ground of how our government was formed and how it works. This knowledge provides the framework for understanding the nature and value of the rights accorded us as United States citizens. Civics education provides the context for understanding checks and balances, the pace at which our government works and why. Civics education provides the how – the how to get involved and what can be accomplished if you do.

Study after study reveals how little we know about civics. The latest, a survey by the Annenberg Public Policy Center of the University of Pennsylvania, released for Constitution Day in September, shows that Americans have a poor grasp of how their government works. Little more than a third of respondents, 36%, could name all three branches of the U.S. government. Thirty-five percent could not name a single one. In its 2011 report, the Brennan Center for Justice showed that

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New Yorkers knew very little about their state constitution and their government. The latest national civics examination indicated that fewer than half of American eighth graders knew the purpose of the Bill of Rights and only one in 10 demonstrated acceptable knowledge of the checks and balances among the legislative, executive and judicial branches, according to the Department of Education.

What's at stake? Studies demonstrate what we all know through common sense and experience. There is a direct connection between knowledge of civics and history and active political engagement, including voting, attending government meetings, contacting a public official, signing a petition about a political issue and even publishing a letter to the editor. Students who know how their government works and that they have a place in it are less likely to be disengaged. These students will be actors in their own lives, not just passive recipients of the change that is afoot in the world.

At his talk last year in Albany, retired U.S. Supreme Court Justice David H. Souter characterized the stakes as even higher. If we do not refortify the teaching of social studies and humanities, what's at stake is no less than the survival of the United States as we know it. "The humanities and social science, in effect, should tell us who we have been, who we have come from, who we are and who we may be," he said.

For the past 40 years, we at the New York State Bar Association have made civics education a labor of love and seek to do our part through our Law, Youth and Citizenship Committee. The LYC is a font of resources. It has had a significant and positive impact on thousands of students and its network of more than 5,000 teachers statewide. LYC is well known for its Mock Trial Tournament – the oldest and largest program of this kind in the nation – and its annual Mock Trial Summer Institute. Educators and hundreds of volunteer attorneys coach and work with students who act as attorneys and witnesses in trials, many taking place in local courtrooms and presided over by a judge.

LYC is involved with the "We the People" program – an instructional program on the Constitution and Bill of Rights for elementary and secondary students that culminates in a mock congressional hearing. Every year, LYC sends attorney volunteers into the schools to help celebrate Law Day (May 1) and Constitution Day (Sept. 17). LYC also partners with national efforts such as retired Supreme Court Justice Sandra Day O'Connor's iCivics program.

Earlier this year, the Association's House of Delegates adopted a report and recommendation from the LYC Committee. The report details how the state is failing to provide an adequate civics education to its students, and calls on educators and lawmakers to treat civics education as a matter of equal importance to the STEM subjects. The Association has made it a legislative priority to lobby lawmakers to make sure that our students are taught this essential knowledge.

Last month, I attended the LYC annual conference at Stony Brook University, which, this year, explored how the First Amendment right of freedom of speech applies to public school students. Conference speakers included three former students who tested the boundaries of the First Amendment in cases decided by the U.S. Supreme Court. Two of these were a brother-sister pair who were suspended from school for wearing black armbands to protest the Vietnam War. In *Tinker v. Des Moines* (1969), the Court decided that students do not "shed their constitutional rights . . . at the schoolhouse gate." I came away from this conference with a renewed optimism that we can help spread the knowledge and the passion for our country and its history that was present among the educators and attorneys attending.

My sense of optimism got another boost in a recent conversation I had with Chief Judge Robert Katzmann for the U.S. Second Circuit Court of Appeals. Judge Katzmann is developing a circuit-wide program to get the public more involved with its federal courthouses. Court staff invite the public in for self-guided tours of the newly renovated landmark Thurgood Marshall U.S. Courthouse in lower Manahattan. This September, Judge Katzmann held the first naturalization ceremony at the court in 18 years. The courthouse hosts mock trial tournament rounds and even held the trial of Goldilocks, which was put on by a fifth grade class from Jamaica, Queens.

Like the Bar Association's LYC Committee, Judge Katzmann wants people to understand the role of the courts and to feel a sense of engagement and ownership of the system. He likens courthouses to secular temples that announce who we are as a society, and what is important to us.

In my first week as President of the NYSBA, I had the great privilege of sponsoring a group of 26 lawyers for admission to the U.S. Supreme Court bar. Our group included a mother-daughter attorney pair, a husband and wife, and lawyers from Paris, Rome, Asia and Canada. One could not walk away from the experience without a palpable sense of awe at the government and court system in which we all are actors.

Civics education, like our courthouses and our schools, announces who we are as a country and what is important to us. Part of that is you. I invite you to share your knowledge with students, tomorrow's leaders. This holiday season treat someone at your table to a second piece of pie for naming the three branches of government. Pull up the old *Schoolhouse Rock!* videos on YouTube. And then call your Bar Association's LYC Committee and spread your passion for this country. ■

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Practical Skills: Probate and Administration of Estates
November 18 Westchester
November 19 New York City, Syracuse
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Intermediate Elder Law Update
November 18 Buffalo
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December 4 Westchester

Hot Topics in Law Practice Management 2014 Summit
(live & webcast)
November 20 New York City

A Primer on Intellectual Property
November 20 New York City
November 21 Albany

Workers' Compensation Update 2014
November 21 Albany, New York City, Syracuse

Anatomy of a Disciplinary Hearing
(9:00 a.m. – 12:45 p.m.)
December 1 New York City, Syracuse
December 3 Long Island
December 5 Westchester
December 9 Albany
December 12 Buffalo

HIPAA/HITECH for Lawyers Update 2014
(live & webcast; 1:00 p.m. – 3:00 p.m.)
December 3 Albany

Taking on Dodd-Frank
(live & webcast; 10:00 a.m. – 1:00 p.m.)
December 4 New York City

Advanced Real Estate
(live & webcast)
December 5 New York City

Commercial Division Practice: What You Need to Know
(live & webcast; 12:00 p.m. – 2:25 p.m.)
December 5 New York City

The Non-Tax Lawyer's Guide to Tax Law
(live & webcast; 9:00 a.m. – 1:00 p.m.)
December 9 Albany

Bridging the Gap – Fall 2014
December 10–11 New York City (live program)
Albany, Buffalo (video conference from NYC)

12th Annual Sophisticated Trusts and Estates Institute
December 11–12 New York City

Cybersecurity for Lawyers: 12 Ways to Protect Yourself and Your Data
(live & webcast; 9:00 a.m. – 1:00 p.m.)
December 12 Albany

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From Tractor Fenders to iPhones

Holographic Wills

By Jim D. Sarlis

A bright, red tractor fender is on display at the University of Saskatchewan law library. Thin lines of the fender's red paint are scratched off, and the silvery metal underneath shows through where some handwriting is etched into the fender. This fender, believe it or not, is the probated will of a local farmer.

The Probate of a Tractor Fender

On the morning of June 8, 1948, Cecil George Harris drove off on his tractor to tend the fields of his farm in Rosetown (a small town in the Canadian province of Saskatchewan, located north of Montana). Before leaving, he said goodbye to his wife and two young children, adding that he'd be back home about 10 p.m. that night. Around noon that day, Mr. Harris got off the tractor to make some adjustments. Unfortunately, he accidentally put it in reverse. The tractor moved backwards, trapping him. His leg was pinned down and bleeding heavily. He was unable to escape or get help. Fearing the worst, he took out his pocketknife and started scratching a message into the tractor's fender: "In case I die in this mess, I leave all to the wife. Cecil Geo Harris."

Sadly, Mr. Harris never made it home. He remained trapped until he was eventually found by his wife. He was taken to the hospital, where he later died from his injuries. Days later, men investigating the accident noticed the writing on the fender. The fender was removed from the tractor and submitted for probate, where it was judicially determined to be a valid holographic will. The etched fender remained on file at the Kerrobert Courthouse until 1996 when it and Mr. Harris' pocketknife were turned over to the University of Saskatchewan College of Law for public display.[1]

The probate of Mr. Harris's fender illustrates three important concepts: The first is that unwitnessed handwritten expressions of testamentary wishes are recognized as valid wills in many jurisdictions. The second is that a valid will can be written on a variety of mediums – even a tractor fender. The third is that, sometimes, circumstances are such that there is no other choice but to write testamentary wishes on whatever is available

Jim D. Sarlis's office is in Rosedale, NY. He is a graduate of Columbia University as well as Fordham University School of Law, where he was on the *Urban Law Journal*. He also studied taxation in the Master of Laws (LL.M.) program at New York University School of Law. Mr. Sarlis has been a guest lecturer at New York Law School on the subject of Will Drafting, and has taught Real Estate Law and Legal Writing in the ABA-governed paralegal program of the City University of New York. Mr. Sarlis is admitted to the New York State Bar, the Federal Courts for the Southern and Eastern Districts of New York, and the U.S. Tax Court. Note: Neither the New York State Bar Association nor this periodical has adopted any position on the issues discussed in this article; nor do they take any position on any of the proposed legislation discussed. The views expressed in this article are those of the author only.

and hope that this unwitnessed expression will be given effect.

Holographic Wills: A General Discussion

A holographic will[2] is one that is handwritten and signed by the testator, generally without any witnesses. Many jurisdictions recognize holographic wills as valid.[3] Instead of the usual due execution requirements, in many jurisdictions such unwitnessed wills need only meet certain minimal requirements in order to be probated.

After her death in 1913, this page was probated under Pennsylvania's law recognizing unwitnessed holographic wills.[5]

Otto G. Richter famously handwrote his will on his hospital chart. His estate was worth $6 million and funded a renowned library named after him at the University of Miami.[6]

Other items on which probated holographic wills were written include a prescription, a score card from a game of bridge, a dunning letter from a creditor, and a hatbox.[7]

Sometimes, circumstances are such that there is no other choice but to write testamentary wishes on whatever is available.

Typically, these requirements consist of the following:

- Mental capacity: The testator must have had the mental capacity – including being of sufficient age – to write a will, although it is generally presumed that a testator had mental capacity unless there is evidence to the contrary.
- Attribution to testator: There must be evidence that the testator actually created the will, which can be proved through the use of handwriting experts, witnesses, or other methods. Generally, the entire will or its material portions must be in the testator's handwriting – not typed and not written by a person other than the testator. Although the testator's signature is generally required, it is not necessary for the testator to sign his or her actual name if the subscription at the end of the writing sufficiently identifies the testator with a phrase such as "your loving mother," or words to that effect.
- Intent to create a will: The testator must be expressing a wish to direct the distribution of his or her estate to beneficiaries.

Holographic wills are not uncommon; in fact, in some jurisdictions they are quite routine. Often, however, they are created in emergency situations by testators who are trapped or stranded, alone, and anticipating death.

Unusual Holographic Wills[4]

Holographic Wills on Unusual Paper Goods

Although lawyers routinely print wills on really nice bond paper, holographic wills have been written on some unusual paper goods:

Margaret Nothe of Philadelphia wrote an interesting entry in her recipe book that ended like this:

> Chop tomatoes, onions and peppers fine . . . . Measure tomatoes when peeled. In case I die before my husband I leave everything to him.

Chloe Newman had a premonition of disaster, so she jotted her wishes on the back of an envelope at an airport restaurant just before boarding a plane. The plane crashed over West Virginia, killing Ms. Newman and 17 other passengers.[8] The newspaper article confirming that the envelope was "declared a legal will by Probate Judge Clair R. Black" explained that Ms. Newman was on her way to remarry her former husband, Frank Newman, from whom she was divorced.[9]

The Invisible Will

A unique holographic will that was probated was not even visible. A seemingly blank piece of paper turned out to contain the testamentary wishes of a blind woman, Beth A. Baer, who could not tell that the pen she had used to write her handwritten will had run out of ink. A handwriting expert managed to make out the words of the will from the indentations made by the pen on the paper. The "blank" sheet was probated by a California court in 1950.[10]

Wills on Unusual Objects

As demonstrated by Cecil George Harris's tractor fender will, there is no requirement that wills be on paper; there is no requirement that wills be on *any* particular material at all.

Testators frequently write their holographic wills on walls – interior walls, exterior walls, prison cell walls. Karl Tausch, a German businessman who died in 1967, wrote a holographic will on his bedroom wall when he realized that death was imminent. It simply read "Vse zene" (i.e., "All to wife" in Czech). It was listed by the *Guinness Book of World Records* as the world's shortest will.[11]

In an emergency, a person will write on whatever is available. A Lancashire man was found dead on a couch. On the front of his shirt, in ink, he had written his will – as well as accusations against those who had contributed to his death.[12]

California's Los Angeles County probated two unusual holographic wills within a few years of each other. One was at the bottom of a wooden chest of drawers on which W.J. Burns handwrote his testamentary wishes, glued a photo of himself, and signed his name; this will was sawed out and filed in court in 1948. The other was a leather purse on which Stella Meehan wrote her testamentary wishes; it was filed in court in 1953.[13]

A.B. William Skinner wrote his will in tiny print on a Royal Navy identification disc measuring 3.8 cm in diameter. His will was probated in 1922.[14]

An eggshell bearing the handwritten words "Jan. 1925. Mag. Everything I Possess. J.B." was submitted for probate by the wife of Manchester canal ship pilot James Barnes. She alleged that this eggshell expressed, in indelible pencil, the testamentary wishes of her husband, a "mariner," written by him while he was "at sea." The eggshell was, however, denied probate because the court apparently had doubts about who was the author and where it was written.[15]

The First iPhone Will

In *Re: Yu*,[16] the Supreme Court of Queensland, in Brisbane, Australia, rendered a landmark 2013 ruling admitting to probate, as a valid holographic will, testamentary wishes typed on the Notes app of an iPhone. The testator, a young man named Karter Yu, was alone and suffering an intense personal crisis when he typed a series of farewell letters to friends and family, followed by what he professed to be his will. He typed his name at the end of it to serve as his signature. He knew that death was imminent, apparently; shortly thereafter, he took his own life.

The court noted that, although the propounded instrument did not fulfill the requirements for due execution of a will, local law also provided that, where a court was satisfied that it was the writer's intention to have the document serve as his or her will, the document may also be admitted to probate, so long as it satisfied three conditions: First, it had to be a "document," as defined in the statute, and the court determined that Mr. Yu's writing, created and stored on the iPhone, constituted an electronic storage medium "from which writings are capable of being produced or reproduced, with or without the aid of another article or device"[17] and, therefore, fulfilled this requirement. Second, it had to express testamentary intentions, and the court held that it did so by providing for distribution of the writer's entire estate and by naming an executor and his alternate. Third, it had to clearly be intended to serve as a will, and the court noted that the writer not only called this document his Last Will and Testament, he used wording evincing his intention to have it dispose of his assets and operate as his will upon his death. The court, therefore, determined that Mr. Yu's unwitnessed iPhone entry qualified as a valid holographic will and admitted it to probate.

Jurisdictions That Recognize Holographic Wills: Legal Requirements

In the United States, a little more than half the states recognize holographic wills in one way or another. A handful of states recognize holographic wills with only minimal requirements.[18] Others require that the signature and "material provisions" of the will be in the testator's handwriting.[19] Some states also require that the will be dated.[20] Several states have various other requirements, including evidence of intent and proof of the handwriting.[21] In North Carolina, the will must also have been found, after the testator's death, among the testator's valuables, in a safe deposit box, or with a person, where it appears it was intended to be kept for safe keeping, and testimony to prove these requirements is required to admit the will to probate.[22] Maryland and New York limit their recognition of holographic wills to those written by military personnel or mariners at sea and provide that the will becomes invalid a short time afterward.[23] States which do not recognize holographic wills nevertheless recognize a holographic will validly executed in a jurisdiction which allows such wills.[24] The remaining states do not recognize holographic wills.

Countries in different parts of the world that recognize holographic wills[25] include Argentina,[26] Austria,[27] Belgium,[28] France,[29] Germany,[30] Italy,[31] Spain,[32] Switzerland,[33] Japan,[34] and South Korea.[35] Interestingly, while most of the provinces of Canada do,[36] England, Scotland, Ireland, and Wales do not.[37]

New York Places Significant Restrictions on Holographic Wills

Contrary to what many people believe, unwitnessed handwritten wills are *not* valid in New York, except in extremely limited circumstances. Such a will is valid in New York only if one of the following conditions is true:

- It conforms to the requirements of Estates, Powers and Trusts Law (EPTL) 3-2.2, which provide that a holographic will is considered valid only if made by mariners at sea and members of the U.S. armed forces while serving in a conflict or by another person who serves with or accompanies the member of the armed forces. Such a will must be entirely in the handwriting of the testator to be valid. Such a will becomes invalid one year after the testator ceases serving with the armed forces or, if the testator was a mariner at sea, upon the expiration of three years from the time the will was made; or
- It is executed in another jurisdiction that recognizes holographic wills and it conforms to the requirements for valid holographic wills in that jurisdiction.

In all other circumstances, any will, including a handwritten one, must conform strictly to the due execution requirements of EPTL 3-2.1, which provides that the will

must be in writing, signed at the end by the testator, in the presence of at least two attesting witnesses who sign at the request of the testator, and the testator must declare at some time during the execution ceremony that the instrument signed is the testator's will.[38]

New York Should Consider Enacting an "Exigent Circumstances" Exception to the Due Execution Rules of EPTL 3-2.1

If Mr. Harris's story had been set in New York instead of Saskatchewan, his tractor fender would never have been probated. His tragic mishap highlights not only the kind of situation where an emergency unwitnessed holographic will might have to be hastily created by a testator, but also the kind of situation where justice, common sense, and compassion favor a court's validating the will.

> Exigent Circumstances refer to situations that demand unusual or immediate action and this allows people to circumvent usual procedures. In other words emergency conditions.[39]

The usual concerns expressed about holographic wills are that they are prone to fraud and forgery.

While this concept is most commonly applied to criminal law situations where search warrants are dispensed with due to concerns about safety or loss of evidence,[40] it is obviously applicable to the situations contemplated here.

Extensive research on the law of holographic wills has failed to uncover, in any jurisdiction, an exception that applies specifically to "exigent circumstances."[41] This is curious. First, anecdotes and precedents from various jurisdictions evidence a need for such an exception – after all, situations analogous to Mr. Harris's tractor tragedy, and the other stories related above, occur regularly. Second, the same reasoning that supports the exception for soldiers and sailors supports an exception for "exigent circumstances" – i.e., these are situations of extreme danger, stress, and isolation when witnesses are unavailable and the solemnity of the task is heightened.[42] Third, "exigent circumstances" are far more likely to come up within the state of New York than in a combat zone or at sea (and, hopefully, the probabilities will stay that way). For example, a testator could get lost while hiking, get snowed in during a blizzard, get stuck in a ravine driving over an embankment, or get trapped while mountain climbing.

The requirements could be as follows: There must be "exigent circumstances," defined as the testator being lost or stranded, alone, and facing a reasonable possibility of death (this last element could be a subjective standard). The will must be entirely handwritten and signed by the testator. It must be dated or its date able to be inferred. The instrument can expire some reasonable time period after its creation unless the testator is incapable of making a new will. In effect, if the testator dies from the exigent circumstances, the holographic will created could be probated after the testator's death; if the testator survives, and is able to create a new will, the holographic will created would shortly thereafter expire and the testator would have to create a will executed with the formalities of EPTL 3-2.1 or risk dying intestate.

The usual concerns expressed about holographic wills are that they are prone to fraud and forgery, and that they are often ambiguously and inartfully drafted.[43] Unfortunately, the same could be said of many wills executed even with the formalities of EPTL 3-2.1.[44] Could an "exigent circumstances" exception spawn issues as well as court cases interpreting them? Of course it could, but that is no different than what happens in any situation. Justice, fairness, and the need for such an exception, however, seem to outweigh any arguments against it. After all, the usual due execution rules will still have to be followed in all situations where a testator can do so; the exception would only apply in those rare and extreme situations where following them is not possible. Furthermore, poor planning is not actually encouraged since any will created under these circumstances comes with an automatic expiration date. The authenticity of the instrument would stem from the fact that it would usually be found along with the testator in most cases. In other cases, handwriting testimony and other extrinsic evidence could supply the proof.

Conclusion

Lay people often mistakenly believe that unwitnessed holographic wills are valid, especially if they grew up in countries where such wills were common. To many, the notion of taking charge and writing out their wishes simply, in their own words and in their own handwriting, may be appealing and may even be romanticized. Indeed, as explained above, a strong argument can be made that unwitnessed holographic wills should be valid when a person is lost or stranded, alone, and has no other choice. However, New York has steadfastly maintained that (except for those in the military or mariners at sea) all of the strict formalities of due will execution must be followed under all circumstances, even with handwritten wills. As a rule, therefore, it is absolutely essential that a person seeking make a will consult with an attorney who is knowledgeable and experienced in will drafting, preferably one who concentrates on Estate Planning, Trusts and Estates, and Elder Law.

Author's disclaimer to non-lawyers: Do not, as the saying goes, try this at home. Do not write your will on

an unusual item. Do not write your will on your own. Consult an attorney . . . who will likely print your will on really nice bond paper. ■

1. Geoff Ellwand, *An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History*, 77 Sask. L. Rev. 1 (2014); *see also The Last Will and Testament of Cecil George Harris*, University of Saskatchewan On Campus News (OCN), January 23, 2009, http://news.usask.ca/archived_ocn/09-jan-23/see_what_we_found.php (includes photographs of the tractor fender with the etched will visible on it, as well as the pocketknife); Robert S. Menchin, Where There's a Will: A Collection of Wills Hilarious, Incredible, Bizarre, Witty . . . Sad 86 (toExcel Press, an imprint of iUniverse, July 1, 2000).

2. The word "holographic" comes from the Greek words *holo-*, meaning all or entirely, and *graphein*, meaning writing. References to Wills can be found from ancient times, including in the Bible, as well as in Greek, Halakha, and Islamic writings. *See, generally,* Legal History of wills, Encyclopædia Brittanica (11th ed. 1911) https://archive.org/details/EncyclopaediaBritannicaDict.a.s.l.g.i.11thed.chisholm.1910-1911-1922.33vols. While an early form of holographic will was recognized during the Roman empire, the modern holographic will arose in France, and later spread to other countries, particularly with the influence of the Napoleonic Code. *Holographic Wills and Their Dating*, Yale L.J., Vol. 28, No. 1 (Nov. 1918), p. 72.

3. See notes 18-37 and accompanying text.

4. When it comes to holographic wills, anecdotes abound. No formal legal citation has been found for some of these examples, even though they are frequently repeated in the lore of holographic wills and they are substantiated by the sources cited below. They are presented here because they illustrate the issues here . . . and because they are pretty darn interesting.

5. John Marshall Gest, *Some Jolly Testators*, 8 Temp. L.Q. 297, 301 (1934).

6. Menchin, *supra* note 1 p. 78; John Poyser, *Death Won't Wait Until Your Will Is Filed*, Calgary Herald, May 11, 2009, http://www2.canada.com/calgaryherald/news/calgarybusiness/story.html?id=6da2a09c-8204-4a77-9b0d-c632f2b7970f&p=1.

7. Menchin, *supra* note 1 pp. 77–78.

8. *Id.*

9. Grosse Pointe News, Grosse Pointe, Mich., Aug. 7, 1947, Vol. 8, No. 32, p. 2, http://digitize.gp.lib.mi.us/digitize/newspapers/gpnews/1945-49/47/1947-08-07.pdf.

10. Menchin, *supra* note 1 at p. 80.

11. Trivia-Library.com, Famous and Bizarre Last Wills and Testaments of Various People, http://www.lawyerment.com/facts/world_records/Judicial/100002.htm. (Incidentally, it may have lost its record status, as of 1995, to Bimla Rishi's will of four Hindi characters that mean "All to son.")

12. The Delmarvia Star, Wilmington, Del., Oct. 3, 1926, p. 12, .http://news.google.com/newspapers?nid=2293&dat=19261003&id=GgknAAAAIBAJ&sjid=tgIGAAAAIBAJ&pg=1300,4960195.

13. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts & Estates 274–75 (6th ed. Aspen Law & Business 1999), in abridged form at http://www.docstoc.com/docs/160004269/WillsTrustRead; *see* its electronic pp. 48-49.

14. *Id.*; *see also* http://www.lawyerment.com/facts/world_records/Judicial/100002.htm.

15. *In re Goods of Barnes*, 136 L.T. (N.S.) 380, 43 T.L.R. 71 (1926), *cited by* Atkinson, Thomas E. "Soldiers' and Sailors' Wills," 28 A.B.A. J. 753 (1942). *See also supra* note 12 at 12; Menchin, *supra* note 1 at 82.

16. [2013] QSC 322, http://www.queenslandreports.com.au/docs/db_key-decisions/QSC13-322.pdf.

17. *Id.*

18. *See, e.g.*, Kentucky (K.R.S. § 394.040), Mississippi (Code § 91-5-1), Oklahoma (Code § 84-54), Pennsylvania (Pa. Code, Title 20, Chapter 25, § 2502), and Wyoming (Wy. Stat. § 2-6-113).

19. *See, e.g.*, Alaska (Alaska Statutes § 13.11.160), Arizona (Arizona Revised Statutes § 14-2503), Idaho (Code § 15-2-503), Maine (Maine Revised Statutes § 2-503), Montana (Montana Statutes § 72-2-522), New Jersey (Title 3B, Ch. 3, § 3), North Dakota (Uniform Probate Code § 2-503), Utah (Utah Code Ann. §§ 75-2-502, -503, -511, and -513).

20. *See, e.g.*, California (Cal. Probate Code § 6111), Louisiana (La. Civil Code § 1588) (under § 2883, such a Will is known as "olographic"), Michigan (Michigan Compiled Laws § 700.123), Nebraska (N.R.S. § 30-2328), and Nevada (N.R.S. §§ 133.030,090,190).

21. Arkansas recognizes a holographic will as valid where the entire will and signature are in the handwriting of the testator, and it is established by three disinterested witnesses that the handwriting and signature are, in fact, that of the testator (Ark. Code § 28-25-104). In Colorado, a holographic will is recognized as valid, whether or not witnessed, if the signature and the material parts of the will are in the handwriting of the testator (CRS § 15-11-502); in addition, a document that appears to have been intended to be a will is also considered valid if it can be established by clear and convincing evidence that the decedent intended the document to be a will (CRS § 15-11-503). South Dakota's law provides that intent that the document is the testator's will can be established by extrinsic evidence (S.D. Code § 29A-2-502). Tennessee recognizes a holographic will as valid if it is in the testator's handwriting, whether witnessed or not, but the testator's handwriting must be proven by two witnesses (Tenn. Code § 32-1-105). Texas requires that the holographic will be proven in one of the following two ways: The testator may attach an affidavit stating that this written instrument is his or her last will and that he or she was competent to make the will and that the will has not been revoked (Texas Probate Code § 60) or, if the testator does not self-prove the will, then at the time of death it must be proved by the testimony of two witnesses as to the handwriting of the testator (Texas Probate Code § 84). West Virginia requires that the will must evidence an intent that the document is to act as a will, and the signature must be intended as a signature to a will, although no acknowledgment or witnesses are necessary (Ch. 41, Art. 1, § 3). Virginia's law provides that, at the time of death, the proof of handwriting must be established by at least two disinterested witnesses (Va. Code Ann. § 64.1-49) or the will was written in the presence of one disinterested witness if executed before 1922 (Va. Code Ann. § 64.1-55).

22. N.C. General Statutes § 31-3.4.

23. Maryland Statutes § 4-103; N.Y. EPTL 3-2.2. This is commonly referred to as the "soldiers and sailors" exception, although the latter term may apply to "mariners at sea" (see, also, notes 38 and 44, below).

24. *See, e.g.*, Connecticut (Code § 45a-251), Hawaii (Haw. Rev. Stat. §560:2-502), and Wisconsin (Wis. Stats. § 853.05). South Carolina does not recognize a holographic will as a valid will; however, certain exceptions are made for holographic wills which are validly executed in a state which allows such wills, or when an out-of-state probate proceeding is involved (S.C. General Statutes §§ 62-2-303, 408, 502, 505).

25. *See, generally*, www.practicallaw.com/privateclient-mjg (organized by country).

26. Argentine Civil Code (*Código Civil de la República Argentina*) 3639.

27. Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or "ABGB").

28. Belgian Civil Code (*Burgerlijk Wetboek/Code Civil*) Art. 970.

29. French Civil Code (*Code Napoleon*) Art. 970.

30. German Civil Code (*Bürgerlichen Gesetzbuch* or "BGB") Art. 2247 BGB.

31. Italian Civil Code (*Codice Civile Italiano*) Art. 602.

32. Spanish Civil Code (*Código Civil de España*) Art. 688.

33. Swiss Civil Code (*Code Civil Suisse/Schweizerisches Zivilgesetzbuch*) Art. 505.

34. Civil Code of Japan (*Nippon Mimpo*) Art. 968(1).

35. In South Korea, holographic wills must be entirely handwritten by the testator, including the date of writing, testator's domicile address, and signature; there is also the unique requirement that the testator's fingerprint or seal must be put on the document. Civil Code of the Republic of Korea Art. 1066. *See, e.g., In re Educ. Found., Petitioner,* Case Nos. 2006Da25103 and 2006Da25110 (Supreme Court 2006), *aff'd*, Case No. 2007Hun-Ba128 (Constitutional Court 2008) (upholding constitutionality of requirement of fingerprint or seal). *See also* http://southkorea.angloinfo.com/money/pensions-wills/.

36. The following Canadian provinces recognize holographic wills: Alberta, Quebec, Manitoba, New Brunswick, Newfoundland, Ontario, and Saskatchewan. Nova Scotia and Prince Edward Island do not. *See, e.g., How to Write a Canadian Hand Written Will*, eHow.com, http://www.ehow.com/how_6453496_write-canadian-hand-written.html. British Columbia currently does not, except for people in the military and mariners. *See, e.g.*, British Columbia Ministry of Justice website, http://www.ag.gov.bc.ca/courts/other/wills_estates.htm#wills.

37. In the United Kingdom, unwitnessed holographic wills written after August 1, 1995 are invalid in England, Wales, Scotland, and Northern Ireland. *See* http://en.wikipedia.org/wiki/Holographic_will.

38. *See, e.g., In re Pulvermacher*, 305 N.Y. 378, 113 N.E. 2d 525 (1953) ("The legislature, cognizant of our unbroken line of decisions requiring compliance with each of the statutory formalities even in the case of holographic wills, has continued its requirements unchanged and unrelaxed."); *In re Agar*, 88 A.D.2d 882 (1st Dep't 1982) (holographic will denied probate where each requirement of due execution was not strictly followed); *see also In re Bouvier*, 2012 N.Y. Slip Op. 30565(U) (Sur. Ct. Oneida Co. 2012).

39. *See* http://definitions.uslegal.com/e/exigent-circumstances/.

40. *Id. See also Mincey v. Arizona*, 437 U.S. 385 (1978); *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948).

41. *I.e.*, the concept of extraordinary, dangerous, or emergency circumstances, even if referred to by some other words or catch-phrase.

42. *See, e.g.*, Andrew G. Lang, *Privileged Will – A Dangerous Anachronism?*, 8 U. Tas. L. Rev. 166 (1984-1986). The exception for soldiers and mariners, and later their secretaries and orderlies and others accompanying them, has existed since the times of Julius Caesar. *Id.* (*citing* R.W. Lee, The Elements of Roman Law, 4th ed. 1956, p. 90). Although criticized at times, the exception has persisted all these centuries. *See generally*, Quentin E. Grant & George V. Palmer, *Soldiers' and Sailors' Wills in New York* (Part I) 12 Alb. L. Rev. 1 (1948); (Part II) 13 Alb. L. Rev. 10 (1949).

43. Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 Real Prop. Tr. & Est. L.J. 27 (2008–2009).

44. *Id.* (study concludes that concerns about holographic wills are largely misplaced, and suggests that rigid traditional will execution formalities be relaxed).

BURDEN OF PROOF

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The End of the Year – and an Era

Introduction

As I write this column the leaves are mostly off the trees, and the morning frost warns that the end of 2014 is not far off. This end-of-year column completes a full decade of "Burden of Proof." While personally satisfying, and more than a little bit surprising, this anniversary is a trifle compared with the run of the *New York Law Digest* under its author and editor, the late Professor David D. Siegel.

The Dean of New York Practice

Every month for 37 years the *Digest* arrived in State Bar members' mailboxes. For the last 29 of those years, I eagerly consumed the *Digest*, from start to finish, with devotion usually reserved for all-you-can-eat buffets. It was a pleasure to run a letter-opener, or whatever else was handy, along the inside of the folded *Digest*, slitting the two tabs securing the lead note inside, away from the prying eyes of nosy postal employees.[1]

Once inside, in prose or the occasional poem, the lead note revealed so much more than a "digest" of a recent significant case. Each was a précis of the procedural and substantive body of law underlying and surrounding the lead case. Other cases were reported concisely, with context. For an area of law that routinely leads students and practitioners alike to torpor, the *Digest* was substantive and succinct, lively and loaded.

No matter the topic, readers could relate to the *Digest*. Professor Siegel conferred regularly with the bench and bar, and understood that collaboration with both was a requisite to truly understanding the application of procedural rules. His embrace of the practical, coupled with an encyclopedic understanding of theory, is what made the *Digest* a critically important tool for practitioners.

But what made the *Digest*, and the rest of Professor Siegel's work, unique, was humor. You never knew when it would appear, often when least expected, but there was something hilarious in almost everything he wrote. Not cute, not amusing. Hilarious.

A Cornucopia of New Legislation

As a longtime member and former chair of the Office of Court Administration's Advisory Committee on Civil Practice, Professor Siegel played a major role in drafting numerous amendments to the CPLR. This year a raft of significant CPLR amendments were enacted, a number of them just in time for this issue, and it seems fitting to end the year reporting on them.

CPLR 2106

CPLR 2106 permits attorneys licensed to practice in New York, together with physicians, osteopaths and dentists authorized by law to practice in New York, who are not parties to the action, to affirm in lieu of executing an affidavit.

Effective January 1, 2015, the statute is renamed and divided into two sections, (a) and (b). Subsection (a) continues the current scheme permitting attorneys, physicians, osteopaths, and dentists to affirm. Subsection (b) authorizes any individual physically outside of the United States and its territories to use an affirmation in lieu of an affidavit, and directs that the affirmation be "in substantially the . . . form" language provided in the statute:

> (b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form: I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature)

Ironically, the only people in the world after the first of the year who may not affirm pursuant to CPLR 2106 are those located within the United States or its territories who are not New York licensed or authorized attorneys, physicians, osteopaths and den-

tists. The amendment recommended by the Advisory Committee would have extended the benefit of CPLR 2106 to everyone.

CPLR 2214

In 2012 the Second Department, in *Biscone v. Jet Blue Airways, Corp.*,[2] affirmed a trial court's decision denying an e-filed motion to renew and reargue for failure to comply with CPLR 2214(c). The Second Department agreed that CPLR 2214(c) requires that a party moving to renew or reargue e-file a complete set of the originally submitted motion papers as an exhibit to the motion to renew or reargue. The court further held that simply referencing previously e-filed documents in lieu of annexing to the motion to renew or reargue was improper, explaining:

> Contrary to the plaintiff's contention, in moving for renewal, both CPLR 2214 and the court rules governing e-filing required her to submit electronically the papers originally submitted with her motion for class certification. Unlike the practice in certain federal district courts, relied upon by the plaintiff, no provision in 22 NYCRR 202.5-b permits a party to refer to supporting documents by the e-filed docket entry number rather than filing the documents themselves. Indeed, 22 NYCRR 202.5-b(d)(1)(i) provides that "all documents required to be *filed* with the court by a party . . . shall be filed and served electronically" (emphasis added). Thus, the plaintiff's initial motion for class certification and its accompanying exhibits and the responding papers should have been electronically filed with the court as an exhibit to the plaintiff's motion, inter alia, for leave to renew.
>
> While the above-cited decisions, holding that motions for leave to renew and/or reargue were defective because the movant failed to submit a proper record, did not involve e-filed cases, the rationale for those decisions nevertheless applies to the case at bar notwithstanding the greater efficacy of the e-filing system. If a party simply refers to docket entry numbers, the motion court would still be forced to expend time locating those documents in the system, a task that could easily be complicated by a voluminous record or incorrect citations to docket entry numbers. Consequently, just as a court "should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions," a court should likewise not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions.[3]

> For an area of law that routinely leads students and practitioners alike to torpor, the *Digest* was substantive and succinct, lively and loaded.

Effective July 22, 2014, the amendments to subsection (c) of CPLR 2214 legislatively overrules *Biscone*:

> (c) Furnishing papers to the court. Each party shall furnish to the court all papers served by that party. The moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system. Where such papers are in the possession of an adverse party, they shall be produced by that party at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct.

A little more than a month after the effective date of new subsection (c), the Second Department, in *Garrison v. Quirk*,[4] affirmed a trial court's denial of summary judgment to the defendant in a medical malpractice action:

> Here, as the Supreme Court correctly determined, the moving defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law. In forming their opinions, the moving defendants' medical experts did not examine the plaintiff's decedent but relied upon, inter alia, medical reports and medical records that were not annexed to the motion. Although the moving defendants contend that they provided the Supreme Court with a CD-R containing the medical records relied upon by their experts, there is no evidence that the CD-R provided to the court properly contained the certified medical records, or was even readable by the court (citations omitted). Moreover, even if a readable CD-R was previously submitted to the court in connection with an earlier motion in this case, the Supreme Court should "not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions."[5]

It is not clear from the decision in *Garrison* whether the case was an e-filed action, although, if it was, the records would, presumably, have been uploaded as an exhibit. If *Garrison* was e-filed, the inability of court personnel to read the CD-R is a factual variant

that calls into question whether the amended statute should have permitted the exhibits to be considered by the trial court. If *Garrison* was not an e-filed case, since the amendment to CPLR 2214(c) applies only to e-filed actions, it is of no help to the *Garrison* defendant.

CPLR 3113

In 2010 the Fourth Department, in *Thompson v. Mather*,[6] considered the role of an attorney representing a nonparty witness at a deposition where the attorney did not also represent a party to the action. The *Thompson* court held "that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition," a holding the Fourth Department, in a three-two decision, reaffirmed in its 2013 decision in *Sciara v. Surgical Associates of Western N.Y., P.C.*:[7]

> [W]e decline to depart from our conclusion in *Thompson* that the express language of CPLR 3113(c) prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client. We further note, however, that the nonparty has the right to seek a protective order, if necessary.[8]

The Fourth Department granted leave, and while the case was awaiting oral argument in the Court of Appeals, *Thompson* and *Sciara* were legislatively overruled, effective September 23, 2014, by amendment to CPLR 3113(c):

> (c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

CPLR 3122-a

CPLR 3122-a provides a method of authentication for the business records produced by a non-party, but as enacted applied only to records produced pursuant to the service of a subpoena *ducus tecum* pursuant to CPLR 3120. Effective August 11, 2014, a new subsection (d) was added to CPLR 3122-a, expanding the authentication procedure to records produced voluntarily, without the service of a subpoena *ducus tecum*:

> (d) The certification authorized by this rule may be used as to business records produced by non-parties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in paragraphs one, two and four of subdivision (a) of this rule.

CPLR 3216

CPLR 3216 is a tool designed to spur into action a party that has neglected to prosecute a lawsuit.

In 2011 the Court of Appeals, in *Cadichon v. Facelle*,[9] reversed the trial court's dismissal of the plaintiff's case pursuant to CPLR 3216, which had been affirmed by the First Department in a three-two decision:

> Here, the action was apparently "dismissed" on December 31, 2007. But there is no order of dismissal to that effect, as evidenced by the parties' conduct in scheduling depositions as if the case were still active. Defendants point to the stipulation, claiming that once the plaintiffs failed to file their note of issue, the trial court was within its right to dismiss the action. It is evident from the 90-day demand and the dictates of CPLR 3216 that the plaintiffs' failure to comply with the demand would "serve as a basis" for the trial court, on its own motion, to dismiss the action. That is not what occurred here; there is no evidence in the record that the trial court made a motion to dismiss the action in this case, and it is apparent that the case was dismissed based upon plaintiffs' failure to comply with the May 3, 2007 stipulation and 90-day demand in doing so. Indeed, there was apparently no "order" of the court dismissing the case and, at best, only a ministerial dismissal of the action without benefit of further judicial review even though the order provided that it only "will serve as a basis for the *court* on its own motion . . ." to take further action (emphasis supplied).[10]

The majority on the Court of Appeals concluded that there was "only a ministerial dismissal of the action without benefit of further judicial review," and reinstated it.

It was not clear whether *Cadichon* was limited to cases where the dismissal was a ministerial act performed by a clerk. Furthermore, language in the majority opinion suggested that the requirement that the court make a motion on notice, rather than exercise, *sua sponte*, its power to dismiss the action pursuant to CPLR 3216, was required because the language in the trial court's notice said just that. What was clear was that some notice of the impending dismissal was required.

Effective January 1, 2015, subsection (a) of CPLR 3216 is amended to make clear that a CPLR 3216 dismissal by a court must be preceded "with notice to the parties":

> (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

CPLR 3216(b)(2) has always required, *inter alia*, that "one year must have elapsed since the joinder of issue" before a demand to resume prosecution could be served. Also effective January 1, 2015, an alternative time period is provided, and the demand

may not be served until the later of the two time periods has expired:

> (2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later[.]

For more than a decade, CPLR 3216 has been used as a calendar control device by certain courts, with the goal of ensuring that cases were either placed on the trial calendar within the "standards and goals" time frames set forth in Rule 202.19(b),[11] or were dismissed or "disposed" within the same time frame, thereby ensuring that no case was beyond "standards and goals."

A problem with this practice is that the only party punished as a result of a court-served CPLR 3216 demand is the plaintiff, since the statute requires that a note of issue be served and filed within the 90-day period, with the failure to do so resulting in dismissal of the plaintiff's case.

The two dissenting justices from the First Department in *Cadichon* pointed to the inherent unfairness in using CPLR 3216 this way:

> The record shows that the discovery delays in this consolidated action were occasioned principally by defendants.
>
> * * *
>
> Since the discovery delays herein were caused by defendants, the case should not have been dismissed, even in the absence of a medical affidavit demonstrating the merit of the action (citation omitted). . . . In any event, the merit of the action was demonstrated, inter alia, through the affirmation of plaintiffs' physician, board-certified in internal medicine and gastroenterology . . .[12]

Effective January 1, 2015, CPLR 3216(b)(3) is amended to add the following requirement:

> Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

This portion of the amendment tracks the language of the 2008 amendment to CPLR 205(a), which required that an order dismissing a case for failure to prosecute

> [w]here a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

Going forward, the amendment to CPLR 3216(b)(3) should prevent the dismissal of a plaintiff's case where the plaintiff has not been the cause of the delay in the prosecution of the action. It should also end, as a practical matter, the practice in some counties of serving a demand in every action, since those demands will now have to be tailored to the specific facts of each individual case, setting forth "the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

Conclusion

It is fitting to remember Professor Siegel in this review of 2014's CPLR amendments. The first question for litigators confronting a tough civil practice issue has always been "What does Siegel say?" Fortunately, his body of work will continue providing answers, and very often solutions, to our thorniest problems. In the often arcane and confusing world of New York Practice, no one was smarter, more knowledgeable, or funnier. He will be missed. ■

1. This tactile pleasure is something the electronic version of the *Digest* cannot duplicate.
2. 103 A.D.3d 158 (2d Dep't 2012).
3. *Id.* at 179 (citations omitted).
4. 120 A.D.3d 753 (2d Dep't 2014).
5. *Id.* at 754 (citations omitted).
6. 70 A.D.3d 1436 (4th Dep't 2010).
7. 104 A.D.3d 1256 (4th Dep't 2013).
8. *Id.* at 1257 (citations omitted).
9. 18 N.Y.3d 230 (2011).
10. *Id.* at 235–36.
11. 22 N.Y.C.R.R. § 202.19(b).
12. 71 A.D.3d 520, 522 (1st Dep't 2010).

The Honorable Judge **John J. Brunetti** is a justice of the Onondaga County Supreme Court in the 5th Judicial District of New York.

Opening, Motion Argument, and Summation

A Walk in a Park or a Minefield?

By Hon. John J. Brunetti

Trial lawyers are often told that what they say in court is not evidence. After hearing the rule stated over and over in preliminary and final jury instructions, in civil[1] and criminal[2] cases, some lawyers may be lulled into a false sense of security, thinking they can say almost anything in court without consequence – a walk in the park, metaphorically speaking. Case law shows that nothing could be further from the truth. In fact, case law shows that an appellate court may classify what a lawyer says in court as "ruinous" and "fatal" to the client's case.[3] With that backdrop, we discuss the minefield that awaits the unwary trial lawyer.

Openings

First, there is the danger of opening the door to ruination in the opening statement. For example, the Court of Appeals upheld a trial court's ruling that the lawyer for a county jail inmate, charged with assault on a deputy during his incarceration, had opened the door to proof of the inmate's record, which had been precluded *in limine*. In the Court's view, counsel "converted the shield of the preclusion order into a sword."[4] The client suffered the consequence.

In a Third Department case, a victory on a statement suppression motion was lost by a defense lawyer who, on opening, claimed "there was no proof" connecting the defendant to the drug at issue.[5] This opened the door to the use of the suppressed statement. Perhaps a more cautious lawyer would have said that the jury "will not hear" any proof, rather than "there was no proof."

Admissions – Formal and Informal

Another mistake made in opening statements is making an admission as the agent of the client. Such an admission by counsel may be classified as either formal or informal. A formal judicial admission is conclusive and dispenses with the need for evidence of the fact admitted.[6] An informal judicial admission, on the other hand, is simply evidence of the fact admitted therein.[7]

In 2013, both the First and Second Departments left no doubt that "a factual assertion made by an attorney during an opening statement is a judicial admission."[8] The fact that the admissions in these two civil cases were classified as informal was likely of little solace to the lawyers who made them.

The Second Department case was a divorce action where the status of real property as marital property was in issue. Counsel's concession in the opening statement that the husband acquired title during the marriage, albeit partially with money from a non-marital source, was ruled an informal admission.[9]

"Ruinous" and "fatal" were the adjectives used by the First Department to describe the consequences of a lawyer's admitting the client's negligence in the opening statement, resulting in a directed verdict in the plaintiff's favor on the claim of negligent maintenance of steps where the plaintiff had fallen.[10]

As for admissions by criminal defense counsel in openings, a Fourth Department case has addressed the issue. There, the defendant was convicted of possession of a dangerous instrument, consisting of sneakers.[11] Defense counsel admitted in opening statement that the defendant was wearing sneakers. On appeal, the People conceded that there was no explicit proof offered at trial indicating that the defendant was wearing sneakers at the time of the crime. The Appellate Division rejected the People's attempt to advance defense counsel's admission so as to relieve them of their burden to prove an essential element of the crime, and so the conviction was reversed for insufficient evidence. The court did not address whether things would have been different had the People ordered a transcript of the defense opening and offered it into evidence before they rested.

There is the danger of opening the door to ruination in the opening statement.

When it comes to other stages of a criminal case, informal judicial admissions by counsel may be committed where defense counsel expressly names the client as the source of the proffered information, or it may be fairly inferred that the client was its source. That was the ruling of the Court of Appeals in *People v. Rivera*.[12] There, defense counsel averred in an affidavit in support of a motion that the defendant possessed "buy money" in a drug sale case because he had made change for the true seller. The trial court ruled the affidavit to be admissible as an informal admission when the defendant testified that he never possessed the buy money. The Appellate Division ruled that the affidavit was a conclusive judicial admission.[13] The Court of Appeals affirmed on the Appellate Division opinion with the proviso that the admission was informal.

Prior Inconsistent Statements

Akin to admissions by counsel are prior inconsistent statements by counsel with which the client may be impeached. See, for example, the Court of Appeals ruling in *People v. Brown*.[14] At trial, defense counsel moved *in limine* for a ruling that, if the client testified that he was present at the scene to buy drugs, not to sell drugs, with money earned from legitimate employment, he would not be deemed to have opened the door to specified prejudicial information. After the defendant testified at trial in a manner inconsistent with his former counsel's statements, the prosecutor sought to use counsel's statements to impeach the defendant. The Court of Appeals found that, since the defendant was the "only source of the information" for counsel's statements concerning the defendant's proposed testimony and that counsel was acting as the defendant's authorized agent in making those statements, counsel's statement was properly used to impeach the client.

Prior inconsistent statements by counsel made at arraignments[15] and bail hearings[16] are also admissible to impeach the client. For example, the Second Department has ruled that a defendant may be impeached with his counsel's statement at arraignment that "[my client] defendant tells me that the complaining witness . . . came towards him in a very threatening manner and he thought he was going to be attacked" if the client's trial testimony is inconsistent with that assertion.[17]

A review of the impeachment-by-counsel's-statement cases indicates that, when confronted with the attorney's prior statement, the client conceded the attorney's prior inconsistent statement during cross-examination, thereby rendering extrinsic proof of it unnecessary. No appellate court has ever been forced to address two issues: What if the client denies being the source of counsel's statement? And, what if the client denies that the lawyer made the statement?

The answer to the second question is easy. The cross-examiner need not call the attorney who made the statement to prove the statement. Since the attorney speaks for the client, all the cross-examiner need do is to call any witness who heard the attorney make the statement[18] – usually a court reporter.

A denial by the client that the client was the source of counsel's statement presents a more difficult issue. If the lawyer who made the statement is the lawyer trying the case, that lawyer would likely be precluded from testifying by the advocate-witness rule[19] found in the New York Rules of Professional Conduct.[20] But what of former counsel? Does the attorney-client privilege apply? On the issue of whether the admissibility of an affidavit of counsel presents an attorney-client privilege issue, the First Department said "no" in *Brown* before review by the Court of Appeals, saying, "The objection that receipt of the evidence violates the attorney-client privilege of confidentiality is patently invalid. There can be no confidentiality about an affidavit filed in open court."[21] That ruling would appear to allow testimony by a former counsel as to what a former client had said.

The only exception would be if the court were to rule that the client's denial implicating the prior counsel in a misrepresentation to the court was not a sufficient allegation of misconduct so as to result in a waiver of the privilege.[22]

In criminal cases, a notice of alibi is required to be served upon the prosecution if the defendant plans to introduce alibi evidence, and thus has the potential to become an admission or prior inconsistent statement. However, if the notice is withdrawn well in advance of trial, it may not be used as an admission or a prior inconsistent statement because it is required so early in the case that it is more a procedural device and should not force the defendant to form a fixed defense so early in the litigation.[23] However, absent a timely withdrawal of an alibi notice, the notice may be used as an informal judicial admission and/or to impeach the defendant if he testifies[24] and/or to impeach a defense witness who is named in the notice.[25]

Closing Arguments

Closing arguments present another fertile ground for a lawyer to speak with negative consequences. Case law shows that even though what a lawyer says in summation is not evidence,[26] a lawyer may not make statements in summation with impunity. A lawyer who operates under the assumption that the proof is closed may be in for a rude awakening because there is still the opportunity for counsel to make admissions and open the door during summation.

The Third Department has recognized the possibility that a lawyer may commit an informal judicial admission in summation, though the court found in that case that what the lawyer said did not measure up to an admission.[27] In *Wheeler*, the plaintiff had sued GTE for gender discrimination in the form of discharge. In order to prevail, she had the burden to prove that the discharge occurred under circumstances giving rise to an inference of gender discrimination. The defense took the position that there was no discharge, but rather a resignation. The jury found that the plaintiff was fired, but for misconduct. The trial court set aside that verdict as against the weight of the evidence, but rejected the plaintiff's claims that defense counsel's statements in summation were admissions. Those statements included: (1) "The issues we had with Ms. Wheeler . . . didn't warrant her discharge and no one was going to discharge her"; and (2) "You're going to hear that somehow [GTE] terminated the plaintiff for misconduct. I'm not quite sure how we did that. The fact is that – is that she quit."[28] The Appellate Division reinstated the verdict, observing that while the trial court was wrong in setting aside the verdict, the trial court correctly recognized defense counsel's statements as arguments, and not as judicial admissions, because none was a concession of a fact.[29]

The First Department and the Court of Appeals have ruled that criminal defense counsel may open the door to additional proof in summation. In the First Department case, defense counsel was found to have opened the door during summation to proof of a photographic identification procedure that would otherwise have been inadmissible,[30] because counsel had "created an unfair impression" about the witness's identification of the defendant. In the Court of Appeals case, *People v. Thompson*, decided in 2014, defense counsel was found to have opened the door during summation to evidence (a glove) that had been ordered suppressed. The Court affirmed the trial court's order permitting the People to re-open their proof to introduce the suppressed evidence before returning to summations.[31]

The *Thompson* case makes re-examination of a case decided by the Court of Appeals 10 years earlier well worthwhile. In *People v. Massie*,[32] the Court took particular note that in summation defense counsel asserted a proposition that defense lawyers sometimes advance during jury selection, in opening and in closing: "Look at the setting. We're here in a courtroom. I'm the defense attorney. I'm asking the questions. [The defendant] is sitting next to me. Who else are [the witnesses] going to identify in this courtroom?"

In *Massie*, there were a total of three identifications by a single witness: (1) a photo identification that, absent an exception, is inadmissible on the People's case in chief;[33] (2) a line-up identification that had been ruled inadmissible on right to counsel grounds;[34] and (3) an in-court identification. When defense counsel elicited evidence about the photo identification, the trial court ruled that the door was opened to the use of the suppressed line-up identification. In the wake of *Thompson*, the "who else are the witnesses going to identify in this courtroom" argument may very well be viewed by a court as an attempt to create a misimpression that the witness had not identified the defendant or his or her picture as the perpetrator until the witness came into the courtroom. Under today's case law, that is the kind of misimpression that may very well open the door to the re-opening of proof, to allow the People to prove the prior identification.

Conclusion

The foregoing tour of the minefield that awaits the unwary lawyer who speaks in court would not be complete without mention of a Court of Appeals case where a lawyer opened the door by failing to speak. That case is *People v. Bolden*,[35] where defense counsel on cross-examination asked a question that called for a "yes" or "no" answer. Did you ever say that you "did not get a good look at the perpetrator"? The witness's non-responsive answer was that "she had been shown a number of photographs at the time she made that statement." The

Court of Appeals upheld the trial court's ruling that "[b]y failing to move to strike that unresponsive answer, defendant's attorney opened the door to an explanation by the People concerning the circumstances under which she had seen the photographs."[36] ■

1. The pattern jury preliminary instruction for civil cases contains the following assertion: "What is said [by counsel] in opening statements is not evidence." PJI 1:3. The pattern final PLJ instruction states: "[A]rguments, remarks, and summation of attorneys are not evidence." PJI 1:25.

2. The pattern jury preliminary instruction for criminal cases contains the following assertion: "What the lawyers say in an opening statement or at any time thereafter is not evidence." CJI 2nd. The pattern final instruction for criminal cases states: "Remember, nothing the lawyers say at any time is evidence." CJI 2nd.

3. *Echavarria v. Cromwell Assocs.*, 232 A.D.2d 347 (1st Dep't 1996).

4. *People v. Rojas*, 97 N.Y.2d 32 (2001) ("In its opening statement, the defense strongly suggested, if not argued, that the jury should acquit defendant because, having done nothing wrong, he was abused and mistreated, culminating in a scuffle with guards who surrounded him in his cell. . . . Having argued that defendant's confinement was unjustified, the defense converted the shield of the preclusion order into a sword by arguing that the People should not be allowed to supply that justification.").

5. *People v. Everett*, 96 A.D.3d 1105 (3d Dep't 2012) ("County Court did, in fact, grant his motion to suppress most of his statements. The court permitted the People to introduce those suppressed statements at trial, however, after defense counsel stated during his opening remarks that there was no proof to connect defendant with the cocaine or the sneakers. The court did not abuse its discretion when it held that these comments created a misleading impression, thereby opening the door to the admission of defendant's statements.").

6. *See* Richardson 8-215.

7. *See* Richardson 8-219.

8. *Kosturek v. Kosturek*, 107 A.D.3d 762 (2d Dep't 2013); *Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480 (1st Dep't 2013).

9. *Kosturek*, 107 A.D.3d 762 ("This unequivocal, factual assertion made during opening statements constituted a judicial admission.").

10. *Echavarria*, 232 A.D.2d 347.

11. *People v. Johnson*, 241 A.D.2d 954, 955 (4th Dep't 1997) ("The People concede that there was no explicit proof offered at trial indicating that defendant was wearing sneakers. The admission by defendant's attorney in his opening statement does not constitute evidence, nor does it relieve the People of their burden of proof.").

12. *People v. Rivera*, 45 N.Y.2d 989 (1978).

13. *People v. Rivera*, 58 A.D.2d 147, 149 (1977).

14. *People v. Brown*, 98 N.Y.2d 226 (2002).

15. *People v. Gary*, 44 A.D.3d 416 (1st Dep't), *lv. denied*, 9 N.Y.3d 1006 (2007) ("The court properly permitted the prosecutor to impeach defendant by way of statements his attorney made at arraignment (citations omitted). It was a reasonable inference that these statements were attributable to defendant, and they significantly contradicted his trial testimony."); *People v. Moye*, 11 A.D.3d 212 (1st Dep't 2004), *lv. denied*, 4 N.Y.3d 766 (2005) ("On cross-examination of defendant Moye, the court properly received statements that defendant Moye's original counsel had made at arraignment as prior inconsistent statements by Moye affecting his credibility. Moye was concededly the source of the information and counsel, attorney of record at the time, was acting as Moye's agent (*see People v. Brown*, 98 NY2d 226, 232–33 (2002)). An attorney's statement at arraignment, relaying information supplied by the defendant and offered for the purpose of obtaining favorable rulings on matters such as bail, clearly falls within Brown's ambit.").

16. *People v. Mahone*, 206 A.D.2d 263 (1st Dep't), *lv. denied*, 84 N.Y.2d 869 (1994) ("Further, it was not improper for the prosecutor to use for impeachment purposes a statement made by defendant's attorney at a bail application which was made in defendant's presence and with his active participation (citation omitted).").

People v. Johnson, 46 A.D.3d 276 (1st Dep't 2007), *lv. denied*, 10 N.Y.3d 865 (2008) ("[T]rial court properly permitted the prosecutor to impeach defendant by way of statements made by her attorney at the bail hearing as it is a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony.").

17. *People v. Killiebrew*, 280 A.D.2d 684 (2d Dep't), *lv. denied*, 96 N.Y.2d 802 (2001).

18. *Rivera*, 58 A.D.2d at 149 ["The fact that the attorney was not called to testify is not a valid objection to the admissibility of the affidavit. Almost the whole point to the vicarious admission rule is that someone other than the agent testifies to the fact that the agent has made an admission out of court."].

19. *See People v. Paperno*, 54 N.Y.2d 294 (1981).

20. N.Y. Rules of Prof'l Conduct, Rule 3.7.

21. *Rivera*, 58 A.D.2d at 149.

22. *See., e.g.*, *Gen. Realty Assocs. v. Walters*, 136 Misc. 2d 1027, 1029 (N.Y. City Civ. Ct. 1987) ("DR 4–101(C)(4) permits the attorney to testify in defense of the charge, even if the testimony breaches the confidentiality rule. Nor need the charge be formal or precise: Where the fair implication of the client's assertion tends to jeopardize the attorney's position, the right of self-defense attaches.").

23. *People v. Burgos-Santos*, 98 N.Y.2d 226, 235 (2002).

24. *People v. Harvey*, 309 A.D.2d 713 (1st Dep't), *lv. denied*, 1 N.Y.3d 573 (2003) ("Defendant failed to preserve his argument that, since he had withdrawn or disavowed the notice, it was error for the court to admit his false notice of alibi as an informal judicial admission. . . . Unlike the situation in *People v Burgos-Santos* (98 NY2d 226, 233–35 [2002]), defendant first attempted to disavow the alibi notice late in the trial. In any event, were we to find any error in this regard, we would find it to be harmless.").

25. *People v. Byfield*, 15 A.D.3d 262 (1st Dep't), *lv. denied*, 4 N.Y.3d 884 (2005) ("The court properly exercised its discretion in permitting the People to cross-examine a defense witness as to whether she was the source of certain information contained in defendant's alibi notice, as well as in receiving the alibi notice as an informal judicial admission that was contrary to defendant's position at trial.")

26. *People v. Roche*, 98 N.Y.2d 70, 78 (2002) ("[W]e note that the People's closing argument does not provide an evidentiary basis for [the requested charge]. As cogently stated by the dissenting Justice at the Appellate Division, statements in a summation are not evidence and may not supply proof supporting a charge request.").

27. *Wheeler v. Citizens Telecomm. Co. of N.Y., Inc.*, 18 A.D.3d 1002 (3d Dep't 2005) ("Supreme Court correctly recognized defense counsel's statements as arguments, and not as judicial admissions. Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary (*see* Prince, Richardson on Evidence § 8–215 [Farrell 11th ed.]). Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted (*see* Prince, Richardson on Evidence § 8–219 (Farrell 11th ed.)). A review of the statements made by defendant's counsel during argument reveals that none are formal or informal concessions of a fact alleged by plaintiff.").

28. Drawn from the Plaintiff's brief on appeal reproduced in Westlaw as follows: 2005 WL 5746264 (Appellate Brief) Plaintiff-Respondent's Brief (Jan. 18, 2005).

29. *See Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629 (1997) ("To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination (citations omitted). The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision' (citations omitted).").

30. *People v. De Los Angeles*, 270 A.D.2d 196 (1st Dep't), *lv. denied*, 95 N.Y.2d 889 (2000).

31. *People v. Thompson*, 81 A.D.3d 670 (2d Dep't 2011), *aff'd*, 22 N.Y.3d 687 (2014).

32. *People v. Massie*, 2 N.Y.3d 179, 182 (2004).

33. *People v. Caserta*, 19 N.Y.2d 18 (1966).

34. *People v. Massie*, 305 A.D.2d 116, 117 (1st Dep't 2003).

35. *People v. Bolden*, 58 N.Y.2d 741, 741–42 (1982).

36. *Id*. at 742.

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The Umpires Strike Back

By Marc T. Wolin and Robert D. Lang

Although not found in the Constitution, it is hornbook law that every fan has the right, frequently used, to boo umpires. Not even textualists, like Justices Scalia and Thomas, would likely disagree. Booing sports referees is considered to be part of the game, handed down from parent to child, generation after generation.[1]Of course, no one cheers the umpire – unless the umpire happens to make a questionable call in favor of their team.

In the United States, baseball in particular provides great opportunities for theater in challenging umpires' decisions, since, of all the major sports, baseball managers retain their traditional right to argue calls, other than balls and strikes, by coming onto the field and "conversing" with umpires at close range.[2] But there is a major difference between coaches kicking dirt on umpires, like Billy Martin, or ridiculing officials and linesmen, like John McEnroe, and physically assaulting referees. That line is increasingly being crossed. Although it has long been said that you have to have very thick skin or be hard of hearing in order to be a referee, neither of those "attributes" will help a referee if physically assaulted.

It's a Dangerous Call

As we discussed in our June 2014 article in this *Journal*, rage against referees is rising. Both the number and the brutality of the attacks on sports referees are increasing. Barry Mano, the president of the National Association of Sports Officials (NASO), reported that each week the NASO receives reports of sports officials being physically abused – and those calls come only from the NASO's 20,000 members. Many other incidents go unreported.[3]

One reason for the increase in physical violence against referees by parents is that, for some, becoming more involved in the athletic pursuits of their children translates into being more involved in the potential of sports scholarships for college and the possibility of a pro contract in the future. Parents are less likely to accept with quiet dignity a bad call by a referee when it affects the events of a family member envisioned to be a future Djokovic or LeBron. Sporting events for these parents are no longer just games; they are now "financial opportunities."[4]

The Umpires Strike Back

Criminal Cases

In December 2010, Florida High School basketball official Jim Hamm called a technical foul on DeSoto High School player Mason Holland. The 6′ 5″ player attacked the 51-year-old referee, picking him up and body slamming him onto the court.[5] After watching the video of his assault, Holland was shocked to see himself act that way, stating, "I got to see the video of it and I was like, that's not me."[6] In addition to violating the law, Holland broke an unwritten rule that, while players can sometimes take on another player, they can never, ever, go after a coach or official.[7] Holland was sentenced, under the written law, to 37 months in prison for battery.[8]

In October 2010, a semi-pro football player attacked a referee after the game, beating him with his helmet, leaving the referee with a broken face and several skull fractures. The player pleaded guilty to assault and was sentenced to 10 years in prison.[9]

In September 2011, in Sarasota, Florida, during the first quarter of a youth football game, coaches of one of the teams disagreed with the referee's call and came onto the field. Following the lead of their so-called mentors, the team joined the argument, and one of the players tackled the referee.[10] The incident was captured on video, showing not only the tackle but other players and unidentified persons joining in.[11]

Civil Suits

In a high school football game in Oklahoma, the referee was punched by a fan as he attempted to break up a fight between the teams in the last 20 seconds of the game. The referee filed suit against the high school, arguing that the school had tried "to excite and arouse the crowd to a fighting frenzy," resulting in the referee being spun around and punched while he attempted to break up the fight.[12]

In Pennsylvania, a referee at a college football game filed suit against a player from Cheyney University, alleging that the player took off his helmet and struck the head linesman in the head. The incident arose after the linesman called a penalty against the player for illegal use of the hands. The player then argued with another referee, using profanity, which resulted in a second penalty, this time for unsportsmanlike conduct. The player then removed his helmet, causing the referee to call a third penalty. After that, the player struck the referee in the head, using his helmet as a weapon. Three days after the incident, the university expelled the player. The referee had to undergo three operations for the injuries suffered.[13]

In 2006, following a two-point overtime loss in a conference game, an assistant basketball coach for West Virginia Wesleyan College verbally, and then physically, assaulted the referee. West Virginia Wesleyan College suspended the assistant coach for the remainder of the basketball season. The referee filed suit against the college and the assistant coach.[14]

In Elgin, Illinois, approximately 35 miles from Chicago, a soccer referee warned a player about tripping. The player responded first by verbally abusing and then physically attacking the referee. The referee sued the player for personal injuries sustained.[15]

> Bill Boyd, a Texas referee, taught a course titled "The Fears in Officiating."

In 2013, a number of legal issues arose at a high school football game in Louisiana. During the third quarter of the game between Manderville and St. Paul's, a linesman repeatedly attempted to move fans away from the field's sideline, because they were interfering with the chain crew. The police officer on the sideline instead told the linesman to pay attention to the game. The referee complained that the fans had not been moved back enough. The police officer responded that the referee should handle the game, while the police officers handled the crowd. Then the referee, in essence, tried to eject the police officer stating, "you're out of the game . . . get outta here."

The police officer responded by arresting the head referee and the linesman on the charge of "public intimidation." The two referees involved were considered "very well respected" by the head of the Louisiana High School Officials Association. The police officer who arrested the two football referees was thereafter suspended and demoted.[16]

While the courts have largely protected referees, there are some outliers. For example, in *Toone v. Adams*,[17] a disgruntled fan of the Raleigh Caps (yes, that is the name of the team), a team in the Carolina League, assaulted the umpire as he was leaving the playing field after the end of the game. Fans were pouring over the right field fence, "cursing and challenging" the umpire to fight. During the game, the manager of the Raleigh Caps had threatened the umpire, saying that if the umpire made yet another decision with which he disagreed, "he would behave in such a manner that plaintiff would be forced to eject him from the game and his ejection would result in extreme hostility toward plaintiff on the part of the partisan fans."[18]

The lower court ruled that the manager of the Raleigh Caps did not owe a legal duty to the umpire in that there were no facts showing a causal relationship between the conduct of the umpire and the assault by the angry fan. On appeal, the decision was affirmed. In its decision, the court portrayed umpires as accepted targets of ridicule

and described them as people who should accept their lowly role in life:

> For the present day fans, a goodly part of the sport in a baseball game is goading and denouncing the umpire when they do not concur in his decisions, and most feel that, without one or more rhubarbs, they have not received their money's worth. Ordinarily, however, an umpire garners only vituperation — not fisticuffs. Fortified by the knowledge of his infallibility in all judgment decisions, he is able to shed billingsgate like water on the proverbial duck's back.[19]

The court found that the unsportsmanlike conduct of the umpire in allegedly inciting fans to violence was not contemporaneous with the assault and, therefore, there was no liability to the umpire:

> No one can say whether Adams' assault on plaintiff was his only action to the umpire's ruling, to the "rhubarb" created by Deal, to both, or whether he was merely venting pent-up emotions and propensities which had been triggered by the epithets, dares, or challenges of one or more of the 3,451 other fans attending the game.[20]

The court concluded, "It would be an intolerable burden upon managers of baseball teams to saddle them with responsibility for the actions of every emotionally unstable person who might arrive at the game spoiling for a fight and become enraged over an umpire's call which the manager had protested."[21]

In *Latham v. Sims*,[22] an umpire at a softball game held during a company picnic called a ball hit down the foul line as foul. A member of the team protested the call by grabbing the plaintiff umpire by the shirt collar and throwing him to the ground. When the umpire got up, the employee grabbed the umpire by the throat with one hand and threw him to the ground again. The umpire sued both the player who assaulted him and the company for personal injuries he sustained. The company that sponsored the picnic filed a motion dismissing the complaint, arguing that the company was not liable for the negligent act of its employee, which occurred outside the scope of employment. The court denied the motion for summary judgment, stating that it was "a close call" whether the company picnic, or at least the batted-ball incident, occurred within the scope of the employment and therefore denied the motion to dismiss.

In *Baugh v. Redmond*,[23] the Louisiana Court of Appeals considered an assault on an umpire in an adult softball game. After the umpire called out a player for leaving a base early on a fly ball, the defendant, a sponsor of a team, verbally harassed the umpire for the remainder of the game. At the end of the contest, as the umpire was leaving, the defendant struck the umpire in the face, knocking his eyeglasses off. The defendant then stepped on the eyeglasses. The blow caused extensive damage to the umpire's teeth. The court found that the plaintiff had not pushed or made any threatening moves toward the defendant, that the assault took place while the plaintiff was walking through the dugout, heading toward the concession stand. As such, the court found that the plaintiff-umpire was not guilty of any comparative fault so as to reduce his recovery for the injuries he sustained.

Self-Help

Self-help by referees is useful, if not necessary, to avoid physical assaults. Bill Boyd, a Texas referee, taught a course titled "The Fears in Officiating," where he recommended that referees introduce themselves to the police or security guards prior to the game and advise them from which section of the court or field they will be leaving. After the game, he recommends that referees remove their whistles from around their necks to reduce the chance that someone will grab it and try to choke them.[24]

Legislation

Legislation protecting officials is essential. In Florida, parents, coaches and fans who threaten or assault referees during games are subject to criminal charges, fines of up to $10,000, and three years in jail for assault, aggravated assault or aggravated battery.[25] Just having statutes that protect sports officials is insufficient; the laws must be effectively enforced. Pennsylvania, in the early 1990s, was one of the first states to enact laws aimed at protecting sports officials, making it a crime to assault a sports official at a sporting event, including interscholastic contests and other organized athletic events. Since 2002, 37 people in Pennsylvania have been charged with assaulting sports officials. However, prosecutors have secured convictions in fewer than 25% of those cases.[26]

Conclusion

There was a time when sports umpires, in essence, wore signs that said "kick me." Despite remaining problems, now, if a sports referee is assaulted, count on the managers or players being suspended and fined and, if an assault was committed by a fan, civil and criminal lawsuits await the individual who puts the "fanatic" back in the "fan." Here's a recent example of how times have changed: An AP sportswriter tweeted that an NBA referee had allegedly said that he would give a "makeup" call to even things out, following a supposed bad call. The referee sued the reporter, alleging defamation of his professional standing.[27]

Umpires are not awarded lucrative Nike contracts and sports energy drink endorsements, nor are long-term, no-cut contracts given to referees. The talking heads and color commentators on *Sports Center* are not referees. Umpires do not appear regularly on *Sports Nation*, *Pardon the Interruption*, *Around the Horn*, and other sports programs. Yet, try holding major competitive sports contests (except perhaps court tennis) without referees. Imagine NFL games where the offensive lineman had to call holding penalties on themselves, NBA games where defensive

players had to call fouls on themselves or Major League Baseball games where each side had to call balls and strikes for themselves.

Although underappreciated and underpaid, without referees and umpires, major competitive sports would descend into anarchy. Even if large salaries and bonuses are not destined to be part of their world, they deserve, at a minimum, to be spared physical abuse, even if choruses of boos from thousands of fans is their lot should they make an unfavorable call against the home team. There will only be more lawsuits and more legislation protecting sports referees if this important message is ignored.

1. Conlan & Creamer, *Nobody Loves an Umpire*, Sports Illustrated (June 26, 1967).
2. Former Baltimore Orioles Manager Earl Weaver took the "art" of arguing to an advanced level by turning the bill of his cap backwards so he could bring his face even closer to an umpire when arguing calls on the field.
3. Shira Springer, *Out of Bounds; Violence Against Referees and Umpires Has Reached a Fever Pitch, But There Are Solutions*, Boston Globe (Aug. 25, 2013).
4. Garry Boulard, *Cease-Fire on the Umpire!* (State Legislatures) (June 2008) (quoting Illinois State Senator Edward Maloney).
5. The video of the assault can be seen online at nesn.com/2010/12/high-school-basketball-player-attacks-referee-faces-felony-video. Bettie, *High School Basketball Player Attacks Referee, Faces Felony*, NESN (Dec. 15, 2010).
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9. *Id.*
10. ABC Action News, *Ref in Football Brawl: Emotions Got Out of Control* (Sept. 2, 2011).
11. *Sarasota Gators Youth Football Coaches, Player Attack Referee*, http://www.huffingtonpost.com/2011/09/01/sarasota-youth-football-coach-player-attack-referee_n_94489html (Sept. 1, 2011).
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13. Elliot Grossman, *Football Referee Sues Player, Claiming Assault During Game*, The Morning Call (Lehigh Valley) (June 26, 1997).
14. Chris Dickerson, *Referee Sues W. Va. Wesleyan, Former Coach For Attack at the Game*, W. Va. Record (Jan. 26, 2006).
15. *Soccer Player Sued by Injured Referee*, Chicago Tribune (July 10, 2007).
16. Tim Polzer, *High School Football Referees Arrested During Game*, Sports Illustrated (Oct. 14, 2013).
17. 262 N.C. 403, 137 S.E.2d 132 (1964).
18. *Id.* at 403.
19. *Id.* at 415–16.
20. *Id.* at 421.
21. *Id.* at 432.
22. 1994 Conn. Super. LEXIS 420 (Super. Ct. Conn. 1994).
23. 565 So.2d 935, 1990 La. App. LEXIS 1604 (1990).
24. Eleena De Lisser, *Abusive Fans Lead Amateur Umpires to Ask Courts, Legislatures for Protection*, Wall St. J. (Aug. 1, 1994).
25. *Threats, Assaults on Referees a Crime*, Miami Herald (Nov. 20, 2005).
26. Rich Cholodofsky, *PA Law Protecting Sports Officials Rarely Used*, Pittsburgh Tribune Review (Apr. 16, 2007).
27. McShane, *NBA Ref Bill Spooner Sues AP Sportswriter Jon Krawczynski for "Defamation" Over Twitter Remark*, NY Daily News (Mar. 15, 2011).

New Criminal Justice Legislation

By Barry Kamins

This article discusses new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law and other related statutes. While, in total, the Legislature passed the fourth-lowest number of bills since 1915, there was no dearth of criminal justice measures. The discussion that follows will primarily highlight key provisions of the new laws, and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the Governor's signature, and, of course, the reader must check to determine whether the bill is ultimately signed or vetoed by the Governor.

Three substantive pieces of criminal justice legislation were enacted in the last session The one that appears to be most far reaching is the Public Trust Act.[1] This legislation was part of a package of bills that also included a modernization of New York's voting laws and campaign finance reforms.

Public Trust Act

The Public Trust Act is an attempt to strengthen New York's laws relating to public corruption, and to provide prosecutors with better tools to prosecute these crimes. As noted in the Governor's Program Bill memorandum, New York's "laws defining public corruption are obsolete and far less effective than federal statutes for prosecuting individuals who commit public corruption crimes."[2]

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As part of the measure, the Legislature enacted two new crimes: Corrupting the Government and Public Corruption.[3] Under prior law, only public officials, and not private individuals, could be convicted of defrauding the government.[4] The new crime of Corrupting the Government can be committed by anyone who engages in a scheme to defraud the state or any political subdivision. It ranges from a class E felony to a class B felony depending upon the value of the property or services wrongfully obtained.

The Act confers the same statute of limitations on the crime of Corrupting the Government that currently exists for any offense involving misconduct in public office. Thus, the crime may be prosecuted against a public servant, or anyone acting in concert with a public servant, for five years after the termination of the official's term of service. In no event shall this period be extended by more than an additional five years.

Finally, an individual or corporation convicted of this crime is now subject to a fine of up to three times the amount of the defendant's gain from the commission of the crime.

The second new crime, Public Corruption, can be committed by anyone, whether a public servant or a person acting in concert with a public servant, who commits any grade of larceny or a scheme to defraud, and the owner of the property is a public entity. When a person is convicted of Public Corruption, and the underlying crime is a class C, D, or E felony, for purposes of sentencing, the crime is deemed to be one class higher than the underlying offense.

The Public Trust Act has amended the law of bribery in several respects.

First, the monetary threshold for Bribery in the Second Degree and Bribe Receiving in the Second Degree has been reduced from $10,000 to $5,000.

Second, Bribery in the First Degree and Bribe Receiving in the First Degree are now divided into two categories. An attempt to influence a public servant with respect to the investigation or prosecution of a class A drug felony continues to be a first degree offense, and there is no fixed threshold monetary value of the benefit. A second, and new, first degree offense was created where there is an attempt to influence a public servant on any matter, and the threshold monetary value of the benefit exceeds $100,000.

Third, the Act makes an attempt to commit the crime of Bribery the same level offense as the completed crime. For example, Attempted Bribery in the First Degree and Bribery in the First Degree are both class B felonies.

As part of the Public Trust Act, the Legislature has transferred a crime, Corrupt Use of Position or Authority, from the Election Law to the Penal Law.[5] This crime is a class E felony, and is designed to prevent a public official from using his or her official authority to encourage another person to use political influence on behalf of the official.

It should be noted that the Public Trust Act contains a number of collateral consequences that flow from a conviction for these crimes, including the inability to hold civil office, the loss of employment as a lobbyist and the inability to enter into public contracts. The reader should consult the new statute for specific details of these collateral consequences.

> The Public Trust Act is an attempt to strengthen New York's laws relating to public corruption.

Heroin Trafficking and Abuse

The second substantive piece of legislation enacted in the 2014 session was a package of 11 bills designed to address the dramatic increase in heroin trafficking, and abuse, in New York. Over the past few years, heroin-related deaths rose 84% in New York City, and over the last decade, heroin use has more than doubled in New York State among adults between the ages of 18 and 25.

The package of bills focuses on increased insurance coverage for addiction treatment, funding for public awareness of drug use, and relevant changes in school curricula. With respect to criminal justice issues, one bill created a new crime, Fraud and Deceit Related to Controlled Substances,[6] a class A misdemeanor. This crime will address fraudulent practices by individuals who unlawfully seek to obtain controlled substances or prescriptions for controlled substances.

It should be noted that this crime mirrors Public Health Law § 3397, which remains in effect. The new Penal Law section specifically incorporates certain evidentiary presumptions found in Public Health Law § 3397, as well as a section in Public Health Law § 3396(1) relating to burdens of proof.

In addition, as part of this legislative package, a Penal Law amendment elevates the penalties for physicians and pharmacists who abuse the public's trust by selling controlled substances under the guise of legitimate health care practices. The renamed crime, Criminal Sale of a Prescription or a Controlled Substance by a Practitioner or Pharmacist, is elevated to a class C felony.[7] In addition, this newly amended crime has been added as a designated offense for purposes of obtaining an eavesdropping warrant and a "criminal act" within the Penal Law definition of enterprise corruption.[8]

Compassionate Care Act

The third substantive piece of legislation in the past session was the passage of the Compassionate Care Act, permitting the use of marijuana for medical purposes.[9] More than 20 other states have enacted some form of statute permitting the use of medical marijuana but New York's version has been viewed as one of the most carefully drafted,[10] and it contains a number of fail-sale provisions.

Initially, there is a sunset clause that requires the law to expire in seven years. Second, the Governor can suspend the program at any time upon the recommendation of either the State Police Superintendent or the Commissioner of Health if there is a risk to public health and public safety. Third, the law creates a category of Registered Organizations for the purpose of manufacturing, selling and dispensing marijuana for medical use. The law limits the number of these organizations to five. These companies cannot begin to operate until they are issued registration cards, and the law provides that the card shall be issued within 18 months of the law's effective date, or at such time as the Commissioner and Superintendent certify that the law can be implemented in accordance with public health and safety concerns.

As expected, there are a number of law enforcement provisions in the statute. Medical marijuana may be prescribed only by a physician, licensed in New York, who has the training or experience to treat the specified medical conditions for which marijuana can be dispensed and who has been registered with the Health Department to prescribe medical marijuana. The statute enumerates these conditions and identifies them as "serious conditions." In addition, a patient can only be certified to use medical marijuana if the registered practitioner certifies that the patient has one of a number of specified medical conditions (i.e., a "serious condition") is under the doctor's care and, in the opinion of the doctor, the patient is likely to receive therapeutic or palliative benefit from medical marijuana.

Medical Marijuana

With these regulations as a backdrop, the Legislature created a new crime, Criminal Diversion of Medical Marijuana in the First Degree, a Class E felony. A practitioner can be convicted of this crime if he or she certifies a patient when the practitioner has reasonable grounds to know that the patient has no medical need for marijuana, or that the certification was for a purpose other than to treat a serious condition.[11]

If a certified patient knowingly possesses or stores an amount of medical marijuana in excess of the amount he or she is authorized to possess under the statute, the patient can be convicted of Criminal Retention of Medical Marijuana, a class A misdemeanor.[12] A person can be convicted of Criminal Diversion of Medical Marijuana in the Second Degree, a class B misdemeanor, if he or she sells or delivers medical marijuana to another with the knowledge, or has reasonable grounds to know, that the recipient is not registered to use medical marijuana.[13]

Finally, a defendant charged with any of these crimes listed above will be eligible for the judicial diversion drug program.[14]

Expanded Definitions and Increased Penalties

Each year the Legislature has expanded the definitions of certain crimes and increased penalties for others, and this year was no exception. In *People v. Golb*,[15] the New York Court of Appeals struck down as unconstitutional subdivision one of Aggravated Harassment in the Second Degree.[16] The Court found the statute "unconstitutionally vague and overbroad" under both the federal and state Constitutions. Specifically, the Court held that the statute failed to properly define what causing "annoyance or alarm" means or specifically what behavior the law proscribes.

Constitutional Defect

The Legislature reacted quickly in enacting a new statute to cure the constitutional defect, recognizing that this statute is often used as a predicate to obtain orders of protection in domestic violence cases.

The language found to be unconstitutional was removed and, in its place, the statute prohibits any communication of a threat to cause physical harm where the offender "knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household."[17]

The language also reflects the Legislature's acknowledgment of evolving technology; it eliminated a reference to telegrams and added the computer "or any other electronic means" as methods of communications that are now covered under the statute.

Closing a Loophole

The Legislature has amended the Persistent Sexual Abuse statute to close what some believed to be a loophole. The crime was originally enacted to impose harsher penalties on criminals who commit specified sex crimes on multiple occasions during a 10-year period. However, under the prior law, the 10-year period could include time during which the offender was incarcerated and thus unable to commit any crime. The statute was amended to exclude time during which the offender was incarcerated for any reason.[18]

Increased Protection

A new law has increased protection for two classes of individuals who are assaulted: employees of the New York City Housing Authority and school crossing guards. The law elevates a misdemeanor assault on a crossing

guard to the crime of Assault in the Second Degree, a class D felony, by adding school crossing guards to the list of service professionals covered under this crime.[19] A second new law elevates a misdemeanor assault to a class D felony when it is committed against an employee of the New York City Housing Authority performing his or her duties at a housing project owned, managed or operated by the Authority.[20]

Stalking and Unlawful Surveillance

Two new laws expand the definition of Stalking and Unlawful Surveillance. Stalking in the Fourth Degree now includes the use of a GPS device, or other electronic devices, to follow someone. This amendment will be beneficial to victims of domestic violence who often have been tracked by the use of such devices.[21]

Revenge Porn

New York has joined eight other states that have passed new laws to address "revenge porn," a practice in which individuals post intimate pictures or videos of former romantic partners. Prior law prohibited only the surreptitious viewing of another person's intimate body parts without that person's knowledge or consent. The statute, Unlawful Surveillance, was amended to prohibit the dissemination of an image in which an individual is engaged in sexual conduct regardless of whether the person's intimate body parts are exposed.[22]

Theft of "Companion Animals"; Crossbow Hunters and Fireworks

Other amendments include an increase in the penalty, from $250 to $1,000 for stealing "Companion Animals."[23] Individuals who hunt with a crossbow have been afforded an exemption from liability under the weapons section of the Penal Law similar to exemptions for those who hunt with rifles, shotguns and longbows.[24] Finally, the Penal Law sections dealing with the possession and sale of fireworks have been rewritten to provide clearer definitions of "fireworks," "dangerous fireworks" and "novelty devices." In the past, a number of courts have dismissed indictments because of ambiguities in the definition of these terms.[25]

New Crimes

Immigrant Assistance Crimes

The Legislature enacted a series of new crimes in this last session. In response to a number of incidents in which individuals have taken advantage of those seeking to become United States citizens, the Legislature enacted the Immigrant Assistance Service Enforcement Act.[26] The legislation makes changes to Article 28-c of the General Business Law, which regulates the conduct of immigrant assistance service providers, and it increases the number of prohibited acts and penalties under the General Obligations Law for violations of these provisions.

The law also creates a new Penal Law crime, Immigrant Assistant Services Fraud, which is committed when a service provider violates the provisions of the General Business Law and wrongfully obtains property by false or fraudulent pretenses, representation or promises. The crime is a class A misdemeanor and is elevated to a class E felony if the value of the property exceeds $1,000.

Public Lewdness

The Legislature also responded to increased incidents of public lewdness by those who have committed these acts in the past, enacting Public Lewdness in the First Degree, a class A misdemeanor. This new crime applies to individuals over the age of 19 who intentionally expose themselves to a person less than 16 years of age as well as a person who commits the crime of Public Lewdness and who has been convicted of Public Lewdness (a class B misdemeanor) within the preceding year.[27]

Directing a Laser at an Aircraft

In response to reports by the Federal Aviation Administration (FAA) that an increasing number of individuals have been pointing laser devices at aircraft, the Legislature enacted the crime of Directing a Laser at an Aircraft.[28] The crime, a class A misdemeanor, is committed when a person, with the intent of disrupting safe air travel, directs the beam of the laser onto an aircraft within the jurisdiction of the United States, and such beam exceeds the limits set by the FAA, and the pilot files an incident report with the FAA. The crime is elevated to a class E felony when the use of the laser beam causes a significant change of course or other serious disruption to the safe travel of an aircraft.

Ivory

In an attempt to curtail the slaughter of endangered African elephants and rhinos, the Legislature has outlawed the sale of ivory articles valued in excess of $25,000, making it a class D felony under the Environmental Conservation Law (ECL). The law also increases fines for the sale of ivory goods under that amount.[29] Finally, under the Agriculture and Markets Law, it is now a Violation under the Penal Law for a person to subject an animal to tattooing, or skin piercing, unless such piercing provides a medical benefit or is done for the purpose of identification of the animal.[30]

Procedural Changes

A number of procedural changes were enacted in the last session. To assist elderly witnesses who must testify before the Grand Jury, a new law permits any person, older than 60 years of age, with a physical or mental infirmity, to be accompanied in the Grand Jury by a social worker or "informal care giver."[31] Second, all crimes committed in Rikers Island facilities will be prosecuted in Queens County, rather than Bronx County, saving

much traveling time in the delivery of prisoners.[32] Third, a court must now waive the mandatory surcharge and crime victim assistance fee when the court finds the defendant is a victim of sex trafficking, as that term is defined in the Penal Law, or under federal law.[33]

Finally, a new law makes procedural changes in the process that is followed when 16- and 17-year-old defendants are charged with prostitution. Last year, a new law gave Criminal Court judges the option of converting these charges to a person in need of supervision (PINS) proceeding and granting relief under the Family Court Act. In the past session, the Legislature clarified the alternatives that are available to a court in these cases. The charges may be conditionally converted and retained by the court as a PINS proceeding; the charges may proceed as a criminal case, which may lead to a conviction by plea or verdict (and a mandatory youthful offender adjudication); or the person may be referred by the court for specialized service alternatives and the charges subsequently dismissed in the court's discretion in the interest of justice on the grounds that the youth participated in the services provided to him or her. In addition, all defendants charged with these crimes shall be deemed a "sexually exploited child" as defined in the Social Services Law, thus entitling these individuals to specialized services.[34]

Sentencing

In the area of sentencing, a new law affords judges the discretion to choose the length of probationary terms in both felony and misdemeanor cases. In felony cases, a court can now impose a probationary term of three, four or five years, except for any felony involving a sexual assault, a class A-II drug felony and certain class B felony drug convictions. For a class A misdemeanor, a court can impose a probation term of two or three years except for sexual assault. In addition, the new law eliminates the costly requirement of pre-sentence investigation reports in cities with a population of one million or more, where there is a negotiated sentence of imprisonment of 365 days or less.[35] A subsequent, and related, new law affords a defendant certain due process rights when a judge wishes to extend a shorter period of probation following a violation of probation.[36]

Vehicle and Traffic Law

A number of changes have been made in driver-related offenses under the Vehicle and Traffic Law (VTL). A new measure increases the fines for all motorists who text or use cell phones while operating a vehicle, with a third offense now carrying a maximum fine of $450.[37] Another new law creates a class D felony for anyone arrested for DWI, after having been convicted of DWI or four related offenses, three or more times in the preceding 15 years.[38]

SORA

With respect to sex offenders, a new law prohibits a person registered under the Sex Offender Registration Act from becoming a volunteer firefighter.[39] Another law expands the state registry to include all prior sexual offenses for which an offender has been convicted.[40]

With the Compassionate Care Act as a backdrop, the Legislature created a new crime, Criminal Diversion of Medical Marijuana in the First Degree.

Prisoners

Several new laws will affect prisoners. One new measure requires the Department of Corrections to maintain a website that provides accurate information concerning the visiting rules for all correctional facilities in New York State. This will resolve the perennial problem of family members who are turned away from facilities when they arrive at a facility on the wrong day.[41] Finally, the Department of Corrections may no longer release an inmate who has received mental health treatment without first devising a treatment plan to be implemented upon the prisoner's release.[42]

Extending Laws and Miscellaneous Laws

Each year the Legislature enacts laws that either extend or repeal existing statutes. This year the Legislature extended, until May 14, 2015, the provision in the Arts and Cultural Affairs Law relating to the resale of tickets to places of entertainment.[43]

In various miscellaneous laws, access to "opioid antagonists" has been expanded. These are drugs that neutralize and negate the effect of opioids, e.g., oxycodone, which can cause drug overdoses.[44] Two new measures will affect children. One law expands the category of persons responsible for reporting cases of suspected child abuse,[45] and the other increases the ability of parents to protect their children from identity theft.[46] In another new measure, crime victims have been afforded greater monetary awards when medical equipment is damaged or stolen during a crime.[47] Finally, the personnel records of probation officers have been cloaked with the same degree of confidentiality as those of police officers, corrections officers and firefighters.[48] ■

1. 2014 N.Y. Laws ch. 55, eff. Mar. 31, 2014.
2. Governor's Program Bill, #3, at p.1.
3. 2014 N.Y. Laws ch. 55 (adding Penal Law §§ 496.02, 496.06), eff. Mar. 31, 2014.
4. *See* Penal Law § 195.20, Defrauding the Government.
5. Penal Law § 200.56, formerly Election Law § 17-158 (now repealed).
6. 2014 N.Y. Laws ch. 36 (adding Penal Law § 178.26), eff. June 23, 2014.
7. 2014 N.Y. Laws ch. 31 (renaming and amending Penal Law § 220.65), eff. June 23, 2014.
8. 2014 N.Y. Laws ch. 37 (amending Criminal Procedure Law § 700.05 (CPL)), eff. June 23, 2014.
9. 2014 N.Y. Laws ch. 90, eff. July 5, 2014.
10. .*See* Francis J. Serbaroli, *A Primer on New York's Medical Marijuana Law*, N.Y.L.J. (July 22, 2014).
11. 2014 N.Y. Laws ch. 90, (adding Penal Law § 179.10), eff. July 5, 2014.
12. 2014 N.Y. Laws ch. 90, (adding Penal Law § 179.15), eff. July 5, 2014.
13. 2014 N.Y. Laws ch. 90, (adding Penal Law § 179.11), eff. July 5, 2014.
14. 2014 N.Y. Laws ch. 90 (amending CPL § 216.00), eff. July 5, 2014.
15. 23 N.Y.3d 455 (2014).
16. Penal Law § 240.30(1).
17. 2014 N.Y. Laws ch. 188 (amending Penal Law § 240.30), eff. July 23, 2014.
18. 2014 N.Y. Laws ch. 192 (amending Penal Law § 130.53), eff. Nov. 1, 2014.
19. 2014 N.Y. Laws ch. 196 (amending Penal Law § 120.05), eff. Nov. 1, 2014.
20. 2014 N.Y. Laws ch. 197 (amending Penal Law § 120.05), eff. Sept. 3, 2014.
21. 2014 N.Y. Laws ch. 184 (amending Penal Law § 120.45), eff. Oct. 21, 2014.
22. 2014 N.Y. Laws ch. 193 (amending Penal Law § 250.45), eff. Nov. 1, 2014.
23. 2014 N.Y. Laws ch. 185 (amending Agriculture and Markets Law § 366), eff. July 23, 2014.
24. 2014 N.Y. Laws ch. 55 (amending Penal Law § 265.20), eff. April. 1, 2014.
25. A. 10141 (not yet signed by the Governor).
26. 2014 N.Y. Laws ch. 206 (amending GBL § 460-d and adding Penal Law §§ 190.87, 190.89), eff. Feb. 2, 2015.
27. 2014 N.Y. Laws ch. 186 (adding Penal Law § 245.03, eff. Nov. 1, 2014.
28. 2014 N.Y. Laws ch. 98 (adding Penal Law § 240.76), eff. Nov. 1, 2014.
29. 2014 N.Y. Laws ch. 326 (amending ECL § 71-0924), eff. Aug. 12, 2014.
30. A. 739 (not yet signed by the Governor).
31. 2014 N.Y. Laws ch. 347 (amending CPL § 190.25), eff. Sept. 4, 2014.
32. A. 7333 (signed by the Governor Oct. 16, 2014).
33. 2014 N.Y. Laws ch. 385 (amending CPL § 420.35), eff. Sept. 23, 2014.
34. A. 8749 (not yet signed by the Governor).
35. 2013 N.Y. Laws ch. 556 (amending CPL § 320.20), eff. Jan. 10, 2014.
36. 2014 N.Y. Laws ch. 17 (amending Penal Law § 65.00), eff. Jan. 10, 2014.
37. 2014 N.Y. Laws ch. 55 (amending VTL § 1225-c), eff. Mar. 31, 2014.
38. 2014 N.Y. Laws ch. 191 (amending VTL § 1193), eff. Nov. 1, 2014.
39. 2014 N.Y. Laws ch. 198 (amending Executive Law § 837-o), eff. Dec. 2, 2014.
40. A. 6074 (not yet signed by the Governor).
41. 2014 N.Y. Laws ch. 286 (adding Correction Law § 138-a), eff. Nov. 9, 2014.
42. A. 10071, (not yet signed by the Governor).
43. 2014 N.Y. Laws ch. 21, eff. May 9, 2014.
44. 2014 N.Y. Laws ch. 42 (amending Public Health Law § 3309), eff. June 24, 2014.
45. 2014 N.Y. Laws ch. 205 (amending Social Services Law § 413), eff. Aug. 6, 2014.
46. A. 4645 (not yet signed by the Governor).
47. A. 8955 (not yet signed by the Governor).
48. A. 8192 (not yet signed by the Governor).

Issues Involving Medical Records as Evidence at Trial

By Hon. John M. Curran

Medical records are among the most routine forms of evidence offered at trial. They are usually offered under the business records exception to the hearsay rule embodied in CPLR 4518(a). In a perfect world, the lawyers would have met before trial either to agree on which redactions are appropriate or which entries should be the subject of a motion. But, it is not a perfect world, and trial lawyers are understandably more concerned with organizing their proof and preparing their witnesses. As a result, the extent to which redactions from medical records must be made is typically an issue left open until after the jury is sworn and the trial has commenced. Arguments and court decisions on potentially important evidentiary issues are therefore left to the heat of battle. At a minimum, the trial process is likely to be delayed. At worst, reversible error is committed and a new trial may be required. The purpose of this article is to attempt to ease that process by addressing fundamental principles governing the admissibility of medical records at trial, as well as issues that frequently arise concerning such admissibility.

The Fundamentals

Medical records constitute hearsay and require an exception to the hearsay rule to be admissible. The usual basis for proffering medical records is the business records exception codified in CPLR 4518. Specifically, CPLR 4518(c) and 2306(a) are jointly employed to provide the foundational requirements of the business records exception for hospital records "relating to the condition or treatment of a patient," which are then "prima facie evidence of the facts contained" therein. CPLR 4518(c) provides that the foundational requirement for the hospital records referenced in CPLR 2306(a) may be furnished

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through "a certification or authentication" by one of the persons designated in the statute.

The statute does not reference physician office records. However, the Appellate Division has extended the business records exception to a physician's office records.[1]

Entries in hospital records qualify for admission into evidence to the extent the entries pertain to diagnosis, prognosis or treatment of the patient.[2] The same is true for entries in a physician's office records.[3] Such entries are admissible even if they contain opinions, observations and conclusions of the person who made the entry.[4]

The rationale behind limiting the receipt of medical records under the business records exception to those entries pertaining to diagnosis, prognosis or treatment is tied to the foundational requirements for the exception.[5] To meet those requirements, a purported business record must be made as part of "a routine, regularly conducted business activity, and that it be needed and relied on in the performance of the functions of the business."[6] The record must have been "made as a part of the duty of the person making it."[7] Because the "business of a hospital . . . is to diagnose and treat its patients' ailments," the business records exception applies only to entries "that relate to diagnosis, prognosis or treatment . . ."[8] The courts have referred to this as a "business duty" to make the record.[9]

The evidentiary framework for this inquiry is governed by whether the physician had a business duty to record the information in order to provide diagnosis and treatment.[10] In addressing this issue, the courts have analyzed whether the physician whose observations about the history of the injury are in the record would be permitted to testify in person to that history.[11] Where the historical events are not germane to diagnosis or treatment, statements of those events incorporated into the record will not be admissible under the business records exception.[12] In other words, unless it relates to diagnosis or treatment, the business records exception to the hearsay rule is inapplicable to entries in medical records. The information in the record may be otherwise admissible as an admission, part of the *res gestae* or a qualifying declaration provided the appropriate declarant is called to testify.[13]

One way to think of medical records as evidence is to consider the records as a declarant. If the "declarant" is properly authenticated as a medical business record, the medical record declarant may "testify" only as to matters germane to diagnosis, prognosis or treatment. Any "testimony" in the record that is not germane to diagnosis, prognosis or treatment is still hearsay, requiring another exception to the hearsay rule and a different declarant in order to be admissible.

CPLR 3122-a

One common misunderstanding pertains to the application of CPLR 3122-a, which provides a means to establish the foundational requirements for the business records exception without the necessity of testimony from a records custodian.[14] The right to object is preserved with respect to the proposed use of certified business records and to the admissibility of such records for "any reason other than the lack of authentication."[15] While the business records exception authorizes the admissibility of hearsay in medical records that relate to diagnosis and treatment, entries which do not so relate are still hearsay. Thus, with respect to medical records, the failure to object within the time frame established by CPLR 3122-a does not waive any objection to the admissibility of the entries in the records based on other rules of evidence.[16]

Statements by Parties

Another common misperception is that any statement in a medical record attributable to a party is admissible because it constitutes an admission. This view, however, is inconsistent with Court of Appeals precedent. In *Williams v. Alexander*,[17] the plaintiff testified at trial that he was struck by the defendant's car while walking across an intersection, and the defendant had not slowed down before striking him. The defendant disputed this version of events and sought to introduce at trial an entry in the plaintiff's hospital record wherein the plaintiff had stated to a physician that "he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car [standstill] to run into him."

The Court of Appeals held that this entry was inadmissible because it was not pertinent to diagnosis, prognosis or treatment. The Court observed in a footnote that the physician who made the entry "would have been competent to testify to plaintiff's alleged admission against interest," but the entry itself in the record was hearsay and not subject to the business records exception.[18]

Using the analogy above, *Williams* means that the medical record as "declarant" may only "testify" as to entries which are relevant to a patient's diagnosis, prognosis or treatment. The alleged admission by the plaintiff would have been admissible but only if a different declarant, i.e., the physician who made the entry, testified.

It is important not to confuse a medical business record "declarant" with other forms of business records. *Williams* is limited to medical records because it is based on the scope of the "business duty" of medical personnel to record information which, according to *Williams*, is restricted to entries relating to diagnosis, prognosis or treatment. Admissions against interest by parties contained in other types of business records may be admissible where the entry was made within the scope of the entrant's business duty.[19]

In the typical tort case, such as *Williams*, the defendant is the party offering the alleged admission in the medical record to demonstrate its contradiction of the plaintiff's trial testimony. There is Appellate Division authority permitting this so long as the evidence sufficiently establishes that the plaintiff was the source of the statement.[20] Under

this line of cases, the statement is admissible even if it is not germane to diagnosis or treatment because it constitutes an admission by the plaintiff.[21] The problem with these decisions is that they ignore the foundational requirements of the business records exception for medical records and address only the second layer of hearsay within the record. Specifically, these decisions focus on the admissibility of the statement in the medical record and overlook the admissibility of the medical record as a "declarant." Because the premise of these decisions is that the medical record entry is *not* related to diagnosis, prognosis or treatment, *Williams* holds that the entry cannot be introduced through the business record exception and must be offered through a different declarant and hearsay exception. As pointed out by Prof. Michael J. Hutter, these Appellate Division cases are contrary to *Williams*[22] and "caution should be exercised in citing to or relying upon them."[23]

When the plaintiff seeks to offer an entry in a medical record that reflects historical events corroborating the plaintiff's trial testimony, it typically will be excluded because it is not germane to diagnosis or treatment, is cumulative and/or constitutes improper bolstering on an important matter.[24] Depending on the circumstance and significance of the purportedly cumulative testimony or improper bolstering, allowing the testimony over objection may be viewed on appeal as harmless error.[25]

Statements and Reports by Third Parties

Medical records also pose a problem when they contain statements, reports and test results from declarants who are not parties or who are not part of the medical business's making and keeping of the proffered record. Generally, the business records exception does not allow the receipt in evidence of entries based upon hearsay or statements made by third parties not engaged in the business or not under a duty in relation to the business.[26] It also is well settled that "each participant in the chain producing the records, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception."[27] Statements in a purported business record are inadmissible "if any of the participants in the chain" of recording the statements "is acting outside the scope of a business duty."[28]

It is common that medical records will contain hearsay statements from third parties, including reports from physicians who are not acting within the regular course of business conducted by the medical business proffering the record. Hospital records typically present fewer problems because statements made by non-parties in the history portion of the record are readily recognized as inadmissible insofar as they are offered through the record. Further, the consultation reports and test results contained within hospital records are usually understood as pertinent to diagnosis or treatment and made on behalf of the hospital in accordance with its requirements.[29]

Office records are more problematic because they may contain a variety of statements from persons who had no business duty to record or convey them and because they often contain consultation reports or test results authored by persons or entities that had no business duty to make entries in the proffered office records.

As noted above, unless the entries in office records are pertinent to diagnosis or treatment, they are inadmissible under the business records exception. The fact that the recording of third-party statements might be routine, and the entrant is under a duty to make the record, does not place such hearsay statements within the scope of the business records exception.[30] For example, if there is a statement or report from another physician in the office records being proffered, that statement or report will require its own exception to the hearsay rule to be admissible.

This analysis raises the "double hearsay" problem relating to business records that in turn contain records from other businesses. The "double hearsay" problem involving "records within records" is common with physician office records and has been made worse by some decisions that seem to authorize the admissibility of hearsay documents.[31]

This issue ordinarily arises when a physician's office records contain reports received from other physicians.[32] Unless there is some independent basis for the admission of such reports, they constitute inadmissible hearsay. The mere fact that a physician's office received another physician's report and made it part of his or her own file does not convert it to the recipient's business record.[33] Such a report constitutes "double hearsay" and its hearsay nature is not cured merely by being placed in the recipient's file.[34] Even if the report is germane to the recipient's medical diagnosis or treatment, it does not cure the "double hearsay" problem because the declarant was under no business duty to make the entry in the recipient's business record.[35]

There is at least one Appellate Division decision cited in support of allowing such "double hearsay." In *Freeman v. Kirkland*,[36] the First Department upheld the

> allowing into evidence the complete medical file of plaintiff's treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories, where the treating physician's testimony at trial established that the medical records related to the diagnosis and treatment of plaintiff's injuries.[37]

Among other records allowed into evidence in *Freeman* was a consultation report from a cardiologist to whom the plaintiff was referred by the treating physician, through whom the record was offered. The out-of-state cardiologist who authored the report did not testify. The treating physician testified that the report was kept in the ordinary course of his business and that it was "part of [his] care and treatment" of the plaintiff. The missing pieces here are that (1) the treating physician who testified did not

make the cardiologist's record and therefore did not have a business duty to make the record; and (2) the cardiologist was a non-party with no business duty to the treating physician's medical practice to make the entry. The cardiologist's report was hearsay and its mere placement in another physician's file did not change that fact.[38]

The Court of Appeals has recognized, however, that a report prepared on behalf of another entity by a psychologist who made his report in accordance with that entity's requirements may be considered the entity's business record.[39] The Appellate Division also has allowed certain billing records of one entity relied upon by a second entity for its own billing purposes to be treated as the second entity's admissible business record.[40] It is difficult to conceive how the limited circumstances under which such "records within records" were allowed would apply to a substantive hearsay report sent from one physician to another.[41]

Professional Reliability

Courts also are sometimes urged to permit medical records containing "double hearsay" or "records within records" because the physician to whom the report was sent testifies that he or she relied on the hearsay reports and that it is accepted in his or her profession to do so. This too would be an erroneous basis for receipt of the hearsay as it seeks to improperly invoke the so-called "professional reliability" exception to the hearsay rule.[42] That concept does not apply except when an expert is expressing an opinion and is relying on out-of-court material.[43] It usually has no application to the receipt of medical records offered through a treating physician's testimony. Even if the treating physician were to offer opinion testimony, that testimony should not serve as a conduit for hearsay contained in the physician's records.[44] The business records exception also does not have a catch-all remedy for hearsay even if the court concludes that the hearsay is reliable.[45]

Statements to Medical Personnel

In *People v. Ortega*,[46] the Court of Appeals affirmed a conviction based in part on statements made by the crime victim to hospital personnel as recorded in the hospital record. The Court specifically based its rationale on the business records exception. The Court condoned the admissibility of the victim's recitation of historical information and the physician's conclusions.

The court in *Ortega* adhered to its holding in *Williams* by focusing its inquiry on "whether the statements at issue were relevant to diagnosis and treatment."[47] The Court relied upon its own analysis to conclude that certain references in the medical records were relevant to diagnosis and treatment.

The concurrence by Judge Smith in *Ortega* took issue with the majority's failure to grapple with the "hearsay within hearsay" problem. Judge Smith opined that the majority effectively adopted a new hearsay exception for "statements made for purposes of medical diagnosis or treatment," an exception expressly recognized in Rule 803(4) of the Federal Rules of Evidence.[48] In a separate concurrence, Judge Pigott noted that medical testimony should have been required before the court could conclude that certain historical information was pertinent to diagnosis or treatment.[49]

The three judicial opinions rendered in *Ortega* should alert practitioners to at least three points: (1) *Williams v. Alexander* remains the law in New York, governing the extent to which entries in medical records will be allowed into evidence under the business records exception and that the standard remains whether the entries are relevant to diagnosis, prognosis or treatment; (2) medical records continue to raise the "hearsay within hearsay" problem and care should be taken to evaluate every level of hearsay within such records; and (3) depending on the entry, it may be effective to argue that the courts should not evaluate whether an entry relates to diagnosis or treatment in the absence of medical testimony.[50]

Another recent Court of Appeals decision also touches on these issues but should not be intermingled with an analysis of medical records as business records. In *People v. Duhs*,[51] the court held that a child victim's statement to an emergency room pediatrician as to how an injury occurred was admissible because the "statement was germane to [the child's] medical diagnosis and treatment and therefore was properly admissible under that exception to the hearsay rule."[52] The Court did not invoke the business records exception because the victim's statement was not included in the medical records. Rather, the Court cited to a decision which is more than a century old, *Davidson v. Cornell*.[53] There, the Court precluded statements made by the plaintiff to an expert retained shortly before trial. However, in its decision, the *Davidson* court observed that statements regarding present condition made to a physician for purposes of treatment are admissible under New York law.[54] In *Duhs*, the statement was made to a physician by a patient seeking emergency treatment and the physician testified in person to its content.

Richardson on Evidence categorizes its discussion of *Davidson v. Cornell* under the heading of "res gestae" or "contemporaneous statements."[55] *Duhs* would fit there too. This categorization should ease distinguishing between the statements in *Davidson* and *Duhs* from the concept of entries in medical records offered as business records.

Professor Hutter also has opined that the decisions in *Ortega*, *Duhs*, and *People v. Spicola*,[56] "without expressly saying so, are clearly expanding the medical treatment hearsay exception."[57] He also joins Judge Smith in concluding that the Court of Appeals has "in essence adopted FRE 803(4)" and that, together, *Ortega*, *Duhs* and *Spicola* have "laid the foundation for the adoption of FRE 803(3)'s hearsay exception for a statement of physical condition."[58]

Conclusion

When offering medical records at trial, entries therein will be admissible only to the extent they are pertinent to diagnosis, prognosis or treatment. These entries must be made and kept by medical personnel with a business duty to do so. The information imparted to the entrant ordinarily must have been conveyed by a person under a business duty to do so. To the extent information in the medical record is received from participants outside the chain of the business duty to make the record, thereby constituting "double hearsay," another exception to the hearsay rule, and a different declarant, will need to be found. ■

1. *McClure v. Baier's Auto. Serv. Ctr., Inc.*, 126 A.D.2d 610, 610 (2d Dep't 1987); *Wilson v. Bodian*, 130 A.D.2d 221, 232 (2d Dep't 1987); *Hefte v. Bellin*, 137 A.D.2d 406, 407–08 (1st Dep't 1988); *Fanelli v. diLorenzo*, 187 A.D.2d 1004, 1005 (4th Dep't 1992).

2. *Williams v. Alexander*, 309 N.Y. 283, 287 (1955); *People v. Ortega*, 15 N.Y.3d 610, 617 (2010); *Davis v. A.H. Robins Co.*, 99 A.D.2d 342, 347 (1st Dep't 1984); *Moran v. Demarinis*, 152 A.D.2d 546, 547 (2d Dep't 1989); *People v. Becraft*, 177 A.D.2d 945, 945 (4th Dep't 1991), *lv. denied*, 79 N.Y.2d 853 (1992); *Maxcy v. Cnty. of Putnam*, 178 A.D.2d 729, 730 (3d Dep't 1991), *lv. dismissed*, 80 N.Y.2d 826 (1992).

3. *Wilson*, 130 A.D.2d at 231.

4. *Davis*, 99 A.D.2d at 347.

5. *People v. Kennedy*, 68 N.Y.2d 569, 579–80 (1986).

6. *Id.* at 579.

7. *Johnson v. Lutz*, 253 N.Y. 124, 128 (1930).

8. *Williams v. Alexander*, 309 N.Y. 283, 287 (1955).

9. *In re Leon R.R.*, 48 N.Y.2d 117, 122 (1979).

10. *Williams*, 309 N.Y. 287–88; *Wilson*, 130 A.D.2d at 231.

11. *People v. Kohlmeyer*, 284 N.Y. 366, 369–70 (1940); *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 398, 399 (1941); *People v. Richardson*, 38 A.D.2d 990, 990 (3d Dep't 1972); *People v. Davis*, 95 A.D.2d 837, 838 (2d Dep't), *lv. denied*, 60 N.Y.2d 965 (1983).

12. *Williams*, 309 N.Y. 283; Jerome Prince, Richardson on Evidence § 8-310, p. 610 (Farrell 11th ed. 1995).

13. *People v. Duhs*, 16 N.Y.3d 405, 409 (2011); *Davidson v. Cornell*, 132 N.Y. 228, 237–38 (1892).

14. CPLR 4532-a is similar in its application to "[a] graphic, numerical, symbolic or pictorial representation of results of a medical or diagnostic procedure or test."

15. Advisory Committee on Civil Practice, Recommendations, CPLR 3122-a (2002).

16. *Siemucha v. Garrison*, 111 A.D.3d 1398, 1400 (4th Dep't 2013); *see also Afridi v. Glen Oaks Vill. Owners, Inc.*, 49 A.D.3d 571, 572 (2d Dep't 2008).

17. 309 N.Y. 283 (1955).

18. *Id.* at 285, n.1.

19. *Kelly v. Wasserman*, 5 N.Y.2d 425, 429–30 (1959); *Chem. Leaman Tank Lines, Inc. v. Stevens*, 21 A.D.2d 556, 556–57 (3d Dep't 1964); *Penn v. Kirsh*, 40 A.D.2d 814, 814 (1st Dep't 1972); *Buckley v. J.A. Jones/GMO*, 38 A.D.3d 461, 463 (1st Dep't 2007).

20. *Ginsberg v. N. Shore Hosp.*, 213 A.D.2d 592, 592 (2d Dep't), *lv. denied*, 86 N.Y.2d 701 (1995); *Musaid v. Mercy Hosp. of Buffalo*, 249 A.D.2d 958, 959–60 (4th Dep't 1998); *Dougherty v. City of N.Y.*, 267 A.D. 828, 828 (2d Dep't 1944), *aff'd*, 295 N.Y. 786 (1946); *Allstate Ins. Co. (Spadaccini)*, 52 A.D.2d 813, 813–14 (1st Dep't 1976); *Gunn v. City of N.Y.*, 104 A.D.2d 848, 849–50 (2d Dep't 1984); *Echeverria v. City of N.Y.*, 166 A.D.2d 409, 410 (2d Dep't 1990); *Passino v. DeRosa*, 199 A.D.2d 1017, 1017–18 (4th Dep't 1993).

21. *Reed v. McCord*, 160 N.Y. 330, 341 (1899); *Gunn*, 104 A.D.2d at 849; *Cuevas v. Alexander's, Inc.*, 23 A.D.3d 428, 429 (2d Dep't 2005); *Berrios v. TEG Mgt. Corp.*, 35 A.D.3d 775, 776 (2d Dep't 2006); *Grant v. N.Y. City Tr. Auth.*, 105 A.D.3d 445, 446 (1st Dep't 2013); *Benavides v. City of N.Y.*, 115 A.D.3d 518, 519–20 (1st Dep't 2014).

22. *Williams v. Alexander*, 309 N.Y. 283 (1955).

23. Michael Hutter, *Admissibility of Patient's Statement in Medical Record*, N.Y.LJ, Dec. 2, 2010 at 3, col 1.

24. *Williams*, 309 N.Y. at 287, 290; *Shufelt v. City of N.Y.*, 80 A.D.2d 554, 555 (2d Dep't 1981); *Hatton v. Gassler*, 219 A.D.2d 697, 697 (2d Dep't 1995); *Cohn v. Haddad*, 244 A.D.2d 519 (2d Dep't 1997); *People v. Jackson*, 124 A.D.2d 975, 976 (4th Dep't 1986); *Carcamo v. Stein*, 53 A.D.3d 520, 521 (2d Dep't 2008).

25. *DeLuca v. Kameros*, 130 A.D.2d 705, 705–06 (2d Dep't 1987). In a criminal case, the question also will be whether proof of guilt is overwhelming.

26. *Johnson v. Lutz*, 253 N.Y. 124, 127, 128 (1930).

27. *In re Leon R.R.*, 48 N.Y.2d 117, 122 (1979).

28. *Id.* at 128.

29. *People v. Cratsley*, 86 N.Y.2d 81, 90 (1995).

30. *Leon R.R.*, 48 N.Y.2d at 123.

31. *Freeman v. Kirkland*, 184 A.D.2d 331 (1st Dep't 1992).

32. *See, e.g., Cohn*, 244 A.D.2d at 521.

33. *Cratsley*, 86 N.Y.2d at 90 (quoting *Standard Textile Co. v. Nat'l Equip. Rental, Ltd.*, 80 A.D.2d 911 (2d Dep't 1981)); *People v. Pierre*, 157 A.D.2d 750, 751 (2d Dep't 1990), *lv. denied* 75 N.Y.2d 969 (1990); *W. Valley Fire Dist. No. 1 v. Vill. of Springville*, 294 A.D.2d 949, 950 (4th Dep't 2002).

34. *Standard Textile Co.*, 80 A.D.2d 911; *W. Valley Fire Dist. No. 1*, 294 A.D.2d at 950.

35. *People v. Ortega*, 15 N.Y.3d 610, 620–21 (2010) (Smith, concurring).

36. 184 A.D.2d 331 (1st Dep't 1992).

37. *Id.* at 332 (citation omitted).

38. *D'Andraia v. Pesce*, 103 A.D.3d 770, 771 (2d Dep't 2013).

39. *Cratsley*, 86 N.Y.2d at 90; *see also People v. Brown*, 13 N.Y.3d 332, 341 (2009).

40. *Plymouth Rock Fuel Corp. v. Leucadia, Inc.*, 117 A.D.2d 727, 728 (2d Dep't 1986); *People v. DiSalvo*, 284 A.D.2d 547, 548 (2d Dep't 2001).

41. *See, e.g., In re Leon R.R.*, 48 N.Y.2d 117 (1979).

42. *See* John M. Curran, *The "Professional Reliability" Basis for Expert Opinion Testimony*, 85 N.Y. St. B.J. 22 (July/Aug. 2013).

43. *State of N.Y. v. Floyd Y.*, 22 N.Y.3d 95, 107 (2013); *People v. Goldstein*, 6 N.Y.3d 119, 134–35 (2005); *Hambsch v. N.Y. City Transit Auth.*, 63 N.Y.2d 723, 725 (1984); *Wagman v. Bradshaw*, 292 A.D.2d 84, 88–89 (2d Dep't 2002).

44. *Wagman*, 292 A.D.2d at 89.

45. *Kennedy*, 68 N.Y.2d at 575 (the requirements of CPLR 4518 "must be satisfied, however reliable such records may otherwise be deemed to be . . .").

46. 15 N.Y.3d 610 (2010); *see also People v. Pham*, 118 A.D.3d 1159 (3d Dep't 2014).

47. 15 N.Y.3d at 618.

48. *Id.* at 621 (Smith, J., concurring); *see also Benavides v. City of N.Y.*, 115 A.D.3d 518 (1st Dep't 2014).

49. *Ortega*, 15 N.Y.3d at 624. Of course, having the physician to whom the statement was made testify would eliminate the need for the business records exception when the statement is made by a party and is offered against that party. A physician testifying to statements made by a non-party such as a crime victim would seem to require a new hearsay exception such as proposed by Judge Smith.

50. *Benavides*, 115 A.D.3d at 519–20; *Pham*, 118 A.D.3d at 1162.

51. 16 N.Y.3d 405 (2011).

52. *Id.* at 408.

53. 132 N.Y. 228 (1892).

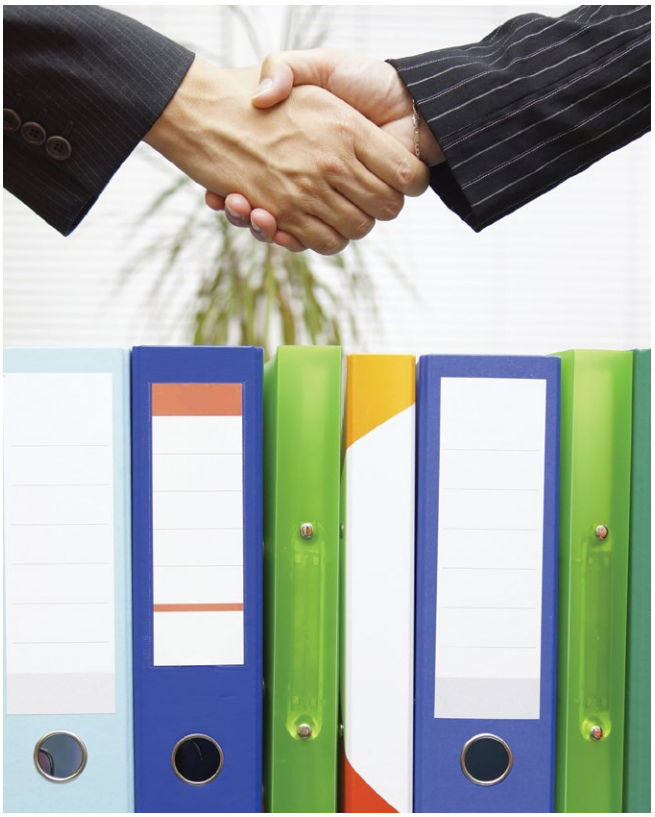
54. *Id.* at 237.

55. Jerome Prince, Richardson on Evidence §§ 8-601, *et seq.* (Farrell 11th ed 1995).

56. 16 N.Y.3d 441 (2011).

57. Michael Hutter, *Admissibility of Statements of Pain and Physical Condition*, N.Y.L.J., June 2, 2011 at 3.

58. *Id.*; Rule 803 (3) of the Federal Rules of Evidence sets forth a hearsay exception for statements of "then-existing mental, emotional, or physician condition."



Buying or Selling a Small or Solo Practice – Part 1

By Nat Wasserstein

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Years ago, the practice of law was, perhaps, the only professional practice in which its practitioners were prohibited from realizing financial value from all of the decades of hard work they put into their careers. Attorneys who attempted to sell their practices were chided, or, worse, disciplined, and reminded that their clients were not chattel to be bought and sold. In 1945 the American Bar Association (ABA) Committee on Professional Ethics and Grievances issued Opinion 266, stating that "purchase of the practice and good will of a deceased lawyer by another lawyer not his partner and the payment therefor to his estate measured by a percentage of the fees, gross or net, subsequently paid by his former clients, violates Canon 34, and may violate Canons 37 and 27 [of the Model Rules]."[1] In practice, this rule worked to discriminate against solo and small firm practitioners who did not have partners to whom they could turn to sell their ownership interests.

This did not mean that the selling of law practices did not occur. Lawyers have been trained to strategize creative solutions for their clients' dilemmas, so certainly the same thinking was applied to the sale of their own assets.[2] One popular way to exit a practice without raising ethical red flags was the use of "of counsel" relationships.[3] A new attorney would join the practice, and, after a set period of time, the retiring attorney would become "of counsel" to the firm, later quietly withdrawing from practice entirely and allowing the new attorney to keep the firm name and goodwill.[4]

In 1990, however, this changed with the ABA's adoption of Model Rule 1.17. Model Rule 1.17 permitted the sale of law practices and addressed the disparity between succession options available to solo/small and larger firm practitioners. Now, more than 20 years later, nearly every state has adopted some variation of the Model Rule.[5] Attorneys, their estates, and their representatives are now permitted to sell not only the tangible firm assets but also the intangibles, including their book of business and their goodwill. The time for this change could not be better.

Many do think it is a dark time to be in the business of law. Average salaries are declining; half of recent law school grads carry a debt load of $100,000 or more;[6] and law school applications are decreasing. Also, the market is witnessing the emergence of non-traditional service providers (e.g., LegalZoom). Sadly, suicides by lawyers are at epidemic levels. In fact, a prudent, risk-adverse person might think to stay away from the legal profession altogether.

Many causes for the distress in the U.S. legal market exist, which began an unprecedented downturn in late 2008, but, after all the numbers are crunched, it comes down to supply and demand. The demand growth for legal services, according to Thomson Reuters, was -1.1% in 2013, while the number of lawyers grew by around 1%.[7] Law firm growth in the boom years prior to the recession created an unsustainable economic model where firms increased their rates 6%–8% per year with little regard for what was going on in the broader econ-

omy. During this same period, the national inflation rate grew by only 4% per year.

However, what if this great economic disruption in the legal industry is not the beginning of the end for the practice of law – but a new beginning, a renaissance? As with any renaissance, it all starts with providing a new perspective.

As Winston Churchill once said, "[l]et our advance worrying become advance thinking and planning."

New York State contributes approximately 20%, or roughly $40 billion, to the $200 billion market for legal services in the United States. A commission appointed by then Chief Judge Judith S. Kaye to examine solo and small-firm practice reported in 2006 that 83.5% of the attorneys surveyed in New York were solo practitioners. An additional 14.7% were small-firm practitioners in offices of 10 or fewer attorneys.[8] Over the next 10 years, approximately 400,000 attorneys nationwide will be turning 65 and looking toward retirement while the number of new law school graduates is estimated to be only 45,000–50,000 per year.[9]

In New York alone last year, 166,317 attorneys maintained law licenses, with approximately 10,000 of those being newly admitted counsel. According to the National Center for Education Statistics, there are likely to be only 2,100 legal jobs per year for the foreseeable future in the state, resulting in a surplus of 8,000 new lawyers per year.[10] Although at first it may seem that the forces of supply and demand at work will continue to weigh negatively on the future of the legal market, the number of lawyers turning 65 in New York over the next ten years could be close to 50,000. Today, entering retirement age doesn't necessarily mean it's time to retire; however, it certainly means it's time to think about where the funds could be coming from when you do.

With one-third of the nation's attorneys aged 65 and older projected to retire in the next ten years, plus a large surplus of new lawyers, the time could not be riper to seize the golden opportunity. This might be the time to take advantage of the possibility to buy or sell a law practice. This would provide retiring attorneys with additional liquid assets for their retirement while also providing new attorneys with an established client base as well as operating assets. In short, *a renaissance is coming for those who recognize and take advantage* of the opportunity.

This article discusses this opportunity, how attorneys can take advantage of it, as well as the disadvantages of failing to do so. Part 1 focuses on succession planning and some relevant ethical considerations.

The Risks of Retiring or Leaving a Law Practice Without a Succession Plan

There is a saying, "Lawyers don't retire, they just die at their desks." Although meant to be amusing, the reality is all too worrisome and realistic. When an attorney is suddenly unable to practice, duties to his or her clients do not abruptly end; rather, the attorney, or his or her estate in certain circumstances, continues to owe clients moral, ethical, and legal duties.[11] In addition, the burden placed on an attorney's estate and/or family in such situations can be immense.

Moreover, in the event of an attorney's untimely death or a guardianship, the practice becomes an asset[12] of the estate, which can be sold to benefit the estate. However, without a succession plan in place, such an asset is more of a burden than a financial blessing as doing even simple tasks, such as accessing the firm's operating account, may require court intervention. Thus, all attorneys should begin to develop a crisis plan, including appointing another attorney beforehand to handle cases in the event of illness, disability or death.[13]

The ABA Formal Opinion 92-369 urged all counsel to prepare such a crisis strategy, stating:

> To fulfill the obligation to protect clients and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review the client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.[14]

Even if you are not considering retiring, in addition to developing a crisis plan, the considerations of maximizing your law practice's assets and value, evaluating its total worth, and finding purchasers are issues every attorney should begin to think about and plan for. As Winston Churchill once said, "[l]et our advance worrying become advance thinking and planning."

Ethical Rules and Considerations

When formulating a succession strategy, attorneys must take into account their ethical, moral, and legal obligations to their clients. Most important, before beginning negotiations with potential buyers, attorneys must be aware of what they are actually permitted to sell as part of their practice. The answer may not only be dictated by the tangible aspects of the firm, such as its office space, equipment, etc., but also by the New York Rules of Professional Conduct (New York Rules). Applicable rules may include Rule 1.0(j), Rule 1.1, Rule 1.16, Rule 1.17, Rule 1.6, and Rule 1.9.

Rule 1.17

New York implemented Model Rule 1.17 on April 1, 2009, with the following changes:

Does not adopt (a) or (b); Adds:

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients: (i) concerning the identity of the client, except as provided in paragraph (b)(6); (ii) concerning the status and general nature of the matter; (iii) available in public court files; and (iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) is roughly equivalent to MR but with significant changes in wording (although (c)(1) is the same as MR (d)(2)):

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

Adds (d):

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) is equivalent to MR (c) but changes language significantly:

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

The sale of a law practice is expressly governed by Rule 1.17, which permits retiring attorneys to sell their law practice, including goodwill, to one or more lawyers or law firms with the warning that "[t]he practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[15]

Unlike some jurisdictions, the New York Rules do not permit attorneys to sell practice areas or portions of their practice. Rather, Comment [6] to Rule 1.17(a) notes the requirement that all of the private practice be sold is satisfied only if the seller makes the entire practice available for sale.[16] The policy behind this requirement is to protect those clients whose matters are less lucrative and who thus may find it difficult to secure other counsel if a sale were limited to substantial fee-generating matters.[17]

One question many attorneys have during succession planning is what confidential information can and should be provided to a potential purchaser of the practice in light of attorney-client privilege, confidences and secrets. Rule 1.17(b) address this, providing that notwithstanding attorney/client privilege, the seller may disclose to the prospective buyer information regarding individual clients. This includes the identity of the client, the status and general nature of the client matter, public court filing information, and the financial terms of the attorney/client relationship and payment status of the client's account.[18] This does not mean a seller has the right to inspect each case in-depth as Rule 1.17 continues to require sellers to restrict access to specific, matter-related information that may be otherwise protected by the attorney-client privilege unless client consent is expressly granted.[19]

An additional concern is fee sharing. Rule 1.5 provides that "[a] lawyer shall not make an agreement for, charge, or collect an illegal fee or expense."[20]

For attorneys who choose to follow an earn-out method of law firm valuation, the structure must be carefully considered to avoid any fee-sharing violations. When the retiring attorney relinquishes his license to practice, such arrangement may further implicate improper referral problems.

Rule 1.17 also requires the seller and buyer to jointly provide written notice to the clients in the seller's book of business, notifying them of the sale, and their right to retain other counsel or take possession of their file. They are also told consent to the transfer will be presumed if no objection is received within 90 days of their receipt of the notice, fee information and the identity and background of the purchaser.[21] If a client cannot be located, a court order approving the transfer of a file may be required.

Buyers may have additional duties to the practice after the sale, such as maintaining copies of all retainer and compensation agreements, bills, and invoice payments, and operating account banking records (seven years);[22] conflicts check systems;[23] original wills and property documents (indefinitely);[24] and trust fund obligations.[25]

More ethical and professional responsibility issues must be taken into account, including the competency of the purchasing attorney and due diligence of both parties, discussed in part 2 of this article. ■

1. *See* Dennis A. Rendleman, *The Evolving Ethics of Selling a Law Practice*, 29 GPSolo 4 (2012).

2. *See*, *e.g.*, *Geffen* v. *Moss*, 53 Cal. App. 3d 215, 125 Cal. Rptr. 687 (2d Dist. 1976) (where a retiring attorney and purchaser structured a sales agreement for the practice's physical assets that also prohibited the retiring attorney from practicing in the area of the sale and required him to encourage clients to use the services of the purchasing attorney).

3. ABA Ethics Opinion 90-357 offers four definitions of the "of counsel" relationship: (1) part-time practitioners who practice in association with a firm but on a different basis than the mainstream lawyers of the firm; (2) retired partners of the firm who remain associated with the firm and available for occasional consultation; (3) lawyers who are probationary partners to be; and (4) a permanent status in between those of partner and associate lacking an expectation of likely promotion to full partner status.

4. *See* Rendleman, *supra*, note 1.

5. New York adopted its own version of Model Rule 1.17 (see sidebar). For a comparative chart of which states have or have not adopted ABA Model Rule 1.17 or variations thereof, *see* ABA CPR Policy Implementation Committee, on Committee Variations of the ABA Model Rules of Professional Conduct Rule 1.17: Sale of Law Practice, Feb. 6, 2014, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_17.authcheckdam.pdf (last visited Apr. 7, 2014).

6. *See* Sam Favate, *Law Students, How Much Debt Do You Want?*, Wall St. J., Mar. 23, 2013, http://blogs.wsj.com/law/2012/03/23/law-students-how-much-debt-do-you-want/ (last visited Apr. 7, 2014) (noting that graduates from the top 10 law schools often graduate with around $150,000 in school-related debt).

7. 2014 Report on the State of the Legal Market, Peer Monitor®, https://peermonitor.thomsonreuters.com/wp-content/uploads/2014/01/2014_PM_GT_Report.pdf.

8. *See* Report of the Commission to Examine Solo and Small Firm Practice 2006, http://www.courts.state.ny.us/reports/ssfreport.pdf.

9. *See* 2014 Report on the State of the Legal Market, *supra* note 7.

10. *Id.*

11. *See* Rule 1.3(b) (providing that an attorney may not neglect a matter, for example, by missing a court hearing); Rule 1.16(e) (providing that attorneys must return client property and funds); Rule 1.6 (providing that attorneys must protect client confidential information).

12. A practice may also include liabilities that would pass to the estate, such as a malpractice claim.

13. For more information on preparing a crisis plan and sample forms, *see Planning Ahead: Establish An Advanced Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*, N.Y. State Bar Ass'n Comm. on Practice Continuity (2005).

14. ABA Formal Opinion 92-369: Disposition of Deceased Sole Practitioner's Client Files and Property, Dec. 7, 1992, http://www.osbplf.org/docs/aids/ABA%20FORMAL%20OPINION%2092-369.pdf.

15. Rule 1.17(a); Comment [1] to Rule 1.17.

16. Comment [2] to Rule 1.17.

17. Comment [6] to Rule 1.17.

18. Rule 1.17(b).

19. Comment [7] to Rule 1.17.

20. Rule 1.5(a).

21. Comment [7] to Rule 1.17.

22. Rule 1.15(d).

23. Rule 1.10(e).

24. *Planning Ahead*, *supra* note 13.

25. Rule 1.16; Rule 1.5.

BY PETER SIVIGLIA

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Options

The task of transactional attorneys is to place commercial litigators on the endangered species list by preparing well-thought-out, well-written contracts. That mandate generated this article, because the option – certainly one of the most, if not the most, important and valuable of commercial instruments – is frequently not given the attention it requires *in private transactions*. This neglect may well be due to the fact that in private transactions the option, like the right to buy leased equipment or a right of first refusal, is often a sideshow to the main event: the primary, underlying deal.

Unlike a contract written to address a negotiated transaction about to take place for which the terms have been agreed, the option addresses a transaction that *might* occur sometime in the future. Nevertheless, the attorney must, with the client, anticipate all aspects of that possible future transaction and deal with all of those aspects in the option agreement as if the subject of the option were a transaction about to take place.

Options to Buy or Lease a Physical Asset

Thus, for example, if the option is to buy equipment, the option must contain the entire contract to purchase that equipment: specifications for the equipment, delivery terms, price, payment terms, warranties, and every other term of the purchase all the way to governing law. If the contract includes deferred payment terms with the seller taking a security interest in the equipment, then the entire text of the security agreement must be included as an exhibit to the option agreement. And if the buyer is to issue its promissory note to evidence the debt and the payment terms, that note must also be added as an exhibit to the option agreement.

If any blank spaces, such as dates, must be completed when the option is exercised, the option agreement must specify how to complete those blank spaces. Their completion must be purely mechanical. Nothing must be left to discussion.

The same rules apply to a lease: the entire lease agreement must be attached as an exhibit to the option agreement, with any blank spaces to be completed mechanically as specified in the option agreement.

Failure to adhere to this mandate by leaving terms of the underlying transaction incomplete can create an arena of dispute and litigation, all to the benefit of none other than commercial litigators. For example, witness the allegations in a complaint filed in the New York State Supreme Court involving an option to purchase real estate in Manhattan. The option in question was written by two well-known New York law firms. The complaint stated:

> Pursuant to the Agreement, if [Plaintiff] exercised the option on or before January 31, 1995, then [Plaintiff] and [Defendant] were to enter into a definitive Contract of Sale of the Premises . . . for the sum of $18,000,000 . . . [with] a deposit in the sum of $1,800,000. The Agreement expressly provided that *the Contract of Sale was to be "reasonably satisfactory to [Plaintiff] and its counsel."*(emphasis supplied)
>
> Prior to January 1, 1995, [Plaintiff] attempted to exercise the option under the Agreement and advised defendant that it was ready, willing and able to enter into a contract of sale and make the required deposit. *[Defendant], in response to [Plaintiff's] exercise of its option, proposed a contract of sale that contained terms that were not reasonably satisfactory to [Plaintiff] and its counsel. Among other things, [Defendant's] proposed contract (i) would have required . . .* (emphasis supplied)

. . . , and straight on 'til morning. (Apart from containing the entire contract of sale, the option should have required that the notice of exercise be accompanied by the down payment.)

To state just the basic terms of the underlying transaction and how and when an option may be exercised is to design a playground of litigation. The option must not leave to future negotiation any term of the sale, lease, or other transaction. The option must contain the entire contract for the sale, for the lease, or for the other transaction.

Rights of First Refusal

This mandate of comprehensive specificity applies equally to rights of first refusal, but, because of the nature of those rights, certain adjustments are necessary. Too often contracts only state that a party will have "a right of first refusal," nothing more.

Alone, the term right of first refusal means little, if anything. As the allegations in the complaint cited above bear painful witness, the term "right of first refusal," by itself, is an invitation to dispute and to litigation.

To operate properly, a right of first refusal must be written along the lines set forth below. It is not even necessary to use the term right of first refusal:

1. Before the Seller may sell an item, the Seller must first offer the option holder the right to purchase the item on specified terms, all as set forth in a proposed contract of sale.
2. The option holder then has a

stated period to elect to buy the item on those terms.

3. If the option holder elects not to buy the item, then the Seller may sell the item elsewhere on those same terms within a specified period.
4. If the terms are changed within that specified period, the Seller must then offer the option holder the right to purchase the item on the new terms under the foregoing procedures.
5. If the Seller does not sell the item within the allotted time on the required terms, then the Seller may not sell the item without first offering it again to the option holder on specified terms (old or new) under the foregoing procedures.

One additional comment on the right of first refusal: When restrictions on the sale or transfer of an asset require a bona fide offer, it is essential that the offer meet certain requirements so that it does not frustrate a right of first refusal with features that the optionee cannot match.

A bona fide offer to purchase should require an all-cash purchase price payable within a short, specified period without any collateral securing payment of that purchase price. These requirements eliminate types of payment (such as shares in a company or some other asset) and types of collateral to which the optionee might not have access.

That's right: Rights of first refusal can be a pain in an area located about midway between the heel and the back of the head. Clients like to receive them but beware of giving them because the very procedures required to make a right of first refusal work properly can frustrate a sale or a marketing effort. And the fact that a first-refusal rightholder can commandeer the transaction may well discourage a prospective buyer from playing the game.

Shareholder Arrangements: The Non-Agreement Option

A common feature of privately held corporations is the right of first refusal. This right has a dual personality in the corporate context: (1) preemptive rights in favor of the shareholders when the corporation, itself, issues additional shares; and (2) rights of first refusal in favor of the other shareholders when one of the shareholders wishes to sell all or some of its shares.

Preemptive rights generally reside in the state's corporation law or in the articles or certificate of incorporation. New York's corporation law provides that shareholders do not have preemptive rights "except as otherwise expressly provided in the certificate of incorporation."[1] Thus, in New York, preemptive rights should never be recorded in a shareholder agreement lest they run the risk of being declared invalid. They must reside in the certificate of incorporation.

On the other hand, rights of first refusal pertaining to the sale of shares by a shareholder – together with provisions dealing with voting rights pertaining to matters such as representation on the board, shareholder approvals, and control – are commonly housed in shareholder agreements. The danger, though, with a shareholder agreement is that its provisions are subject to challenge because of an alleged default. Therefore, as an alternative, attorneys should borrow a page from the preemptive-rights mandate of New York's corporation law and consider a different home for these shareholder arrangements – not an agreement, but, instead, the company's constitution: its certificate of incorporation.

Placing these provisions in the company's certificate of incorporation eliminates the risk of challenge based on default. Under this solution, the delineation of voting rights and control are handled by different classes of stock. Each class would have its own right to elect members to the board. And matters requiring director and shareholder approval would be determined in accordance with the wishes of the parties – in some cases by class vote at each level, and in other cases, without regard to a class vote.

Both preemptive rights and rights of first refusal pertaining to these shares must respect the sanctity of each class. So, for example:

1. In the case of preemptive rights and rights of first refusal, holders of the shares of the class being offered would have first priority. Only if none of the shareholders of that class exercise options would shareholders of the other class or classes have a right to purchase the offered shares.
2. In the case of rights of first refusal, the corporation as well as the other shareholders would have the right to purchase. Only if the corporation does not or cannot exercise its option[2] would shareholders have the right to purchase the offered shares. And, then, as in item (1) above, only if none of the shareholders of the offered class exercise options would shareholders of the other class or classes have a right to purchase the shares.
3. Shareholders would be required to exercise their options only with respect to *all* – not some – of the offered shares; and if more than one eligible shareholder exercise options, then (a) in the case of shareholders of the offered class, the shares would be allocated among the purchasers in proportion to their respective shareholdings of that class; and (b) in the case of shareholders of other classes exercising their rights to purchase, the offered shares would be allocated among them in proportion to their respective shareholdings in the company.

As observed at the opening of this article, the option is one of the most – if not the most – important and valuable commercial instruments. Even as an adjunct to another transaction, the option requires careful, diligent attention lest that value be lost in a jungle of litigation.[3] ■

1. N.Y. Business Corporation Law § 622(b)(2) (BCL).

2. A corporation may not purchase its own shares "if the corporation is then insolvent or would thereby be made insolvent." BCL § 513(a).

3. For forms on the types of options treated in this article as well as others, see Chapters 8, 8B and 12 of *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating*, West 2014.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate at a firm that has maintained a long-standing client relationship with a professional sports league (the League). Recently, the League suspended one of its star players (DD) for two years as a result of an incident where he assaulted his fiancée in a hotel elevator and rendered her unconscious. The player has since filed a legal action against the League in federal court alleging that the League's suspension of him was arbitrary and capricious under the League's personal conduct policy in light of the fact that the League had previously rendered a monetary fine against DD based upon the incident in question which had been documented in a surveillance video showing DD pulling his unconscious fiancée out of the elevator but not the actual assault.

Earlier this year, I participated in a call along with my supervising partner (SP), the League's assistant general counsel (the AGC), the League's General Counsel (the GC) and another League executive. During the call, the GC advised us of the incident and when SP asked if the incident was recorded, the GC quickly responded that it was in possession of the subject video. My first thought upon hearing this information was to find out if other videotapes of the incident existed. I wrote those thoughts on a notepad and showed them to SP who quickly waved me off during the call. After the conclusion of the call, SP chided me and demanded that I never make such inquiry of the client again.

A few weeks later, I ran into the AGC at a client event. He pulled me aside and informed me that although the GC told my firm that only one videotape of the incident existed, the League in fact had another tape in its possession showing the entirety of the incident (including DD physically assaulting his fiancée) but he indicated that he was directed not to ever discuss the existence of the second tape because of the public relations fallout that would almost certainly ensue if the full video ended up in the public realm as well as the potential legal ramifications for the League.

My firm is preparing to defend DD's lawsuit, which will almost certainly include depositions of League executives. I have been told that the plan is to take the position that the only videotape in existence was the one that was disclosed to the public. What if I told you that I know this information to be false? What are my professional responsibilities? Is there a "reporting up" requirement? With regard to how the SP handled his fact gathering, was he obligated to fully probe the League's GC as to his knowledge of the existence of any and all evidence relevant to the incident? Finally, if it is later determined that SP knowingly failed to make the proper inquiries so as to avoid learning damaging information, could my firm be disqualified from representing the League in the lawsuit brought by DD or possibly sanctioned?

Sincerely,

Tim Troubled

Dear Tim Troubled:

Your question first asks us to address the professional obligations that arise when an attorney learns that a client intends to present false information to opposing counsel and/or a tribunal. Rule 4.1 of the New York Rules of Professional Conduct (the RPC) tells us that "[i]n the course of representing a client, a lawyer shall not *knowingly* make a false statement of fact or law to a third person" (emphasis added). Rule 3.4 which requires that attorneys act with fairness and candor when dealing with an opposing party and their counsel is also applicable.

In Rule 3.4, subparagraph (a)(1) states that "a lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce."

Subparagraph (a)(4) requires that "a lawyer shall not . . . *knowingly* use perjured testimony or false evidence" (emphasis added).

Subparagraph (a)(6) requires that "a lawyer shall not *knowingly* engage in other illegal conduct or conduct contrary to these Rules" (emphasis added).

In addition, Rule 3.3 governs your obligations to the court. Rule 3.3(a)(1) states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." In addition, Rule 3.3(a)(3) requires that

> [a] lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . .

The key words used in the aforementioned sections of the RPC are "know" and "knowingly." Comment [8] to Rule 3.3 states that "[t]he prohibition against offering or using false

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

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evidence applies only if the lawyer *knows that the evidence is false*" (emphasis added) and that "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."

Generally speaking, lawyers are permitted to rely on a client's recitation of the facts and do not have a duty to second-guess or independently verify what their clients tell them, an issue which we covered in a previous *Forum*. *See* Vincent J. Syracuse and Matthew R, Maron, *Attorney Professionalism Forum*, New York State Bar Association Journal, July/August 2012, Vol. 84, No. 6. In fact, even if a lawyer has doubts about the veracity of a client's version of the relevant facts, so long as a lawyer's investigation of the facts does not conclusively demonstrate that what the client is saying is false or fraudulent, a lawyer is permitted to accept the client's word. Put another way, attorneys are not required to be the judges of their clients' positions. *Id.*; *see also* Lawrence J. Vilardo and Vincent E. Doyle III, *Where Did the Zeal Go?*, Litigation, American Bar Association, Fall 2011, Vol. 38, No. 1.

These principles do not necessarily create a "safe haven" for you. In the circumstances that you have described, the fact that you have apparently become aware that the League has possession of a second video and, nevertheless, wants to take the position that the original video disclosed to the public was the only one in existence, could place you in violation of Rule 4.1 and any one of subsections (1), (4) or (6) of Rule 3.4(a). Moreover, your knowledge of the existence of the second video tape requires full compliance with subsections (1) and (3) of Rule 3.3(a) in order to avoid an ethical violation.

Your next question asks if there is a "reporting up" requirement if you see another lawyer committing an act in violation of the ethical rules.

Rule 8.3(a) states that

> [a] lawyer who knows that another lawyer has committed a violation of the [RPC] that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Id.

Whether SP's behavior requires "reporting up" under Rule 8.3(a) cannot be answered without further additional information. Have you told SP what the AGC revealed to you about the existence of a second videotape? If so, how did he react? Did he tell you to ignore what you were told by the AGC? All of these questions must be answered before we can know whether SP should be reported for alleged misconduct. Again, the critical issue is whether SP has *knowledge* of the second video tape, and nevertheless intends to make false representations to opposing counsel and/or the tribunal.

With respect to how SP handled his fact gathering from the client, we note that Rule 1.3(a) provides that "[a] lawyer shall act with reasonable diligence . . . in representing a client." In addition, SP should also have been guided by competency requirements for attorneys as set forth in Rule 1.1(a), which requires that "[c]ompentent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." We believe that compliance with both of these ethical obligations would require SP to have conducted a more diligent and thorough fact gathering in his communications with the GC.

SP should not have prevented you from making a proper inquiry as to the relevant events as it could subject him to discipline under Rule 3.4(a) and Rule 4.1. If it is later determined that SP *knowingly* prevented you from making a further inquiry from the client because he was afraid of what the client would say, then he would have likely breached an ethical obligation and should be reported pursuant to Rule 8.3(a).

One thing that should be remembered is that retaliation by law firms against lawyer-employees is not permitted and we call your attention to the decision of the New York Court of Appeals in *Wieder v. Skala*, 80 N.Y.2d 628 (1992), which holds that firing an attorney for reporting misconduct of a fellow attorney employed at the same firm violates public policy. *See* Simon's New York Rules of Professional Conduct Annotated at 1840 (2014 ed.). Indeed, the Court of Appeals took a strong position in *Wieder* by articulating the need to protect those reporting misconduct to the appropriate disciplinary authorities. However, the disciplinary committees should not be the only ones enforcing potential misconduct. At a minimum, we hope that your firm has in place internal policies to handle reporting situations like the one you described involving SP. By having such policies in place, the firm can protect itself from potential exposure resulting from acts of misconduct by its attorneys and, at the same time, provide a mechanism allowing for the firm's attorneys to comply with their ethical obligations.

As to your last inquiry, the consequences stemming from SP's conduct would more likely result in sanctions rather than the disqualification of your firm under Part 130, which we have discussed at length in prior *Forums*.

If your firm does intend to move forward in the litigation with DD and continues to push the position that only one video exists, this could be deemed frivolous conduct since false, material factual statements are being asserted in the case you have described.

There is no doubt that you are in a precarious situation. It is therefore important to acknowledge that both you and the attorneys at your firm must comply with all ethical obligations, especially when confronted with the scenario discussed here.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a mid-level partner in a firm that is considered the leader in advising a particular industry. Across the relevant practice areas, the law as it applies to this industry is unsettled and developing, so our activity calls for a lot of judgment. Clients often rely on our advice almost as if our judgments were the law . . . which, of course, they are not, and that is the nub of my problem.

In particular, based on our long-standing advice and the strength of our firm's reputation, no one in the industry engages in a particular practice I will call "X." Last week, a new entrant to the industry (Client) asked about "X," and when I gave the stock "no" answer, Client handed me a research paper written by another lawyer who has never had contact with this particular industry. I read the paper with some skepticism and discovered, to my surprise, that it utterly demolishes our long-held position and proves, conclusively in my judgment, that X is permissible.

My boss (whose name is on our firm's door) cannot find a hole in the newcomer's analysis but yet still insists that "we have our story and we are sticking to it." I am not sure whether he concedes that he has been wrong or refuses to consider that possibility, but his main concern is that our firm and those whom we have advised have too much invested in the status quo to consider a change. He points out that all the leading industry players have been able to operate successfully (though at some additional cost) without doing X, so there is little to gain in our telling everyone that we have been wrong all along. On the other hand, if we say yes only to Client, it will gain an unfair advantage over the others and when word inevitably gets out we will look silly (or worse) and may lose a lot of business.

To complicate matters, Client insists that the reasoning that it and the new guy on the block have adduced in support of X is their proprietary information, insofar as it represents an ability to do something lucrative that the rest of the market has missed. Client has prohibited us from disclosing that anyone believes that X is permissible.

My boss has instructed me to tell Client that its other lawyer is mistaken and has no feel for this very specialized industry; and, given our firm's reputation, that might well be the end of the matter. But that will not be the end of the matter for me. I am not comfortable giving advice that I honestly believe to be wrong or in participating in what appears to me to be a cover-up. I have three questions:

1. May or must I tell Client my opinion, regardless of the directive from my senior partner?
2. Is Client within its rights in prohibiting our firm from disclosing to others the fact that someone has concluded that X is permissible (regardless of what we advise Client)?
3. If I leave my firm, may I disclose this sordid mess at least to justify why I am leaving or why I have changed my views, or am I bound to respect the firm's confidences even if they constitute, in my judgment, intentional malpractice?

Sincerely,

Painted Into a Corner

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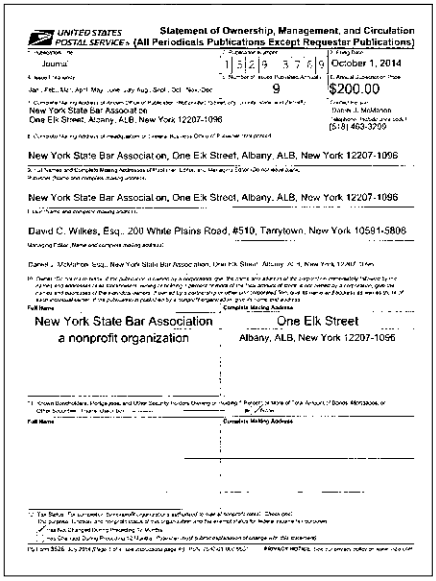

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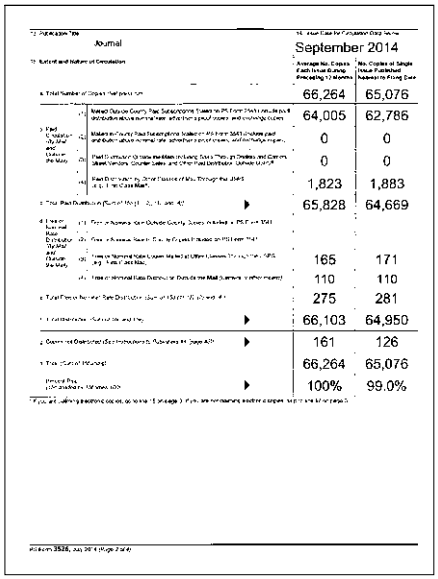

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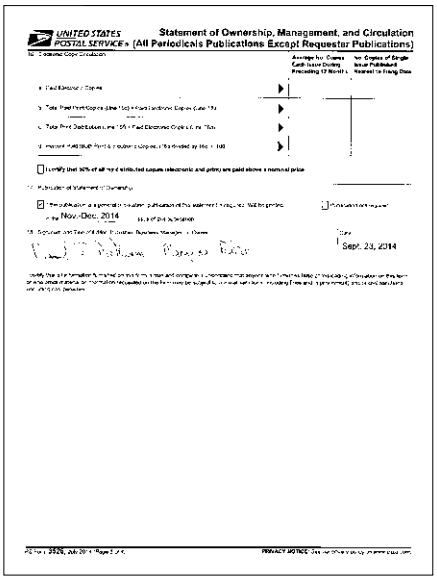

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Bronx, NY

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Pittsford, NY

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Garden City, NY

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New York, NY

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South Egremont, MA

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Yun Huang
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Pengcheng Zhu
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Yang Zou
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ment.[19] The Fourth Department has not ruled on this issue.

The new proof you introduce in your renewal motion might also be an affidavit from a witness you could not locate when you made your original motion.[20]

The court might consider as part of your renewal motion new evidence you discover while investigating the case even though you've conducted your investigation after you lost the original motion.[21]

Retaining a new expert in your case isn't a basis for moving to renew.[22]

A court might deny your renewal motion if the only new evidence is an examination before trial (EBT) transcript that was available at the time of the original motion.[23]

If you allege in your renewal motion that you have new proof you want the court to consider, but you introduce the same proof you introduced in your original motion, the court will likely deny your motion to renew.[24] The court might denominate your motion to renew as a motion to reargue.[25]

The court might deny your motion to renew if you didn't exercise due diligence in obtaining the proof on your original motion.[26]

If the basis for your motion is that the law has changed, move to renew. Don't move to reargue. In your motion to renew, explain to the court how the court's original decision would be different under the new law.

Asserting new legal arguments in your motion to renew isn't a basis for the court to grant renewal.[27]

Time. CPLR 2221 doesn't specify any time limit for moving to renew.[28] Unlike a motion to reargue, a motion to renew doesn't have a 30-day time limitation.[29] The only limitation on a motion to renew is that you move "without unreasonable delay."[30] If you wait too long to move to renew, a court might deny your motion to renew by finding that you're the dilatory party.[31]

If you move after the court has entered judgment and after your time to appeal has expired, the court might deny your renewal motion as untimely if the basis for your motion is that the law has changed.[32]

Notice of Motion or Order to Show Cause. You may move to renew by notice of motion or by order to show cause. Most practitioners move by order to show cause because it's an expedient way to have the court hear their motion to renew.

If you move to renew by order to show cause and the court declines to sign your order to show cause, you may appeal the declination.[33]

Appeals. Regardless whether the court grants or denies your motion to renew, you may appeal the court's decision on your motion to renew.[34] The "grant or denial of a motion for leave to renew is appealable as of right."[35]

You may timely appeal the court's original order.

An appellate court will apply the law "as it exists at the time of appeal, not as it existed at the time of original determination."[36]

You may move to renew on the basis that you have new evidence even after an appellate court has affirmed the original order.[37]

A court will likely deny your renewal motion if the basis for your motion is that the law has changed and your motion concerns an order that disposed of your case and you didn't file a notice of appeal.[38]

You may move to renew even after your time to appeal has expired.[39] If the basis for your renewal motion is that you have new evidence, a court might grant your motion even if you didn't appeal the court's original order.[40]

Although an appellate court won't grant affirmative relief to a nonappealing party, move to renew if an appellate court "has made a determination . . . that affects previous motions that were[n't] appealed."[41] Consider the following scenario: The trial court denied your cross-motion to dismiss the complaint.[42] Your co-defendant appealed the trial court's decision denying its motion to dismiss the complaint.[43] The appellate court dismissed the complaint as to your co-defendant.[44] You may move to renew the trial court's decision on your cross-motion to dismiss the complaint.[45] Thus, on a motion to renew, you "may be allowed to exploit a co-defendant's appellate victory if the issues as disposed of in the appealed case would also benefit [you,] the nonappealer."[46]

After consulting with your client, consider whether to move to renew, appeal the original decision, or both. Consider the cost, time, and effort in moving to renew or to appeal.

Opposing a Motion to Renew

Oppose a motion to renew by submitting opposition papers.

If your adversary argues in its moving papers that it has new evidence that would change the court's decision, you must convince the court in your opposition papers that the new evidence wouldn't change the court's decision. Argue that your adversary hasn't provided a reasonable justification for failing to present the new evidence on the original motion. Depending on your department, you may also argue that the allegedly new evidence isn't newly discovered.

If your adversary argues in its motion to renew that the new law would change the court's decision, persuade the court that even under the new law the court's decision stands.

Regardless whether the court grants or denies your motion to renew, you may appeal the court's decision on your motion to renew.

If the new law doesn't apply to your case, explain why it's inapplicable.

If your adversary relies on the same law the court applied, articulate that to the court. Argue that it's how the court interpreted the law that's at issue. The court might denominate your adversary's motion as a motion to reargue instead of as a motion to renew.

Argue that the court can't consider your adversary's new legal arguments on a motion to renew.

In the next issue of the *Journal*, the *Legal Writer* will discuss motions to vacate defaults. ■

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1. David D. Siegel, New York Practice § 254, at 449 (5th ed. 2011).

2. *Id.*

3. CPLR 2221(e)(2).

4. CPLR 2221(e)(3); David L. Ferstendig, New York Civil Litigation, § 7.17[3], at 7-122 (2014).

5. Ferstendig, *supra* note 4, § 7.17[3], at 7-122.

6. *Id.* (citing *Cippitelli v. County of Schenectady*, 307 A.D.2d 658, 658, 762 N.Y.S.2d 841, 842 (3d Dep't 2003); *Giardina v. Parkview Court Homeowners' Ass'n, Inc.*, 284 A.D.2d 953, 953, 730 N.Y.S.2d 585, 586 (4th Dep't 2001); *Greene v. N.Y. City Hous. Auth.*, 283 A.D.2d 458, 459, 724 N.Y.S.2d 631, 632 (2d Dep't 2001); *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 271 A.D.2d 636, 638, 706 N.Y.S.2d 724, 726 (2d Dep't 2000); *Ulster Sav. Bank v. Goldman*, 183 Misc. 2d 893, 896, 705 N.Y.S.2d 880, 882 (Sup. Ct. Rensselaer County 2000); contra *Mejia v. Nanni*, 307 A.D.2d 870, 871, 763 N.Y.S.2d 611, 612 (1st Dep't 2003) ("Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice.")).

7. Siegel, *supra* note 1, § 254, at 450 n.5 (citing *Ulster Sav. Bank*, 183 Misc. 2d at 896, 705 N.Y.S.2d at 882 ("In this instance, plaintiff has not advanced any argument to support a claim of reasonable justification for the failure to present the facts on the prior motion. Under the circumstances, in view of the mandatory language of CPLR 2221 (e)(3), the court is constrained to deny the motion to renew."); *Poag v. Atkins*, 3 Misc. 3d 1109(A), at *4 (Sup. Ct. N.Y. County 2004) ("[T]he court has continued to apply the pre-amendment exception thereto permitting the exercise of discretion to grant a motion for leave to renew, based upon facts inexplicably omitted on the prior motion. Under the circumstances in this case, and in the interest of justice, this court will exercise that discretion, and grant the plaintiff's motion for leave to renew.")).

8. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 16:330, at 16-38 (2006; Dec. 2009 Supp.).

9. *Id.*

10. *Id.* (citing *Tishman Constr. Corp. of New York v. City of N.Y.*, 280 A.D.2d 374, 376–77, 720 N.Y.S.2d 487, 490 (1st Dep't 2001) ("[T]he court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made. Indeed, we have held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to 'defeat substantive fairness.'")); Ferstendig, *supra* note 4, § 7.17[3], at 7-126 (citing *Mattis v. Keen*, 54 A.D.3d 610, 611, 864 N.Y.S.2d 6, 8 (1st Dep't 2008) ("Although motions to renew should be based on newly discovered facts that could not have been offered on the prior motion, courts have discretion to relax this requirement and grant the motion in the interest of justice.")).

11. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Henry v. Peguero*, 72 A.D.3d 600, 602–03, 900 N.Y.S.2d 49, 51 (1st Dep't 2010) ("Supreme Court's grant of renewal in this matter contravenes this Court's policy of confining motion practice to the limits imposed by the CPLR. Neither of the statutory requirements for renewal was satisfied by plaintiff. Dr. Mian's addendum was not the result of any additional examination or medical testing; rather, the doctor's conclusion was based on the medical information previously available to him and could have been included in his original affidavit. While, in appropriate circumstances, renewal may be predicated on previously known facts, it is settled that '[t]he movant must offer a reasonable excuse for failure to submit the additional evidence on the original motion.'"); *Cuccia v. City of N.Y.*, 306 A.D.2d 2, 2–3, 761 N.Y.S.2d 31, 32–33 (1st Dep't 2003)); Ferstendig, *supra* note 4, § 7.17[3], at 7-128 (citing *Am. Audio Serv. Bureau v. AT & T*, 33 A.D.3d 473, 477, 823 N.Y.S.2d 25, 28 (1st Dep't 2006) ("Plaintiff's explanation that the documents were overlooked because the files are voluminous is simply not a reasonable justification.")).

12. Ferstendig, *supra* note 4, § 7.17[3], at 7-126 (citing *Spectrum Painting Contrs., Inc. v. Kreisler Borg Florman Gen. Constr. Co., Inc.*, 54 A.D.3d 748, 749, 864 N.Y.S.2d 61, 63 (2d Dep't 2008) ("The Supreme Court providently exercised its discretion in denying . . . [the renewal motion] on the ground that it failed to offer a reasonable excuse as to why it did not present the alleged new facts on the prior motion. In any event, the additional facts would not have supported a change in the court's original determination.")); *Delvecchio*, 271 A.D.2d at 638, 706 N.Y.S.2d at 726.

13. *Id.* (citing *Henley v. Foreclosure Sales, Inc.*, 57 A.D.3d 483, 484, 869 N.Y.S.2d 171, 172 (2d Dep't 2008) ("Since the information presented in support of the defendant's motion was either information previously submitted on the original motion, information available at the time the original motion was made, or equivocal new information, the motion was properly denied.")).

14. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Davidson v. Ambrozewicz*, 23 A.D.3d 903, 903–04, 803 N.Y.S.2d 810, 810 (3d Dep't 2005); *Robinson v. Consol. Rail Corp.*, 8 A.D.3d 1080, 1080, 778 N.Y.S.2d 387, 388 (4th Dep't 2004)).

15. Siegel, *supra* note 1, § 254, at 450.

> Unlike a motion to reargue, a motion to renew doesn't have a 30-day time limitation.

16. Ferstendig, *supra* note 4, § 7.17[3], at 7-123, 7-124 (citing *Hachney v. Monge*, 103 A.D.3d 844, 845, 960 N.Y.S.2d 176, 178 (2d Dep't 2013) ("CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form.")).

17. Siegel, *supra* note 1, § 254 at 79 (July 2014 Pocket Part) (quoting *Kalir v. Ottinger*, 2011 WL 6968334 (Sup. Ct. N.Y. County 2011) ("Moreover, because the error was procedural, renewal is proper to correct the motion."); *B.B.Y. Diamonds Corp. v. Five Star Designs, Inc.*, 6 A.D.3d 263, 264, 775 N.Y.S.2d 34, 35 (1st Dep't 2004) ("Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure. Defendants' failure was demonstrably inadvertent and plaintiff has failed to show any prejudice.")).

18. *Id.* (citing *Singh v. Mohamed*, 54 A.D.3d 933, 935, 864 N.Y.S.2d 498, 500 (2d Dep't 2008) ("Neither the plaintiff nor Dr. Guy provided a reasonable justification as to why the doctor's reports containing contemporaneous range-of-motion findings in the plaintiff's lumbar and cervical regions of the spine, were not in proper form when submitted in opposition to the initial motion.")).

19. *Id.* (citing *Wilcox v. Winter*, 282 A.D.2d 862, 863–64, 722 N.Y.S.2d 836, 837 (3d Dep't 2001) ("Clearly, the failure on the part of plaintiff's counsel to provide Supreme Court with the unredacted version of the affidavit in the first instance was a simple procedural error and leave to renew was an entirely appropriate remedy to excuse it.")).

20. Ferstendig, *supra* note 4, § 7.17[3], at 7-124 (citing *Gonzalez v. Vigo Constr. Corp.*, 69 A.D.3d 565, 566, 892 N.Y.S.2d 194, 195 (2d Dep't 2010) ("The plaintiff offered a reasonable excuse for not including an affidavit from a nonparty witness in opposition to the original motion. The misidentification of an eyewitness to the subject accident, by not stating his correct surname in the police report, resulted in a reasonable delay in locating the eyewitness and obtaining his affidavit.")).

21. *Id.* (citing *Smith v. Cassidy*, 93 A.D.3d 1306, 1307, 941 N.Y.S.2d 413, 415 (4th Dep't 2012)).

22. *Id.*§ 7.17[3], at 7-125 (citing *Burgos v. Rateb*, 64 A.D.3d 530, 531, 883 N.Y.S.2d 115, 117 (2d Dep't 2009) ("The retention of a new expert is not a legitimate basis for renewal; renewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.'")).

23. Barr et al., *supra* note 8, § 59:05, at 745 (citing *Glasburgh v. Port Auth. of N.Y. & N.J.*, 193 A.D.2d 441, 441, 597 N.Y.S.2d 327, 328 (1st Dep't 1993) ("Appellant's motion to renew was properly

denied, the only "new evidence" offered in support thereof being a deposition transcript that was available at the time of the original motion.")).

24. Ferstendig, *supra* note 4, § 7.17[3], at 7-125 (citing *Chernysheva v. Pinchuck*, 57 A.D.3d 936, 937, 871 N.Y.S.2d 621, 623 (2d Dep't 2008) ("In support of her motion for leave to renew, the plaintiff relied upon evidence that, while generated after the summary judgment motions were fully submitted, contained no 'new facts' that would change the prior determination awarding summary judgment to the defendants.")).

25. *Id.* (citing *Staten Is. N.Y. CVS, Inc. v. Gordon Retail Dev.*, LLC, 57 A.D.3d 764, 765, 869 N.Y.S.2d 583, 584 (2d Dep't 2008) ("Here, the plaintiffs' alleged new evidence had not only been submitted to the Supreme Court in opposition to the original motions, cross motion, and separate cross motion but had also been considered by the court in determining them. Accordingly, that branch of the plaintiffs motion, denominated as one for leave to renew, was, in fact, a motion for leave to reargue.")).

26. *Id.*§ 7.17[3], at 7-124, 7-125 (citing *Jones v. 170 East 92nd St. Owners Corp.*, 69 A.D.3d 483, 483-84, 893 N.Y.S.2d 534, 535 (1st Dep't 2010) ("Putting aside that this affidavit was inadvertently omitted from plaintiffs' moving papers and first submitted only in their reply, plaintiffs' attorney's bald statement that the doctor's affidavit was not included in their opposition to the prior motion because 'it was not made available to [p]laintiffs until this time' does not satisfy plaintiffs' burden 'to show due diligence in attempting to obtain the statement before the submission of the prior motion.'")).

27. 1 Byer's Civil Motions § 59:05 at 744 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.) (citing *In re State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 A.D.2d 519, 519, 455 N.Y.S.2d 30, 31 (2d Dep't 1982); *see Brian Wallach Agency v. Bank of N.Y.*, 75 A.D.2d 878, 880, 428 N.Y.S.2d 280, 282 (2d Dep't 1980) ("Although the waiver issue could have been raised on the original motion for a joint trial, the circumstances indicate that the bank's failure to do so may fairly be said to have resulted from excusable mistake or inadvertence.")).

28. Barr et al., *supra* note 8, § 16:332, at 16-38.

29. *Id.* (citing *Di Russo v. Kravitz*, 21 N.Y.2d 1008, 1010, 290 N.Y.S.2d 928, 929, 238 N.E.2d 329, 330 (1968) ("Defendant's motion for renewal of the motion to dismiss was promptly made upon the discovery of the fraud during trial and before the case was concluded and a final determination rendered.")).

30. Byer's Civil Motions, *supra* note 27, § 59:05, at 46–47 (2013 Cumulative Supplement) (citing CPLR 2221(e); *Ramos v. City of N.Y.*, 61 A.D.3d 51, 55, 872 N.Y.S.2d 128, 131 (1st Dep't 2009) ("Although the better practice would have been to move for renewal prior to commencing these new actions, the new actions show that plaintiff had not fallen asleep at the wheel. Upon receiving guidance by Justice York, plaintiff immediately moved for renewal. Under these circumstances it cannot be said that plaintiff unreasonably delayed seeking relief after learning of the new evidence.")).

31. Siegel, *supra* note 1, § 254, at 78 (2013 Cumulative Supplement) (citing *Garcia v. City of N.Y.*, 72 A.D.3d 505, 507, 900 N.Y.S.2d 17, 19 (1st Dep't) ("Even if we were to assume that plaintiff only learned of the 1999 denial shortly before he made his motion to renew in 2007, that is not sufficient. Clearly, plaintiff had a duty to inquire into the status of the 1999 motion. Instead, he sat on his hands for eight years, and offers no explanation as to why he waited so long."), *appeal dismissed*, 15 N.Y.3d 918, 913 N.Y.S.2d 644, 939 N.E.2d 810 (2010)).

32. Ferstendig, *supra* note 4, § 7.17[3], at 7-128 (citing *Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d at 374–75 ("The statute imposes no time limit for making such a motion [renewal] . . . [but] because the plaintiff's motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely.")).

33. CPLR 5704.

34. Siegel, *supra* note 1, § 254, at 450.

35. Ferstendig, *supra* note 4, § 7.17[3], at 7-123 (citing CPLR 5701(a) (2) (viii)).

36. Byer's Civil Motions, *supra* note 27, § 59:04 at 743 (citing *In re Alscot Inv. Corp. v. Incorp. Vill. of Rockville Ctr.*, 64 N.Y.2d 921, 922, 488 N.Y.S.2d 629, 629 (1985) ("[T]he law as it exists at the time a decision is rendered on appeal is controlling.")).

37. *Id.* § 59:05, at 744 (citing *Levitt v. County of Suffolk*, 166 A.D.2d 421, 422, 560 N.Y.S.2d 487, 488 (2d Dep't 1990) ("Although we are in agreement with the Supreme Court that a court of original jurisdiction may entertain a motion to renew or to vacate a prior order or judgment on the ground of newly discovered evidence even after an appellate court has affirmed the original order or judgment, we do not find that the plaintiff exercised due diligence in producing the 'new evidence.' Assuming, as the plaintiff contends, that he was not sufficiently recovered prior to July 1988 for his deposition to be taken, he has failed to proffer a sufficient explanation for the six-month postdeposition delay in seeking to vacate the prior judgment."); *Sciss v. Metal Polishers Union Local 8a*, 149 A.D.2d 318, 321, 539 N.Y.S.2d 899, 902 (1st Dep't 1989)).

38. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Glicksman v. Bd. of Educ./Cent. Sch. Bd. of Comsewogue Union Free Sch. Dist.*, 278 A.D.2d 364, 366, 717 N.Y.S.2d 373, 374–75 (2d Dep't 2000) ("The statute imposes no time limit for making such a [renewal] motion. However, there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments. None of the circumstances set forth in CPLR 5015 [newly discovered evidence], nor circumstances which would warrant the exercise of the court's inherent power to provide relief from a judgment are present here. Consequently, because the plaintiffs' motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely.")).

39. Byer's Civil Motions, *supra* note 27, § 59:05, at 745 (citing *Prude v. County of Erie*, 47 A.D.2d 111, 114, 364 N.Y.S.2d 643, 647 (4th Dep't 1975) ("[A]n appeal may be taken from a denial of a motion for leave to renew . . . . and a concurrent appeal from the original order upon a subsequent motion to renew may be dismissed as 'academic.' We conclude, therefore, that a motion to renew is not limited to the time within which an appeal may be taken."), *abrogated by McCarthy v. Volkswagen of America, Inc.*, 55 N.Y.2d 543, 450 N.Y.S.2d 457, 435 N.E.2d 1072 (1982)).

40. *Cf. Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d at 374–75.

41. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Koscinski v. St. Joseph's Med. Ctr.*, 47 A.D.3d 685, 686, 850 N.Y.S.2d 162, 163 (2d Dep't 2008) ("Although, as a general rule, an appellate court will not grant any affirmative relief to a non-appealing party, this principle does not bar a non-appealing defendant from seeking renewal of a cross motion to dismiss the complaint insofar as asserted against it based upon an appellate court's decision to grant dismissal of the complaint as to a codefendant.")).

42. Ferstendig, *supra* note 4, § 7.17[3] at 7-128 (citing *Koscinski*, 47 A.D.3d at 686, 850 N.Y.S.2d at 163).

43. *Id.*

44. *Id.*

45. *Id.*

46. Siegel, *supra* note 1, § 254, at 451 (citing *Koscinski*, 47 A.D.3d at 686, 850 N.Y.S.2d at 163).

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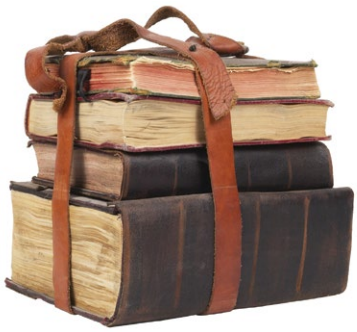

Drafting New York Civil-Litigation Documents: Part XXXVII — Motions to Reargue and Renew Continued

In the last issue, the *Legal Writer* continued the series on civil-litigation documents with motions to reargue and renew. The *Legal Writer* gave an overview of motions to reargue and renew and discussed motions to reargue in-depth. In this issue, we discuss motions to renew in-depth. Consult the last issue for information relevant to motions to renew.

The *Legal Writer* uses "original decision" to refer to the decision that prompts you to move to renew. It's the decision in which the court ruled against you. You're asking the court to reconsider it.

Motions to Renew

Some practitioners refer to a motion to renew as a motion to rehear.[1] Most practitioners call it a motion to renew.

Consult CPLR 2221(e) before moving to renew.

Basis for the Motion. In your motion to renew, you're asking the court to consider "new or additional proof not used the first time around [on your prior motion]."[2] Or, you may demonstrate that the law has changed and the new law would change the court's original determination.[3]

You must also provide a "reasonable justification for [your] failure to present such facts on the prior motion."[4]

Before the New York legislature amended CPLR 2221 in 1999, "a party was not always required to establish reasonable justification."[5] The 1999 amendment to CPLR 2221 "overrules . . . prior case law . . . . [A] showing of reasonable justification is [now] mandatory."[6]

Courts are divided on whether the evidence must be "newly discovered."[7] Before the 1999 amendment, courts had the discretion to grant a renewal motion even if the facts weren't newly discovered — "if the facts were available to the moving party at the time of the original motion."[8] Since the 1999 amendment, courts might not have the discretion to grant a motion to renew if the moving party had the facts available at the time of the original motion.[9]

The First Department gives a court "greater flexibility than the Second Department" on this issue: The First Department has granted motions to renew in the interest of justice even when the evidence wasn't newly discovered.[10] Although the First Department has given courts flexibility in deciding motions to renew, it hasn't entirely relaxed its position.[11]

The Second Department requires that you show a "reasonable justification" for not having presented the new facts on the original motion.[12] If the proof you introduce in your renewal motion was available to you when you moved on the original motion and you fail to offer an excuse, a court will likely deny your motion to renew.[13]

The Third and Fourth Departments acknowledge that courts have the discretion in the interests of justice to grant a motion to renew, but they require the movant to show a "reasonable justification" for not having offered the new evidence in its original motion.[14]

Regardless whether you practice in the First, Second, Third, or Fourth Departments, you have a better chance at winning your motion to renew if you can show "why the additional proof [you're] offer[ing] now was not discovered and offered before [on the original motion]."[15]

The new proof you seek to introduce with your renewal motion might be "facts contained in a document submitted on the original motion . . . [and the document] was rejected [by the court] for not being in admissible form."[16] The court might, for example, have rejected a document that wasn't properly notarized. For procedural errors like this, the outcome of your renewal motion will depend on whether you're in the First, Second, Third, or Fourth Department. The "First Department allows the trial court the discretion to grant renewal in the absence of prejudice, even where the original failure was due to the movant's mistake."[17] The Second Department has a more "rigid position . . . . denying [renewal motions] regardless of the lack of prejudice if the defendant fails to provide a reasonable justification for the defects in the documents originally submitted."[18] The Third Department has the same rule as the First Depart-

> Asserting new legal arguments in your motion to renew isn't a basis for the court to grant renewal.

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