NEW YORK STATE BAR ASSOCIATION

Journal

JUNE 2014
VOL. 86 | NO. 5

The New Employment Battleground

By Mary Noe

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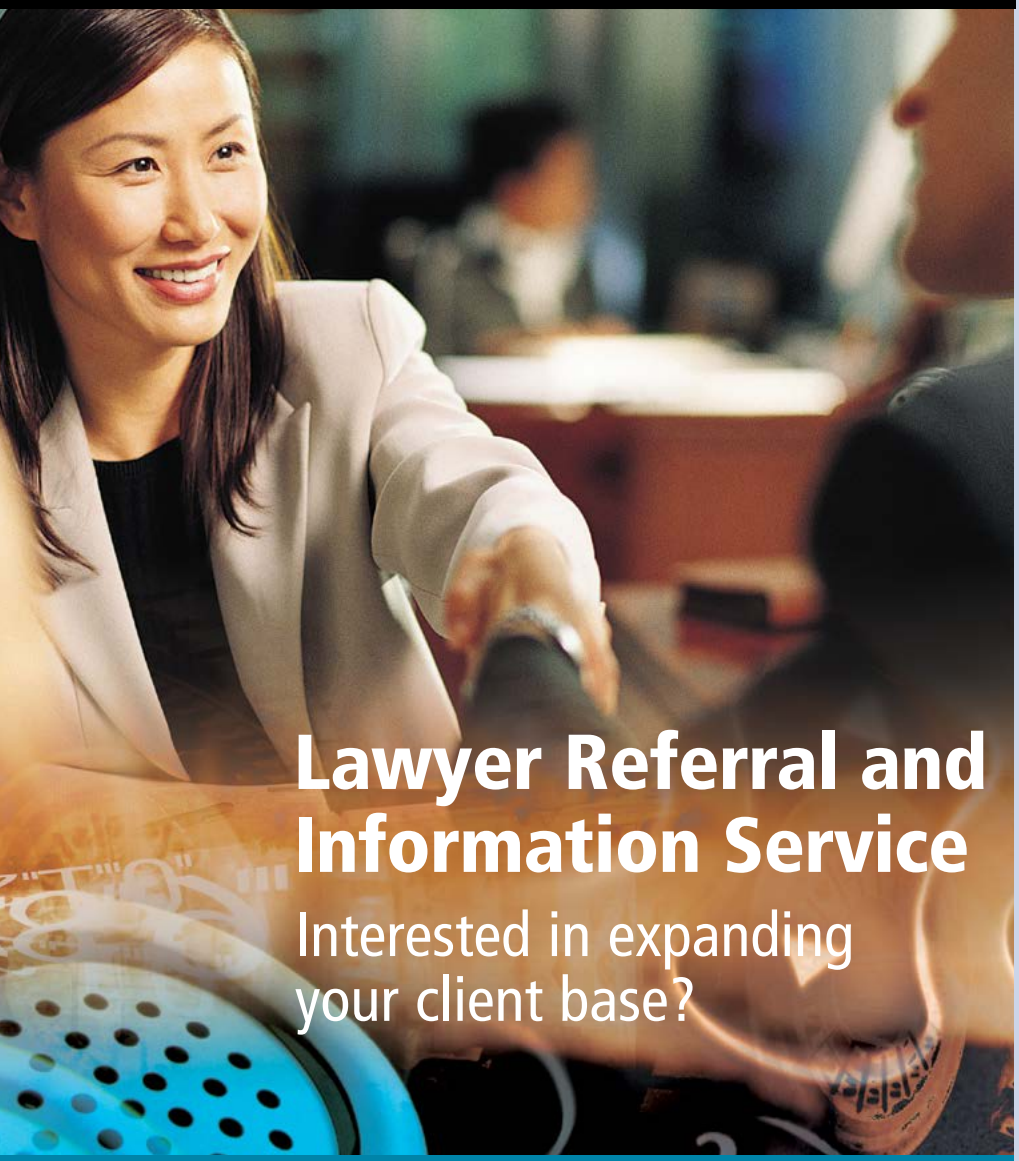

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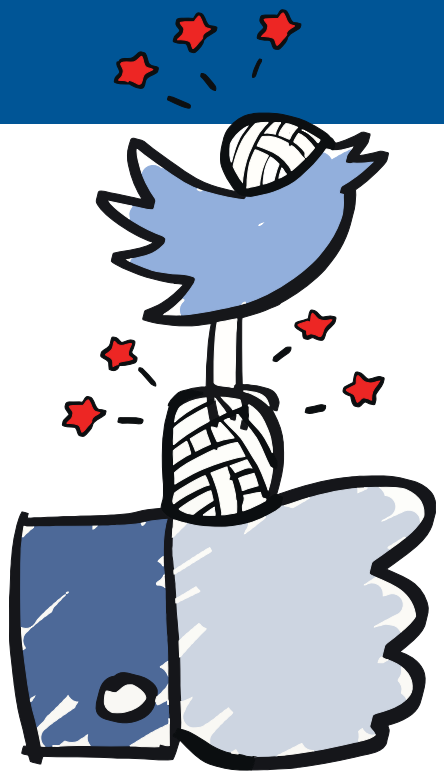

FACEBOOK — THE NEW EMPLOYMENT BATTLEGROUND

BY MARY NOE

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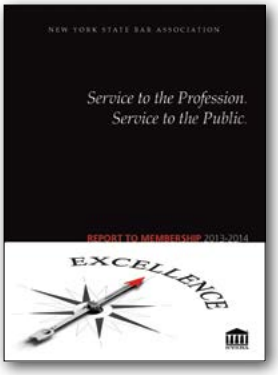

2013–2014 Report to the Membership

Special Pull-out Section

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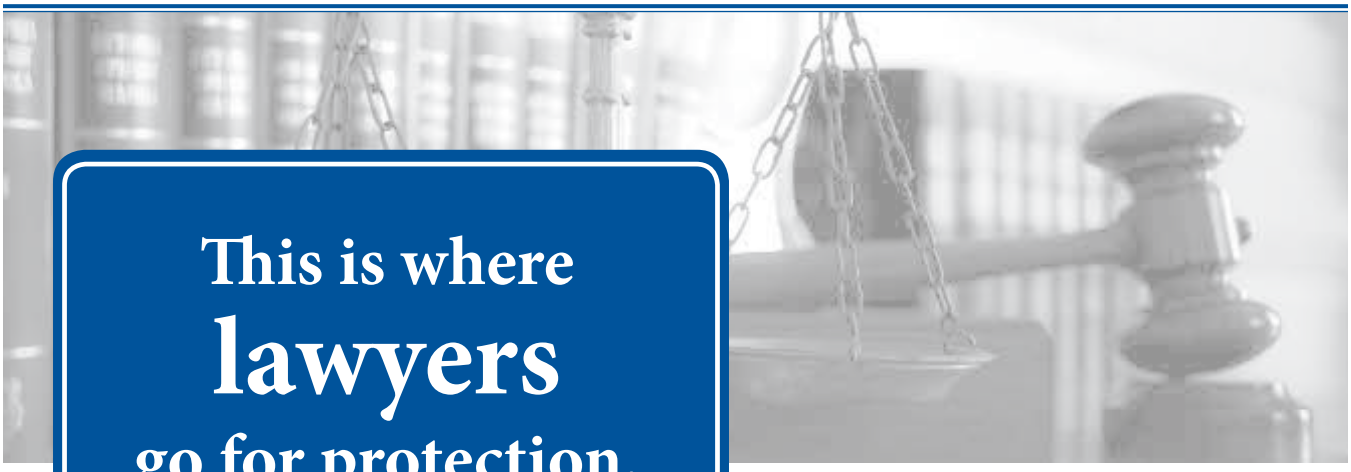

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GLENN LAU-KEE

Change and Continuity – A Question of Balance

The trailblazing attorney is one of our country's historic icons. Lawyers have often been at the forefront of change, through legal reforms, court decisions, challenges to the status quo, and lawsuits. Recently, we celebrated the anniversaries of two major legal landmarks that have had profound and lasting impacts on our society – the U.S. Supreme Court's 1954 *Brown v. Board of Education* decision and the passage of the Civil Rights Act of 1964. Each legal landmark was forged during times of tumult in our country. But today it is the legal profession itself that faces significant and far-reaching change. And, as innovative as lawyers can be on behalf of their clients, when it comes to their own professional lives, lawyers can be creatures of habit and slow to recognize profound shifts in the landscape.

Yet, the indicators are there. There's a sharp drop in law school applications, a diminished pool of legal jobs and an average six-figure debt from law school. Emerging from the recession, corporate executives have increased their focus on costs, pushing back on law firms' bills, refusing to pay for what they view as the practical legal education of new associates fresh out of law school. The business climate is increasingly complex, global and technology-based. Lawyers are facing new competition from non-traditional vendors or seeing work outsourced overseas at a fraction of the domestic cost. New technologies can feel outdated in a nanosecond, but embracing technology has become essential for lawyers to keep pace with the information they need and with their clients' increased expectations – including for almost instant response, 24/7. Clients *want* more but are *willing* to pay less.

These trends have sparked a lively debate both inside and outside of the profession. What must change and how? What should remain the same? What will our legal profession look like in five years?

Should one harbor any doubts that change we must, I offer, as Exhibit A, the June 2013 layoffs at New York's Weil, Gotshal & Manges, numbering 60 associates and 110 support staff members, and partner compensation cuts. Or, Exhibit B, the 2012 bankruptcy of global law firm Dewey & LeBoeuf, a firm that had carried significant debt while employing more than 1,000 attorneys in 26 offices worldwide. Or, Exhibit C, today's young lawyer starting out with a level of fear and uncertainty about entering into this profession.

What is not up for debate is that staying still is not an option. As Albert Einstein said, "life is like riding a bicycle. To keep your balance, you must keep moving."

The core of our role here at the New York State Bar Association is one of stewardship, on behalf of our 75,000 members and on behalf of the legal profession. Our response to upheavals in our profession must be to ensure that the Association is best positioned and organized to provide the greatest benefit to the profession and to the public. But any changes must always be guided by a clear sense of our objectives, grounded in the advancement of professional values. And any changes, to be effective, must be done with thought, discipline, the willingness to question long-held assumptions and the willingness to evaluate results.

The word "crisis" has been used by scholars and practicing attorneys to describe the profession's current state. More than a crisis, I see a great opportunity for our profession to make meaningful changes. Our profession is strongly rooted in core values of assuring access to justice for all, maintaining an independent judiciary, maintaining a strong sense of ethics, giving service through pro bono and relying on the studied, incremental reasoning of stare decisis.

Glenn Lau-Kee can be reached at glau-kee@nysba.org.

PRESIDENT'S MESSAGE

The history of the legal profession, no less than the course of the law itself, has been a ceaseless process of discord and discovery, of gathering order here and deepening commotion there, of patterns emerging and dissolving as new ideas and practices nibble at the edges of old arrangements. It could hardly be otherwise. Law is the most permeable of disciplines, highly sensitive to shifts in behavior and ideas, intimately connected with every human activity. For most of their history, though, Anglo-American lawyers have been accustomed to experiencing those movements at a relatively leisurely pace. Despite having had nearly a century to get used to accelerating rates of social and economic change, we are still playing catch-up. . . . But one should not underestimate the resilience of the dynamic legal traditions of craft professionalism, constitutionalism, and practical reasoning. If we are hopeful, why should we not believe that the energies of those fertile traditions can be harnessed to the needs of a modern, diverse democratic republic? That task will not be accomplished by the sort of traditionalist who wishes to live in a world that no longer exists, or by the sort of innovator who begins with a clean slate and an empty head. What will count are sufficient numbers of lawyers who are knowledgeable enough to be at home in the law's normal science, imaginative enough to grasp the possibilities in the current situation, bold enough to explore them, and painstaking enough to work out the transitions a step at a time.

From: *A Nation Under Lawyers*
by Mary Ann Glendon, Learned Hand Professor of Law, Harvard Law School
(Farrar Straus & Giroux 1994)

The legal profession is not an add-water-and-mix industry. There is no one golden time, one single geographic location, or one or two giants that dominate the field. The legal profession is not a bubble that is going to burst. There will be no collapse. And as quickly and as significantly as things are changing, the core of our profession remains strong but flexible enough to embrace the change that is upon us. The legal profession stretches back to Aristotle and the founding fathers of our country, through William Seward, Secretary of State under President Abraham Lincoln; Robert H. Jackson, United States Attorney General and an Associate Justice of the United States Supreme Court; Richard J. Bartlett, New York's first Chief Administrative Judge; former Chief Judge Judith Kaye; Kenneth G. Standard, a leader in diversifying the legal profession; and the young law students whom we honored this year for their pro bono work on behalf of veterans.

Yet, in a changing world, we at the Bar Center must also change – again, doing nothing is not an option. Technology is, of course, the big disruptor. It has forced massive shifts in many of the traditional organizational models and means of communication. Realizing this, the Association has already enhanced its website and started online private communities that, we believe, will drive improved communication, collaboration and distribution of resources. We offer more digital products and research tools like Fastcase. We are also exploring the use of knowledge management frameworks to mine the rich lode of knowledge and information within our Association and our members, and to make these resources more widely available to members. Mindful of the complexities presented by new modes of communication, Sections of the Association are promulgating guidelines for attorneys on ethics and social media. And we continue to explore how to give our members the assistance they need on all aspects of technology. Keeping up to date requires substantial investment and full consideration of risks involved. We must do our best to make sure that these investments are made wisely.

Another major challenge facing the Association arises from the inexorable process of time – senior lawyers are retiring and newly admitted graduates are entering the profession. As always, irrespective of the professional values that bind us, the generation gap is alive and well. At a recent meeting of bar leaders from around the country, put together by the ABA, a young lawyer, appearing by video conference, told those assembled that the younger generation of lawyers is reaching out, but "you don't hear us!" At a convocation between the Association's Committee on Legal Education and Admission to the Bar and the New York State Judicial Institute, the moderator did not mince words, saying that if the profession does not find a way to inculcate the core professional values in law students and newly admitted lawyers, the days of the professional self-regulation are numbered. It is imperative that the Association find a way to engage and communicate with the younger lawyers.

My predecessor, Immediate Past President David Schraver, made "Educating Tomorrow's Lawyers" one of the topics of his Presidential Summit. As I continue the Association's efforts on pro bono, access to justice, legal reform and the work of our Sections and Committees, I will continue this critical initiative to involve and engage the younger generation of lawyers. We must do our best to understand the differences between the older and younger generations of lawyers, and then, we must work to connect them. To do so, the older generations of lawyers (of which I am one) must be prepared to shed our preconceptions of what drives the younger generation. A recent *New York Times* article that resonated with me noted that, contrary to the widely held belief that the younger generation is driven by self-interest, research shows that, in fact, most are driven by a desire to make a difference in the world. That sense of mission, shared by many of us in the older generations, is a firm foundation on which to bridge the generation gap that divides us.

Change must be balanced with continuity. Whatever the practice of law looks like five, 10, even 20 years down the road, the core values of our profession must be the constant that guides this change. ■

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June 2 Webcast (12:00 p.m. – 1:15 p.m.)
July 18 Albany (11:00 a.m. – 12:15 p.m.; live & webcast)

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

Practicing Entertainment Law in New York: What You Need to Know
(live & webcast)
June 5 New York City

Commercial Litigation Academy
(two-day program; 9:00 a.m. – 5:30 p.m.)
June 5–6 New York City

Discovery Proceedings for Trusts and Estates Practitioners
(9:00 a.m. – 1:00 p.m.)
June 5 Rochester; Westchester
June 11 New York City (live & webcast)

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

Matrimonial Trial Institute V: Trial of a Custody Case
June 6 Albany; Long Island
June 13 New York City (live & webcast)

Practical Skills: Debt Collection and Enforcement of Judgments
June 24 Westchester
June 25 Long Island
June 26 New York City; Syracuse
June 30 Albany (live & webcast)

Bridging the Gap
(two-day program)
July 14–15 New York City (live program)
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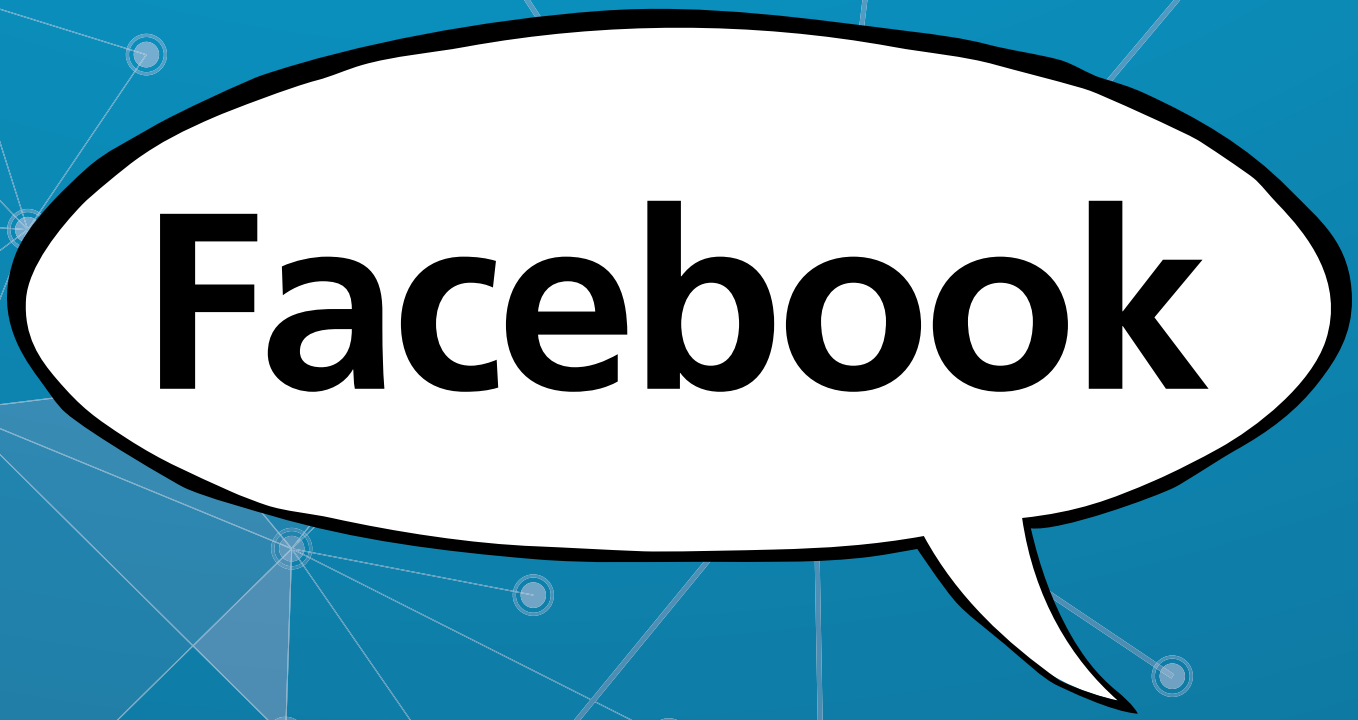
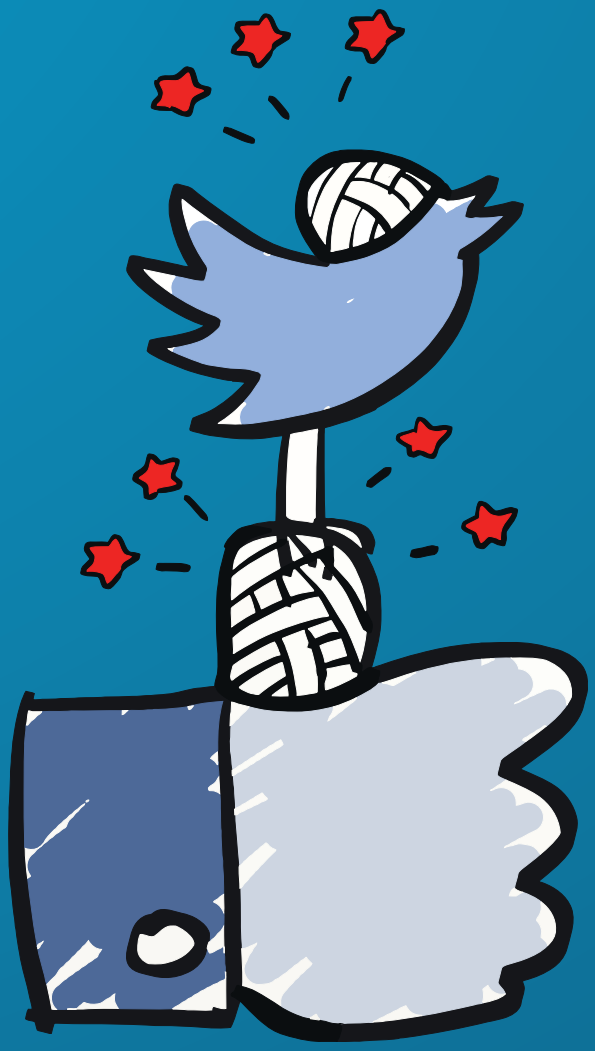


The New Employment Battleground

By Mary Noe



Mary Noe (noem@stjohns.edu) is an Associate Professor of Law, Division of Criminal Justice and Legal Studies, St. John's University. She has written articles on the topics of special education and social media for the *New York Law Journal* and the *N.Y. Litigator* (NYSBA). A *magna cum laude* graduate of Brooklyn College, she earned her law degree from St. John's University.

In June 2010, a New York City fifth grade teacher at P.S. 203 posted on her Facebook page the following:

"After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils [sic] spawn!" And, "Yes, I wld [sic] not throw a life jacket in for a million!!"[1]

The post was made one day after a student tragically drowned at a local area swimming pool.

Less than two years later, a Paterson, New Jersey, first-grade teacher posted on her Facebook page: "I'm not a teacher – I'm a warden for future criminals!" And, "They had a scared straight program in school – why couldn't [I] bring [first] graders?"[2]

The teachers probably thought only their "friends" would see the postings. But Facebook has over one billion active monthly users and those postings were republished by "friends" to a wider audience and became known to each teacher's school administration. Administrative proceedings charging the teachers with misconduct were commenced. Both teachers were terminated. On appeal, the New Jersey teacher's termination was upheld;[3] the New York teacher's job was reinstated.[4]

In both the public and private sectors, social media postings and text messages have become a battleground in litigation over employee firings. Employees have pushed back and claimed retaliations for exercising their constitutional rights of free speech, privacy and association.

This article will examine recent decisions regarding social media and texting in the employer-employee relationship.

The Public Employment Context

Facebook "Liking" as Speech in Public Sector Employment

Deputy Sheriff Daniel Ray Carter, an employee of the City of Hampton, Virginia, Sheriff's Office for more than 11 years, decided to support his boss's opponent for sheriff by "liking" his election Facebook page. Sheriff Roberts learned of Carter's postings on his opponent's campaign Facebook page and told Carter, "You made your bed, and now you're going to lie in it – after the election, you're gone."[5] In November 2011, Sheriff Roberts was reelected, and it came to pass that Carter and five other deputies were not reappointed.

Carter and others brought an action against Roberts alleging their "firing" was in retaliation for exercising their First Amendment right to free association and free speech, not their job performance. In the 11 years Carter worked for Sheriff Roberts, he had always received performance evaluations of "above average."[6]

In assessing retaliatory actions against governmental employers, courts balance a public employee's right to free speech against the government's interest of creating an efficient workplace environment. A public employee must establish that he or she "was speaking as a citizen upon a matter of public concern," rather than "as an employee about a personal matter of personal interest"; that "the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public"; and that "the employee's speech was a substantial factor in the employee's termination decision."[7]

In both the public and private sectors, social media postings and text messages have become a battleground in litigation over employee firings.

While the trial court did not challenge Carter's assertion that he could establish each of these required elements, it concluded that the act of moving a computer mouse over the Like icon on a Facebook page and clicking on it, without any other accompanying statement, was not speech and was not an expressive activity, and thus did not merit constitutional protection.[8]

The Court of Appeals disagreed. In that court's view, Carter's act of clicking the Like button sent out the announcement on the campaign page of the opposing candidate that Carter approved and endorsed his boss's electoral opponent. The same act of "liking" the opponent also caused that candidate's page to appear on Carter's timeline. The court concluded that Carter's "liking" of the candidate on Facebook was expressive activity and thus is considered speech within the meaning of the First Amendment.[9]

The reasoning of the federal appellate court seems unassailable. The act of "liking" is not materially different than holding up a photograph of a candidate at a campaign rally, wearing a colored arm band, making a rude hand gesture or placing a campaign sign in front of a house, all of which are expressive activities.

Search and Seizure and a Public Employee's Texts on Personal Matters

The city of Ontario, California, purchased text messaging pagers for its police SWAT team to send and receive text messages while on the job, in order to provide immediate communication among the team members during emergencies. The city informed the officers of its right to monitor the messages and notified the officers that they should have no expectation of privacy. Then the city had all team members review and sign the city's policy on the use of pagers, again placing them on notice that they, as individuals, should have no expectation of privacy in messages sent or received.[10] This information was repeated at a meeting and circulated in a memorandum sent to all personnel with pagers, including Jeff Quon, a sergeant on the police SWAT team. The city did from time to time review utilization of text messaging and required officers to reimburse the city for overages. It was not the practice of the city to review the content of messages, even when there was an overage.

Sergeant Quon routinely exceeded his allotted texts and reimbursed the city for the overage fees. The police chief began an audit to determine whether the pagers were being used for "on duty" or "off duty" purposes. Quon's pager was one of two with the highest usage. The chief requested the service provider to submit transcripts of Quon's pager-texts and the provider complied. The transcript revealed messages from Quon's wife and his mistress – some sexually explicit. The chief determined

that some of these texts occurred while Quon was "on duty" and forwarded the information to Internal Affairs for further investigation.

Internal Affairs redacted all Quon's texts made when he was "off duty." The Internal Affairs chief stated that the primary purpose of the investigation was to determine if the contract limits with the service provider were appropriate. No action was taken against Quon.

Quon, however, brought an action against the city and the service provider for, among other things, a violation of his Fourth Amendment protection against the unreasonable search and seizure of the content of his messages. Despite the city's notifying the members of the team that they would have no expectation of privacy in their text messages, the trial court determined that Quon had a reasonable expectation of privacy, based on the city's unofficial policy of permitting officers to pay for overages.

As to Quon's claim of a violation of the Fourth Amendment, the court decided that if the purpose of the audit was to determine if there was improper use of the pager while "on duty," then the city violated Quon's Fourth Amendment rights. If, however, the audit's purpose was to determine whether the contract limits for the pagers were appropriate, then no violation occurred. The jury found no violation. There was no liability for the search.

On appeal, the Court of Appeals examined the reasonableness of the search by looking at the totality of the circumstances and "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests."[11]

The court held that the city's users of text messaging had a reasonable expectation of privacy in the content of their messages. It disagreed, however, with the trial court as to the reasonableness of the search, determining that the search was unreasonable because the information could have been ascertained by less intrusive means.

The U.S. Supreme Court concluded that Quon had a reasonable expectation of privacy.[12] The city's review of the content of the text messages constituted a search within the meaning of the Fourth Amendment. However, the Court concluded that because the search was motivated by a legitimate work-related purpose and was not excessive in scope, the search was reasonable. An employer's right to intrude on an employee "for non-investigatory, work-related purposes, as well as for investigations for work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."[13]

The Court's opinion recognized government employers' and employees' difficulties with social media and provided no bright-line rule but rather signaled that decisions should be made on the totality of circumstances presented in the particular case. The Court opined about the future of the technology and employer and employee relations.

> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . [T]he Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.[14]

The Private Employment Context

The Hot Dog Postings[15]

A car dealership in Lake Bluff, Illinois, planned to roll out the new, redesigned BMW at a grand sales event. The manager told the sales staff that arrangements had been made to offer free hot dogs to visitors. The salespeople voiced their disapproval of the manager's meager offering. The manager responded, in essence, that the event was about selling cars and not about food. Salesperson Robert Becker would later describe his reaction to the manager's plan by comparing a high-end BMW to a fine restaurant but one in which the waiter brings a Happy Meal to the table.

Becker took photos, and five days after the event, he posted them on Facebook under the heading "BMW 2011 5 Series Soiree." He wrote, "I was happy to see that [the manager] went 'All Out' for the most important launch of a new BMW in years. . . . The small 8 oz. bags of chips, and the $2.00 cookie plate . . . the semi fresh apples and oranges were a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a[n] over cooked wiener and a stale bunn. . . ." Becker posted a picture of a salesperson with a hot dog and pictures of the snack table. Becker had approximately 95 Facebook "friends," 15 of whom were also BMW employees. By the very next day, the manager had been given copies of Becker's Facebook postings regarding the sales event. When asked about the postings, Becker responded that his Facebook pages and "friends" were "none of your business." The manager claimed he had received calls from other dealers and that Becker had embarrassed management and co-workers. Becker was told to hand in the key to his desk. After the meeting Becker called the manager and apologized. Six days later, Becker was fired. Becker was terminated because he had made negative comments about the company in a public forum.

Salespeople in the BMW dealership were not members of a union. Yet a complaint was filed by the National Labor Relations Board (NLRB) alleging that Becker's termination was an unfair labor practice. The NLRB further asserted that clauses in the dealership's employee handbook violated the National Labor Relations Act (NLRA) by interfering with, restraining, or coercing employees in the exercise of their labor rights.[16]

Here, the NLRB urged that in firing Becker for his Facebook postings, the employer had interfered with "concerted activities" on the part of its employees "for the purpose of collective bargaining or other mutual aid or protection."[17]

The case proceeded before an Administrative Law Judge (ALJ) who found that the dealership did not fire Becker because of his Facebook postings about the BMW sales event but because of another unflattering Facebook posting, which was unrelated to the event.[18] The ALJ noted that he would have found an unfair labor practice to have been proven if the sales event postings had been the cause of the termination. The ALJ suggested that the hot dog postings were really about the impact the manager's perceived poor food choices had on the salespeople's ability to sell cars. Becker was merely communicating his frustration with his employer's actions and the resulting negative impact on sales to Becker's fellow employees. This, the ALJ viewed, as "concerted activity."

The ALJ also reviewed the dealership's employee handbook to determine if it violated the NLRA. The handbook prohibited employees from participating in interviews or answering inquiries from the press concerning the dealerships or its current or former employees. The ALJ found this would reasonably tend to chill employees in the exercise of their Section 7 right to communicate with the media regarding a labor dispute and was therefore unlawful.[19]

Other passages in the handbook were, in the ALJ's view, also in violation of Section 7. Specifically, he took issue with the handbook's statements that "[a] bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers" and "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of Dealership."

The dealership rescinded certain paragraphs from the handbook prior to the hearing; however, that did not satisfy the ALJ, who concluded that the employer should have explained to the employees that it would not interfere with their Section 7 rights in the future.

Harassment Through Social Media Postings

Hispanics United of Buffalo, Inc. was a non-union, not-for-profit employer providing social services to the economically disadvantaged. Its employee handbook had a "zero tolerance" policy toward harassment of one employee by another.[20]

One employee texted and spoke to another employee, criticizing the work of five of their co-workers. The first employee told her confidante that she intended to report the five co-workers, whom she had criticized to the executive director. The second employee shared the first employee's emails with the five co-workers. The five offended co-employees chastised the first employee on Facebook. All postings were made on the employees' personal computers. The employer learned of the Facebook postings and fired the five employees because their actions were in violation of the employee harassment policy.

Charged with an unfair labor practice, the employer defended its right to fire these non-union employees because they were not "trying to change their working conditions and . . . did not communicate their concerns to [the employer]."

The ALJ did not agree and found that the employer violated Section 7 in firing the employees. "Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 8(a)(1)." After reading the Facebook postings, the ALJ found no harassment of the original employee-critic who set the controversy in motion and no violation of the zero tolerance or discrimination policies.

The ALJ concluded that the Facebook postings by the five who were criticized about their job performance were protected activity. The postings were a concerted activity and hence a firing for the activity was an unfair labor practice. In the words of the ALJ, the five employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe [the first employee-critic] was going to make to management."

The two ALJ decisions signal a potentially vast expansion of the jurisdiction of the NLRB, premised upon social network postings as the functional equivalent of a gripe session among a group of disgruntled employees endeavoring to decide upon the next step to take collectively. Employers who never dreamed that their non-union businesses fell within the NLRA may find themselves answering charges of unfair labor practices. Employees may find an unexpected ally in employment disputes.[21]

Conclusion

The American Law Institute (ALI) has decided to weigh in on social media postings in the employment arena. The draft Restatement of Laws on Employment Law suggests that courts should recognize a cause of action for the tort of wrongful employer intrusion upon a protected employee privacy interest.

Forty-one states have adopted a common law right to privacy,[22] as well as the tort of intrusion upon seclusion as defined in Section 652B of the Restatement (Second) of Torts (1977).[23] But the confines of privacy in the employment context have been poorly defined and poorly understood. An employer has been thought to have a legitimate interest in the character and fitness of the people it hires. Employers can be civilly liable to others for negligent hiring or supervision of employees who go on to engage in wrongful conduct. The draft Restatement urges that

liability be imposed upon an employer for the wrongful intrusion upon an employee's protected privacy interest unless there is a legitimate business interest of the employer.

Chatter around the proverbial office water cooler has been replaced by social media postings chiseled in kilobytes with a semi-permanent life to them. Social media postings may provide employers with information of legitimate interest, such as whether an employee is affirmatively aiding the interests of a competitor, as well as information which is widely viewed as irrelevant to the employer's business, such as an employee's position on controversial social or political issues. Whether an employer is the local sheriff, the principal of a school or a car dealer, all employers have an interest in protecting the goodwill of their establishment and the allegiance of the employee. But employees are entitled to a private life – a zone of privacy into which the employer may not intrude. The stakes are high for both sides, because a single employee can damage a business by defamatory postings viewable by a large population, and an employer can damage an employee's life by an unwarranted termination for nothing more than free expression of ideas on issues of little relevance to the business.

Welcome to the new battleground. This is just the beginning. ■

> Employers who never dreamed that their non-union businesses fell within the NLRA may find themselves answering charges of unfair labor practices.

1. *Dep't of Educ. of the City of N.Y. v. Rubino*, N.Y.S. Educ. Dep't, SED file 17,116 (June 6, 2011), www.parentadvocates.org/nicemedia/documents/Lowitt_second_decision.pdf (June 22, 2012).

2. *O'Brien, Sch. Dist. of the City of Paterson*, OAL Docket. No. edu 05600-11-1, Agency Ref. No. 108-5/11 (Oct. 28, 2011), njlaw.rutgers.edu/collections/oal/html/initial/edu05600-11_1.html.

3. *O'Brien, School Dist. of the City of Paterson*, 2013 WL 132508 (Passaic Co., N.J. 2013).

4. *Rubino v. N.Y. City Dep't of Educ.*, 34 Misc. 3d 1220(A), 950 N.Y.S.2d 494 (N.Y. Co., Feb. 1, 2012), *aff'd*, *Rubino v. City of N.Y.*, 106 A.D.3d 439 (1st Dep't 2013).

5. *Bland v. Roberts*, 730 F.3d 368, 381 (4th Cir. 2013).

6. *Id.* at 382.

7. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

8. *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012).

9. *Bland*, 730 F.3d 368.

10. *Quon v. Arch Wireless*, 445 F. Supp. 2d 1116, 1123 (C.D. Cal. 2006), quoting the city's policy:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
>
> D. Access to the Internet and the e-mail system is not confidential; and Information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

11. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 903 (9th Cir. 2008) (quoting *U.S. v. Knights*, 534 U.S. 112, 118–19 (2001)).

12. *City of Ontario v. Quon*, 560 U.S. 746 (2010).

13. *Id.* at 747.

14. *Id.* at 759.

15. NLRB Case No. 13-CA-46452 (2011).

16. *Id.* at p. 11. The authority of the NLRB in non-union employment settings comes from Section 8(a)(1) of the NLRA which provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7, that is, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 158(a)(1), NLRA § 8(a)(1).

17. *Id.* at 8.

18. *Id.* at 9. The manager also owned a Land Rover dealership. A salesperson at the Land Rover dealership allowed a potential customer's 13-year-old son to sit in the driver's seat. The 13-year-old stepped on the gas and drove into a pond. Becker posted a photo of the incident on his Facebook page along with the photos of the hot dog event.

19. *Id.* at 10 (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1978)).

20. *Hispanics United of Buffalo*, NLRB Case 03-CA-027872 (2012), at 10:

> Hispanics United of Buffalo will not tolerate any form of harassment, joking remarks or other abusive conduct (including verbal, nonverbal, or physical conduct) that demeans or shows hostility toward an individual because of his/her race, color, sex, religion, national origin, age, disability, veteran status or other prohibited basis that creates an intimidating, hostile or offensive work environment, unreasonably interferes with an individual's work performance or otherwise adversely affects an individual's employment opportunity.

21. NLRB Case No. 3-CA-27872.

22. Forty-one states and Washington, D.C., recognize tort. Some states recognize the tort within the employment context: Five states – Hawaii, Massachusetts, Nebraska, Rhode Island and Wisconsin – have not adopted the tort but have constitutional privacy protections that include or mirror the intrusion upon seclusion tort. R. Gen. Law 9-1-28.1(a)(1); Neb. Rev. Stat. 20-203; Wis. Stat. Ann. 995.50(2)(a); Art. I, § 6 of the Hawaii Constitution; Mass. Gen. Laws 214. 1B. Four states – New York, North Dakota, Virginia and Wyoming – have not provided for liability for intrusion upon seclusion. New York has a right to privacy, which protects the right of publicity, rather than privacy (N.Y. Civil Rights Law § 50).

23. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B.

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 25 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the 2008 and forthcoming 2014 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches *inter alia*, New York Practice at Columbia Law School and Brooklyn Law School. He serves on the Office of Court Administration's Civil Practice Advisory Committee, as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

"Heaven?" (Part 1)

Late for Court (Again)

As usual, I was running a little late for court. As I flashed my Secure Pass at the court officer at the courthouse entrance, I asked where the new Differentiated Case Management Preliminary Conference & Centralized Compliance Conference Part (DCMPC&CCCP) was located. As I trotted toward the elevator, I heard the officer say, "Room 503."

The elevator doors were closing, so I thrust my briefcase between them and, when the doors re-opened, pushed my way inside. I found myself face to face with my colleague, Chris, one of two adversaries on my case that morning. "Do you know what room DCMPC&CCCP is in?" Chris asked. "503," I said as I confidently hit the button for the fifth floor. "That's a new one for me," Chris said. "Me too," I replied.

Room 503

When Chris and I opened the door to Room 503, I immediately felt a strange sensation. While I had trouble putting my finger on what was different, Room 503 was clearly not like the other courtrooms I had appeared in. It seemed brighter, and cleaner. The benches in the gallery all had cushions, and all of the cushions matched. Assorted conference forms were arranged in neat stacks on a conference table near the door, and the room was filled with the soft, respectful murmur of many voices.

There appeared to be an unusually large number of court personnel present, and the judge was on the bench, engaged in a lively, thoughtful give-and-take with the attorneys appearing before her.

Following the normal custom, I immediately called out the name of my case, "*Smith v. Jones*." The room went silent. Instead of a desultory wave or nod from the other attorneys, every face in the room stared at me with the look opera patrons give a persistent cougher. The look the court officer gave me was cause for concern. After what seemed an eternity, the subdued murmurings resumed. I turned to Chris, quipping nervously: "We're not in Kansas, anymore."

Chris and I sat on one of the benches, and I took in my surroundings. Everything was familiar, yet different. I looked more closely at the other attorneys. All were dressed as though they were on a photo shoot for a Paul Stuart or Ralph Lauren magazine ad. All were fit and tanned – they even smelled good. I felt oddly out of place. I turned to Chris: "We better see if they do a calendar call or if we just check in when all sides are present."

We asked the part clerk what we should do. She asked the name of our case. I told her, she scanned her printout, and said, "Your case isn't on in this part." "Isn't this DCMPC&CCCP?" I asked. "No," she replied, and said to the court officer, "These guys are looking for DCMPC&CCCP."

Before I knew what was happening, I felt a strong grip on my right arm. "Come with me," the court officer said, leading Chris and me to and then through the courtroom door. "DCMPC&CCCP is in Room 053." Just before the door shut, I echoed the question John Kinsella asks his son Ray in *Field of Dreams*: "Is this heaven?" "No," the officer replied, "it's the Commercial Division." As the door closed, I said to Chris, "The Commercial Division? I could have sworn this was heaven." Chris and I rode the rest of the way in silence down to the basement, to Room 053 and DCMPC&CCCP.

The Rules of the Commercial Division

As luck would have it, I soon had an opportunity to return to Room 503. A commercial matter came into the office where the plaintiff was suing my client on a $30,000 commercial loan. I knew that the Commercial Division had its own set of rules and, excited at the prospect of practicing in that courtroom, I resolved to learn as much as I could about the court and its rules.

Monetary Thresholds and Jurisdiction for Commercial Cases

The Commercial Division Rules are set forth in 22 N.Y.C.R.R. § 202.70; they are available on the OCA website.[1] The first thing I learned was that not every county has a Commercial Division, and those that do have different monetary thresholds:

> Monetary thresholds
>
> Except as set forth in subdivision (b), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interests, costs,

disbursements and counsel fees claimed, are established as follows:

Albany County $25,000

Eighth Judicial District $50,000

Kings County $75,000

Nassau County $100,000

New York County $500,000

Onondaga County $25,000

Queens County $50,000

Seventh Judicial District $25,000

Suffolk County $50,000

Westchester County $100,000

Since the damages claimed in my case exceeded the $25,000 monetary threshold in the county where the action was venued, I next consulted 22 N.Y.C.R.R. § 202.70(b) to determine whether the claim was one properly brought in the Commercial Division and found that it was:

(b) Commercial cases

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:

* * *

(6) Business transactions involving or arising out of dealings with commercial banks and other financial institutions; . . .[2]

Knowing that the case was properly placed in the Commercial Division, I checked to see if there were special rules for Preliminary Conferences.

Preliminary Conferences

I located and consulted Rule 8:[3]

(g) Rules of practice for the Commercial Division

Rule 8. Consultation prior to Preliminary and Compliance Conferences

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference, including the timing and scope of expert disclosure under Rule 13(c); and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) identification of potentially relevant types or categories of electronically stored information ("ESI") and the relevant time frame; (ii) disclosure of the applications and manner in which the ESI is maintained; (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) identification, redaction, labeling, and logging of privileged or confidential ESI; (viii) claw-back or other provisions for privileged or protected ESI; (ix) the scope or method for searching and reviewing ESI; (x) the anticipated cost and burden of data recovery and proposed initial allocation of such costs; and (xi) designation of experts.

Right off the bat, I noticed differences from the non-commercial, that is, "regular" Preliminary Conference Rules.[4] Although parties in a non-commercial case are permitted to agree upon an order in advance of the conference and submit it to be "so ordered," in which case the conference would be cancelled, there is no requirement, as in the Commercial Division's Rule 8(a), to "consult prior to a preliminary or compliance conference about . . . resolution of the case, . . . discovery and any other issues . . . and . . . the use of alternate dispute resolution." Nor is there a requirement to "confer with regard to anticipated electronic discovery issues" prior to the conference.

The requirement to confer with my adversary prior to the conference seemed useful, akin to the "meet and confer" requirement in federal court. I searched online for a sample of a form used in a Commercial Division case and stumbled upon the Division's "new" Preliminary Conference. Use of the new form was adopted May 2, 2014, and went into effect on June 2, 2014. Good thing I checked.

Preliminary Conference Form

The Preliminary Conference form is 11 pages long and begins with appearances of counsel. The next section, titled "Confidentiality Order," states that "most cases in the Commercial Division involve facts that are highly sensitive. In such cases, the court, in order to proceed to proper discovery, orders the parties to enter into a Confidentiality Agreement which the court will 'so order.'" The order "recommends" a form confidentially order promulgated by the New York City Bar and directs that if the "parties need to change" the form, the parties are to submit proposed changes for the court to review.

Next is a section for a description of the action, followed by a summary of all parties' claims and defenses, along with amounts demanded. The order goes on to address bills of particulars, notices for discovery and inspection, interrogatories, depositions, and other discovery. Impleader actions are directed to be commenced within 15 days of the completion of depositions of enumerated parties.

Then, electronic disclosure is addressed. This section requires that the attorneys certify their participation in the "Meet and Confer" mandated in Rule 8(b), as well as that "they are sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery or to have brought someone to address these issues on their behalf."

Under the heading "Other Directives Concerning Electronic Discovery," the order requires identification of "relevant custodians for the computers/servers," identification of "relevant search terms," identification and redaction of privileged information and privilege logs, the insertion of claw back provisions for inadvertent disclosure, and a directive concerning costs of electronic disclosure:

> Each party shall bear its own costs of production pursuant to *U.S. Bank v. Greenpoint Mtge.* (citation omitted). In the event that cost shifting becomes an issue, the parties shall each write a letter to the Court of not more than three (3) pages outlining the problem prior to having the court help resolve the problem.

Finally, the section on electronic discovery requires identification of "issues concerning the scope and methods of preserving electronically stored information."

Page eight of the form order addresses an end date for fact disclosure, detailed provisions regarding expert exchange, and an end date for all discovery. Page nine includes the note of issue deadline, deadlines for dispositive motions, the scheduling of a Compliance Conference, and space for "Additional Directives."

Page 10,[5] where the judge signs the order, contains the following warning: "THE DATES SET FORTH HEREIN MAY NOT BE ADJOURNED EXCEPT WITH THE APPROVAL OF THE COURT."

Conclusion

After spending just a few minutes reviewing the rules of the Commercial Division, I realized that it was going to take serious research and preparation to successfully navigate in that court; in particular, I had to carefully review the portion of the form order dealing with experts.

On the same website where I found the new Preliminary Conference form, I saw a number of newly enacted rules, together with proposals for a number of additional new rules, all with public comment periods ending in late May and early June.[6]

Whether or not the Commercial Division is, to paraphrase John Kinsella, heaven for litigators, requires further study. In the next issue, I will share what else I learned. ■

1. http://www.nycourts.gov/rules/trialcourts/202.shtml#70.
2. 22 N.Y.C.R.R. § 202.70(b)(7).
3. 22 N.Y.C.R.R. § 202.70(g)(8), amended eff. Sept. 23, 2013.
4. 22 N.Y.C.R.R. § 202.12, amended eff. Sept. 23, 2013.
5. Page 11 is titled "ADDITIONAL PAGES," leaving nothing to chance.
6. http://www.nycourts.gov/rules/comments/index.shtml.

5 Ways to Lose Referral Fees; 10 Ways to Keep Them

By Patrick J. Higgins

Lawyers referring cases to other lawyers are part of a tradition as old as the bar. An equally old tradition is lawyers losing those referral fees.

Telling another lawyer that a client will be calling is a professional courtesy. It is not a referral agreement. To share a fee, the lawyers must agree to that, and do so in a way meeting the criteria of the New York Rules of Professional Conduct (New York's Model Rules) and supporting case law. The courts have made this clear. The question is, how can lawyers validly agree to share fees, and thereby ensure that their mutual client is best served without dispute?

The Law

New York statutory law recognizes that lawyers may share fees with other lawyers.[1] But lawyers cannot divide a fee with a lawyer who is not associated with the same law firm unless (1) the fee is in proportion to the services rendered by each lawyer *or* by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive.[2]

In the tort field, whether a fee is excessive is generally not in dispute. Personal injury and medical malpractice contingency fee agreements meeting the statutory requirements are not excessive.[3] Neither are court-approved infant or wrongful death settlements.

Rather, lawyers lose referral fees, or become entangled in referral fee disputes, in five historical ways. We discuss each below, and provide ten ways to avoid these scenarios.

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Scenario 1 – "I never agreed to share fees"

In this scenario, there is no express written fee-sharing agreement. The case settles. One lawyer claims an agreement to share fees, and the other denies it. These cases vary in result. They turn on evidence of an agreement in the writings between the lawyers, custom and practice, or parol evidence.

A case on point is *Mills v. Chauvin*.[4] The lawyers were former friends and business partners. The referring lawyer, Chauvin, sent a case over to Mills, who handled the case (the receiving lawyer). The case settled, and the referring lawyer claimed that the case was sent to Mills for him to handle on a *quantum meruit* basis. The receiving lawyer argued that he was entitled to one third of the fee, based on his agreement to that effect with Chauvin. The trial court and the appellate division found for the receiving lawyer. Emails between the lawyers clearly and concretely established their intent to share the fee as the receiving lawyer indicated, thereby forming a binding agreement.[5]

Sometimes custom and practice and parol evidence establish a fee-sharing agreement, as in *Carter v. Katz, Shandell, Katz & Erasmous*.[6] Mrs. Carter was the widow of the deceased referring lawyer Bernard Carter. He had referred a medical malpractice case to the defendant receiving firm on a 50% fee-sharing agreement. The dispute arose when he died, the case settled, and no fee issued to his estate.

Mrs. Carter sued the firm for the estate's 50% of the fee and won. The trial court found that (1) Bernard Carter had in the past referred 10 cases to the defendant firm and had received a 50% fee split on all of them; (2) the retainer statement filed with the Second Department listed Bernard Carter and the defendant lawyers as retained lawyers; and (3) Bernard Carter had worked jointly on the case with the defendant law firm. These factors unequivocally demonstrated that Bernard Carter had referred the case under a 50% fee-sharing agreement and that his estate was entitled to that share of the fee.

Scenario 2 – "You didn't do enough work or share responsibility"

The receiving lawyer argues that the referring lawyer only did 20% of the work, even though the referring lawyer was due 50% of the fee under the fee-sharing agreement. The receiving lawyer argues that the referring lawyer should receive a fee based on *quantum meruit*.

As between these lawyers, the law favors the referring lawyer. A written agreement between lawyers to divide legal fees is valid and will be enforced according to its terms, if the lawyer who seeks a share of the fee (generally the referring lawyer) contributed some work, labor or service toward earning the fee.[7] The courts will not inquire into the precise value of "some work";[8] therefore, the fee split need not be proportional to the work performed.[9] This is particularly true where the referring lawyer has not refused a request to contribute more substantially.[10] Thus, where a written fee-sharing agreement called for one third of the fee to the referring lawyer, and that lawyer performed 10% of the work on the case, the referring lawyer was entitled to the one-third fee share in the agreement.[11] The referring lawyer, however, must show that he or she did some work.[12]

Sometimes, the referring lawyer does not work on the case. In this instance, the lawyer still may share the fee according to the fee-sharing agreement if the lawyer has agreed to be jointly responsible to the client for the case, and the client has agreed to that.[13] Without this joint responsibility, the referring lawyer is doing nothing but recommending a lawyer and cannot share the case fee.[14]

A valid agreement to share fees precludes an action for *quantum meruit*.[15] However, if the referring lawyer does not work on the case, or share responsibility for it, the courts have voided such an agreement and set fees based on *quantum meruit*.[16]

Scenario 3 – "The fee-sharing agreement is void because it violates New York's Model Rules"

In this scenario, one lawyer resists sharing the fee because the fee-sharing agreement violates New York's Model Rules. If the dispute is only between lawyers, and does not impact the client, the courts frown on one lawyer wielding the ethics rules as a sword against a colleague. They look to see whether the client has been misled or deceived, and knows of – and has agreed to – the fee-sharing agreement.[17] If so, they are more likely to find that a lawyer resisting payment had freely agreed to be bound by the fee-sharing agreement and benefited from it.[18]

However, other cases hold that a fee-sharing agreement violating New York's Model Rules is unenforceable.[19] And the courts are not bound by fee-sharing agreements when setting fees in infant settlement or wrongful death cases – even if all lawyers agree on the sharing of fees.[20] Such agreements constitute only "non-mandatory guidance."[21]

Scenario 4 – "Your share of the fee is not calculated that way"

Sometimes, lawyers agree to share fees, but disagree on the fee. These disputes include whether the referring lawyer should also receive one third of the enhanced fee on a medical malpractice case,[22] whether the referring lawyer's one-third fee share should be reduced by the receiving lawyer's later fee-sharing agreement with another counsel,[23] and whether a successor lawyer was responsible for the fees of appellate counsel as part of the fee-sharing agreement.[24]

The courts have applied traditional contract principles to such issues. Specific, unambiguous language remains the coin of the realm. Thus, in *Samuel v. Druckman & Sinel*,[25] the Court of Appeals held that the referring law-

yer was entitled to one third of the entire legal fee in the case, just as the fee-sharing agreement said. This was so even though the receiving lawyer had retained another lawyer to help with *Frye* motions and to try the complex case, and the efforts of the receiving lawyer and his retained lawyer generated the enhanced fee.[26]

Scenario 5 – "Yes, we had a referral agreement, but you didn't refer this case"

In *Clark v. Vicinanzo*,[27] general practice attorney Clark referred a case to the firm of Vicinanzo and Wollman.[28] The case later settled, generating a $600,000 fee to that firm. Clark did not receive his referral fee and sued. Wollman answered the complaint and cross-claimed against Vicinanzo for 50% of the fee based on an oral fee-sharing agreement whereby Wollman would get salary and 50% of the fee for any work that he brought in.

Clark settled with Vicinanzo and Wollman. Wollman then tried his cross claim against Vicinanzo for 50% of the fee before a judge. The issue was not whether an enforceable fee-sharing agreement existed. Vicinanzo conceded that it did. Rather, the lawyers disagreed about whether Wollman had brought the case in to the firm. Vicinanzo said that while Wollman may have been involved peripherally, Vicinanzo brought the case in, so there was no referral and no 50% sharing of the fee.

The trial court ruled for Vicinanzo based on conflicting and contradictory evidence and self-serving statements by the parties.[29] The appellate division found no reason to disturb the finding of the trial court, which was best suited to observe and weigh the credibility of the lawyers.[30] This was a $300,000 lesson for Wollman, if he did refer the case to the firm, and an expensive lesson in legal fees and time for Vicinanzo if he didn't.

10 Ways to Avoid Disputing – or Losing – Referral Fees

No lawyer – or court – enjoys fee-sharing disputes and litigation. These disputes are best studied from afar. To ensure that vantage point:

1. Every fee-sharing agreement should be reduced to writing signed by the referring and receiving lawyer.
2. The fee-sharing agreement must set forth the specific percentage of the fee that each lawyer will receive.
3. The fee-sharing agreement should define the fee that will be shared, such as the entire fee recoverable in the action or, if less, words to that effect.
4. If the referring attorney is not going to work on the case, the fee-sharing agreement must state that the each lawyer assumes joint representation for the case.
5. The fee-sharing agreement should state that the client's fee for legal services will not be increased as a result of the fee and case sharing between lawyers.
6. The client must be advised in writing of the above, and execute a writing agreeing to the fee sharing.
7. For lawyers who must file retainer statements, the opening filed retainer statement should confirm that both lawyers will share the fee and set forth the percentages.
8. These written agreements should be executed when a fee-sharing agreement is executed.
9. If there is no fee-sharing agreement, this should be confirmed in writing so that the "referring" attorney understands this up front.
10. With in-house referrals such as in the *Clark* case above, the law firm should require that a written form for all such referrals be executed by the managing partner and the attorney bringing the case in. This form should be presented for signature when the case is first brought in. This will confirm that it is a referral pursuant to the existing fee-sharing agreement. If executed, that form should end disagreement as to whether a particular case qualifies or does not qualify as a referral. It will, of course, also bring that issue to a head at that time if the managing partner will not sign the form.

If the referring lawyer does not work on the case, or share responsibility for it, the courts have set fees based on *quantum meruit*.

These 10 points should prevent lawyers from losing referral fees and help them avoid Pyrrhic fee disputes with colleagues. It is better for the client, bench, and bar that the involved lawyers enjoy the successful client outcome they originally intended. ■

1. Judiciary Law § 491.
2. Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0) rule 1.5(g).
3. Judiciary Law § 474-a.
4. 103 A.D.3d 1041, 1047 (3d Dep't 2013); *see also Krug v. Offerman, Fallon Mahoney & Cassano*, 214 A.D.2d 889, 890–91 (3d Dep't 1995) (ruling on whether an agreement existed to share fees based on an of-counsel relationship to perform workers compensation services for an injured plaintiff represented by the defendant firm).
5. *Mills*, 103 A.D.3d at 1047–48.
6. 120 Misc. 2d 1009 (Sup. Ct., Queens Co. 1983).
7. *Oberman v. Reilly*, 66 A.D.2d 686, 687 (1st Dep't 1978), *lv. dismissed*, 48 N.Y.2d 602, 654 (1979); *Grasso v. Kubis*, 198 A.D.2d 811 (4th Dep't 1993).
8. *Samuel v. Druckman & Sinel, LLP*, 12 N.Y.3d 205, 210 (2009).

9. *Id.* at 210; *Mills* at 1048; *Nicholson v. Nason & Cohen*, 192 A.D.2d 473, 474 (1st Dep't 1993).

10. *Benjamin v. Koeppel*, 85 N.Y.2d 549, 556 (1995).

11. *Graham v. Corona Grp. Home*, 302 A.D.2d 358, 359 (2d Dep't 2003).

12. *A. Stanley Proner, P.C. v. Julien & Schlesinger*, 134 A.D.2d 182 (1st Dep't 1987).

13. *Samuel*, 12 N.Y.3d at 210.

14. *Nicholson*, 192 A.D.2d at 474.

15. *Oberman*, 66 A.D.2d at 687; *Jontow v. Jontow*, 34 A.D.2d 744, 745 (1st Dep't 1970).

16. *Calcagno v. Aidman*, 20 Misc. 3d 1132(A) (Sup. Ct., Richmond Co. 2008); *see also In re Levy*, 16 Misc. 3d 1106(A) (Sur. Ct., Nassau Co. 2007).

17. *Samuel*, 12 N.Y.3d at 210; *Benjamin*, 85 N.Y.2d at 556; *Mills*, 103 A.D.3d at 1047; *Reich v. Wolf & Fuhrman*, 36 A.D.3d 885, 886 (2d Dep't 2007); *Ballow Brasted O'Brien & Rusin, P.C. v. Logan*, 435 F.3d 235, 242–43 (2d Cir. 2006); *Weiser & Assoc. v. Anthony C. Donofrio & Assocs., P.C.*, 2009 N.Y. Slip Op. 31393(U) (Sup. Ct., N.Y. Co. 2009).

18. *Cook-Zwiebach v. Oziel*, 2011 N.Y. Slip Op. 52194(U) (Sup. Ct., N.Y. Co. 2011).

19. *Hirsch v. Bashian & Farber, LLP*, 79 A.D.3d 971, 972 (2d Dep't 2010); *Ford v. Albany Med. Ctr.*, 283 A.D.2d 843, 845–46 (3d Dep't 2001); *Law Offices of K.C. Okoli, P.C. v. Maduegbuna*, 2008 N.Y. Slip Op. 31142(U) (Sup. Ct., N.Y. Co. 2008). The rule violated in these cases was DR 2-107, which was in effect at the time.

20. *Wagner & Wagner, LLP v. Atkinson, Haskings, et al.*, 596 F.3d 84, 89–90 (2d Cir. 2010).

21. *Id.* at 90.

22. *Samuel*, 12 N.Y.3d at 208–10.

23. *Borgia v. City of N.Y.*, 259 A.D.2d 648 (2d Dep't 1999).

24. *Gair, Gair, & Conanson, P.C. v. Stier*, 123 A.D.2d 556, 557 (1st Dep't 1986).

25. 12 N.Y.3d at 210.

26. *Id.*

27. 151 A.D.2d 951, 953 (3d Dep't 1989).

28. This was apparently not a partnership (*see Clark*, 151 A.D.2d at 953, n.2).

29. *Id.* at 953.

30. *Id.*

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Scientific Proof

The Court's Role as Gatekeeper for Admitting Scientific Expert Testimony

By Hon. William J. Giacomo

The trial courts are entrusted with the duty of gatekeeper when reviewing the admissibility of scientific expert testimony. The intention is to eliminate junk science and ensure jurors only hear reliable expert testimony which will assist them in understanding key issues of fact presented at trial.[1] Over the years, case law has defined the trial court's "gatekeeper" role and outlined particularized standards for determining admissibility of scientific expert testimony at trial. This article will discuss the development of this standard of review. It will also examine the application of this standard in two notable and high-profile Florida cases – *State of Florida v. Casey Marie Anthony*[2] and *Sybers v. State*.[3]

Development of the Trial Court's Gatekeeper Role in Evaluating Scientific Expert Testimony

The 1911 case of *People v. Jennings*[4] was a case of first impression regarding the admissibility of expert testimony for fingerprint identification.[5] "*Jennings* paved the way for the introduction of expert testimony regarding fingerprint evidence in several states, including New York."[6] In *Jennings*, the state proffered four qualified expert witnesses in support of the prosecution in a murder case. The experts compared points of resemblance in photographs of the fingerprints found on the railing at the crime scene to Jennings' fingerprints. Based on this comparison, they opined that the fingerprints on the railing matched Jennings'.[7] In ruling the expert fingerprint identification was admissible evidence, that court compared fingerprints to photographs, x-rays, and evidence retained from a microscope – all of which are admissible evidence.[8] It found a "scientific basis for the system of finger print identification" and established the "general and common use" standard, holding that scientific expert testimony is admissible when it "is in such general and common use that the courts cannot refuse to take judicial cognizance of it."[9]

In the 1923 case of *Frye v. United States*,[10] the Court of Appeals of the District of Columbia established a "general acceptance" standard, which New York has adopted as its standard of review for scientific expert testimony. Frye appealed his second-degree murder conviction, alleging the trial court erred in precluding the testimony of his expert regarding results of a "deception test" (also known as a polygraph test), which measures rises in blood pressure.[11] Appellant argued that scientific experiments have demonstrated that blood pressure rises as a result of nervous impulses associated with conscious deception or falsehood, and that his deception test results (which lacked such rises) should have been admitted into evidence.[12]

The Court of Appeals upheld the lower court's ruling on the inadmissibility of expert testimony on the results of a deception or polygraph test. In so ruling, the court established a "general acceptance" standard of review for scientific expert testimony. It held:

> Somewhere in this twilight zone the evidential force of the [scientific] principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be *sufficiently established to have gained general acceptance in the particular field* in which it belongs.[13]

The court held that polygraph test results are inadmissible since such test "has not yet gained such standing and scientific recognition . . . as would justify the courts admitting [it as] expert testimony."[14] Critics believed the *Frye* standard imposed an unreasonably high standard of review for scientific expert testimony, which would prevent jurors from considering helpful information in determining the outcome of a case.[15] Nonetheless, courts used *Frye*'s "general acceptance" standard for evaluating scientific expert testimony throughout most of the 20th century.[16]

In 1975, the Federal Rules of Evidence were adopted. Rule 702, which specifically addresses the federal standard for the admissibility of expert testimony, states that a qualified expert may testify in the form of an opinion or otherwise when

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[17]

Rule 702 seemed to differ from *Frye* in that it shifted the focus of evaluating expert scientific evidence away from the scientific community and onto the judge and jurors as triers of fact.[18] Thus, the federal standard of review varied until the Supreme Court addressed the issue in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[19]

In *Daubert*, the plaintiff commenced a product liability case against the defendant, who marketed the drug Bendectin to pregnant women, including the plaintiff, to alleviate morning sickness. The plaintiff alleged the drug caused birth defects. The trial court precluded the plaintiff's scientific expert studies linking Bendectin to birth defects, holding that such studies did not meet *Frye*'s "general acceptance" standard.[20] The Supreme Court reversed, holding that "[t]he Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial."[21] The Supreme Court granted the trial court judge the duty of gatekeeper, "requiring trial courts to scrutinize the reliability of any expert evidence offered by the parties."[22] As a gatekeeper, the trial court judge must assure that the expert testimony derives from scientific knowledge, is "relevant to the task at hand," and "rests on a reliable foundation."[23] *Daubert* established four considerations for determining the admissibility of scientific expert testimony under Federal Rule of Evidence 702:

1. whether the theory or technique has been tested in the expert's community,
2. whether the theory or technique has been subject to peer review,
3. any potential rate of error,
4. whether the theory or technique is generally accepted in the expert's community.[24]

In *General Electric Co. v. Joiner*,[25] the U.S. Supreme Court addressed the issue of the proper standard of review by an appellate court in reviewing a trial court's determination on the admissibility of expert testimony. In this case, an electrician sued the manufacturer of polychlorinated biphenyls (PCB) after suffering liver cancer, allegedly caused by exposure to PCBs during the course of his employment. The trial court excluded the plaintiff's expert testimony regarding studies that infant mice subjected to massive doses of PCBs developed cancer.[26] On the appeal, the Court held that a "[t]rial judge's determinations regarding the admissibility of expert testimony were to be reviewed only for abuse of discretion."[27]

"In *Kumho Tire Co. v. Carmichael*, the [Supreme] Court further clarified the extent to which *Daubert*'s reliability standard applies to proffers of evidence under Rule 702."[28] The plaintiff commenced a product liability suit against a tire manufacturer and distributor after the plaintiff's car tire blew out, causing a fatal car accident. In applying the *Daubert* standard, the trial court excluded testimony from a tire failure analyst who concluded that the blown-out tire was the result of a manufacturer or design defect. The Eleventh Circuit reversed and remanded, stating *Daubert* applies only to *scientific* expert testimony (and not a tire failure analyst). In reversing the Eleventh Circuit, the Supreme Court held that the trial court properly applied the *Daubert* standard to the non-scientific expert, stating that "a judge's basic gatekeeping function applies to all expert testimony" and there should be no distinction between scientific knowledge and other knowledge.[29] The Court upheld the preclusion of the expert's testimony due to its unreliability and reasonably doubted methodology.[30] Therefore, under *Daubert*, *General Electric Co.*, and *Kumho Tires* rulings:

> [C]ourts are free to use a flexible approach for all expert testimony in analyzing whether the proffered testimony is reliable knowledge. Furthermore, the lower courts are insulated from rigorous review by the abuse of discretion standard, which is applied in all determinations of whether an expert should be allowed to testify.[31]

Is the Trial Court's Gatekeeper Role Foolproof or Can "Junk Science" Make Its Way Into the Courtroom?

The broad standard of review for admitting scientific expert testimony places a heavy burden on the trial court

to examine proffered scientific evidence and determine its reliability. This may result in admitting scientific testimony which is nonetheless unreliable or disputed in the scientific community. The court's role as gatekeeper has figured prominently in two high-profile Florida cases – *State of Florida v. Casey Marie Anthony*[32] and *Sybers v. State*.[33]

In the *Casey Anthony* trial, prosecutors argued that Anthony's daughter Caylee was poisoned with chloroform[34] and then suffocated when duct tape was placed over her mouth and nose. The girl's body was found in a field near the family home six months after she disappeared; her remains were too decomposed for an exact cause of death to be determined. The state offered Dr. Arpad Vass as an expert on the issue of the chemical makeup and odor analysis of decomposing human remains. The defense moved to exclude decomposition odor analysis (DOA) performed on a carpet sample taken from the trunk of a vehicle used by Ms. Anthony and any "testimony relating to any air, carpet samples, or paper towels" by Dr. Vass, claiming it was unreliable evidence.[35] Under the standard set forth in *Frye*, this was a case of first impression in the state of Florida, addressing the admissibility of DOA evidence. The court applied the *Frye* test to determine whether the scientific evidence was "sufficiently established to have gained general acceptance" in the scientific community.[36] The court admitted Dr. Vass as an expert and allowed him to testify regarding the odor of human decomposition in the carpet sample taken from the trunk, finding that Dr. Vass' extensive training and experience rendered his expert opinion on the odor emanating from the sealed carpet sample reliable and admissible.[37]

The court also admitted the DOA analysis evidencing early decomposition odors found in the carpet. Dr. Vass testified at the *Frye* hearing that a colleague, Dr. Marcus Wise, an analytical chemist, removed air from the carpet sample with a syringe and injected said air into a Gas Chromatography Mass Spectrometry (GC-MS) detector. He testified that the FBI lab as well as GC-MS expert and noted author Dr. Statheropoulos used GC-MS to determine the chemical compounds of human decomposition.[38] Interestingly, when asked by the defense if GC-MS was generally accepted in the scientific community as the instrument used to measure levels and specific compounds for human decomposition, he replied: "Well, I would say that GC-MS can do that, yes."[39] When pressed by the defense if it was generally accepted science, he simply stated, "Well, sorry, I just don't understand your question. To me it sounds like you're asking can the GC-MS determine if it's a human decomp product, and the answer is no. The GC-MS can be used and has been validated, and it is my opinion scientifically valid in order to identify compounds that can be associated with human decomposition."[40] The GC-MS results from the carpet sample found several varying peaks identified as chloroform, which Dr. Vass characterized as the "largest peak in any sample we have ever shot in the 20 years I've been at Oak Ridge."[41]

Dr. Vass also testified as to a second test he performed on the carpet sample, referred to as "cryotrapping,"[42] which also identified the existence of chloroform. On the basis of these test results, Dr. Vass opined that the amount of chloroform detected in the trunk material was 10,000 times greater that what would typically be expected.[43] Notably, however, he also testified that he detected butyric acid (which appears in the early stage of human decomposition), yet did not detect valeric acid and propionic acid (which would typically precede butyric acid in the human decomposition process).[44]

> The trial courts are entrusted with the duty of gatekeeper to eliminate junk science and ensure jurors only hear reliable expert testimony.

In admitting this testimony, the court held that GC-MS was "routinely accepted as evidence in courts throughout Florida."[45] It found that it was the "gold standard" test generally accepted in the scientific community to identify odors emanating from a decomposing human body, as testified to by both Dr. Vass and the defense expert, Dr. Kenneth Furton, and as demonstrated by Dr. Statheropoulos' widely cited scholarly article.[46] The court held that the fact that Dr. Furton used the same GC-MS data and arrived at a different expert opinion than Dr. Vass[47] only presented an issue for the jury regarding the weight of the evidence as opposed to the admissibility of such evidence.[48]

The trial court's decision to admit the DOA analysis and Dr. Vass' observation regarding the odor was controversial. DOA analysis is in its infancy and opponents of its admissibility argue that it is premature to deem such analysis as generally accepted in the scientific community. As previously discussed herein, the *Frye* court unequivocally precluded scientific expert testimony that "has not yet gained such standing and scientific recognition . . . as would justify the courts admitting [it as] expert testimony."[49] Yet, after the *Frye* hearing, the trial court in the *Casey Anthony* case nonetheless admitted the novel DOA analysis.

Sybers v. State[50] concerned William Sybers, a medical examiner, who was convicted of the first-degree murder of his wife, allegedly by injecting her with two doses of

succinylmonocholine.[51] Immediately after his wife was found dead, instead of ordering an autopsy, Sybers had the body embalmed. Nine years later, the victim's body was exhumed and tested and evidence of succinylmonocholine was found in her embalmed tissues. Sybers was tried and convicted of her murder. Sybers appealed the conviction, arguing that "the trial court committed reversible error when it admitted, following a *Frye* hearing, expert testimony based on tests purportedly establishing the presence of succinylmonocholine in the victim's embalmed tissue nine years after the victim's death."[52] At the *Frye* hearing, Dr. Kevin Ballard, the state's expert, testified that he had developed a "unique" test known as the

> "bench procedure" for quaternary ammonium compounds in biological specimens which he used to test embalmed tissue from appellant's deceased wife for the presence of succinylcholine, . . . which is lethal in sufficient doses.
>
> . . .
>
> [H]e validated his methodology by using the "standard addition" method, which was generally accepted in the scientific community.[53]

The trial court admitted Dr. Ballard's expert testimony, finding that the individual steps used by Dr. Ballard to validate his methodology were generally accepted in the scientific community.[54] However, on appeal, the trial court's decision was reversed and the case was remanded for a new trial.[55] In its ruling, the appellate court stated that the *Frye* test is "designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound."[56] The court held:

> [The] State has failed to carry its burden of establishing by "independent and impartial proof" that the scientific principles underlying the testing, i.e., that an unstable compound like succinylmonocholine can be preserved in nine-year-old embalmed tissue and that it could come only from an injection of succinylcholine, are generally accepted in the relevant scientific community.[57]

This raises the question of whether the trial court in *Sybers* fulfilled its obligation as gatekeeper and adequately probed the witnesses to determine whether the state's expert testimony and testing methodology were reliable and "generally accepted" in the scientific community. The record shows that the defense in *Sybers* presented evidence to dispute the state's expert theory that succinylmonocholine can only be present in a human body by injection. In fact, one of the state's own experts, Marc LeBeau, Unit Chief Supervisory Chemist in the Toxicology Department of the FBI Laboratory, in Quantico, Va., acknowledged the possibility of such substance being present as a result of contamination or as a naturally occurring substance within the human body. He performed tests on a number of embalmed tissue samples that he knew did not contain succinylmonocholine to make sure that there were no outside contaminants and that succinylmonocholine was not a naturally occurring product in embalmed tissue.[58] Furthermore, the defense also offered expert testimony from Dr. Ashraf Mozayani (the chief toxicologist and laboratory director of the Houston, Texas medical examiner's office) and Dr. Graham Jones (the director of the medical examiner's toxicology laboratory in Edmonton, Alberta) to demonstrate the possibility that the succinylmonocholine detected in the victim's body was present by natural occurrence.

In *Sybers*, the trial court had to consider the reliability of the scientific expert testimony proffered for admission at trial. In addition to the reliability and general acceptance of the scientific testing methods, the court arguably should have given greater weight and consideration to the reliability and general acceptance of the validity of such test results when testing a body which was immediately embalmed and recovered for testing nine years later.[59] Sybers' defense experts, Dr. Mozayani and Dr. Jones, testified that Dr. Ballard's failure to validate his methodology was unsound, especially when he could have done so by testing other embalmed tissue specimens.[60] They also questioned Dr. Ballard and Mr. LeBeau's failure to publish their work detailing their methodology or subjecting it to peer review. They opined that "succinylmonocholine could not be detected within the tissues after two years when the tissues were embalmed 90 minutes after death and immediately preserved in a freezer."[61]

Collectively, this information before the trial court should, at the very least, have cast doubt on the reliability of Dr. Ballard's scientific test results given the condition of the subject body. In its ruling, the trial court simply stated that the state's expert satisfied the *Frye* test by proving that the individual steps of his testing methods were generally accepted by the scientific community without any consideration of these additional factors which could impact the reliability of such test results and might have rendered the test results unacceptable within the scientific community.[62]

Conclusion

The trial courts have been entrusted with the duty of being a gatekeeper with regard to the admissibility of scientific expert evidence. Case law and the enactment of Federal Rule of Evidence 702 have established the standard of review for trial courts to consider the admissibility of such evidence. The ultimate goal is to admit reliable and generally accepted scientific evidence that will assist a jury in understanding key issues at trial. Nevertheless, despite the substantial case law and Rule 702, it is not a foolproof or error-free standard. The *Casey Anthony* trial depicts how novel science of DOA or "air science" may result in the admissibility of potentially unreliable evidence which may later be refuted by further advance-

ments in science. Likewise, the *Sybers* case clearly depicts how one can be convicted based upon scientific expert theory that is later deemed unacceptable in the scientific community. Consequently, the role of a trial court as gatekeeper must not be taken lightly.

1. *See generally Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *see Castillo v. E.I. Du Pont DeNemours & Co. Inc.*, 854 So. 2d 1264, 1272–73 (Fla. 2003) (discussing *Frye*).

2. Case No. 48-2008-CF-15606-O (May 7, 2011 Order).

3. 841 So. 2d 532 (Fla. 1st DCA 2003).

4. 252 Ill. 534, 96 N.E. 1077 (1911).

5. Jessica M. Sombat, *Latent Justice: Daubert's Impact on the Evaluation of Fingerprint Identification Testimony*, 70 Fordham L. Rev. 2819, 2834 (2002) (Sombat).

6. *Id*. at 2833 (citing *People v. Roach*, 215 N.Y. 592 (N.Y. 1915)).

7. *Jennings*, 252 Ill. at 547–48.

8. *Id.*

9. *Id.* at 549.

10. *Frye*, 293 F. 1013.

11. *Id.* at 1013–14.

12. *Id.*

13. *Id*. at 1014 (emphasis added).

14. *Id.*

15. Edward K. Cheng and Albert H. Yoon, *Does Frye or Daubert Matter: A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471 (2005) (Cheng & Yoon) (citing Harvey Brown, *Eight Gates for Expert Witnesses*, 36 Hous. L. Rev. 743, 779 (1999) ("[T]he *Frye* test was criticized because the newness of a scientific theory does not necessarily reflect its unreliability, 'nose counting' of the scientific community could be difficult and unhelpful, and the standard delays the admissibility of new evidence simply because the scientific community has not had adequate time to accept the new theory.")).

16. *Id.* p. 476.

17. Fed. R. Evid. 702.

18. Sombat *supra* n. 5, p. 2838.

19. 509 U.S. 579 (1993).

20. *Id*. at 579.

21. *Id.*

22. Cheng & Yoon, *supra* n. 15, p. 477 (citing *Daubert*, 509 U.S. at 592–93).

23. *Daubert*, 509 U.S. at 580.

24. *Id*. at 591–96.

25. 522 U.S. 136 (1997).

26. *Id.*

27. Cheng & Yoon, *supra* n. 15, p. 477; *see also Joiner*, 522 U.S. at 142.

28. Cassandra H. Welch, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 Harvard J.L. & Pub. Pol'y 1085, 1089–90 (June 2006) (Welch), discussing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

29. *Id.* at 1090; see *Kumho Tire Co.*, 526 U.S. at 138.

30. *Kumho Tire Co.*, 526 U.S. at 139.

31. Welch, *supra* n. 28, pp. 1090–91.

32. Case No. 48-2008-CF-15606-O (May 7, 2011 Order).

33. 841 So. 2d 532 (Fla. Dist. Ct. App. 2003).

34. "Chloroform was once a widely used anesthetic. Its vapor depresses the central nervous system . . . , allowing a doctor to perform various otherwise painful procedures. . . . Some people use chloroform as a recreational drug or to commit suicide." (Wikipedia, the free encyclopedia, last modified February 26, 2013). Dr. Arpad Vass relied on the large concentration of chloroform which was far greater than what is typically seen in human decomposition to come to his conclusions.

35. *Casey Marie Anthony*, Case No. 48-2008-CF-15606-O.

36. *See Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923).

37. *Casey Marie Anthony*, Case No. 48-2008-CF-15606-O at 20.

38. *Id.* at 12.

39. *Id.*

40. *Id.*

41. *Id.* at 8–9.

42. "Cryotrapping" is a simple method for the identification of individual components in a gas mixture. (Wikipedia, the free encyclopedia).

43. *Casey Marie Anthony*, Case No. 48-2008-CF-15606-O at 8–9.

44. *Id.* at 9–10.

45. *Id.* at 17 (citing *State v. Sercey*, 825 So. 2d 959 (Fla. Dist. Ct. App. 2002)).

46. *Id.* at 17–18 (citing *Goebel v. Warner Transp.*, 612 N.W.2d 18, 22 (S.D. 2000)).

47. Dr. Furton opined "that odor signatures of human decomposition were not generally accepted in the scientific community and there are no scientifically valid methods capable of identifying the presence of human remains. . . . Unlike Dr. Furton, however, Dr. Vass opined that the compounds identified were associated with human decomposition." (*Id.* at 20).

48. *Id.* at 21.

49. *Frye*, 293 F. at 1014.

50. *Sybers v. State*, 841 So. 2d 532, 534 (Fla. Dist. Ct. App. 2003).

51. Gene Ostrovsky, *Succinylmonocholine, A Perfect Poison, Makes Appearance in the Dubai Killing*, http://www.medgadget.com (Mar. 9, 2010). Succinylmonocholine is a muscle relaxant known as the "perfect poison" due to its "small effective dose," "ease of administration," "rapid and definitive action," and "difficulty in detection by a forensics team."

52. *Sybers*, 841 So. 2d 532.

53. *Id.* at 535–36.

> Dr. Ballard testified . . . that he did not perform method validation on the victim's specimen samples, as that term was traditionally used, because it was impossible to do a true validation study on unique specimens. Method validation was intended for routine testing. Instead, he validated his methodology by using the "standard addition" method, which . . . involved taking a portion of a specimen and "spiking" it with the analyte of interest to show the capability of pulling that analyte out of the matrix. This was called the positive control. The standard addition method also involved the use of a negative control, i.e., a "blank" sample known not to have the analyte in it, to ensure against false positives.
>
> *Id.* at 535–36.

54. *Id.* at 540.

55. Sybers pled guilty to manslaughter and was sentenced to 10 years (eight years suspended), and was released on time served.

56. *Id.* at 542 (citing *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993); *Stokes v. Stokes*, 548 So. 2d 188, 193-193 (Fla. 1989)).

57. *Id.* at 543 (citing *Ramirez v. State,* 810 So. 2d 836, 844 (Fla. 2001)).

58. *Sybers*, 841 So. 2d at 537.

59. The appellate court found that the state did not carry its burden of proof that "an unstable compound like succinylmonocholine can be preserved in nine-year-old embalmed tissue and that it could come only from an injection of succinylcholine, are generally accepted in the relevant scientific community." *Id.* at 543.

60. *Id.* at 539.

61. *Id.* at 541.

62. The appellate court in *Sybers* reversed the trial court's conviction and remanded the matter for a new trial. Sybers entered a voluntary plea of "guilty to manslaughter and was sentenced to 10 years in prison. Eight years was suspended and he was released because he spent the last two years in prison from the first trial." *Shed of Murder Rap, Ex-Examiner Admits Manslaughter, Goes Free*, St. Petersburg Times (May 13, 2003).

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If You Can't Kill the Ump, Should You Sue?

Legal Liability for Sports Referees

By Marc T. Wolin and Robert D. Lang

Introduction

The role of a sports official is an unusual one. It can be argued that, in effect, sports officials are quasi governmental officials – akin to judges or traffic police or administrative hearing officers. Government officials under the law are given superior protection or immunities, since it is recognized that they need to do their jobs without undue exposure or recrimination. In the current legal environment under the vast majority of cases, officials are given the benefit of the doubt when misfortune occurs.

There are thousands of sports officials in the United States, participating in everything from pickup leagues to professional sports. The vast majority of officials get nominal pay and do this predominantly as an avocation. They are motivated by their love of the sport, the physical activity and thrill of athletic competition, community service and so forth. When the contestants take the field, they might not like the officials, but all respect the necessity of their presence to fairly control the contest and rule on the play. Leagues can easily ask players or coaches not participating in the contest to officiate, but instead rely on impartial third-party officials.

What else does the role of the official entail? Is it to create a "safety bubble" over the participants, so nothing bad happens even in sports with hazardous activity? Is it to maintain some sort of Orwellian control of the game so people's innately aggressive behavior is minimized so there are no "cheap shots" or dangerous behavior on behalf of the participants? Are the officials (as well as the league and school authorities) liable when bad things happen, notwithstanding the assumption of risk of the participants and the behavior of the participants?

Thankfully, the vast preponderance of case law shows that the world has not gone mad. While people always can and will sue for anything, a sports official is not responsible for making sure bad things do not happen. Nor is the official responsible for the irresponsible conduct of participants under a broad theory that had

the referee controlled the game better that would have prevented a participant from engaging in dangerous and illegal conduct. Under controlling law, a sports official is held to a standard of gross negligence. While not the same immunity enjoyed by governmental officials, it is preferable to a standard of mere negligence.

Case Law

To be sure, no one goes to a sporting event for the purpose of watching the referees. Except in rare circumstances, for example, when the NFL replaced the replacement referees,[1] or when referees make a favorable, although perhaps dubious, call in their team's favor,[2] fans tend not to cheer for referees.[3]

Yet, referees are the only ones participating in the event who are not invested in which team prevails. They act simultaneously as participant and spectator, "active when they run up and down the field alongside players, yet detached when they make swift, impartial decisions in the midst of intense competition."[4]

Referees in sport are often placed in difficult situations, needing to react immediately without time to contemplate their action. Although taking one's time to react is usually considered a virtue, in the context of sports, hesitancy by the referee can be construed as uncertainty, resulting in increased questioning of on-field decisions.[5]

Liability

Few people will volunteer to referee sporting events if, in addition to accepting the risk of being criticized by players, coaches and fans, they also risk potential legal liability. In this regard, efforts to protect athletes from concussions can potentially place officials at risk when a player who suffers a concussion files a claim, not only against a coach or the team physician, but also the referee, on the theory that the referee knew, or should have known, that the player was dazed and confused and should not have been allowed to re-enter the athletic contest. Legislation designed to protect players from concussions can have the effect of bringing referees directly into the line of fire.

For example, last year in Ohio, a bill intended to protect athletes from concussions required coaches or officials to remove a player from a game or practice should the athlete show signs of a concussion or be suspected of suffering from a concussion. Although the proposed legislation contains some immunity for coaches, the Association of Coaches objected to the legislation, concerned that the net effect of the bill would be to increase legal liability for volunteers in youth sport organizations.[6] A number of states have already passed legislation that limits the liability of referees and/or define assaults on sports officials as crimes.[7]

Although it has been argued that there should be a way to sue sports officials for "referee malpractice,"[8] courts are generally loath to substitute their judgment for that of an official and, in practice, intervene only when a referee's conduct constitutes gross negligence, substantially departing from the necessary standard of officiating.

The requirement of gross negligence by a sports official, rather than mere negligence, makes sense because few individuals would be willing to officiate if their mere negligence would result in personal liability for injuries sustained by players.[9] There is no disputing that the acts of sports officials can cause serious injuries, especially to players. A well-publicized incident occurred in the NFL in 1972, when All-Pro linebacker Charles "Bubba" Smith[10] was injured while playing for the Baltimore Colts in a pre-season game against the Pittsburgh Steelers. While running toward the sidelines after an interception, Bubba Smith leaped over fallen players and struck the aluminum sideline marker, which was still stuck in the ground – rather than having been allowed to fall. Bubba Smith sued the NFL and the game official. After a mistrial, a second jury found for the defendant. However, the case is significant as it was the first time that a sports official could possibly have been found liable for negligence during an athletic event. The case was not dismissed against the game officials and was allowed to go to the jury. The *Smith* court opined that any standard that would allow referees and umpires to be liable on a mere negligence approach would undoubtedly discourage those who volunteer or participate as referees, as they would be putting themselves at a greater legal and financial risk without receiving substantial, if any, monetary benefit.

Thirty-six years later, in 2008, University of Houston wide receiver Patrick Edwards broke his leg, just after half time, during a football game against Marshall University. A metal cart used by the Marshall University band was parked a few feet behind the south end zone and Edwards ran into it while trying to catch a long pass.[11] In addition to the pain, suffering and $30,000 in medical bills, Edwards faced the possibility that the compound fracture, which required having a rod inserted into his lower right leg, jeopardized his potential NFL career.

Edwards sued Marshall University, Conference USA and the game referee, citing the NCAA football rules requiring that "all markers and obstructions within the playing enclosure shall be placed or constructed in such a manner as to avoid any possible hazard to players." The case settled for $250,300.[12]

The requirement that officials ascertain that the playing fields are in safe condition is long-standing. For example, in *Forkash v. City of New York*,[13] the plaintiff was injured during the semifinal game of a softball tournament, sponsored by the City Department of Parks and the *New York Daily Mirror*.

All players testified that the outfield contained shards of glass from numerous broken bottles and that, prior to the game, they had told a uniformed New York City Parks Department supervisor, who was also acting as umpire, that the field was not in suitable playing condi-

tion. The supervisor had the infield, not the outfield, cleared with a large broom. At the end of the first inning, players again complained to the supervisor/umpire about the condition of the outfield but were told that the brooms had already been put away, it was getting dark and they should "just get out there and play."[14] The two outfielders (both 18 years old) did what they were told and continued to play.

In the fifth inning, when it had already grown quite dark, a ball was lined to the outfield. The plaintiff, running toward the ball while trying to make a play, tripped on a piece of glass in the field and collided with a second outfielder, who was also trying to catch the ball.

In the litigation that ensued, defendant City of New York successfully moved to dismiss the complaint, stating there were no questions of fact for the jury. On appeal, a unanimous First Department reversed, stating that the jury should decide the questions. The plaintiffs were of "impressionable years," and their obedience to the umpire, which was "in baseball proverbially a dominating and inflexible figure,"[15] created an issue of fact for the jury to decide whether the players may not have had a choice "when they knew that disobedience might disturb a sporting event sponsored and planned by the city and already in progress, might perhaps prejudice their team, perhaps harm their own reputations."[16]

What does the role of the official entail? Is it to create a "safety bubble" over the participants, so nothing bad happens even in sports with hazardous activity?

Reasonableness

For an example of the courts applying a reasonableness standard when reviewing the decisions of a referee, consider *Santopietro v. City of New Haven*,[17] where a softball game in an organized league in New Haven, Connecticut, went out of control. Players started cursing, taunting members of the other team, kicking a garbage can, throwing bats on the ground and their gloves on the pitcher's mound, and engaging in other ungentlemanly behavior. Two defendants served as umpires for the game.

In the sixth inning, after hitting a fly ball to the outfield, one of the players intentionally flung his bat toward the backstop. The bat passed through the backstop and struck the plaintiff, a spectator, in the head, fracturing his skull and causing other serious injuries. The plaintiff was not on the field of play; he was watching his son play in another game on an adjacent field.

The two umpire defendants moved for directive verdict in their favor, which was granted. On appeal, the dismissals were sustained. In affirming the dismissal, the appellate court noted that umpires have considerable discretion, noting,

> testimony confirms what is the common understanding of the umpire's task. In the absence of exceptional circumstances, a softball umpire, when confronted with unruly behavior by a player that arguably constitutes unsportsmanlike conduct, faces a spectrum of discretionary options. At one end of the spectrum is taking no action; at the other end is ejection of the player or suspension of the game. In between are warnings and other appropriate disciplinary action. The umpire has discretion, within the spectrum, to respond to the offensive behavior in the manner that the umpire finds to be most appropriate in the given circumstances.[18]

The court noted that the plaintiff had failed to produce expert testimony to establish that the applicable standard of care was breached by either or both of the umpires. Further, the fact that the two umpires had improperly failed to act in response to two earlier incidents in the game (tossing a bat toward other bats and taunting) was insufficient to allow a jury to decide whether the umpires breached a duty to the plaintiff.[19]

Similarly, in *Zajaczkowski v. Connecticut State Soccer Association, Inc.*,[20] the plaintiff was playing in an adult soccer game in Stamford, Connecticut, as a member of the Polonia Stamford Soccer Team. While scoring a goal, the plaintiff collided with the goalkeeper from the opposing team and sustained personal injuries. The plaintiff sued the Connecticut State Soccer Association, Inc. and the Amateur Soccer League of Connecticut but failed to sue the referee who had supervised play. Nor did the plaintiff sue the City of Stamford, which owned the playing field, or the goalkeeper who injured the plaintiff.

Among the claims made by the plaintiff was that the defendants failed to properly supervise the officials provided to referee the game, failed to train the officials and permitted the game to continue, while knowing it was not being properly officiated to prevent violent behavior and violation of the rules. In granting the defendant's motion for summary judgment, the court noted that neither the plaintiff nor his manager nor members of his team complained to the referee regarding the condition of the playing field or any violent level of play. Nor did any player or coach request that a referee stop the game. Accordingly, there was insufficient evidence of

negligence regarding the acts taken, or not taken, by the referee during the game.

Where a referee acts reasonably, liability will not be imposed when a player suffers a personal injury in the course of an officiated contest. In *Pape v. State*,[21] the claimant sustained personal injuries playing an intramural floor hockey game in the gym of the State University of New York at Albany. After stealing the puck from an opposing player, a second player from that team knocked the puck away from the claimant. The claimant grabbed the second player by the legs, just above the knees, and attempted to tackle him. The second player grabbed and flipped the claimant and fell on the claimant's neck, fracturing his cervical spine. At trial, Court of Claims Judge Modugno found that the incident occurred because the claimant attacked the second player – it was not attributable to a lack of supervision and training by the referees. On appeal, a unanimous Third Department sustained the verdict below, finding that there was no basis to disturb the finding that the referees had not committed a lapse of duty; in any event, "the referee's officiating was not a proximate cause of the injury."[22]

Best Intentions

When umpires seek to reduce the risk to participants, they can themselves be at risk of a lawsuit. In May 1995, during a Little League game in Colorado, the umpire picked up a bat lying in the path of a player running from third to home and tossed it away, striking 10-year-old Austin Wright, who was standing in the on-deck circle, waiting his turn to bat. The bat hit the boy in the face, shattering five of his permanent teeth and cutting his upper lip.

Nine years later, Wright filed a lawsuit against the umpire who had tossed the bat. The junior baseball league and the umpire argued that there was no liability because Wright's father had signed a waiver releasing the league from any claims of negligence or injury to his son. Jefferson County District Judge Margie Enquist agreed and dismissed the lawsuit prior to trial. In 2006, the Colorado Court of Appeals reversed the dismissal and stated that the case should proceed to trial since the waiver did not exempt those who acted grossly negligently, willfully or wantonly. Appellate Judge Daniel Taubman ruled that "[i]f a base runner had been approaching home plate, [the umpire's] conduct may have been negligent because he might have simply thrown the bat in a manner that a reasonably careful person under the same pressure to prevent an injury would not have done."[23] The Appellate Court also noted that the conduct of an umpire may rise to legal liability if the umpire grabbed the bat and consciously decided to throw the bat into the on-deck circle.[24]

Another such incident occurred in 1999, during an NFL game between the Cleveland Browns and the Jacksonville Jaguars. Orlando "Zeus" Brown, a 6-foot, 7-inch 360-pound offensive tackle for the Browns, suffered a significant, career-ending eye injury after being hit when the referee tossed a weighted penalty flag. Although the NFL allegedly instructed its referees to weight penalty flags with popcorn kernels, the official in question used BBs.[25] In 2001, Brown sued the NFL for his personal injuries, seeking $250 million, stating that the flag incident prematurely ended his career; but he did not sue the referee who threw the flag. Instead, Brown sued the NFL for alleged negligent training of its officials.[26] According to reports, Brown settled in 2002 for between $15 million and $25 million.[27]

In 2012, the *New York Times* reported in a front-page article[28] about a Pop Warner pee wee game in Massachusetts. The game, with players as young as 10 years and none weighing more than 120 pounds, resulted in so many injuries that one team no longer had the required number of players to participate – five pre-adolescent boys sustained head injuries. The officials did not intervene. Some parents accused the other team's players of deliberately trying to hurt their sons, and one coach accused the other coach of not properly training his team and jeopardizing them by not forfeiting. The league officials suspended both coaches for the rest of the season, and the referees who oversaw the game were barred from officiating any more contests in the league.

An October 2009 high school soccer match in Michigan resulted in a 14-year-old player nearly losing his leg as a result of injuries sustained from being kicked by an opposing player. Suit was filed against the two referees on the theory that they had failed to control overly aggressive play. Close to 40 depositions were taken, including testimony from teammates and spectators. The referees contended that they did not see the player (who was also a defendant) who kicked the plaintiff engage in aggressive behavior and that with two referees, they could not cover the entire field. Ultimately, the case settled, on confidential terms, for $300,000.[29]

In *Aboubakr v. Metropolitan Park District of Tacoma*,[30] a highly competitive baseball game between two teams of 18-year-olds included taunts and cursing. At one point, the home plate umpire warned the teams to calm down and to stop cursing or he would end the game. The game ended; the teams engaged in the traditional handshake, which, in retrospect, turned out to be a bad idea because during the handshake a fight broke out between Streets and Carter, two opposing players. The fight was quickly broken up, and one manager took his team off to left field (literally) for a customary after-game talk.

At the end of that meeting, the opposing teams started fighting, and one player picked up a baseball and threw it toward the opposing team, striking the plaintiff in the eye and causing serious injuries. By that time, the game had concluded, and the field had been cleared for approximately 15 minutes before the incident occurred. The two umpires assigned to the game had already collected the bases and were standing safely across the street, out of harm's way.

The injured player filed a lawsuit against the park district, the umpires, the coaches and the player who threw the ball. The defendants, other than the player responsible for the accident, moved for summary judgment, and the trial court dismissed the claim. On appeal, the court affirmed.

With respect to the umpires, the plaintiff argued that they had breached their duty to adequately control the game, specifically the verbal taunting between the teams, thereby allowing the situation to escalate into physical violence. The plaintiff contended that the umpires should have taken greater steps to control the situation, including stopping the game, to prevent the incident that took place.

The Appellate Court noted that umpires in athletic events can be held liable only if the player who committed the act had a "known propensity toward violence or there was a total absence of supervision."[31] The court found no evidence to support the plaintiff's claim that the player in question had a known propensity for violence, or that the umpires were aware that he posed any physical harm. Nor was there any evidence to establish that the player had fought with other boys in the past or had a reputation for violence although, prior to the ball-throwing incident, the player in question had wrestled with one of the opposing players.

> [T]he evidence reveals nothing about Streets' behavior to suggest that he would throw a baseball at someone with malicious intent. Moreover, Aboubakr admitted that he did not anticipate anything more happening once [coach] Emerson walked [player] Streets across the field. Thus, [plaintiff] fails to show that the umpires or Emerson had any knowledge of any propensity for violence by Streets that should have prompted them to take more stringent precautions.[32]

Although the plaintiff argued that the umpire should have stopped the game in order prevent any possible physical fight, the court concluded that "there is simply no way of knowing whether the umpires could have done anything to prevent the bad feelings between Streets and Carter from boiling over. Aboubakr also suggests that the umpires could have stopped the game during play, but such an act may well have increased the tensions rather than defused them."[33]

Regrettably, *Aboubakr* is not the only instance when the post-game handshake resulted in violence. In *Talasazan v. Northridge Arena Soccer League, Inc.*,[34] the plaintiff had finished playing a soccer match. When he went to shake the hands of his opponents, one punched him and a full-scale brawl broke out where the plaintiff was struck in the eye and lost consciousness.

In the lawsuit he brought against the soccer league, the plaintiff established that security guards were present during most of the games he previously played at the league's arena; and that on at least three occasions, he saw the security guards intervene when players fought or argued, successfully preventing those situations from escalating. However, on the night in question, the plaintiff saw no security guards, and records obtained from the soccer club showed that the security guards were not paid for the date in question.

In denying the defendant's motion for summary judgment, the court pointed out that the absence of security guards on the date in question made a material issue of fact as to whether adequate safeguards were taken, which would have prevented the assault from taking place:

Regrettably, *Aboubakr* is not the only instance when the post-game handshake resulted in violence.

> The question posed by Talasazan is why the guards were not present the night he was injured. Respondents have never addressed that question and we are left to speculate why guards were present some nights and not others. Given the statistical frequency of fights and the absence of any such explanation by the respondents, we believe it was highly foreseeable that fights could occur at any game, making the need for guards at every game just as foreseeable.[35]

Despite the fact that it would appear to be a good idea for referees to be present during the traditional post-game handshake between players, the Massachusetts State Basketball Officials Association (MSOBA) filed a lawsuit in court in 2008 seeking a temporary injunction challenging the ruling by the Massachusetts Interscholastic Council, a committee of the Massachusetts Interscholastic Athletic Association, that referees in all team sports remain at the competition site until after the handshake ceremony has concluded.

At a hearing in Worcester, Massachusetts, Superior Judge Christine M. Roach rejected the claim by the referees that being present during the traditional handshake could subject them to physical harm. MSOBA argued that the rule would put its members in danger from fans and coaches who were upset at calls made during the game. In a courtroom filled with referees, high school administrators and officials, the court ruled that the referee organization had "not met [its] burden to demonstrate the required level of imminent, non-speculative, substantial, and irreparable harm to [the referees'] physical, reputa-

tion, or financial interest."[36] Indeed, the presence of the officials during the handshake might prevent instances such as those in *Aboubakr* and *Talasazan*.

The role of a referee in enforcing the rules, especially those related to safety, was presented in *Carabba v. Anacortes School District No. 103*.[37] There the plaintiff, a high school student, sued for serious injuries sustained while participating in a high school wrestling match. Specifically, he alleged that the referee failed to adequately supervise the contestants, permitting his attention to be diverted from the actions of the match, thereby allowing an illegal and dangerous hold to be applied, and failing to cause that hold to be broken, resulting in personal injuries. Specifically, in a match between two boys wrestling in the 145-pound-weight division, one boy was applying a half nelson, trying to roll the plaintiff into a pin position. The referee, noticing a separation between the two mats, moved to close the gap between the mats to prevent the boys from rolling off the main mat and onto the bare floor. His attention diverted, one of the contestants applied what many of the eyewitnesses saw as a full nelson. As the round ended, the plaintiff was unable to move; a major portion of his spinal cord had been severed, resulting in permanent paralysis of all voluntary functions below the level of his neck.

The case was submitted to the jury solely on the issue of the referee's negligence. The trial court ruled that the referee was acting as the agent of the school district when he refereed during the match. The jury returned a verdict for the defendants and the plaintiff appealed. On appeal, the Appellate Court reversed the judgment and remanded the matter for a new trial, finding that the school district, through the actions/inactions of the referee, owed a duty to the student participants. Accordingly, any negligence of the referee was imputed to the defendant school district.

Referee Liability Abroad

Lawsuits against referees are not restricted to the United States. In 2013, in Australia, a physiotherapist went onto the field during a rugby match to tend to an injured player. She was struck by other players as play continued while she was still on the field, suffering serious injuries, including a crushed vertebra, a $30,000 medical bill for spine surgery and, she claimed, an 80% loss of income.[38] The suit included as a defendant the referee for allowing play to continue while an "obviously injured" player was lying on the ground nearby. The referee denied that he was under an obligation to stop play by blowing his whistle and stated that he did not regard the condition of the injured player to be serious.[39] That suit is presently pending.

Rugby is, indeed, a contact sport. A study in South Africa noted the rise of personal injury claims in rugby injuries among youths in that country and asked if a 13-year-old plays in a game intended for those under the age of 11 and the older one injures a player from the opposing team, could the referee be held liable for allowing the 13-year-old to play?[40]

In May of 2013, a discussion in Australia concerned the potential liability of a referee for not sending a "bloke" off the field in a rugby match after repeated incidents of serious foul play, should that player remain on the field and injure another player. In response to this situation, Bill Harrigan, the director of referees of Australia's National Rugby League (NRL), "brushed off questions over on-field officials' liability in cases of serious injuries," stating "[t]he NRL's got insurance. The refs are covered."[41]

Economic Loss

Few sporting events in the United States create as much passion as college basketball. In 1982, during the final seconds of a Big Ten basketball game between the University of Iowa and Purdue, veteran referee Jim Bain called a foul on an Iowa player, awarding two free-throws to Purdue, resulting in a Purdue victory. The loss eliminated Iowa from the Big Ten championship.

A few days after the game, John and Karen Gillespie, who operated Hawkeye John's Trading Post, a store in Iowa City specializing in University of Iowa sports memorabilia, began marketing T-shirts showing a man with a rope around his neck captioned, "Jim Bain Fan Club." Bain then sued the Gillespies for injunctive relief

and damages. Perhaps thinking the best defense is a good offense, or perhaps hoping for a sympathetic view from the "home" Iowa courts, the Gillespies counterclaimed, allegedly that his conduct in officiating the game was below the standard of confidence required of a referee. For money damages, the Gillespies claimed that the misconduct by Bain caused Iowa to lose and, because Iowa was eliminated from the Big Ten championship, the Gillespies lost a potential marketing opportunity for memorabilia recognizing Iowa as the Big Ten champion.[42]

The trial court granted summary judgment dismissing the counterclaim. On appeal, the dismissal was affirmed by the Iowa appellate court in *Bain v. Gillespie*.[43] The court held that the referee owed no duty to the Gillespies' business interest:

> Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillespies has cited no authority, nor have we found any, which recognizes an independent tort for "referee malpractice." Absence corruption or bad faith, which is not alleged, we held no such tort exists.[44]

If anything, fans have even a greater interest in their teams than those that market their merchandise. After the New England Patriots and coach Bill Belichick were caught in the 2007 "Spygate" scandal, a New York Jets season ticket holder filed a federal lawsuit, *Mayer v. Belichick, et al.*, against the Patriots, Belichick and the NFL, taking the case all the way to the U.S. Supreme Court. The plaintiff (who was also a lawyer) argued that a class action suit should be allowed on the basis that large sums of money were spent by fans to watch professional football games that were essentially rigged. The suit was dismissed by the U.S. District Court of New Jersey (Judge Brown) and affirmed by the Third Circuit Court of Appeals,[45] and the Supreme Court declined to hear the appeal.[46] In affirming the dismissal, the Third Circuit specifically noted:

> At the very least, a ruling in favor of Mayer could lead to other disappointed fans filing lawsuits because of "a blown call" that apparently caused their team to lose or any number of allegedly improper acts committed by teams, coaches, players, referees and *umpires*, and others. This Court refuses to countenance a course of action that would only further burden already limited judicial resources and force professional sports organizations and related individuals to expend money, time, and resources to defend against such litigation. Under the circumstances, public policy considerations evidently weigh against Mayer and his various claims.[47]

To which we add, Amen!

Conclusion

Let's take an historical perspective. In 1940, during a football game between visiting Cornell, entering the game with an 18-game unbeaten streak, Dartmouth, the home team underdog, led 3-0 and field conditions made it difficult for either team to move the ball.[48] Late in the fourth quarter, Cornell had a first down at the Dartmouth 6-yard line. Cornell failed to score on four downs. Nevertheless, the linesmen signaled Cornell still had possession, and the referee agreed. On the next play, with nine seconds on the clock, Cornell scored on a touchdown pass and won the game 7-3 with benefit of the "fifth down."

After the New England Patriots and coach Bill Belichick were caught in the 2007 "Spygate" scandal, a New York Jets season ticket holder filed a federal lawsuit.

After the game was over, officials reviewed the film and discovered their error.[49] The following day, the Cornell players, football coach, acting athletic director and president agreed that Cornell should send a telegram to Dartmouth offering to forfeit the game. Dartmouth accepted the forfeit.[50]

In 1990, 50 years later, during a football game between Colorado University and Missouri University, underdog Missouri led 31-27 late in the fourth quarter. Colorado drove near the Missouri goal line following second down; the officiating crew failed to flip the down marker and note that it was now third down. On the next play, Colorado was stopped short of the end zone. On the following play (it was actually fourth down but it was marked by the officials as third down), Colorado was again stopped short of the goal line. The quarterback spiked the ball, stopping the clock with two seconds remaining. The referees failed to award the ball to Missouri and, on the final play of the game, Colorado scored, "winning" the game.[51]

For 20 minutes thereafter, the Big Eight officiating crew and the referee conferred as to whether the score counted. During that delay, radio and television announcers noted that Colorado had scored with the help of the additional play and the referee was so advised. Nevertheless, the referee ruled that the touchdown would stand.

In contrast with Cornell's reaction following the Cornell-Dartmouth game of 1940, Colorado football coach Bill McCartney[52] stated that he had considered forfeiting the game but decided against it because "the field was

lousy," thereby blaming the home team Missouri for the condition of the field, linking those conditions to accepting the fifth down.[53]

Colorado went on to claim the 1990 National Championship. The seven-man Big Eight Conference officiating team was suspended indefinitely. The reaction in Missouri was predictable.[54] It was not until 1998, eight years after the game and four years after McCartney retired as Colorado head football coach, that he admitted making mistakes and being "saddened" by the fifth down fiasco.[55]

We may not need to wait another 50 years for another "fifth down" situation. Should it occur, it remains to be seen whether the reaction of the participants will be closer to those of a 1940 Cornell-Dartmouth game or the 1990 Colorado-Missouri game. It would hardly be surprising if lawsuits are filed by the universities (think of the lost revenue in bowl games which the school lost with a lower BCS standing), players (who, not playing in that bowl game, will miss out on the opportunity to showcase their talent for the NFL), fans (who need little reason to sue other than the belief that their school has been wronged) and possibly even mascots and cheerleaders who will miss out on television exposure because their team is either not "bowling" or is going to a less prominent bowl. Indeed, matters might not even proceed to that point since fans and athletes watching the game on TV or checking their smartphones in the stadium, would immediately text, email and call in efforts to notify the officials and their team of the mistake, much like viewers at home sought to contact tour officials to complain that Tiger Woods had taken an illegal drop in a golf tournament.[56]

The fifth down example is illustrative of the change in the interpretation of equity, fairness and self responsibility over the past decades. The standard of gross negligence is consistent with the concept that the official has the elevated status of an impartial arbiter who must be insulated from liability. Additionally, current case law has not put an obligation upon the official to be a "safety bubble." Last, the official is not being held liable for the control of the game, although plaintiffs will fashion their case to minimize the poor behavior of participants who, in fact, are the ones committing the tortious behavior that runs afoul of proper behavior in the first instance, and the rules of the game in the second.

It is in everyone's interest that referees and umpires are fully focused on the actions on the field, without being distracted by concerns over future lawsuits. For most, service as a referee is more a labor of love than a full-time profession. As has been observed, these are men and women who love their sport; usually they once were athletes themselves and want to stay connected and active in sports. They may be without the ball, but they are still running up and down the court or the field; they are integral to the game and to the fabric of sport.[57]

It is therefore important that the law continue to allow referees to do their job, with the players performing, the fans rooting, and the referees officiating without the unsettling prospect of potential litigation changing the basic nature of sports. This can best be done by protecting referees by having them liable only for intentional or grossly wanton actions. Negligence in refereeing a sporting event should not be allowed to give rise to legal iability. Let's just play ball.

1. Joseph White, *"That Kind of Chokes You Up": Referees Cheered at First NFL Game Following End of Lock Out*, Minneapolis StarTribune (Sept. 28, 2012).

2. Consider the reaction by the St. Louis Cardinals' fans when Umpire Don Denkinger called Jorge Orta safe at first base in the eighth inning of Game 6 of the 1985 World Series, even though television replays and photographs clearly showed that Orta was out by half a step. Kansas City went on to win the world series and Denkinger was blamed for their victory. Ron Fimrite, *Vilified for a World Series Call, Ump Don Denkinger Has Remained Calm*, Sports Illustrated (Jan. 6, 1986).

3. Notably, after Umpire Jim Joyce publicly admitted making an incorrect call, costing Detroit pitcher Armando Galarraga a perfect game, Detroit Tigers fans cheered Joyce the following day when he returned to umpire another game. "'When I walked down that tunnel and I got the reception I did from the Tigers fans, I had to wipe the eyes,' Joyce said." *Umpire Back in the Game After Bad Call*, www.cbn.com/cbnnews, June 3, 2010.

4. Erin E. McMurray, *I Expected Common Sense to Prevail*, 29 Brook. J. Int'l L. 1307, 1330 (2004).

5. Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game into Your Own Hands, Take Them to Court!*, 4 Sports Law. J. 213, 219 (1997).

6. *YMCA Expresses Concern With Ohio Concussion Bill*, Columbus Dispatch (Apr. 21, 2012).

7. Arkansas (Ark. Stat. Ann. § 16-120-102); California (Cal. Penal. Cod. § 243.8); Delaware (Del. Cod. Ann. 16-6835); Florida (Fla. Statutes § 784.081); Georgia (Ga. Cod. Ann. § 51-141); Idaho (Concurrent. Resolution Mo. 32); Illinois (745 ILCS 80); Kentucky (KRS. 508.025); Louisiana (La. Reb. Stat. Ann. § 14-34-4); Maryland (Ann. Code of Maryland § 51-902); Minnesota (Minn. Chap. 128C.08(2); Massachusetts (Mass. Gen. Laws Ann. Ch. 23 1, § 85D); Mississippi (Miss. Code Ann. § 95-9); Montana (Montana Code Ann. § 45-5-211); Nevada (NRS 41.630); New Jersey (N.J. Stat. Ann. § 2A:62A-6); North Carolina (N.C. Gen. Stat. §14-33(b)(9)); North Dakota (N.D. Cent. Code § 32-03-46); Ohio (Anderson's Ohio Revised Code § 2305.831); Oklahoma (Oklahoma Stat. Ann. Tit. 21 § 650.1); Pennsylvania (42 Pa. C.S.A. § 8332.1); Rhode Island (R.I. Gen Laws § 9-1-48); South Carolina (Code of Laws S. Car. § 22-3-560); Texas (Tex. Civ. Prac. & Rem. Code Ann. § 84.001); West Virginia (W. Va. § 61-2-15a).

8. Jason Loomis, *The Emerging Law of Referee Malpractice*, 11 Seton Hall J. Sport L. 73 (2001).

9. Kenneth W. Biedzynski, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11, U. Miami Ent. & Sports L. Rob. 375, 408 (1994); *see* Michael Mayer, *Stepping In to Step Out of Liability: The Proper Standard of Liability for Referees in Foreseeable Judgment-Call Situations*, 3 DePaul J. Sports L. Contemp. Probs. 54, 83 (2005).

10. *Smith v. Nat'l Football League*, No. 74-418 Civ. T-K (U.S.D. Fla. 1974). When he was playing at Michigan State University, students sometimes chanted "Kill, Bubba, Kill" in an effort to encourage Bubba to sack the quarterback, something for which Bubba needed little encouragement.

11. The accident has been viewed almost 200,000 times on YouTube. "Houston Wide Receiver Breaks Leg," 10/29/08, www.youtube.com/watch?v=wMBOoNzWSwM.

12. *Former Houston Receiver Patrick Edwards Settles Lawsuit Against Marshall, C-USA*, Sportingnews.com (Mar. 20, 2012); *MU's Tab $250,300 in Houston WR Suit*, Charleston Gazette (Apr. 27, 2012).

13. 27 A.D.2d 831 (1st Dep't 1967).

14. *Id.* at 832.

15. *Id.*

16. *Id.*

17. 239 Conn. 207 (Sup. Ct., Conn. 1996).

18. *Id.* at 224–25.

19. *Id.* at 231–32.

20. 2010 WL 1052937 (Superior Ct. Conn. Feb. 23, 2010).

21. 90 A.D.2d 904 (3d Dep't 1982).

22. *Id.* at 904–05.

23. Howard Pankratz, *Lawsuit Against Umpire Back in Play*, www.denverpost.com (Apr. 21, 2006).

24. *Id.*

25. Adam Rubin, *Ref Blamed for Eye Injury*, N.Y. Daily News (Mar. 30, 2001).

26. Darryll M. Halcomb Lewis, *An Analysis of Brown v. The National Football League*, 9 Vill. Sports & Ent L.J 263, 266 (2002).

27. Daniel E. Slotnik, *Orlando Brown, Who Sued N.F.L. Over Errant Flag, Dies at 40*, N.Y. Times (Sept. 23, 2011).

28. Ken Belson, *A 5-Concussion Pee Wee Game Leads to Penalties for the Adults*, N.Y. Times A1 (Oct. 23, 2012).

29. Douglas Levy, *Suit Over Soccer Injuries Settled for $300K; Attorney Uses Referee Rules for Argument*, Mich. Law. Weekly (May 6, 2013).

30. 94 Wash. App. 1044 (Ct. App. Wash. 1999).

31. *Id.*

32. *Id.*

33. *Id.*

34. 2002 WL 31720287 (Ct. App. Cal. 2002).

35. *Id.*

36. Dave Nordman, *Referees Lose on Handshake Rule in Court*, Boston Globe (Dec. 12, 2008).

37. 72 Wash. 2d 939, 435 P.2d 936 (1967).

38. Stephanie Gardiner, *Physio Sues After Collision With Players*, Sydney Morning Herald, New South Wales (May 30, 2013).

39. *Id.*

40. *Personal Liability Claims During Rugby Season*, Bizcommunity.com South Africa (Apr. 23, 2013).

41. Mike Colman, *Refs Have a Duty of Care*, The Courier (May 3, 2013).

42. *See* John Cadkin, *Sports Official Liability: Can I Sue if the Ref Missed a Call?*, http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/05/05-Cadkin.pdf.

43. 357 N.W.2d 47 (Ct. App. Iowa 1984).

44. *Id.* at 1700.

45. 605 F.3d 223 (3d Cir. 2010).

46. *Supreme Court Won't Hear "Spygate,"* E.S.P.N.-NFL (Mar. 7, 2011).

47. *Mayer v. Belichick*, 605 F.3d at 237 (citations omitted, emphasis added).

48. "1940 Dartmouth v. Cornell–The Five Down Game," Collectableivy.wordpress.com/…/1940-dartmouth-v-cornell.the-five-down-game.

49. To view footage of the "fifth down," see, "The Infamous 5th Down: Cornell v. Dartmouth," www.youtube.com/watch?v=QKvefNPmT4 (Oct. 25, 2006).

50. Interestingly, the Cornell president, Edmund Ezra Day, was a Dartmouth alumnus. He confidently told the Cornell team, "Fellas, I'm a Dartmouth graduate. I know Dartmouth and it won't be long before we get a return telegram saying 'no Cornell, you won it on the field, and that's the way it should be.'" Dartmouth never sent that telegram, choosing instead to accept the forfeit. Robert J. Scott & Myles A. Pocta, Honor on the Line: The Fifth Down and the Spectacular 1940 College Football Season (2010).

51. To view the final series of plays, including the infamous "5th down," see www.youtube.com/watch?v=ZQJT8qOMMwQ.

52. In an interesting parallel to Cornell's Edmund Day, a graduate of Dartmouth, Colorado's coach Bill McCartney was a graduate of Missouri.

53. Stuart Whitehair, *Colorado Football: CU vs. Missouri 1990 (The Fifth Down Game)*, Bleacher Report (June 23, 2008). This is another parallel to the 1940 Cornell-Dartmouth game since, in both instances, the field conditions of the home team affected the outcome.

54. Dave Matter, *Fifth Down Is a Play That Will Live in Infamy*, Columbia Daily Tribune (Oct. 6, 2010).

55. John Henderson, *No Downplaying CU's Fifth Down at Missouri*, Denverpost.com (Oct. 6, 2010): "'The single biggest problem was me,' McCartney said in a recent interview. 'There's an old rule of thumb whenever you're competing. When you win, be humble. In all candor, I wasn't humble in victory. . . . I stood on the sideline during the game and said to myself – not to anyone else – if we win this game, I'm going to talk about the field, but if we lose, I'm not going to say anything.'"

56. Tony Manfred, *Tiger Woods Is in Another Illegal Drop Controversy After Winning the Players Championship*, Business Insider (May 13, 2013).

57. Earl Gustkey, *Taking Aim at the Stripes: Referees Lately Are Becoming the Target of Many More Suits*, L.A. Times (Mar. 4, 1986).

The Use of *Cy Pres* Petitions to Obtain Grants of Residual Funds From Class Action Settlements

By Martin Minkowitz, Lesley Rosenthal and Michael A. Wiseman

Introduction

One of the mechanisms that the New York Bar Foundation and other charitable organizations have used to fund charitable activities is the petition of courts and counsel for *cy pres* awards for potential residual funds from class action settlements. This article describes the *cy pres* mechanisms generally and some of the successes the New York Bar Foundation has achieved.

A fertile source of funding for nonprofits exists where unclaimed, or "residual," funds are left over from class action settlements. The doctrine of *cy pres*, from the Norman French phrase *cy pres comme possible* ("as near as possible"), may be invoked when courts wish to allocate unclaimed funds that are left over from a settlement at the end date of the distribution process.[1] That date arrives when either all known plaintiffs have been made whole[2] or when distributions have ceased according to an end date specified by either the settlement[3] or the court ("claim deadline").[4] *Cy pres* may also factor in settlement agreements where parties seek to prophylactically plan for the disposition of unclaimed monies through what are known as "*cy pres*" distribution provisions.[5]

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Class Action Settlements

Outside its application to charitable trusts, the *cy pres* doctrine is most frequently applied in the class action setting,[6] where cases involve named representatives acting on behalf of numerous absent class members.[7] Class action complaints may implicate putative classes of thousands or even millions of potential claimants who are subsumed under the class definition.[8] In this context, funds may go unclaimed because some class members remain unidentified and therefore unaware of pending settlements or because eligible class members who are otherwise entitled to funds fail to submit claims as required[9] or because the individual recovery amounts do not exceed procedural costs.[10] These residual funds are ripe sources of potential monies for nonprofits savvy enough to petition the court to invoke the *cy pres* doctrine. The court may approve such a distribution if the end destination befits the original interests and composition of the class.[11]

Eleemosynary Organizations

Charities and the foundations that support them may petition courts and counsel under the *cy pres* doctrine to receive distributions of residual funds.[12] Organizations that choose to do so must keep in mind the foundational basis for the doctrine that the residual funds must serve goals closely related to the underlying claims that presaged the settlement in question.[13]

Legal and Practical Considerations in Making Requests

Legal Considerations

In a class action settlement arising in federal court, the district court judge plays an active role as a steward of the class's interests and as a counterweight to the sometimes conflicting pecuniary interests of counsel.[14] Federal Rule of Civil Procedure 23(e)(1)(A) mandates the court to conduct a fairness hearing in order to protect the interests of the class.[15] The goal of the court is to determine whether the settlement is fair, reasonable and adequate by examining whether the interests of the class are better served by settlement than by further litigation.[16] In doing so, the court considers whether the claims process is likely to be fair and equitable in its operation.[17]

The court reviews the settlement as a whole, including *cy pres* provisions, and has within its equitable authority the ability to deny a *cy pres* assignment if it finds that the charity in question does not suit the goals of the underlying litigation; but the court may not rewrite the settlement agreement.[18] Alternatively, parties may provide in the settlement agreement that the court may, at its discretion, choose a charity to benefit from any residual funds; however, this can be disfavored.[19] If nothing is provided in the settlement, the court will face the whole cloth dilemma of how to dispense residual funds.

The district court has great discretion in deciding how to award these residual funds,[20] and, generally, the unclaimed funds may be distributed by the court in one of three ways: (1) reversion to the defendant; (2) disbursement to other class members who have filed claims; or (3) *cy pres* distributions.[21] Courts diverge in their treatment of the *cy pres* doctrine. Some judges express skepticism,[22] preferring monies to be returned to the defendant,[23] but others hold that a *cy pres* distribution is an appropriate way "for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'"[24] Cognizance of these regional variations is an important aspect in developing a persuasive petition.

Cy pres distributions must be tied to the underlying litigation – "the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity."[25] In seeking to apply this standard, the First Circuit, for example, has adopted the "reasonable approximation" test, based on the American Law Institute Principles of Aggregate Litigation enunciated in § 3.07(c): "[W]hen feasible, the recipients should be those 'whose interests reasonably approximate those being pursued by the class.'"[26] This recurrent test is perhaps the most important component of a successful petition for residual funds. Nonprofits and charities should be aware and considerate of this governing standard. For example, the court in *In re Lupron* cited numerous sister circuits that have applied the reasonable approximation test in rejecting *cy pres* awards to charitable organizations, and it stated that "[a]s these cases make clear, the mere fact that a recipient is a charitable or public interest organization does not itself justify its receipt of a cy pres award."[27] The primary focus of a petition for residual funds should be to explain to the court how the funds will be used and the nature of the organizations to whom they may be awarded, including specific charities, if known.

Cy pres awards must conform to the geographic nature of the underlying class and nature of the litigation. Courts have also considered the geographic makeup of the *cy pres* recipients and compared them to the geographic composition of the class. In *In re Airline Antitrust Ticket Commission*, the Eighth Circuit held that a *cy pres* distribution in a national class action suit against airlines to mostly local recipients was an abuse of the district court's discretion.[28] In the Tenth Circuit, the District Court of New Mexico stated that

> because many corporations, especially national corporations, are incorporated in Delaware or other eastern states, or large states, it may be that class litigation is concentrated in areas like the Southern District of New York [or] in certain Californian districts; thus, concentrated, urban areas may benefit more from class litigation than more rural, sparsely populated areas,

like New Mexico, which have few particularly large corporations and few national class actions.[29]

A successful petition will convince the court that the *cy pres* recipient will provide indirect benefit to the class by being similar in nature or in geographic composition.

Practical Considerations

In order to bolster the credibility of the organization, re-granting entities, such as the New York Bar Foundation, may articulate to the court whether there are legal or administrative fees associated with the distribution of grant money. There are some techniques for a successful petition to be considered.

Although every litigation is affected by its own set of facts and circumstances, the following are strategic guidelines that petitioners for *cy pres* awards may wish to consider:

1. Identify the goals, strengths, and capabilities of your foundation, and the charities to which the foundation may be donating.
2. Identify cases that fit the paradigm (both old and new cases).
3. Research the particular circuit court, district court, and how the judges have ruled in previous cases involving the *cy pres* doctrine.
4. Articulate why the petitioner-foundation is particularly well-suited to identify suitable charities and to distribute funds.
5. Contact plaintiff's counsel and express desire to be involved with the possibility of helping to distribute residual funds.
6. Petition the court.

Include a detailed description of the proposed charities, their mission and use of the grant monies in relation to the underlying goals of the litigation. Alternatively, explain how the use of the grant monies will provide an indirect benefit to the class.

The New York Bar Foundation, for example, as a leading provider of *cy pres* assistance to courts and counsel, uses speeches, meetings and brochures to cultivate contacts in cases where *cy pres* monies might result. The New York Bar Foundation has a small administrative staff and a zealous board, who understand the legal system and unmet needs. This energy and knowledge is coupled with financial oversight of the board's finance and investment committees, making the Foundation a go-to organization for judges and class action counsel for *cy pres* awards.

The Foundation reports that *cy pres* matters have included:

- *White v. First American Registry*[30]: Federal District Judge Lewis A. Kaplan awarded $1.2 million *cy pres* funds to the Foundation to re-grant to organizations addressing improper tenant screening practices. Board members with background in legal services and housing issues made site visits to the five grantees, interviewed program managers, and required true-ups of budgets against actual spending. Programs improved access to fair housing and helped families avoid homelessness.
- *Pinnacle*[31]: $2 million+ of settlement funds were ordered by the Honorable Colleen McMahon to be administered by the Foundation, to oversee promised improvements in housing conditions for low-income New Yorkers.
- *City of Detroit v. Grinnell*[32]: Chief Judge Preska, in Manhattan, entrusted The New York Bar Foundation to re-grant $850K to an entrepreneurship program for disabled veterans at Syracuse University and an antitrust technology policy center at University of Pennsylvania Law School. These funds, from a long-forgotten antitrust settlement, helped improve disabled veterans' prospects and business ethics nationwide. Board members with technology law knowledge made site visits and provided accountability over the three-year grant period.

Obtaining *cy pres* awards requires vigorous efforts to earn the trust of judges, uncover settlement funds that should be paid out to charities, locate suitable recipients, and provide accountability.

Obtaining *cy pres* awards requires vigorous efforts to earn the trust of judges, uncover settlement funds that should be paid out to charities, locate suitable recipients, and provide accountability. These awards are increasing access to justice to our society as a whole, in this unique and high-impact way. ■

1. *In re Lupron*, 677 F.3d 21, 30 (1st Cir. 2012); Lesley Rosenthal, Good Counsel: Meeting the Legal Needs of Nonprofits 116 (2012) (Rosenthal).
2. *Id.*
3. *See, e.g., In re Crazy Eddie Sec. Litig.*, 906 F. Supp. 840, 843 (E.D.N.Y. 1995) (reviewing a settlement which "required that all proofs of claims must be filed by a date specified in a notice of the proposed settlement of class actions").
4. *See, e.g., In re Cendant Corp. Prides Litig.*, 189 F.R.D. 321, 323 (D.N.J. 1999) (stating that the court has general equitable power to define the scope of class action judgments and settlements); *Grace v. City of Detroit*, 145 F.R.D. 413, 415 (E.D. Mich. 1992) (holding that Fed. R. Civ. P. 23(d) provides authority for issuance of a class notice which bars claims not filed before a particular date).
5. *See In re Lupron*, 677 F.3d at 26.
6. *Cy Pres Settlements*, The American Law Institute Principles of the Law of Aggregate Litigation § 3.07 cmt. a (2010) (Aggregate Litigation).

7. William B. Rubenstein & Alba Conte, Newberg on Class Actions § 1.1 (5th ed. 2013).

8. Thomas M. Hefferon & Douglas A. Thompson, *Class Action Update: The Increasing Scrutiny of Class Settlements and Other Developments*, 60 Bus. Law. 797, 805 (2005).

9. Aggregate Litigation, § 3.07(b), *supra* note 6.

10. Kevin M. Forde, *What Can a Court Do With Leftover Class Action Funds? Almost Anything!*, 35 No. 3 Judges' J. 19 (1996).

11. *See* Aggregate Litigation, *supra* note 6, at § 3.07 cmt. b ("In such circumstances, there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.").

12. *See* Rosenthal, *supra* note 1, at 116.

13. *See* Aggregate Litigation, *supra* note 6, at § 3.07(c) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class."); *see also id.* at § 3.07 cmt. a (commenting that the doctrine arose from the trust context, where "if the testator's precise terms could not be carried out the court could modify the trust in a manner that would best carry out the testator's intent").

14. *See* David F. Herr, Annotated Manual for Complex Litigation 503 (4th ed. 2013) ("[J]udges should be wary of granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants' product, while granting substantial monetary attorney fee awards.").

15. *Id.* at 502; *see* Fed. R. Civ. P. 23(e)(1)(A).

16. Herr, *supra* note 14, at 503; *see* Fed. R. Civ. P. 23(e).

17. Herr, *supra* note 14, at 502.

18. *Id.* at 502 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety.")).

19. *See In re Lupron*, 677 F.3d at 24, 26 ("[W]e express our unease with federal judges being put in the role of distributing cy pres funds at their discretion.").

20. *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1108–09 (D.N.M. 2012).

21. *See* Herr, *supra* note 14, at 523.

22. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (Posner, J.) (stating in dicta that where it is infeasible to distribute proceeds of a class action settlement and therefore the *cy pres* remedy is applied to "prevent the defendant from walking away from the litigation scot-free . . . [t]here is no indirect benefit to the class from the defendant's giving money to someone else. In such a case the 'cy pres' remedy . . . is purely punitive.").

23. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, J., concurring) (stating that the court must return residual funds to the defendant).

24. *Id.* at 474 (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007)).

25. *Nachshin v. AOL*, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011).

26. *In re Lupron*, 677 F.3d at 33 (quoting Aggregate Litigation, *supra* note 6, at § 3.07(c)).

27. *Id.* at 34:

> *See, e.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (rejecting, in a nationwide privacy class action, a *cy pres* distribution to local Los Angeles charities because it did not "account for the broad geographic distribution of the class," did not "have anything to do with the objectives of the underlying statutes," and would not clearly "benefit the plaintiff class"); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311–12 (9th Cir. 1990) (invalidating a *cy pres* distribution to the Inter-American Fund for "indirect distribution in Mexico," *id.* at 1304, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members," *id.* at 1312); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres* distribution to local law schools, and directing the district court to "consider to some degree a broader nationwide use of its *cy pres* discretion"); *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1253–54 (7th Cir. 1984) (invalidating, in a national antitrust class action, a *cy pres* distribution that would establish a private antitrust research foundation on the basis that "[t]here has already been voluminous research" on the subject).

28. 268 F.3d 619 (8th Cir. 2001) (explaining that a *cy pres* distribution should be closely related to the geographic origin of the underlying claim and distributed to those similarly situated to the class).

29. *In re Thornburg*, 885 F. Supp. 2d at 1109.

30. No. 04 Civ. 1611 (LAK), United States District Court, S.D. New York.

31. *Charrons, et al. v. Pinnacle Grp.*, No. 07 Civ. 6316 (CM), U.S. District Court, S.D. New York.

32. Nos. 68 Civ. 4026, 4028 and 4027 (LAP), U.S. District Court, S.D. New York.

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The Note of Issue Filing Requirement

By Kenneth R. Kirby

Introduction

Practitioners in personal injury and other civil litigation[1] have for some time been confronted with a growing practice in the New York State Supreme Court – namely, the pre-note of issue scheduling of civil cases for a "date certain" on which trial is to commence. This is usually done as part of a comprehensive, written "Scheduling Order" that not only establishes a deadline for the completion of disclosure but also sets a date by which a note of issue must be filed. Presumably, when such a date certain for trial is thus established at a first or "preliminary" conference, the date certain is recorded, at a minimum, on the individual justice's trial calendar, whether or not it is placed, at that juncture, on a county clerk's "main" trial calendar (in counties where such is maintained). This growing practice raises an important question, namely, is the note of issue requirement for placing a civil case on the trial calendar, as enacted in Rule 3402(a) of the Civil Practice Law and Rules (CPLR), still the effective gatekeeper to the trial calendar? And if it is not, should its historical efficacy be restored? To answer these questions, we must first examine the note of issue requirement itself, and, later, the pertinent calendar provisions of the Uniform Civil Rules for the Supreme Court and the County Court (Uniform Court Rules), as found in Part 202 of Title 22 of the New York Compilation of Codes, Rules, and Regulations (N.Y.C.R.R.). We then discuss the problems that arise when courts prematurely schedule civil cases for trial before, rather than after, the filing and service of a note of issue. Finally, a proposal that would avert or, at the least, reduce the frequency of these problems is advanced.

The Note of Issue Requirement

Historically, to place a civil case on the Supreme Court's or the County Court's trial calendar, a party – typically, the plaintiff – has been required to file and serve a note of issue accompanied by a certificate of readiness that

attests to the completion or waiver of all discovery. Trial readiness, not the date of commencement of the action, is the *sine qua non* of placement on the trial calendar. As Professor David D. Siegel described the procedure in his Practice Commentaries to Rule 3402 of the Civil Practice Law and Rules:

> C3402:1. Note of Issue. Generally.
>
> In New York practice under the CPLR, the filing of a "note of issue" is the thing that gets the case onto the court's "calendar" to await trial. Not until that filing [occurs] does the case take its position in line, and, unless the case has been granted a preference under CPLR 3403, its position is the bottom of the calendar, whence it moves up as earlier cases go to trial. *The time when the action was commenced is not the determinant*. If action X is commenced months or even years after action Y, action X will nevertheless be tried first if X's note of issue was filed first.[2]

In a peculiar quirk of New York civil practice,

> Under subdivision (a) of CPLR 3402, it is the filing of the note of issue that puts the case on the court's trial calendar. The filing presumably signifies that the case is ready for trial, but the thing that really attests to [trial] readiness is a device not mentioned at all in CPLR 3402, or, for that matter, anywhere in the CPLR. It is the "certificate of readiness," a paper that ordinarily accompanies the note of issue and confirms that the case is indeed ready; that all pretrial procedures have been completed or an opportunity for them has been had but not exploited. The certificate is a creature entirely of the rules.[3]

To place Professor's Siegel's Practice Commentaries in context, the text of CPLR 3402(a) is set out, below:

> Rule 3402. Note of issue.
>
> (a) Placing case on calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

Pursuant to the mandatory last sentence of the above statute, the clerk "shall," as a ministerial task not involving the exercise of discretion, "enter the case upon the [trial] calendar" . . . "as of the date of the filing of the note of issue." Notably, the clerk is directed to do so without any direction from a Supreme Court justice or a County Court judge and even before the expiration of opposing counsel's 20-day "window" within which to move to vacate the note of issue, as prescribed in 22 N.Y.C.R.R. § 202.21(e).[4]

Consistent with the foregoing, 22 N.Y.C.R.R. § 202.21(a) (Note of issue and certificate of readiness) provides, in pertinent part, "No action or special proceeding shall be deemed ready for trial or inquest unless there is *first* filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section" (emphasis supplied). If, therefore, a civil action or special proceeding is, conversely, not "ready for trial or inquest" in a case where a note of issue accompanied by a certificate of readiness is not "first filed," it stands to reason that civil actions or special proceedings should *not* be scheduled for a "date certain" for trial or inquest "unless" a note of issue with certificate of readiness has "first [been] filed, [accompanied by] proof of service on all parties entitled to notice" – as is, also, statutorily required by CPLR 3402(a).

The purpose of requiring the concomitant filing and service of a certificate of readiness that attests to the trial-readiness of the case, together with the note of issue, is obvious – to ensure that no case reaches the trial calendar if it is not actually ready to be tried. To effectuate this, 22 N.Y.C.R.R. § 202.21(e) provides that any non-filing party may, within a strict 20-day "window" after the filing and service of a note of issue and certificate of readiness, move to vacate the note of issue "if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." Once this window closes, discovery is, in almost all instances, closed.[5]

Thus, 22 N.Y.C.R.R. § 202.21(e) provides a time-sensitive mechanism for a party who believes discovery is incomplete to remove the case from the trial calendar so that discovery can be completed. If a litigant timely moves for such relief and if an order vacating the note of issue is granted, then

> [a] case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of a motion.[6]

If, on the other hand, a motion to vacate is not timely made or if timely made is denied, the case remains on the trial calendar – with discovery now closed except upon the demonstration of the aforesaid "special, unusual or extraordinary circumstances"[7] – and continues its ascent to the top of the calendar as the other cases ahead of it are tried or otherwise concluded.

A fairly straightforward process, it would seem, but one that is short-circuited when a court schedules a date

certain for trial at a first, or "preliminary," conference with counsel. A preliminary conference is, under the Uniform Court Rules, to be conducted before a note of issue and certificate of readiness have been filed and served upon other counsel[8] and therefore, before either the completion of discovery or the commencement, let alone the expiration of, opposing counsel's 20-day period within which to move to vacate the note of issue. When at this early juncture of a civil case, a court issues a comprehensive written scheduling order that not only establishes a deadline for the completion of disclosure but also a deadline for the filing of a note of issue and a date certain for trial, problems can and do arise, frequently giving rise to motion practice that might, otherwise, have not become necessary.

Problems That Can Arise When a Date Certain for Trial Is Scheduled Pre-Note of Issue

When one Supreme Court justice in, say, Action X, schedules a trial date (Date Z) before a note of issue has been filed and served, it can put trial counsel in a bind. What if another Supreme Court justice (one whose practice it is never to schedule a matter for trial until *after* a note of issue with certificate of readiness has been filed and served) inadvertently double schedules this same trial counsel for trial in Action Y on Date Z? The second justice correctly reasons that the trial scheduling order issued in Action X *before a note of issue with certificate of readiness was filed in Action X* is not compatible with CPLR 3402(a)'s note of issue requirement and technically, was never on the trial calendar.[9] What is trial counsel to do, other than disappoint one or the other of the two clients for whom he or she must now supply substitute trial counsel who is available to try one of the two cases on Date Z, while original trial counsel tries the other? The client whose case must be tried by substitute counsel will find this solution unpalatable, to say the least.

Besides this worst-case scenario, other problems sometimes arise when a trial date is scheduled at a preliminary conference. Often, this premature scheduling sets the stage for ensuing discovery disputes if problems or delays occur during the course of discovery proceedings, rendering the scheduled trial date impracticable or, in hindsight, overly ambitious.

Sometimes discovery is delayed by non-parties who are outside or not entirely within either party's control, such as treating physicians who may not promptly respond to requests for medical records and other information needed to conduct an injured plaintiff's examination before trial or independent medical examination. Clients may either not have anticipated or be unprepared or unequipped to cope with the scope or breadth of discovery demands served upon them. And if the breadth or scope of discovery demands is, or appears to the responding party to be, overbroad or excessive, court intervention or motion practice may be necessary to resolve the issue. Sometimes, privilege or confidentiality issues or concerns must be resolved or litigated. Occasionally, trial counsel may simply be overwhelmed by a spate of discovery and/or other deadlines across a number of cases he or she is handling, sometimes in different courts in different jurisdictions, each court[10] with its own unique set of rules and deadlines.

Premature scheduling at a preliminary conference of either a date by which a note of issue must be filed or a date certain for trial can be problematic – most often, when counsel find themselves unable to complete discovery by the time appointed to file a note of issue. More than one plaintiff's attorney, for example, has been heard to respond, in opposition to a defendant's motion to vacate the note of issue upon the ground that discovery is incomplete, that the attorney was "forced" to file the note of issue in order to comply with the court's scheduling order.

Whether what is needed is to complete discovery, file a note of issue or even to commence trial itself, litigants can find themselves bumping into prematurely established deadlines. When this happens, motion practice frequently ensues, as one party or the other applies to or moves the court to vacate the note of issue, for extension(s) of deadline(s) and/or, in the most extreme situations, for an adjournment of the date set for trial.

When, however, CPLR 3402(a)'s note of issue requirement is honored and the Uniform Court Rules' calendar provisions (discussed below) are followed in the sequential order prescribed therein, the "compliance conference" – an intermediary conference that occurs after the preliminary conference but not later than 60 days before the date fixed for the completion of discovery[11] – provides a means to adjust to exigencies or difficulties that may have arisen during the discovery process, by extending the previously set discovery deadline to allow all parties to complete discovery before requiring that a note of issue be filed by a date that the court may, then, set during that compliance conference – but not before.

The Provisions of the Uniform Court Rules for the Supreme Court and the County Court Do Not Contemplate Scheduling a Civil Case for Trial Before, Rather Than After, a Note of Issue (With a Certificate of Readiness) Has Been Filed

Before the inauguration of the Individual Assignment System, way back when, each county clerk would maintain a central trial calendar system, upon which cases were placed solely by the filing, along with the required fee and proof of service upon all parties or their counsel, of a note of issue with a certificate of readiness. Then, cases worked their way up the calendar, to be assigned for trial to whatever Supreme Court justice was available, or, pursuant to such rotation as might have been established. In those days civil cases were not assigned to a particular justice until a note of issue had

been filed, and the parties were afforded wide latitude to chart their own procedural course through the courts[12] "unless public policy is affronted."[13]

However, the Individual Assignment System has accentuated the individual justice's own calendar preferences. As Professor David D. Siegel has warned practitioners, "[i]n this day of the Individual Assignment System (IAS), the preferences of the individual judge must be checked on, as well. When one judge owns a case from cradle to grave, as contemplated under the IAS, the judge's individual preferences are especially important in respect of calendar matters."[14]

While perhaps "especially important," "the preferences of the individual judge" should not trump either CPLR 3402(a)'s note of issue requirement (such filing being an absolute and indispensable prerequisite to scheduling a civil case for a "date certain" for trial), or the calendar provisions contained in 22 N.Y.C.R.R. Part 202, for the two reasons that follow.

First, even were the Uniform Court Rules to be (erroneously) construed as permitting justices to place cases on their individual calendars notwithstanding the non-filing of a note of issue with concomitant certificate of readiness, statutes prevail over conflicting or contradictory court rules.[15]

Second, the calendar provisions of the Uniform Court Rules do not support such a construction. They are worded and structured to effectuate, rather than circumvent, the note of issue filing-and-service requirement for placement of a civil case on the trial calendar, as that requirement appears in Rule 3402(a). We proceed, therefore, to an examination of those calendar provisions.

Preliminary Conference Calendar

Section 202.22(a)(1)–(8), title 22 of the N.Y.C.R.R. (Calendars), prescribes a number of civil calendars for use by Supreme Court justices and County Court judges in civil actions. Among these is a "(1) *Preliminary Conference Calendar*. A preliminary conference calendar is for the calendaring for conferences of cases *in which a note of issue and certificate of readiness have not yet been filed*."[16] (emphasis supplied). What specific topics are to be addressed at such a preliminary conference, which is to be held not more than 45 days after the request for judicial intervention has been filed?[17] Section 202.12(c)(2) (Preliminary conference) prescribes, among other items to be considered, the "establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed within the time frame set forth in subdivision (b), unless otherwise shortened or extended by the court depending upon the circumstances of the case."[18] At the conclusion of such a preliminary conference, "a form of a stipulation and order, prescribed by the Chief Administrator of the Courts, shall be made available which the parties may sign, agreeing to a timetable *which shall provide for completion of disclosure* within 12 months of the filing of the request for judicial intervention for a standard case, or within 15 months of such filing for a complex case."[19]

Is the note of issue requirement for placing a civil case on the trial calendar, as enacted in CPLR 3402(a), still the effective gatekeeper to the trial calendar?

Crucially, no specific provision is made, within the cited sections, for the court to set either a deadline for the filing of a note of issue or a trial date.

Compliance Conference Calendar

Moving forward, then, in the chronology of a civil action, 22 N.Y.C.R.R. § 202.19(b)(3) provides, "No later than 60 days before the date fixed for the completion of discovery, *a compliance conference shall be held to monitor the progress of discovery*, explore potential settlement, *and set a date for the filing of the note of issue*." (emphasis supplied). Clearly, therefore, no Supreme Court justice or County Court judge should, at a preliminary conference, impose a deadline even for the filing of the note of issue, let alone schedule a date certain for trial.

Pretrial Conference Calendar

Moving even deeper, in point of time, into the progression of a civil action toward trial, "[a] pretrial conference shall be held within 180 days [i.e., after] the filing of the Note of Issue."[20] Such a pretrial conference calendar is, in contradistinction to either a preliminary conference or a compliance conference, "for actions awaiting conference *after the note of issue and certificate of readiness have been filed*."[21] 22 N.Y.C.R.R. § 202.19(c)(2) (Pretrial conference) mandates, "*At the pretrial conference, the court shall fix a date for the commencement of trial*, which shall be no more than eight weeks after the date of the conference" (emphasis supplied).[22]

Based, therefore, on the clear language of all the pertinent court rules prescribing various court calendars and their respective purposes and sequence, as well as the mandatory language of 22 N.Y.C.R.R. § 202.19(c)(2) and CPLR 3402(a), the court must wait until the pretrial conference to "fix a date for the commencement of trial." This is the first conference prescribed to occur following the filing of a note of issue, which filing, in its turn, is the statutory prerequisite to the placement of the case onto the trial calendar in the first instance.[23]

Having examined the purposes and sequence of the various court calendars prescribed by the Uniform Court Rules, and, having already discussed the controlling statute, CPLR 3402(a), let us examine CPLR 3401 and the applicable court rules prescribing various court calendars and governing calendar practice to ascertain whether there is any persuasive basis upon which Supreme Court justices or County Court judges may, properly, schedule civil cases for trial before a note of issue with concomitant certificate of readiness has been filed and served in manner prescribed by both CPLR 3402(a) and 22 N.Y.C.R.R. § 202.21(a), (b).

Two possibilities present themselves, CPLR 3401 and 22 N.Y.C.R.R. § 202.12, but they fail to justify courts in scheduling a civil case for trial in the absence of a filed-and-served note of issue with certificate of readiness because each is too general, and neither is as specific as is CPLR 3402(a) with respect to prescribing a method for placing civil cases on the trial calendar. Further, in light of the express language of CPLR 3402(a), the provisions of 22 N.Y.C.R.R. § 202.21(a), (b), (e), (f), and the other Uniform Court Rules establishing various court calendars and prescribing their purposes and sequence, each of these two possibilities is inadequate to justify any Supreme Court justice or County Court judge in setting a civil case down for a "date certain" for trial before, rather than after, a note of issue with certificate of readiness has been filed and served.

First, CPLR 3401 provides, generally, as follows:

> Rules for the hearing of causes.
>
> The chief administrator of the courts shall adopt rules regulating the hearing of causes, which may include the filing of notes of issue, the preparation and publication of calendars and the calendar practice for the courts of the uniform court system.

Insofar as practicable, such rules with the city of New York shall be uniform.

The problem with relying on a general statute such as CPLR 3401 as justification for scheduling civil cases for trial before a note of issue has been filed is that CPLR 3402(a) prescribes, with great specificity, the method by which a case is placed on the trial calendar. *By filing and serving a note of issue* along with a certificate of readiness, at that time the clerk is statutorily *commanded* to place the case on the trial calendar. Because "so far as the particular intention [as expressed in one statute, or, one part of one statute] is applicable, the general intention [as expressed in another statute, or, in another part of one statute] yields."[24] Rule 3401, the more general of the two, cannot be construed to authorize courts to schedule trials absent a filed-and-served note of issue.[25] Consider as well the fact that the overall structure of Part 202 of the Uniform Court Rules is consistent with requiring a note of issue with certificate of readiness to have been filed and served as a prerequisite to either placing a civil case on the trial calendar or scheduling that civil case for trial.

The second possibility, 22 N.Y.C.R.R. § 202.12, provides, at subsection (c), "The matters to be considered at the preliminary conference shall include . . . (7) any other matters that the court may deem relevant." Does this general, catch-all provision afford courts *carte blanche* to "deem relevant," at a preliminary conference, the establishment of a date certain for trial in derogation of the prescribed statutory means by which a case is to be "[p]lac[ed] . . . on [the trial] calendar" – namely, by filing and serving a note of issue? No. As restated by the Fourth Department in *Sciara v. Surgical Associates of West New York, P.C.*,[26] "it is well established that, in the event of a conflict between a statute and a regulation, the statute controls."[27] Or, as stated in *Hellner*, "'Administrative regulations are invalid if they conflict with a statute's provisions *or are inconsistent with its design and purpose*.'"[28] Hence, 22 N.Y.C.R.R. § 202.12(c)(7) must, *perforce*, yield to CPLR 3402(a)'s sole prescribed statutory method for "[p]lacing [a] case on [the] calendar" – to wit, by filing and serving a note of issue. The statute must, therefore, control not only the means by which civil cases are placed on the trial calendar, but, logically, when they may first be scheduled for trial.

The Solution: Uniformly, in All Supreme and County Courts Across New York State, Honor the Note of Issue Rule and Do Not Schedule Civil Cases for Trial Until and Unless a Note of Issue With Certificate of Readiness Has Been Filed, Served, and, if Timely Moved Against, Not Vacated

The solution: Go back to the future. Honor what the court long ago said in *A. Kreamer, Inc. v. M. Kamenstein, Inc.*[29] (reversing an order that had placed the action on the calendar for trial on a day certain in Kings County Supreme Court and directed the plaintiff or defendant to, thereafter, serve and file a note of issue): "There is no authority in the court to direct trial of an action when the action itself is not on the calendar." If courts firmly and uniformly across the state, and in all instances, adhered to the *statutory* rule requiring the actual filing and service of a note of issue and certificate of readiness as an absolute and indispensable prerequisite to placing a Supreme Court or County Court civil action or special proceeding on the trial calendar and, hence, to scheduling such matters for a date certain for trial (or, for inquest), this would go a long way toward avoiding impossible trial conflicts for litigators. It would also obviate or, at the least, reduce the need for motion practice seeking to vacate the note of issue, directed toward the timing, provision, scope, propriety, or breadth of discovery or seeking trial adjournments or continuances to accommodate either the completion of discovery or trial counsel's scheduling conflict(s). By re-establishing the note of issue rule as the sole and exclusive means by which a civil case can be

placed on the trial calendar and, *ergo*, scheduled for a date certain for trial, the courts would avoid trial schedule conflicts; reduce the frequency of discovery problems, disputes and motion practice; and, most important, allow all civil litigants to be represented, at trial, by counsel of their choice – counsel who are most familiar with their cases, having "lived" with those cases from inception through trial.

1. Including, among others, this author.

2. 7B McKinney's Cons. L. of N.Y., CPLR 3402, Siegel's Practice Commentaries, C3402:1, p. 14, main volume. (emphasis supplied.)

3. *Id.*, C3402:2, pp. 15–16. *See* 22 N.Y.C.R.R. § 202.21(b) (prescribing the form and content of not only the certificate of readiness but, also, the note of issue).

4. Meaning, necessarily and as a matter of deductive logic, that once a copy thereof is filed and "served upon the clerk of the trial court" (*see* 22 N.Y.C.R.R. § 202.21(e)), as well as, obviously, opposing counsel, an order vacating a note of issue necessarily and immediately operates to strike a case from the trial calendar, thereby activating CPLR Rule 3404's one-year period to restore the case thereto (in manner as prescribed in 22 N.Y.C.R.R. § 202.21(f)) so as to prevent the case from being "deemed abandoned" and automatically dismissed, by entry of the clerk without the necessity of a motion, for neglect to prosecute, all pursuant to CPLR 3404.

5. *Joseph v. City of Buffalo*, 187 A.D.2d 946, 947 (4th Dep't 1992) ("It is settled law that, upon the filing of a note of issue and statement of readiness, a party is foreclosed from further discovery, absent a demonstration of special, unusual or extraordinary circumstances."), *aff'd*, 83 N.Y.2d 141 (1994).

6. CPLR 3404 (Dismissal of abandoned cases). What it means for a case to be "deemed abandoned . . . for neglect to prosecute" or "marked 'off' or struck from the calendar …" could be the subject of a separate, entire article, even though an order vacating a note of issue should, as a matter of pure logic, be construed, *ipso facto*, as "str[i]k[ing] the case from the calendar" for purposes of both CPLR 3404's one-year restoration requirement and (automatic) dismissed-as-abandoned provision whenever a case that has been so stricken is not restored to the [trial] calendar within that rule's one-year window. See discussion at n. 4, *supra*.

7. *Joseph*, 187 A.D.2d at 947.

8. *See* 22 N.Y.C.R.R. § 202.22(a)(1), entitled Calendars and sub-titled, Preliminary Conference Calendar, which provides, "A preliminary conference calendar is for the calendaring for conference of cases *in which a note of issue and certificate of readiness have not yet been filed*" (emphasis supplied).

9. "Since no note of issue was ever filed in this action, it was never on the trial calendar." *Clark v. Great Atl. & Pac. Tea Co., Inc.*, 23 A.D.3d 510, 511 (2d Dep't 2005).

10. And, often, each justice or judge of each court.

11. *See* 22 N.Y.C.R.R. § 202.19(b)(3).

12. *Stevenson v. News Syndicate Co., Inc.*, 302 N.Y. 81, 87 (1950) (citations omitted); *Chem. Bank v. Buxbaum*, 76 A.D.2d 850, 851 (2d Dep't 1980) (citations omitted).

13. *Mitchell v. N.Y. Hosp.*, 61 N.Y.2d 208, 214 (1984) (citations omitted). Indeed, such continues to be the law. *See, e.g., Doe v. Marzolf*, 258 A.D.2d 970, 970 (4th Dep't 1999) (citations omitted); *see also Ford v. Pulmosan Safety Equip. Corp.*, 13 Misc. 3d 1242(A) (Sup. Ct., Queens Co. 2006) (Kelly, J.) (noting, at *9, "However the parties, as always, are free to chart their own procedural course."), *app. dismissed*, 52 A.D.3d 710 (2d Dep't 2008).

14. 7B McKinney's Cons. L. of N.Y., C3401:1 (Siegel's Practice Commentaries), p. 9 (main volume).

15. *Sciara v. Surg. Assocs. of W.N.Y., P.C.*, 104 A.D.3d 1256, 1257 (4th Dep't Mar. 15, 2013) (majority opinion), *lv. to app. granted*, 107 A.D.3d 1503 (4th Dep't June 7, 2013), *app. dismissed*, 22 N.Y.3d 951 (Oct. 22, 2013).

16. 22 N.Y.C.R.R. § 202.22(a)(1).

17. 22 N.Y.C.R.R. § 202.19(b)(1).

18. Which, in its turn, refers to the "Differentiated Case Management" deadlines for an "expedited" case (eight months); for a "standard case" (12 months); and for a "complex case (15 months), as these are each prescribed in 22 N.Y.C.R.R. § 202.19(b)(2)(i)–(iii). See also, in this regard, 22 N.Y.C.R.R. § 202.19(b)(2), directing the court, "[a]t the preliminary conference, [to] designate the track to which the case shall be assigned."

19. 22 N.Y.C.R.R. § 202.12(b) (emphasis supplied).

20. 22 N.Y.C.R.R. § 202.19(c)(1).

21. 22 N.Y.C.R.R. § 202.22(a)(4) (emphasis supplied).

22. Which pretrial conference necessarily follows, in point of time, both the "preliminary" conference and the "compliance" conference because the pretrial conference "shall be held within 180 days of [i.e., after] the filing of the Note of Issue" (22 N.Y.C.R.R. § 202.19(c)(1)), but each of those two conferences are to occur before such a filing. *See* 22 N.Y.C.R.R. § 202.19(b)(1), (3).

23. *See A. Kreamer, Inc. v. Kamenstein, Inc.*, 251 A.D. 865, 865 (2d Dep't 1937), *cited in* 105 N.Y. Jur. 2d, Trial, § 36, at p. 83, n. 5 (main vol., 2006). In this case, the Appellate Division reversed on the law an "[o]rder *placing the action upon the calendar* of Special Term, Part III, for Trials for the County of Kings, *for a day certain, and directing the plaintiff or defendant to [thereafter] serve and file a note of issue*" because "[t]here is no authority in the court to direct trial of an action *when the action itself is not on the calendar*" (citations omitted) (emphasis supplied). On, as was improperly scheduled in that case, a "date certain."

24. 1 McKinney's Cons. L. of N. Y., Statutes, § 238, p. 405 (main vol.).

25. *See also* 97 N.Y. Jur. 2d, Statutes, § 116, pp. 101–02 (main vol.) ("It is a rule of statutory construction that in the event of an apparent conflict between parts of a statutory scheme, *specific overrides general*, . . .") (emphasis supplied).

26. 104 A.D.3d 1256 (4th Dep't) (majority opinion), *lv. to appeal granted*, 107 A.D.3d 1503 (4th Dep't), *app. dismissed*, 22 N.Y.3d 951 (2013).

27. *Id.* at 1256 (quoting *Hellner v. Bd. of Educ. of Wilson Cent. Sch. Dist.*, 78 A.D.3d 1649, 1651 (4th Dep't 2010)).

28. *Hellner*, 78 A.D.3d at 1651 (citation omitted) (emphasis supplied).

29. 251 A.D. at 865.

MEET YOUR NEW OFFICERS

President
Glenn Lau-Kee

Glenn Lau-Kee, of New York City, took office June 1 as the 117th president of the 75,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected Lau-Kee at the organization's 137th annual meeting, held this past January in Manhattan.

Lau-Kee is a partner of Kee & Lau-Kee, a small firm located in Manhattan. He concentrates his practice in real estate and business law.

A 15-year member of the State Bar Association, Lau-Kee most recently served as president-elect and co-chair of the President's Committee on Access to Justice. He was a member-at-large of the Executive Committee and co-chair of the Membership Committee. He is a member of the Business Law, Health Law and Real Property Law Sections. He received the Commercial and Federal Litigation Section's George Bundy Smith Pioneer Award in 2010.

Lau-Kee was a member of the Task Force on the State of Our Courthouses and the Special Committees on Legal Specialization, Multijurisdictional Practice and Sarbanes-Oxley Issues.

He was a vice-chair of the board of the Greater New York City YMCA and a board member of the Fund for Modern Courts, The New York Bar Foundation and US-Asia Institute. He served as president of the Asian American Bar Association of New York from 1997–1999 and was appointed by former Chief Judge Judith S. Kaye to serve on the Commission to Examine Solo and Small Firm Practice, and the Committee to Promote Public Trust and Confidence in the Legal System.

President-elect
David P. Miranda

David P. Miranda, of Albany, New York, took office June 1 as president-elect of the 75,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected Miranda at the organization's 137th annual meeting, held this past January in Manhattan. In accordance with NYSBA bylaws, Miranda will become the Bar Association's 118th president on June 1, 2015.

Miranda is a partner at Heslin Rothenberg Farley and Mesiti in Albany. He is a trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, patent infringement and Internet issues.

A 25-year member of the State Bar Association, Miranda has served as a secretary of the Association and a member of its Executive Committee and House of Delegates. He is past chair of the Electronic Communications Committee and the Young Lawyers Section, and co-chaired the Special Committee on Strategic Planning. He currently serves as chair of the Special Committee on CLE.

He is a member of the NYSBA's Intellectual Property Law Section, Commercial and Federal Litigation Section, Committee on Annual Award, Committee on Continuing Legal Education and Membership Committee.

Miranda is a past president of the Albany County Bar Association. In 2009, he served on the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, then-Chief Judge Judith S. Kaye appointed him to the New York State Commission on Public Access to Court Records.

A resident of Voorheesville, Miranda graduated from the State University of New York at Buffalo and Albany Law School.

Secretary
Ellen G. Makofsky

Ellen G. Makofsky, of Garden City, New York, has been elected secretary of the New York State Bar Association.

A founding partner of Raskin & Makofsky LLP, Makofsky concentrates her practice in elder law and trusts and estates.

A 27-year member of the State Bar, Makofsky is a member of the House of Delegates. She was a member-at-large on the Executive Committee for four years. She chaired the Elder Law Section and is the Secretary of the Senior Lawyers Section and a member of the Trusts and Estates Law Section. She is the co-chair of the Women in the Law Committee and is a member of the Committee on Continuing Legal Education and the Membership Committee. She also is president of the National Academy of Elder Law Attorneys, New York Chapter.

A resident of Sands Point, Makofsky graduated from Boston University and earned her law degree *cum laude* from Brooklyn Law School.

Treasurer
Sharon Stern Gerstman

Sharon Stern Gerstman, of Buffalo, New York, has been re-elected treasurer of the New York State Bar Association.

Gerstman is of counsel to Magavern Magavern Grimm in Buffalo. She concentrates her practice in the areas of mediation and arbitration, and appellate practice.

A 34-year member of the State Bar, Gerstman previously served on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section's Executive Committee.

She was chair of the Committee on Civil Practice Law and Rules and the Special Committee on Lawyer Advertising and Lawyer Referral Services. She previously co-chaired the Task Force on E-Filing and the Special Committees on Lawyer Advertising and Strategic Planning. She also served on the American Bar Association's Board of Governors for three years and is a member of the ABA's House of Delegates.

A resident of Amherst, Gerstman graduated from Brown University and earned her law degree from the University of Pittsburgh School of Law. She received a master's degree from Yale Law School.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

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

Sincerely,
Richard Risk-Averse

Dear Richard Risk-Averse:

As you correctly point out, data security is a frontline issue that has gotten significant attention in the press – both inside and outside of legal circles. Recent data breaches at major corporations and law firms have underscored the need for stronger, more effective mechanisms to protect sensitive and confidential client information.

Prior Forums have focused upon several key provisions of the New York Rules of Professional Conduct (RPC) that give practitioners an ethical blueprint that tells us what attorneys need to know when using various technologies in everyday practice. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 2013, Vol. 85, No. 4 (mobile devices); Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2013, Vol. 85, No. 5. (usage of social media to conduct research); Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., Jan. 2014, Vol. 86, No. 1. (email as a basic method for everyday communication). Your question about data security gives us an opportunity to address what is perhaps one of the most important issues that lawyers face when we have to reconcile the need to use technology with our obligation to protect a client's confidential information.

To answer your question, we begin with Rule 1.1, which recites a lawyer's basic ethical obligation to provide competent representation. Specifically, Rule 1.1(a) states that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This means attorneys must have a basic understanding of how technologies are utilized in connection with the representation of a client. As we have noted on multiple occasions in this Forum, attorneys must be intimately familiar with the usage of those technologies. Although not necessarily applicable in New York, amended Comment [8] to Rule 1.1 of the ABA Model Rules of Professional Conduct states that, in maintaining competence, "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*. . . ." *Id*. (emphasis added.) It is foolish for a lawyer to ignore evolving technologies and their impact on the lawyer's practice.

Along with your obligation to provide competent representation, discussed above, establishing the appropriate data security policy for your firm also requires an understanding of Rule 1.6(c) of the RPC which states, in pertinent part, that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client. . . ."

We assume that, by now, most attorneys are aware of the ethical obligations we have outlined. But what about nonlawyers, and what happens when nonlawyers have access to a client's confidential information? RPC Rule 5.3(a) tells us:

> A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is *reasonable under the circumstances*, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

Id. (emphasis added.)

This may seem relatively straightforward but we must also look at the Comments to this rule because they point us to other portions of the RPC which discuss an attorney's supervisory obligations. Comment [1] to Rule 5.3 states:

> [Rule 5.3] requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately

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> supervise those nonlawyers. Comments [2] and [3] to Rule 5.1 . . . provide guidance by analogy for the methods and extent of supervising nonlawyers.

Although Rule 5.1 spells out the specific obligations for the supervision of lawyers by those attorneys with management responsibility in a law firm, the Comments to this Rule are applicable in the context of supervising nonlawyer personnel.

Comment [2] to Rule 5.1 states:

> Paragraph (b) [of Rule 5.1] requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers *to make reasonable efforts to establish internal policies and procedures* designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. . . . (emphasis added.)

In addition, Comment [3] to Rule 5.1 provides:

> Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) [of Rule 5.1] can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary . . . the ethical atmosphere of a firm can influence the conduct of all its members and lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

The Comments to Rule 5.1 as related to Rule 5.3 are a simple statement of the steps required for proper supervision of nonlawyer personnel in both small- and large-firm environments. However, as is often the case, Comments to the RPC can be subject to varying interpretations as well as numerous questions. For example, what would "reasonable efforts to establish internal policies and procedures" entail, especially in the area of protecting sensitive and confidential client information from improper disclosure or usage? (*See supra* Comment [2] to Rule 5.1.) What level of detail is required when a firm enacts a data security policy to protect client information and how should that policy be updated and communicated to nonlawyer personnel at the firm? Is it proper for a small firm to require only "informal supervision [of nonlawyer personnel] and periodic review of compliance [with supervisory policies]"? (*See supra*, Comment [3] to Rule 5.1.) And is "informal supervision" of nonlawyer personnel (especially when it comes to protecting unauthorized disclosure or use of confidential information) enough so that the supervising attorney is complying with his or her ethical obligations?

In his discussion of Rule 5.3, Professor Roy Simon reminds us that it makes sense to emphasize the importance of confidentiality when supervising nonlawyers even though the RPC is technically inapplicable to nonlawyers. *See* Simon's New York Rules of Professional Conduct Annotated at 1301 (2014 ed.). However, Professor Simon also believes that the law firms and lawyers supervising nonlawyer personnel should give these individuals "specific, formal instruction regarding a lawyer's duty of confidentiality." *Id.*

Comment [2] to Rule 5.3 states:

> With regard to nonlawyers, who are not themselves subject to these Rules, *the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm.* Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must ensure that such assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a nonlawyer has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

Id. (emphasis added.)

If it was not made clear already, Comment [2] to Rule 5.3 suggests that attorneys in supervisory positions must take extra steps to make nonlawyer personnel aware that they must act with the same manner as and in accordance with the ethical obligations of the attorneys who supervise them. That being said, you along with the other attorneys in supervising roles at your office have an obligation to both advise and coordinate data security policies with the nonattorney staff at your firm to prevent the disclosure and usage of confidential information. Rule 5.3 (as discussed above) expressly provides for this supervisory obligation, and although the Comments to Rule 5.3 suggest that nonattorneys are not subject to the RPC, the RPC, as a whole, does define a "type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to their professional employment." *See* Simon's New York Rules of Professional Conduct Annotated at 1299 (2014 ed.).

To that end, we would recommend the following best practices when implementing a data security policy at your firm.

- A written and regularly updated data security policy which is

shared with all firm employees at regular intervals, as well as firm-wide training on such policies. We would recommend circulating and updating such policies quarterly. (These policy recommendations have also been proposed in the context of cloud computing. *See The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations*, New York City Bar Ass'n, Nov. 2013, at http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf.)

- A near impenetrable encryption system on firm networks and individual computers for accessing confidential and sensitive client information so that the risk of a data breach is significantly reduced.
- A mechanism so that such confidential information remains encrypted if in the event electronic documents are "checked out" from the firm's documents servers or other firm-wide computer servers, so that work on client matters can be conducted outside of the office. We would recommend putting these documents on an encrypted USB flash drive.
- Utilize the Trusted Platform Module standard on all firm-issued laptop computers or tablets to prevent these devices from being improperly accessed if they are ever lost or misplaced. Ideally, laptop computers should contain fingerprint readers.
- Restrict access to certain confidential and sensitive client information to specific firm personnel. At a minimum, your firm's document management and electronic discovery systems should allow for the ability to restrict access to highly sensitive information.
- Use encrypted passwords for hardwire networks and internal wireless Internet systems to prevent unauthorized access and remind all firm employees that passwords should be changed at regular intervals.
- And most important, coordinate all data security policies and protocols with either your internal IT staff or a trusted outside third-party IT vendor.

It is understandable that some may view these data security recommendations as rather extreme in an almost "Big Brother" sort of way. However, it is important to remember that we are in the business of risk management. We are practicing in an environment where client information is almost always kept in electronic form and the risk of unauthorized access is ever-present. Risks have consequences as evidenced by the recent example of a managing clerk of a major international firm who was charged both at the criminal and civil levels with insider trading, based upon information he improperly accessed from his employer's computer system concerning mergers, acquisitions and tender offers involving publicly traded firm clients. *See U.S. v. Metro et al.*, 14-mj-08079 (D.N.J.) and *U.S. v. Eydelman et al.*, 14-cv-01742 (D.N.J).

Indeed, for a lawyer or law firm, it is conceivable that the range of consequences for the failure to preserve and protect confidential information could run the gamut from professional discipline, to a malpractice suit and – taken to its logical extreme – even criminal liability. One former commissioner from the United States Securities and Exchange Commission noted:

> Law firms can be found liable for insider trading by partners or employees under the common law principle of *respondeat superior*, or pursuant to Section 20(a) of the Exchange Act, which imposes liability on controlling persons. *Respondeat superior* liability generally is interpreted to require that the offending act by the employee be within the scope of his or her employment. However, courts have liberally construed this rule to cover conduct that is incidental to, or a foreseeable consequence of, the employee's activities. Under the right circumstances, insider trading by a lawyer or employee with frequent access to material, non-public information might pass the foreseeability test.

See Philip R. Lochner, Jr., *Lawyers and Insider Trading*, Jan. 24, 1991, at http://www.sec.gov/news/speech/1991/012491lochner.pdf.

And, we have also seen recently, a CEO of a prominent national retail store company lose his job because of a massive data breach where the personal financial information for millions of customers was obtained by hackers. *See* Anne D'Innocenzio, *Target's CEO Is Out in Wake of Big Security Breach*, Associated Press, May 5, 2014, http://bigstory.ap.org/article/targets-chairman-and-ceo-out-wake-breach. This is just one of many examples why data security is so important in today's environment. For lawyers, data security is of even greater importance because failure to preserve confidential and sensitive information could put an attorney's career at significant risk.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com), Tannenbaum
Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I represent one of the defendants in an action brought against a number of parties in an unfair competition case involving various employees who left their employer to work for a competitor. The plaintiff has sued its former employees and their current employer (my client). It is a high-stakes litigation involving huge sums of money, and it has gotten to the boiling point. Plaintiff's counsel and the attorney for one of the employees have been exchanging what I consider to be vulgar and horrifying emails. The level of insults hurled between these two

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Deborah Heidi Share
David Gerald Sharon
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Xi Shi
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Lisa Caitlin Sullivan
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Avi Abraham Sutton
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Kan Zhang

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Morgan Jean Maragliano
Kyle Thomas Pero
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Vincenzo Salvatore Sofia
Erica Arden Vladimer
James L. Wallick

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Allison Mussen
Nancy C. Santana

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Renato Lucio Smith
Alesia Vick
Terrace Vincent Walsh

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Pang Wei Wang

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Mosunmola Motolani Ojo
Caitlin Marie Steinke

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Etido Udousoro
Sean Joseph Veach

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Diana Marie Cannino
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TWELFTH DISTRICT
Jeanine Rosa Belb Anderson
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Yoonmee Ann Cho
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Mark Dyer
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Corinne Martinique Fisk
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Giamara M. Rosado
Shantal Darlene Sparks
Jessica Anne Swensen
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THIRTEENTH DISTRICT
Marcus Araujo
Joseph M. Bonomo
Miriam Martine Camara
Vincent Frazzetto
Yekaterina Gabay
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Jason Katz
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Daniel C. Perrone
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Lamia Mohamed Abdel Moniem
Helena Wasey Abebe
Hannah Kennedy Albertson
Noor Mohammed Alfawzan
Stephen Keith Allinger
Matthew Louis Altenberg
Aron John Ambia
Neema Amini
Vinita Andrapalliyal
Lori Erin Andrus
Ekaterina Antsygina
Benish Anver
Enrique Sebastian Arduengo
Clare Yvonne Arguedas
Luther Ray Ashworth
Hoi Yee Au
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John Douglas Barlow
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Christopher Hardy Benson
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Tamara Ruth Block
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Jeffrey John Paul Bookman
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Phillip Aaron Brest
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Reid Patrick Brooks
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Mao Chen
Wen Chen
Mingwei Joy Cheng
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Yaron Cohen
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Tal Zev Cushmaro
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Attorney Professionalism Forum

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individuals and the language of their exchanges would make schoolyard talk look like dialogue from the Victorian age. One insult by plaintiff's counsel included a reference to the death of opposing counsel's child; another email made a remark about the disabled child of one of the lawyers. I am astounded that two members of the bar would engage in such disgusting behavior or think that their conduct is effective advocacy. Thankfully, none of the attacks have been directed to me. I am trying to represent my client to the best of my ability and have kept out of fray.

My question for the Forum: How am I supposed to handle this kind of bad behavior?

Sincerely,

Donald Disgusted

No Intent. You may also oppose criminal contempt by providing an affidavit from an individual — the putative contemnor — who has personal knowledge to show that person's lack of intent in allegedly disobeying the court's lawful mandate.[13]

You may demonstrate no intent by alleging that your ill health or financial difficulties made you unable to comply with the court order.[14] A court might order an evidentiary hearing to determine the legitimacy of that defense.

No Lawful, Proper, or Valid Order. You may also argue that the court's mandate wasn't lawful, proper, or valid and thus that no lawful, proper, or valid mandate existed for you to obey. But orders that are "transparently invalid, void or frivolous need not be obeyed."[15]

Even if the court's order was erroneous and later reversed, a court may punish for criminal contempt if the court had jurisdiction (personal and subject matter) or if the court's order wasn't "void on its face, transparently invalid or frivolous."[16] The logic is that if the court didn't have subject-matter jurisdiction, then the process itself was a nullity.[17] A court's contempt power isn't a vehicle for the court to exceed its authority.[18]

You Complied, Were Unable to Comply, or Will Comply. In your opposition papers, explain to the court that (1) you complied with the court's lawful order in all respects; (2) you were unable to comply with the court's order;[19] or (3) you'll comply with the court's order but you need more time to comply.

If you show that you've complied with the court's order in all respects, the court ought not to find you in criminal contempt.

Inability to comply with the court's order is a defense to a contempt motion. Showing that you've made a good-faith effort to comply will "negate[] an intention to disobey."[20] But good-faith effort is more than just stating that you tried and failed. You'll need to demonstrate that you've made every reasonable effort to comply. Showing that you've made a "[s]ubstantial or diligent effort is not enough, even if performed in good faith."[21] Self-induced inability to comply — as a result of your own actions — is no defense.[22]

Inability to comply with the court's order is a defense to a contempt motion.

In your opposition papers, explain to the court that you'll comply with the court's order, but that you need more time to comply. Assert facts that would mitigate the court's contempt adjudication.[23] A court might not absolve you from criminal contempt, however. Your adversary might argue that if you had needed more time to comply with the court's order, you should have moved in advance by order to show cause to seek more time to comply. Having not done that, you're at the court's mercy at the criminal-contempt phase.

Bankruptcy. Filing a bankruptcy petition doesn't stay a criminal-contempt proceeding.[24]

Corporations and Non-Parties. A court may hold a corporation in contempt.[25] The obvious punishment of a corporation for criminal contempt is a fine. (The *Legal Writer* discusses the punishment for criminal contempt below.) A court's command as to a corporation is a command to its officers and agents, once they know of the command, to comply with the court's order.[26] If a corporate officer impedes efforts to comply with the court's order or fails to take steps to comply with the order, the officer, like the corporation, is subject to punishment for contempt.[27]

Non-parties may be punished for criminal contempt only if they "act as servants or agents of the parties, or, if with knowledge of the order's terms, they act collusively with parties" to disobey a court order.[28]

Attorneys. An attorney who misinterprets the meaning and validity of the court's order and gives you bad advice may not be held in criminal contempt. The attorney may be held in criminal contempt, however, if the attorney exceeds the attorney's "limitation and counsels the client to disregard or disobey the order."[29] Also, your attorney's advice "may be considered in mitigation of punishment."[30] On the other hand, your attorney's "mistaken view of the law is no defense" to criminal contempt.[31]

Appealed Orders and Reversals. If you disagree with the court's order, you may try to get the court to reconsider its initial order — mandating or prohibiting you from doing an act — by moving to renew or reargue.

If that fails, obtain a stay or appeal, or both. It is no defense to criminal contempt that you had appealed the court's order when you disobeyed it.[32] If you didn't get a stay of the order during the pendency of the appeal, "the requirement of obedience is the same as though no appeal was taken at all."[33] Oppose the criminal contempt by showing the court that you've appealed the court's initial order and obtained a stay pending the appeal.

Consider this scenario: You didn't appeal the court's order even though you believed it was wrong. After disobeying the court's order, the court held you (or your client) in criminal contempt. You appealed the court's criminal-contempt adjudication. On appeal, you attempt to revive your "abandoned challenges" to the court's initial order.[34] But your right to challenge the court's initial order ended when you failed to appeal. You're barred from collaterally attacking the court's initial order on an appeal of a criminal-contempt adjudication. This is called the collateral-bar rule.

The Court's Adjudication of Criminal Contempt

On the return date, the court will consider the moving papers, opposition papers, and reply papers to determine whether a criminal-contempt adjudication is appropriate.

Once the moving party establishes its prima facie case of contempt in its papers, the burden shifts to the alleged contemnor to show that the alleged contemnor (1) complied with the court's lawful mandate in all respects, (2) is unable to comply with the court's order,[35] or (3) will comply with the court's order.

An evidentiary hearing isn't required before a court holds you in criminal contempt.[36] Due process — notice and an opportunity to be heard — is the only requirement.[37]

If factual disputes prevent the court from determining on the papers alone whether to adjudicate you (or your client) in criminal contempt, the court will hold an evidentiary hearing. At the hearing, you may testify, bring your own witnesses, and confront your adversary's witnesses. You may bring counsel to assist in your defense. At the hearing, your adversary must prove beyond a reasonable doubt that you (or your client) intentionally disobeyed a clear and unequivocal court order.

A court that holds you in criminal contempt must specify in its order the circumstances of the criminal contempt. It must be in writing: "No appellate review of a contempt adjudication and punishment is possible unless it has been reduced to writing."[38] The court must also specify the facts and circumstances of the contempt in its order.[39] Conclusory allegations aren't enough.[40]

The mandate for criminal contempt must state that the "disobedience was willful."[41] If the court doesn't specify that its adjudication is for criminal contempt or doesn't find that the contemnor willfully — intentionally — disobeyed an order, the court's adjudication will be for civil contempt, not criminal contempt.[42]

The Punishment for Criminal Contempt

The punishment for criminal contempt is the same as it is for summary criminal contempt: a fine of not more than $1000 or jail for no more than 30 days, or both.[43] The punishment for criminal contempt is in the court's discretion. If the penalty is a fine, your adversary won't receive the money; the money will go into the public treasury.[44] You make your payment payable to the County Clerk in the court that adjudicated you in criminal contempt. The criminal-contempt fine is to punish "for the wrong in the interest of public justice, and not in the interest of an individual litigant."[45]

Once a court finds you in criminal contempt and sentences you to jail, the burden rests with you, the contemnor, to justify your release from jail; you'll need to show your inability to purge the contempt.[46] (The *Legal Writer* discusses purging contempt below.)

Review of Criminal-Contempt Adjudication

Appeal a contempt adjudication "either by direct appeal or [by commencing] a CPLR Article 78 proceeding in the nature of certiorari."[47]

If the contempt is committed in the court's immediate view and presence, the most common method to appeal the summary criminal contempt is to commence an Article 78 proceeding. "Article 78 is almost exclusively the vehicle for appellate review because it is the judge who, as witness to the offense, exercises discretion and orders summary punishment based on [the judge's] own observation and knowledge."[48] If the court in its mandate of commitment doesn't specify the "acts of contempt which occurred in the immediate view and presence of the court, review is dependent on appeal rather than certiorari."[49]

You might appeal the summary-contempt adjudication if "an adequate stenographic record" exists.[50]

If the contempt is committed outside the court's presence and the court's adjudication of contempt occurs after a hearing, the minutes of the hearing itself become a record for appeal.[51]

The courts have asked the New York State Legislature to clarify whether "Judiciary Law criminal contempts are civilly appealable in the same fashion as Judiciary Law civil contempts."[52] The New York State Legislature has not yet responded.[53]

Purging Criminal Contempt

After a court has adjudicated you or your adversary in criminal contempt, you and your adversary may not settle the contempt adjudication.[54] Before the court makes a contempt adjudication, the moving party, however, may withdraw its contempt motion (or order to show cause).[55]

You may not purge — "doing or refraining from [doing] that which was commanded or forbidden in the first place" — the crime of criminal contempt under the Penal Law.[56]

In rare circumstances, you may, however, purge criminal contempt under the Judiciary Law.[57] No right exists to purge criminal contempt. Purging the criminal contempt is in the discretion of the court that originally held you in contempt: "Purgation is actually only a stay or modification of the punishment and such a stay or modification is strictly within the province of the court that originally adjudged the contempt."[58]

Although purging contempt is in the lower court's discretion, some appellate courts have gone beyond the confines of an appellate record and considered purgation on appeal.[59]

In the next issue of the *Journal*, the *Legal Writer* will discuss civil-contempt motions. ■

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1. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337, 345 (1998).

Continued on Page 60

2. *Id*. at 397.

3. 1 Byer's Civil Motions § 19:04, at 223 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.) (citing *In re Rotwein*, 291 N.Y. 116, 122, 51 N.E.2d 669, 672 (1943) ("Intent to defy the dignity and authority of the court is a necessary element of a criminal contempt.")).

4. Gray, *supra* note 1, at 347.

5. *Id*. at 348.

6. *Id*.

7. *Id*.

8. *Id*. at 349.

9. *Id*. at 359 (citing *Campanella v. Campanella*, 152 A.D.2d 190, 194, 548 N.Y.S.2d 279, 281 (2d Dep't 1989) (holding that contempt is appropriate when recipient actually knows of court order, even though order was not personally served on recipient); *In re McCormick v. Axelrod*, 59 N.Y.2d 574, 583, 466 N.Y.S.2d 279, 283, 453 N.E.2d 508, 513 (1983) ("[T]he party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party.")).

10. *Id*. at 350.

11. *Id*. at 359.

12. *Id*.

13. Byer's Civil Motions, *supra* note 3, at § 19:01, at 220.

14. *Id*. at § 19:06, at 225 (citing *Berman v. Loremady Realty Corp.*, 31 A.D.2d 899, 899, 297 N.Y.S.2d 829, 831 (1st Dep't 1969)).

15. Gray, *supra* note 1, at 354.

16. *Id*. at 362; Byer's Civil Motions, *supra* note 3, at § 19:01, at 220 (citing *Mount Sinai Hosp., Inc. v. Davis*, 8 A.D.2d 361, 363, 188 N.Y.S.2d 298, 301 (1st Dep't 1959) ("[I]t is elemental that a contemnor may not question the validity of the order violated. The purpose of a criminal contempt proceeding for willful disobedience of its lawful mandate is to vindicate the authority of the court and its orders. While upon a motion to cite for civil contempt, a court may look into the propriety of the order violated no such power should be exercised in proceedings to punish for criminal contempt.")).

17. Gray, *supra* note 1, at 361.

18. *Id*. at 364.

19. *Id*. at 367.

20. *Id*. at 366.

21. *Id*. at 367.

22. *Id*.

23. Byer's Civil Motions, *supra* note 3, at § 19:01, at 220.

24. *Id*. at § 19:03, at 223 (citing *Skripek v. Skripek*, 239 A.D.2d 488, 489, 658 N.Y.S.2d 62, 63 (2d Dep't 1997) ("Courts have repeatedly held that criminal contempt proceedings do not fall within the scope of the automatic stay under section 362 (a) of the United States Bankruptcy Code.")).

25. Gray, *supra* note 1, at 355.

26. *Id*. at 356.

27. *Id*.

28. *Id*. at 357–58.

29. *Id*. at 368.

30. *Id*. at 371.

31. *Id*.

32. *Id*. at 363.

33. *Id*.

34. *Id*.

35. *Id*. at 367.

36. Judiciary Law § 751(1); Byer's Civil Motions, *supra* note 3, at § 19:04, at 223 (citing *Bing et al. v. Sun Wei Ass'n, Inc.*, 205 A.D.2d 355, 355, 613 N.Y.S.2d 371, 371 (1st Dep't 1994) ("Nor is there merit to appellant Ming's contention that a full-blown evidentiary hearing was required to hold him in contempt, the only due process requirements being that the party charged 'be notified of the accusation, and have a reasonable time to make a defense.'") (quoting Judiciary Law § 751(1))).

37. Judiciary Law § 751(1); Byer's Civil Motions, *supra* note 3, at § 19:04, at 223 (citing *City Sch. Dist. v. Schenectady Fed. of Teachers*, 49 A.D.2d 395, 398, 375 N.Y.S.2d 179, 183 (3d Dep't 1975)).

38. Gray, *supra* note 1, at 398.

39. *Id*. at 399.

40. *Id*.

41. *Id*.

42. Byer's Civil Motions, *supra* note 3, at § 19:01, at 220.

43. David D. Siegel, New York Practice § 482, at 839 (5th ed. 2011) (citing Judiciary Law § 751(1)); Byer's Civil Motions, *supra* note 3, at § 19:07, at 225 (noting some exceptions in Judiciary Law § 751: violating an order of protection — imprisonment may not exceed three months; illegally going on strike by an employee organization under Civil Service Law — fine is unlimited; violating an injunction under Executive Law § 63(12) involving deceptive business practices — maximum fine of $5000; disobeying lawful mandate by union or hospital arising from Labor Law § 713(3)(a) — the fine is in the court's discretion).

44. Siegel, *supra* note 43, at § 482, at 838.

45. Byer's Civil Motions, *supra* note 3, at § 19:06, at 224.

46. *Id*. at § 19:08, at 225–26 (citing *Bansal v. Bansal*, 281 A.D.2d 503, 504, 721 N.Y.S.2d 798, 798 (2d Dep't 2001) ("To justify an individual's release from incarceration once a finding of contempt has been made, the burden rests with the contemnor to show his or her inability to purge the contempt.")).

47. Gray, *supra* note 1, at 399.

48. *Id*. at 399–400.

49. *Id*. at 400 (citing *Douglas v. Adel*, 269 N.Y. 144, 149, 199 N.E. 35, 38 (1935) (noting that criminal contempt committed in the court's immediate view is reviewable by writ of certiorari, not by appeal)).

50. *Id*. at 400 (citing *People v. Sanders*, 58 A.D.2d 525, 525, 395 N.Y.S.2d 190, 191 (1st Dep't 1977) ("[W]e note that while we are of the view that the most appropriate procedural vehicle for review of summary contempt is an [A]rticle 78 proceeding, we nonetheless find that in the case at bar there exists an adequate record for appellate review and therefore review by direct appeal may obtain."); *People v. Clinton*, 42 A.D.2d 815, 815, 346 N.Y.S.2d 345, 345 (3d Dep't 1973) ("Although an [A]rticle 78 proceeding is the usual method of review of a judgment of criminal contempt which has been committed in the presence of a court, the parties here agree that, since there is an adequate record for appellate review in the case at bar, review by appeal is appropriate."); *People v. Zweig*, 32 A.D.2d 569, 570–71, 300 N.Y.S.2d 651, 653–54 (2d Dep't 1969) (finding that contempt in the court's immediate view is appealable — rather than reviewable through an Article 78 proceeding — if the record is adequate for appellate review)).

51. *Id*. at 400.

52. *Id*. at 412.

53. *Id*. (citing *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 407 (1882) ("If it is best that there should be [appeals for criminal contempts], the attention of the legislature should be directed to the subject."); *Hanbury v. Benedict*, 160 A.D. 662, 664, 146 N.Y.S. 44, 47 (2d Dep't 1914) ("The only question presented by this record is whether the order adjudging said Hanbury guilty of contempt may be reviewed by a writ of certiorari or by a notice of appeal.")).

54. *Id*. at 402 (citing *Dep't of Envtl. Prot. v. Dep't of Envtl. Conservation*, 70 N.Y.2d 233, 240, 519 N.Y.S.2d 539, 543, 513 N.E.2d 706, 709–10 (1987) (rejecting parties' private settlement after criminal contempt adjudication)).

55. *Dep't of Envtl. Prot.*, 70 N.Y.2d at 240, 519 N.Y.S.2d at 542, 513 N.E.2d 7at 709.

56. Gray, *supra* note 1, at 400.

57. *Id*. at 401; Byer's Civil Motions, *supra* note 3, at § 19:04, at 223 (citing *In re Silverstein v. Aldrich*, 76 A.D.2d 911, 912, 429 N.Y.S.2d 41, 42 (2d Dep't 1980) (noting that attorney purged summary criminal contempt adjudication when he produced his client's letter)).

58. *Id*.

59. *Id*. at 402 (citing *Kuriansky v. Ali*, 176 A.D.2d 728, 728–29, 574 N.Y.S.2d 805, 806–07 (2d Dep't 1991) (modifying lower court's criminal contempt adjudication by eliminating the fine and allowing appellants to purge the contempt by complying with the grand jury subpoenas duces tecum); *People v. Williamson*, 136 A.D.2d 497, 497, 523 N.Y.S.2d 817, 818–19 (1st Dep't 1988) (holding excessive lower court's punishment of 15 days in jail for criminal contempt and modifying punishment to $250 fine)).

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BY GERALD LEBOVITS

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

In the last issue, the *Legal Writer* gave an overview of criminal contempt, civil contempt, summary contempt, plenary contempt, and Penal Law contempt, and introduced criminal-contempt motions. In this issue, we continue our discussion of criminal-contempt motions.

Moving for Criminal Contempt Under the Judiciary Law

In the last issue, the *Legal Writer* discussed how to serve your criminal-contempt motion and the necessary components of your motion. The *Legal Writer* explained the warnings that must appear in bold on the face of your contempt motion. You must also clearly state in your motion that you're seeking to punish for criminal contempt.

Penal Law § 215.50 — criminal contempt in the second degree — "mirrors almost the entire" Judiciary Law § 750.[1] But criminal contempt under the Judiciary Law isn't a crime. Our focus is on criminal contempt under the Judiciary Law.

The burden of proof in a criminal-contempt Judiciary Law motion is the same as the burden of proof for criminal contempt under the Penal Law: beyond a reasonable doubt. The moving party's burden of proof on criminal contempt is to prove beyond a reasonable doubt that you (or your client) willfully — meaning "intentionally" — disobeyed a clear and unequivocal court order. A criminal-contempt proceeding is "civil in nature, [and] vindication [i]s its objective, not remediation."[2] The moving party need not prove that the contemnor's conduct prejudiced the moving party.

Intent. In proving criminal contempt, you'll need to show that the contemnor's intent, a necessary element,[3] was to disobey the court's clear and unequivocal mandate.

Clear and Unequivocal Mandate. Before a court holds you in criminal contempt, the moving party must show that you (or your client) disobeyed a court order. The order must be clear, explicit, precise, and unequivocal: "A clear court order avoids any uncertainty in the minds of those to whom it is addressed and who are charged with obedience."[4] In its order, the court need not explicitly warn you of the consequences of disobeying its order.[5] But if a court commands you to do something and later punishes you for not complying with its order, the court "may not do so in language so vague and undefined that it does not afford fair notice and warning of what is required or forbidden."[6] The court's order "must have operative commands capable of enforcement, not merely expressions of abstract conclusions or principles of law."[7] The order need not include the word "ordered."[8]

Knowing About the Court's Order. A court order need not be personally served on you before a court punishes you for contempt for violating the order.[9] An order is "served" when the recipient knows that the order exists and its terms. Hearing a court's order in open court is just as binding as a signed, written order you've received from the court.[10] The oral order in open court is "an order served upon all those assembled to whom it is directed."[11] You're presumed to know of the court's order if your attorney communicates the contents of the court's order to you.[12]

Opposing Criminal Contempt

In response to the moving papers for criminal contempt, you may submit opposition papers. Your adversary may then submit reply papers.

The burden of proof in a criminal-contempt Judiciary Law motion is the same as the burden of proof for criminal contempt under the Penal Law: beyond a reasonable doubt.

Service. In opposing criminal contempt, you may contest service of the moving papers. If the court directed your adversary to serve the moving papers for contempt by a date certain and your adversary didn't serve on time, tell the court in your opposition papers that the criminal-contempt motion (or order to show cause) must be denied for improper service. If the court required your adversary to serve the moving papers in person, by certified mail return-receipt requested, by first-class mail, or by some other method and your adversary failed to comply, argue that your adversary's contempt papers must be denied for improper service. Failing to object to service waives improper service.

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