NEW YORK STATE BAR ASSOCIATION

Journal

FEBRUARY 2013
VOL. 85 | NO. 2

Made for Each Other

Social Media and Litigation

by Andrew B. Delaney and Darren A. Heitner

Also in this Issue

Prior Convictions and Employment Discrimination

The *Singletree* Forest

Sealed Records

Joint Custody

BESTSELLERS

FROM THE NYSBA BOOKSTORE

Februrary 2013

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 3rd Ed.

Provides useful guidance on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. *With CD of forms, regulations and statutes.*

PN: 40269 / **Member $45** / List $55 / 330 pages

Best Practices in Legal Management

The most complete and exhaustive treatment of the business aspects of running a law firm available anywhere.

PN: 4131 / **Member $139** / List $179 / 498 pages

Includes CD containing all the forms.

Depositions: Practice and Procedure in Federal and New York State Courts, 2nd Ed.

A detailed text designed to assist young attorneys and experienced practitioners with all aspects of depositions.

PN: 40749 / **Member $75** / List $90 / 738 pages

Estate Planning and Will Drafting in New York

A comprehensive text for those who are just entering this growing area, offering practical guidance.

PN: 4095 / **Member $175** / List $210 / 880 pages

Legal Manual for N.Y. Physicians, 3rd Ed.

Completely updated to reflect new rules and laws in health care delivery and management, discusses day-to-day practice, treatment, disease control and ethical obligations as well as professional misconduct and related issues.

PN: 41329 / **Member $120** / List $140 / 1,130 pages

New York Antitrust and Consumer Protection Law

Includes a discussion on the rise of the importance of the Donnelly Act, New York State's Antitrust law, its relation to the Federal Sherman Act and an overview of multistate litigation issues.

PN: 40258 / **Member $50** / List $65 / 260 pages

Public Sector Labor and Employment Law, 3rd Ed., 2011 Revision

The leading reference on public sector labor and employment law in New York State is completely revised with updated case and statutory law.

PN: 42057 / **Member $150** / List $185 / 1,670 pages

Sales and Use Tax and the New York Construction Industry, 2nd Ed.

Provides practical advice and a comprehensive overview of relevant statutes, regulations and applicable case law.

PN: 42211 / **Member $40** / List $50 / 184 pages

Workers' Compensation Law and Practice in New York

Combining academic analysis with practical considerations for the courtroom, this book provides expert guidance on all aspects of workers' compensation law.

PN: 4236 / **Member $125** / List $175 / 720 pages

NEW!

Admission to the New York State Bar, 2012

All relevant statutes and rules, an overview of admission procedures, a comprehensive table of statutory and rule cross-references, a subject-matter index and the N.Y. Rules of Professional Conduct.

PN: 40152 / **Member $50** / List $70 / 226 pages

Contract Doctrine and Marital Agreements, 2nd Ed.

Completely reorganized, with updated case and statutory law, this new edition is a unique reference essential for this complex and challenging area of law.

PN: 41593 / **Member $175** / List $225 / 2 vols.

Criminal and Civil Contempt, 2nd Ed.

This second edition explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, focusing on contempt arising out of grand jury and trial proceedings.

PN: 40622 / **Member $40** / List $55 / 294 pages

Evidentiary Privileges, 5th Ed.

A valuable text of first reference for any attorney whose clients are called to testify. Expanded, with updated case law and statutes.

PN: 409912 / **Member $45** / List $60 / 432 pages

Foundation Evidence, Questions and Courtroom Protocols, 4th Ed.

New edition of this classic text features expanded chapters on Direct and Cross-Examination and new chapters on Objections, Motions to Strike and The Courtroom and the Court.

PN: 41072 / **Member $60** / List $70 / 294 pages

Legal Careers in New York State Government, 10th Edition

Everything you need to know about a career in public service in state and municipal government and the state court system.

PN: 41292 / **Member $50** / List $70 / 360 pages

N.Y. Lawyer's Deskbook and Formbook (2012–2013)

Award-winning and packed wtih new information and forms for use in over 25 practice areas.

N.Y. Lawyers' Practical Skills Series (2012–2013)

An essential reference, guiding the practitioner through a common case or transaction in 16 areas of practice. Fourteen titles include forms on CD.

NYSBA Practice Forms on CD 2012–2013

More than 600 of the forms from *Deskbook* and *Formbook* used by experienced practitioners in their daily practice.

Products Liability in New York, 2nd Ed.

A comprehensive text on this challenging and complex area of law.

PN: 41979 / **Member $120** / List $170 / 1,268 pages

COMING SOON!

In the Arena: A Sports Law Handbook

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB1662**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

EDITORIAL OFFICES
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844
www.nysba.org

ADVERTISING REPRESENTATIVE
Network Media Partners
Meredith Schwartz
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
e-mail: mschwartz@networkmediapartners.com

EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961–1998

CONTENTS

FEBRUARY 2013

MADE FOR EACH OTHER
Social Media and Litigation

BY ANDREW B. DELANEY AND DARREN A. HEITNER

10

DEPARTMENTS

5 President's Message
8 CLE Seminar Schedule
18 Burden of Proof
BY DAVID PAUL HOROWITZ
34 Point of View
BY BARBARA BAUM LEVINE AND JAMES M. MCCARTHY
47 New Members Welcomed
50 Presentation Skills for Lawyers
BY ELLIOTT WILCOX
52 Attorney Professionalism Forum
60 Index to Advertisers
60 Classified Notices
61 Language Tips
BY GERTRUDE BLOCK
63 2012–2013 Officers
64 The Legal Writer
BY GERALD LEBOVITS

CARTOONS © CARTOONRESOURCE.COM

22 Protection Against Employment Discrimination Based on Prior Criminal Convictions – Correction Law Article 23-A
BY PHILIP L. MAIER

28 Don't Get Lost in the *Singletree* Forest
Avoiding Expert Preclusion Under CPLR 3101(d)(1)(i)
BY PATRICK J. BRENNAN AND DANIEL I. JEDELL

31 Sealed Records and Sex Abuse Cases Brought Under 42 U.S.C. § 1983
BY BENJAMIN W. HILL

44 Joint Custody Revisited
BY DANIEL D. MOLINOFF

since we offer comprehensive, cost-effective coverage from CNA

The NYSBA endorses the Lawyers' Professional Liability plan administered by USI Affinity* and underwritten by CNA. Our LPL plan offers broad and affordable coverage tailored to suit the specific needs of your practice.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI AFFINITY

To request your **FREE** quote call

800.727.7770

or visit

www.mybarinsurance.com

*USI Affinity is the brand and marketing name for the licensed entity USI Insurance Services, LLC

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

SEYMOUR W. JAMES, JR.

Voting: A Solemn Trust

In the United States, voting is one of our most fundamental rights. The founders of our nation regarded voting as "one of the most solemn trusts in human society"[1] and a "rational and peaceable instrument of reform."[2] In the centuries since our founding, women, people of color, Native Americans and the poor have fought to participate in the electoral franchise; today, political developments around the country and the continued significance of the Voting Rights Act remind us that the right to vote is not one that can be taken for granted. Nonetheless, national voter participation rates typically hover between 40% and 60% of the eligible population, and voter turnout in New York State is consistently ranked among the lowest in the country.

When I became president of the State Bar in June 2012, I designated voter participation as a top priority during my term and named a Special Committee on Voter Participation. The committee was charged with examining the barriers to voting in New York State and recommending legal reforms that could make it easier and more convenient for New Yorkers to register and vote. Ably chaired by former Assistant U.S. Attorney General and New York State Senator John R. Dunne of Albany (Whiteman Osterman & Hanna) and Daniel F. Kolb of New York City (Davis Polk & Wardwell), the Special Committee has completed its work and recently submitted its report for consideration by the Association's House of Delegates.

The Special Committee was constituted with an eye toward diversity in terms of politics, geography, practice setting, gender and ethnicity, and its membership is split evenly between Democrats and Republicans with one Independent member. The committee invited hundreds of relevant organizations around the state to contribute comments to inform its work, and committee members met personally with representatives of interested groups on five different dates. The committee's final report includes several recommended reforms, including modernizing the registration process, pre-registering 16- and 17-year-olds, allowing Election Day and same-day registration, improving voting practices, and combating deceptive election practices.

The Special Committee concluded that modernizing the registration process could go a long way toward increasing voter participation, improving efficiency and accuracy in the voter rolls, and reducing costs. Its report recommends allowing online voter registration and affirmatively presenting citizens with an opportunity to register electronically any time they interact with a state or federal agency, making registration a seamless part of that agency's process. In order to verify their identity pursuant to the federal Help America Vote Act, voters who register online would be required to present identification before they are allowed to vote. Similarly, the pre-registration of 16- and 17-year-olds is thought to be an effective way to increase voter participation among younger citizens. Reforms that would permit Election Day registration pose the greatest logistical challenges, because their enactment would require a state constitutional amendment. The Special Committee on Voter Participation is confident that this change would increase registration and participation and help to reduce frustration for citizens who have moved within New York, but who have not yet registered in their new districts. Until such a change is possible, the Special Committee recommended that the current law be changed to allow for registration up to 10 days before an election – the constitutional minimum – rather than the current 25-day cut-off.

SEYMOUR W. JAMES, JR., can be reached at sjames@nysba.org.

In addition to reforming the registration process, the Special Committee recommended several changes to voting practices in order to encourage participation. Early in-person voting would allow people the option of voting in person at a designated location before Election Day. This would make it possible for people to vote on a non-work day and thus reduce lines and waiting times at polling sites. The Special Committee also urged the continuation of efforts to improve ballot design to make them clearer and more user-friendly, improvements to the recruitment and training of poll workers to enhance professionalism and thus make voting quicker and more convenient, and reforms that would combat deceptive election practices such as increasing penalties for conduct that suppresses votes.

We are pleased that the report has been adopted by our House of Delegates and is now the official position of the New York State Bar Association. I look forward to working with the Special Committee to advocate for the implementation of these important reforms in the coming months. ■

1. Samuel Adams, The Boston Gazette (April 2, 1781) (reprinted in The Writings of Samuel Adams: 1778–1802 [1908]).

2. Thomas Jefferson, letter to Spencer Roane (September 6, 1819), *available at* http://www.loc.gov/exhibits/jefferson/137.html.

NYSBACLE

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

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

Gain the Edge
February 21 New York City

Medicare Compliance Under the Medicare Secondary Payer Act: What Every Attorney Needs to Know
Live & Webcast (1:00 p.m. – 4:45 p.m.)
February 26 Albany

CPLR Update 2013
February 27 Long Island (5:30 p.m. – 9:10 p.m.)
March 9 Buffalo (9:00 a.m. – 12:40 p.m.)
March 13 New York City (5:30 p.m. – 9:10 p.m.)
March 22 Albany (1:00 p.m. – 4:40 p.m.)
March 23 Syracuse (9:00 a.m. – 12:40 p.m.)

Key Concepts in Representing Motor Vehicle Accident Victims
(1:00 p.m. – 4:00 p.m.)
February 28 New York City

Legal Malpractice
(9:00 a.m. – 1:00 p.m.)
March 1 New York City
March 8 Albany; Long Island
March 22 Rochester; Westchester

Basics of Criminal Law for the Criminal and Civil Lawyer
March 5 Albany
March 13 Buffalo
March 15 New York City

Marketing and Business Development 101 for Small to Medium-Sized Firms
Live & Webcast (9:00 a.m. – 3:30 p.m.)
March 6 New York City

Bridging the Gap
March 12–13 New York City (live program)
March 12–13 Albany; Buffalo (video conference from NYC)

9th Annual International Estate Planning Institute
March 14–15 New York City

Ethics for Business and Transactional Lawyers
Live & Webcast (9:00 a.m. – 1:00 p.m.)
March 18 New York City

Practical Skills: Family Court Practice
April 8 Syracuse
April 9 Albany
April 10 Buffalo; Long Island
April 12 New York City; Westchester

Basics of Trial Practice – After the Verdict
(9:00 a.m. – 12:45 p.m.)
April 12 Long Island; Syracuse
April 19 New York City
April 26 Albany; Buffalo

Ethics and Civility 2013
(9:00 a.m. – 1:00 p.m.)
April 12 Albany; Buffalo
April 19 Long Island; Rochester
April 26 New York City

New York Evidence Rules: Criminal and Civil
April 16 New York City
April 18 Albany

Matrimonial Trial Institute III
April 19 Westchester
April 26 Rochester
May 9 Long Island
June 7 Albany
June 14 New York City

Meet the Justices of the Third Department
(3:00 p.m. – 6:00 p.m.)
April 24 Albany

To register

or for more information call toll free **1-800-582-2452**
In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
www.nysba.org/CLE (Note: As a NYSBA member, you'll receive a substantial discount)

NYSBA

Practical Skills: Purchases and Sales of Homes

April 29	Buffalo
April 30	Long Island; Rochester
May 1	New York City; Syracuse
May 2	Albany; Westchester

Advanced Insurance Practice 2013

May 3	New York City; Syracuse
May 10	Albany; Buffalo
May 17	Long Island

17th Annual New York State and City Tax Institute

May 7	New York City

DWI on Trial – The Big Apple XIII

May 9	New York City

Contested Accounting Proceedings

(9:00 a.m. – 1:00 p.m.)

May 14	Albany
May 15	Long Island; Rochester
May 29	Westchester
May 30	New York City; Syracuse

Starting a Practice in New York

May 16	New York City

Article 81 of the Mental Hygiene Law

May 17	Albany
May 31	New York City
June 14	Syracuse

Practical Skills: Basic Elder Law Practice

May 20	Long Island; Syracuse
May 21	Westchester
May 23	Albany; New York City
May 29	Buffalo

Practical Skills: Basics of Contract Drafting

June 10	Long Island
June 14	New York City

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

NYSBA CLE Is Pleased to Announce Our Newly Upgraded CD and DVD Product Lines

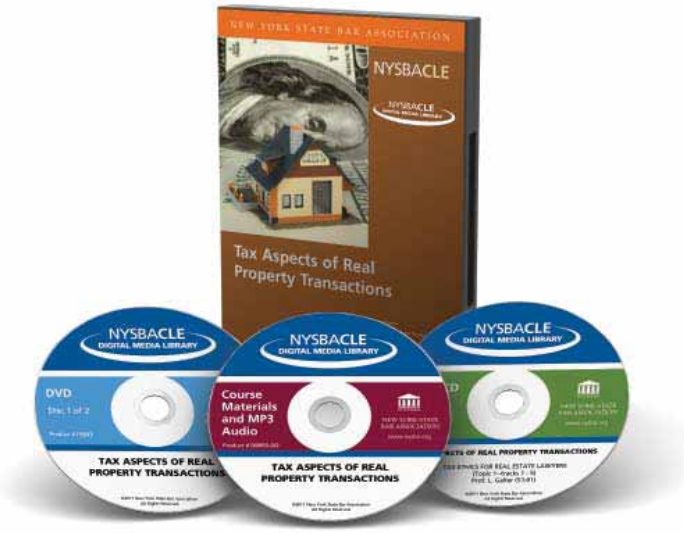
Newly redesigned and expanded to offer you the most complete digital media package available on the market today!

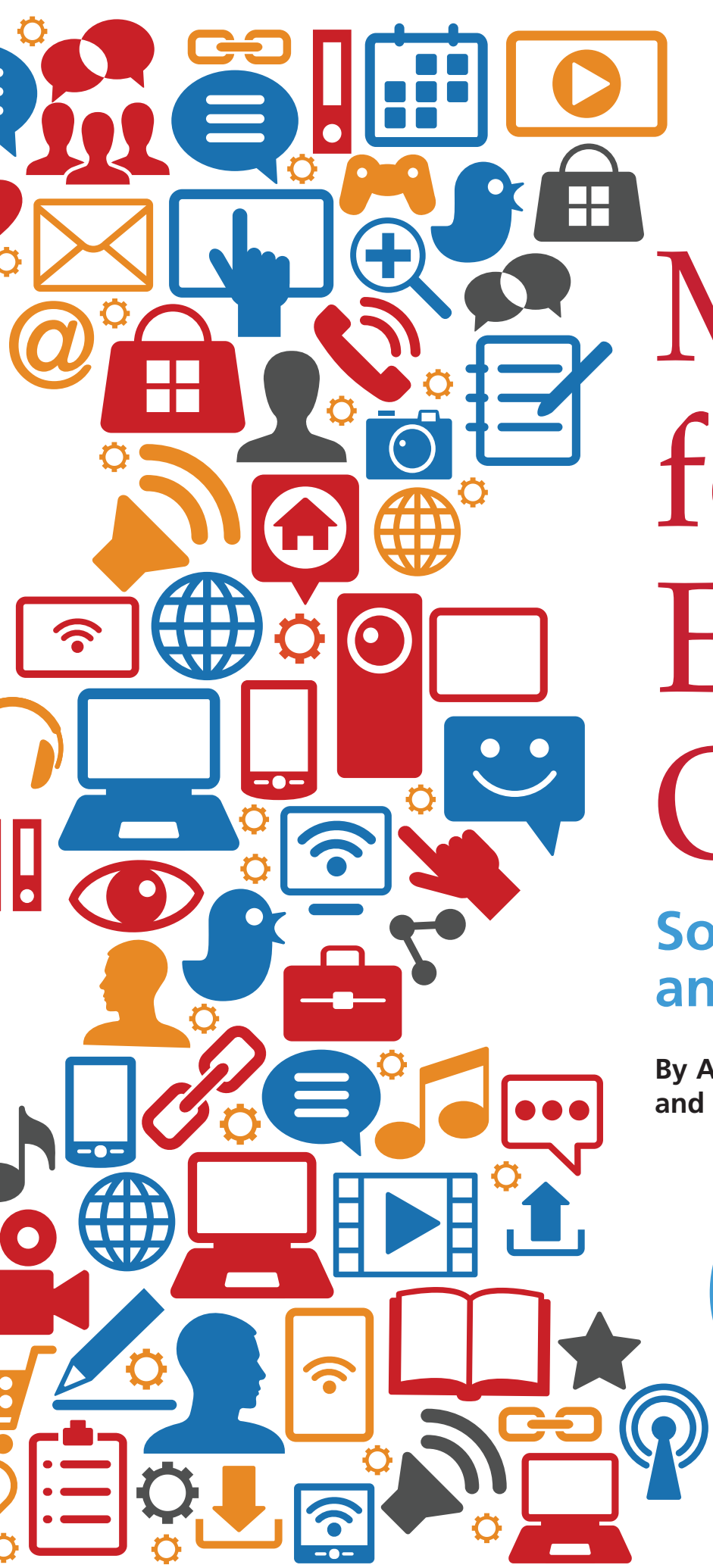
Each stand-alone product contains:

- the complete CLE program on CD or DVD disc
- a downloadable PDF file containing all course materials
- a separate MP3 audio file containing all program panel presentations that can be downloaded to your computer and copied and transferred to other devices, including iPhones, tablets, mp3 players and other computers and laptops
- content can be uploaded to "cloud"-based file-sharing

Fulfill your MCLE requirements at any time with no connection to the Internet required!

Go to www.nysba.org/av to view our complete line of program titles available in CD/DVD and Online Video/Audio streaming and download formats.





Made for Each Other

Social Media and Litigation

By Andrew B. Delaney
and Darren A. Heitner

Introduction

Almost half of the people in America are using social media, and their number is rising rapidly.[1] Social media permeates our daily lives. As of 2009, more than 70% of lawyers had accounts on social-media networks.[2] More than 85% of "younger" lawyers use social media.[3] The person who lacks at least one social-media profile will soon become the exception rather than the rule. For the litigator, social media provides a wealth of information – available at one's fingertips that just a few years ago required hiring a personal investigator to obtain. Though social media contains an immense amount of information, gleaning it and using it is not without pitfalls. This article will discuss the various types of social media and how these can be used, both in the courtroom and for other legal purposes; provide strategies for introducing information obtained through social media into evidence; examine the ethical and legal concerns; and present suggestions for further study.

Types of Social Media

Facebook, LinkedIn, and Twitter are currently the most popular social networking sites. When considering social media, keep in mind that none of the "top three" is even a decade old. Social media is ever evolving. At any point in time, a new social networking site may sprout from the depths of the unknown and become a popular destination for individuals to post content that is shared among the online community. Litigators must stay on top of the latest developments.[4]

Facebook

Facebook is the most popular social media platform. Facebook, started as a hobby,[5] is arguably one of the most successful businesses launched in recent history.

In 2004, Mark Zuckerberg, while a student at Harvard, started "thefacebook" with some financial help from Edward Saverin. Originally, membership was limited to Harvard students.[6] Access to the social network soon expanded to Stanford and Yale. By August 2006, membership was open to 30,000+ "recognized schools, colleges, universities, organizations, and companies within the U.S., Canada, and other English speaking nations."[7] That September, Facebook ended its strict exclusivity rules and became open to everyone.[8]

The rest, as they say, is history. As of this writing, Facebook reports that it has more than one billion users who log in at least once per month,[9] half of whom will log in to Facebook any given day.[10] People share immeasurable amounts of information on Facebook, including status updates, pictures, videos, and links to stories published on third-party websites, which Facebook stores. A 2011 article on Geek.com reports that Facebook stores up to 800 pages of personal information *on each user*.[11]

That wealth of information can be a valuable resource for the litigator. Depending on the applicable privacy settings, a quick check on Facebook could provide information that could make or break a case. Certain users allow anyone browsing the Internet, with or without a Facebook account, to access information posted on their profile pages. Even information that may at first appear to be unavailable can, however, later be accessed through discovery, subpoena, and court order.

LinkedIn

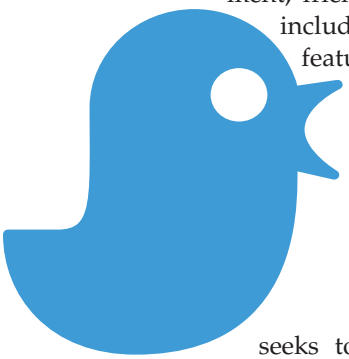
LinkedIn reports that it "started out in the living room of co-founder Reid Hoffman in 2002."[12] It officially launched in May 2003 and by the end of its first month had 4,500 members. As of this writing, LinkedIn reports that it has 175 million members in over 200 countries.[13]

Andrew B. Delaney is an attorney with Martin & Associates, P.C. in Barre, Vermont. He earned his J.D., *cum laude*, from Vermont Law School in 2010, where he was Technology Editor for the *Vermont Law Review*.

Darren A. Heitner is an attorney at Wolfe Law Miami, P.A., in Miami Florida, and a writer for *Forbes*, focusing on the business of sports, including entertainment law, music law, and intellectual property law. He is the Founder/Chief Editor of Sports Agent Blog, a publication covering the niche sports agent industry. Heitner is also a professor of Sport Agency Management at Indiana University Bloomington.

It is a publicly traded company on the New York Stock Exchange, with the ticker symbol LNKD.

LinkedIn is geared toward professional networking, though it shares attributes with other social-networking sites. LinkedIn users can update their status, add connections, join groups, and network. However, it is specifically geared toward business networking, and users will not find in-site game applications. Nor does LinkedIn boast a chat feature like Facebook's. Users can post their educational and work histories, request testimonials from their connections, and supply information about their specialties and publications. Although LinkedIn is not as ubiquitous as Facebook, it is still useful to the litigator. LinkedIn provides information about employment, friends, and connections, and includes a "recommendations" feature. In a sense, LinkedIn seeks to enhance the traditional résumé with a more accessible and interactive electronic version.[14]



One might say that Twitter took the "status update" from Facebook and refined it.

LinkedIn may also be useful to the litigator in its intended use. While some lawyers might be hesitant to create a Facebook-style social media profile, LinkedIn provides a more-reserved alternative for the legal professional. LinkedIn boasts several law-oriented groups, as well as other networking opportunities.

Twitter

One might say that Twitter took the "status update" from Facebook and refined it. Users are limited to 140-character "Tweets," which update "followers" on users' activities and other items of interest. Twitter also appears to be premised on the "Do one thing and do it well" UNIX philosophy.[15]

Theoretically, Twitter is the product of a failed podcasting platform.[16] Some controversy exists around its founding. It was a project that started out slowly. During its beginning stages, the platform had fewer than 5,000 users after two months, and the CEO of its parent company bought back investors' stock for an estimated $5 million. The company is now estimated to be worth in the neighborhood of $5 billion.[17]

Twitter's value to the litigator lies in the real-time status updates that potential litigants may post. Twitter archives are searchable and largely public. Indeed, the Library of Congress hosts an entire Twitter archive that is continuously updated.[18]

Other Sites

Myriad other sites are devoted to social networking as well. Google+, a new entrant to the scene, has been described as a "throwback to Facebook 2004."[19] MySpace is still around, although it no longer enjoys the level of traffic it did in 2006, when it was still more popular than Facebook.[20] Further, MySpace has shifted its focus to content instead of pure social networking and has attempted to become "the social network for music."[21]

Uses of Social Media Before Trial

Research

Lawyers are certainly permitted to conduct research on social media networks. "Obtaining information about a party available in a [public] Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted."[22] And social media can provide invaluable information for initial evaluation of a claim. For example, Facebook and LinkedIn might reveal where a potential defendant works, what kind of assets that person might have, any content uploaded regarding the future claim, and how that person sees himself or herself in the context of the potential case. Performing this research can help the attorney to be more informed prior to filing suit. In some cases, it might help a litigator avoid bringing a claim that sounds great on the surface but breaks down under scrutiny. In other instances, a plaintiff's attorney may uncover valuable information that can be inserted into a complaint's general allegations and perhaps added as exhibits to bolster the plaintiff's count(s). If the attorney is particularly fortunate, a social media profile may contain an admission that will go a long way toward building a case.

On Facebook, any person, Facebook user or not, has access to content published on users' Facebook profiles (subject to each Facebook user's privacy settings). The privacy setting may be changed by the subject to restrict access, by blocking others from "subscribing" to one's updates and changing other permissions. However, no privacy setting will completely restrict a party in a lawsuit from access to published Facebook content. Facebook's Privacy Policy, in a section titled "Some other things you need to know," includes the following statement:

> We may access, preserve and share your information in response to a legal request (like a search warrant,

> court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you, including financial transaction data related to purchases made with Facebook Credits, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.[23]

Similarly, all content published on Twitter may be available for consumption by the general public. While users are given the option to block their Tweets from anyone who has not been admitted as a follower, those same Tweets may be re-published (re-Tweeted) by permitted followers many times over, reaching a much larger audience than intended by the publisher. Further, Twitter has its own "Law and Harm" policy, which states:

> Notwithstanding anything to the contrary in this Policy, we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation or legal request; to protect the safety of any person; to address fraud, security or technical issues; or to protect Twitter's rights or property. However, nothing in this Privacy Policy is intended to limit any legal defenses or objections that you may have to a third party's, including a government's, request to disclose your information.[24]

In 2010, in a case involving a driver injured in a car accident, a New York court addressed the protection of a Facebook user's posted content.[25] The defendant, Harleysville Insurance Co. of New York (Harleysville Insurance), did not believe that the plaintiff, Kara McCann, had sustained serious injuries and made a request for the production of photographs from McCann's Facebook account as a means of verification.[26] The trial court denied (which the appellate court affirmed) Harleysville Insurance's motion to compel discovery, finding that the motion was overbroad, along with an apparent lack of proof regarding the relevancy of the Facebook photos.[27]

Parties do not have the ability to force the production of all content published on Facebook. In order to require a party to produce published Facebook content, the demand must be specific and demonstrate the relevance of the requested information. In this particular case, the court stated that Harleysville Insurance "essentially sought permission to conduct a 'fishing expedition' into Plaintiff's Facebook account based on the mere hope of finding relevant evidence."[28] The court did not concern itself with the type of privacy setting the plaintiff attributed to her Facebook content; instead, it denied the motion to compel discovery because the defendant did not make a clear showing of the relevance of the evidence.

However, in another 2010 New York case, the party seeking to compel discovery requests was permitted to receive not only current and historical Facebook content, but also pages that had been deleted by the user.[29] The key question is whether the evidence is *material and necessary*. The court stated that disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" is required.[30] The court also stated that preventing access to *private postings* would be "in direct contravention to the liberal disclosure policy in New York State."[31]

Defense

Occasionally, a person may claim one set of facts in public, but in the so-called "privacy" of his or her online network an entirely different set of facts will come to light. In such a situation, a litigator has a unique opportunity to, for example, defend against a claim that might otherwise seem unwinnable.

One such case concerned a University of Kentucky student who sued a nightclub in federal court after she slipped and fell while dancing on top of the bar, causing injury. She alleged that the bar was slippery and wet, and that the nightclub should have done more to prevent the accident. The defendant nightclub sought access to the plaintiff's and a witness's private Facebook pages. At one point, in a unique twist on in camera review, the magistrate judge overseeing the case offered to create a Facebook profile and "friend" witnesses "for the sole purpose of reviewing photographs and related comments."[32] The witnesses, however, never responded to the judge's "friend" requests.[33]

Though the judge ordered Facebook "to produce photographs, messages, wall posts and other information on the profiles of the injured patron and a friend who witnessed the accident," Facebook was able to successfully argue that the Stored Communications Act prohibited disclosure of members' information.[34] Eventually, the plaintiff's profile was reviewed in camera pursuant to her consent, and some content was presumably disclosed to the defense. The case settled on the proverbial courthouse steps, one day before it was scheduled to go to trial.[35] One can only speculate as

to the motivation for the settlement, but the potential evidence from social media may have been a significant factor.

Once information is available on social media sites, removal can be difficult – and in certain cases, disastrous. The plaintiff in a recent wrongful death action from Virginia[36] had potentially damaging material posted on his Facebook profile. His attorney advised the plaintiff to "clean it up," and deactivate the account. Although the plaintiff received a substantial jury verdict, the amount was cut post-trial due to the plaintiff's and counsel's behavior, and both were ordered to pay significant sanctions, including the defense attorney's fees and costs.[37] In addition to more than $500,000 in sanctions, the attorney was fired from his firm. Allegedly he no longer practices law and faces possible further sanctions from the state bar association.[38]

Trial Preparation

If a claim appears headed to litigation, then social media can prove invaluable for trial preparation. If the percentages noted above hold true, then roughly half the witnesses will have a social media profile. Gleaning information from social media profiles can help an attorney be much better prepared for cross-examination of adverse witnesses, by providing ideas for questions that will keep the adverse witnesses off balance. A lawyer can give the impression that he or she knows things about the witnesses that the other side does not. This can provide an insurmountable tactical advantage, and the jury will notice. Another, more subtle, advantage is the corollary: The more you know about your witnesses, the better prepared you will be when the other side tries to put one of these witnesses off balance.

The key to being prepared is to prepare. The more you prepare for trial, the better you will come across to a jury. Being prepared brings with it a sense of confidence that cannot be feigned. Social media can be an excellent aid in preparation.

Uses of Social Media and Litigation

While social media provides a source of information useful in preparation for trial, how can it be used in the courtroom? After all, are not most statements made on a social media site the very definition of hearsay?

Authentication

There are no hard and fast rules when it comes to authenticating social media–based evidence. For example, in 2011, a defendant in a criminal law case sought to impeach a prosecution witness with printouts from her Facebook account. The court refused to allow the evidence, holding that "it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the prosecution witness] and not simply from her Facebook account."[39]

A recent whitepaper from an e-discovery processing firm notes the problem of authenticating social media–based evidence. How, exactly, does a lawyer make the jump from the computer screen to the courtroom? The author explains:

> Under US Federal Rule of Evidence 901(a), a proponent of evidence at trial must offer "evidence sufficient to support a finding that the matter in question is what its proponent claims." Unless uncontroverted and cooperative witness testimony is available, the proponent must rely on other means to establish a proper foundation. A party can authenticate electronically stored information ("ESI") per Rule 901(b)(4) with circumstantial evidence that reflects the "contents, substance, internal patterns, or other distinctive characteristics" of the evidence. Many courts have applied Rule 901(b)(4) by ruling that metadata and file level hash values associated with ESI can be sufficient circumstantial evidence to establish its authenticity.[40]

As the paper further explains, metadata and file level hash values are not easy to preserve when collecting social media–based evidence.[41] Preservation and authentication of ESI is a highly technical and specialized field.

One option to help ensure eventual authentication of social media–based evidence is, of course, to hire a professional engaged in the business of preserving this data. Although it may be expensive to hire an e-discovery expert, the initial expense is likely to be outweighed by the future benefit. To keep the cost of litigation manageable, it may make sense to have an investigator or paralegal perform the initial research and then follow up with a professional, if appropriate.

Admission by Party Opponent

The most natural use for social media in the courtroom is the admission by a party opponent. The admission by a party opponent is not an exception to the hearsay rule but is actually considered non-hearsay under the Federal Rules.[42] New York recognizes the same exception.[43] Accordingly, one of the first places to look for possible evidence is the opposing party's or parties' social media profiles. Something highly relevant to a claim or defense could be out there in hyperspace.

Impeachment

Social media might be used to impeach a witness. A lawyer representing his or her client in litigation may access and review the other party's published social media content to search for potential impeachment material.[44] As an

example, in *Eleck*, the criminal case discussed above, the defendant likely could have introduced the contradictory Facebook printouts for impeachment purposes had the evidence been authenticated properly.

Effect on the Listener

One of the broader exceptions to the hearsay rule is the effect it has on the listener. For example, if a client saw a Facebook post that infuriated that client, then the attorney might be able to inquire as to how a certain post made the client feel. It can help to give context or to explain why a client acted in a certain way in a given situation.

An additional benefit to the effect-on-the-listener exception is that it is "hard to unring the bell, once that bell has been rung."[45] As a practical matter, evidence introduced for the effect it has on the listener – although not offered for its truth – still gets before the jury. On very rare occasions, it may be counsel's best bet for getting effective and relevant – yet technically inadmissible – evidence before the finder of fact.

Independent Legal Significance

If a statement has independent legal significance, then it is admissible, even though it might otherwise be considered hearsay. Contracts can be created online through social media. Libel, slander, and threats can all be expressed via social media. It matters only that the thing of independent legal significance was said, not that it is true.

Courtroom Closing Notes

Our discussion has focused on some of the more common methods one might employ for introducing social media into evidence. This is not an exhaustive list. The argument could be made, for example, that Facebook postings are business records. Ultimately, whether or not social media–based evidence will be allowed in a courtroom setting will depend on the trial judge, the other litigants, and your own creativity.

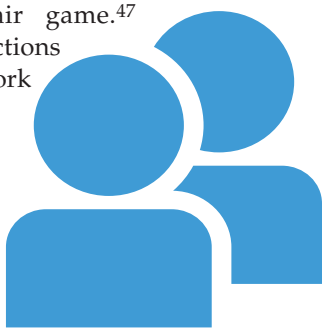
Pitfalls

No matter how enticing the information gleaned from a social media profile, it must always be viewed with a healthy dose of skepticism. People lie. It can never be absolutely certain that the person behind the profile is the same person he or she purports to be. Content may be posted on someone's social media profile by a third party without the owner's permission and/or knowledge. Social media's greatest value lies in providing a starting point. It should never be regarded as a substitute for further research.

Social media profiles are not, as a rule, overly easy to access. Various privacy controls can prevent a member of the general public from viewing a person's personal profile. In most cases, the lawyer using social media to investigate a claim, prepare a defense, or prepare for trial will fall into the member-of-the-general-public category. In addition, at least one ethics opinion has held that it is unethical for an attorney to "friend" an adverse party or potential witness in a case without disclosing the purpose for the friend request.[46]

The New York State Bar Association, however, has clearly held that publicly available Facebook and MySpace postings are fair game.[47] That said, various jurisdictions have stated that social network information must be discovered ethically, and that lawyers are prohibited from using deception to gain access to such material.[48]

While social media provides a source of information useful in preparation for trial, how can it be used in the courtroom?



Ultimately, the attorney will have to vet social media–based evidence using the same criteria that would be used for any other type of evidence. This is an exciting and developing area of the law, but attorneys must exercise professional judgment in using social media in the courtroom and otherwise.

Suggestions for Further Study

The Electronic Discovery Reference Model is a group created in 2005 "to address the lack of standards and guidelines in the electronic discovery (e-discovery) market."[49] The group, in conjunction with FindLaw, provides an "Interactive Guide to Electronic Discovery," which is a helpful resource for understanding the e-discovery process and best practices.[50]

Regarding the ethical considerations associated with use of social media, a recent *Delaware Law Review* article argues that competency and diligence require attorneys to account for social media in investigation and discovery.[51]

Another recent law review article explores sanctions for e-discovery violations and ESI, identifies "230 sanction awards in 401 federal cases"[52] and provides an excellent overview of the issue of pitfalls in preservation of ESI and sanctions.

Many blogs are devoted to e-discovery and social media as these relate to the practice of law.[53] E-discovery and the use of social media in litigation are fast-develop-

ing – perhaps the *fastest* developing – areas in the practice of law. New resources become available every day and the potential for innovation is wide open.[54]

1. *See* Nadine R. Weiskopf, Tweets and Status Updates Meet the Courtroom: How Social Media Continues to be a Challenge for E-Discovery in 2011, 2 (2011) (citing a study by Arbitron Inc., which finds that 48% of Americans age 12 or older have a profile on one social networking site – a 100% increase from 2008).

2. *Survey Reveals Substantial Growth in Online Social Networking by Lawyers Over the Past Year*, Martindale.com (Sept. 18, 2009), http://www.lexisnexis.com/community/lexishub/blogs/legaltechnologyandsocialmedia/archive/2009/09/18/survey-reveals-substantial-growth-in-online-social-networking-by-lawyers-over-the-past-year.aspx.

3. Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, Am. Bar Ass'n (July 28, 2011), http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html.

4. Note that a great deal of information can be found on private and public blogs, gaming sites, and discussion boards. The social-media sites chosen herein represent the "tip of the iceberg," so to speak.

5. Sid Yadav, *Facebook – The Complete Biography*, Mashable.com, Aug. 25, 2006, http://mashable.com/2006/08/25/facebook-profile/.

6. Nicholas Carlson, *At Last – The Full Story of How Facebook Was Founded*, Bus. Insider (Mar. 5, 2010), http://www.businessinsider.com/how-facebook-was-founded-2010-3.

7. Yadav, *supra* note 5.

8. Michael Arrington, *Facebook Just Launched Open Registrations*, TechCrunch.com (Sept. 26, 2006), http://techcrunch.com/2006/09/26/facebook-just-launched-open-registrations/.

9. Somini Sengupta & Nick Bilton, *A Billion Users Raise Stakes at Facebook for Revenue*, N.Y. Times (Oct. 4, 2012), http://bits.blogs.nytimes.com/2012/10/04/facebook-passes-1-billion-active-users/.

10. *Key Facts – Statistics*, Facebook, http://newsroom.fb.com/key-facts.

11. Matthew Humphries, *Facebook Stores up to 800 Pages of Personal Data per User Account*, Geek.com (Sept. 28, 2011), http://www.geek.com/articles/geek-pick/facebook-stores-up-to-800-pages-of-personal-data-per-user-account-20110928/.

12. *About Us*, LinkedIn, http://press.linkedin.com/about.

13. George Anders, *Why You Suddenly Can't Resist Updating Your LinkedIn Profile*, Forbes (Oct. 12, 2012), http://www.forbes.com/sites/georgeanders/2012/10/12/why-you-suddenly-cant-resist-updating-your-linkedin-profile/.

14. Indeed, one of the features of LinkedIn is that users are encouraged to upload a traditional "paper" résumé in order to complete their profile.

15. *See* Scott Merrill, *Do One Thing, and Do It Well: 40 Years of UNIX*, TechCrunch.com (Aug. 21, 2009), http://techcrunch.com/2009/08/21/do-one-thing-and-do-it-well-40-years-of-unix/ (explaining UNIX's underlying philosophy).

16. Or so the story goes. *See* Nicholas Carlson, *The Real History of Twitter*, Bus. Insider (Apr. 13, 2011), http://articles.businessinsider.com/2011-04-13/tech/29957143_1_jack-dorsey-twitter-podcasting (explaining that Twitter evolved from the failure – or unfeasibility – of the Odeo podcasting platform, which was intended originally to be used with Apple products).

17. *Id.*

18. Matt Raymond, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, Lib. of Cong. Blog (Apr. 14, 2011), http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/.

19. Charlene Madson, *Status Update on Google+*, Google+ (July 8, 2011) ("I like this . . . it's like a throwback to Facebook 2004.").

20. Yadav, *supra*, note 5.

21. *See* Emma Barnett, *MySpace Mounts Last Ditch Effort to Retain Social Music Crown*, The Telegraph (Oct. 27, 2010), http://www.telegraph.co.uk/technology/myspace/8088227/MySpace-mounts-last-ditch-effort-to-retain-social-music-crown.html.

22. NY State Bar Ass'n, NY Comm. on Prof'l Ethics, Op. 843 (Sept. 10, 2010).

23. *Data Use Policy*, Facebook, http://www.facebook.com/about/privacy/other.

24. *Twitter Privacy Policy*, Twitter, https://twitter.com/privacy.

25. *See McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525 (4th Dep't 2010).

26. *Id.*

27. *Id.*

28. *Id.*

29. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426 (Sup. Ct., Suffolk Co. 2010).

30. *Id.* at 427.

31. *Id.* at 430.

32. Brandon Gee, *Coyote Ugly Calls Facebook to the Stand*, The Tennessean, Apr. 24, 2011, *at* http://www.wbir.com/news/article/167347/2/Coyote-Ugly-calls-Facebook-to-the-stand.

33. *Id.*

34. *Id.* The Stored Communications Act codified at 18 U.S.C. §§ 2701–2712.

35. Brandon Gee, *Coyote Ugly, Student Reach Deal in Injury Case*, The Tennessean (May 6, 2011), http://www.ongo.com/v/878816/-1/042AE76454CBD8C5/coyote-ugly-student-reach-deal-in-injury-case.

36. *Lester v. Allied Concrete Co.*, Nos. CL 08-150, CL09-223, 2011 WL 89856003 (Va. Cir. Ct. Sept. 1, 2011); *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223, 2011 WL 9688369 (Va. Cir. Ct. Oct. 21, 2011).

37. K&L Gates, *Client & Counsel Sanctioned for Spoliation Where Plaintiff Was Instructed to "Clean Up" His Facebook Page*, Electronic Discovery L., Nov. 18, 2011, http://www.ediscoverylaw.com/2011/11/articles/case-summaries/client-counsel-sanctioned-for-spoliation-where-plaintiff-was-instructed-to-clean-up-his-facebook-page/.

38. John Patzakis, *Facebook Spoliation Costs Lawyer $522,000; Ends His Legal Career*, Next Gen. eDiscovery L. & Tech Blog (Nov. 15, 2011), http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/.

39. *State of Conn. v. Eleck*, 23 A.3d 818 (Conn. App. 2011).

40. John Patzakis, *Overcoming Potential Legal Challenges to the Authentication of Social Media Evidence*, X1 Discovery (2011), http://x1discovery.com/download/X1Discovery_whitepaper_Social_Media_2011.pdf.

41. *Id.*

42. Fed. R. Evid. 801(d)(2).

43. *Satra Ltd. v. Coca-Cola Co.*, 252 A.D.2d 389 (1st Dep't 1998).

44. N.Y. State Bar Ass'n, *supra* n. 22.

45. As another saying goes, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it."

46. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (Mar. 2009).

47. NYSBA Comm. on Prof'l Ethics, Op. 843 (Sept. 10, 2010).

48. *See* N.Y. City Comm. on Prof'l Ethics, Formal Op. 2010-2; Phila. Bar Ass'n Op. 2009-02.

49. ERDM, *Frequently Asked Questions*, http://www.edrm.net/joining-edrm/frequently-asked-questions.

50. FindLaw's Interactive Guide to Electronic Discovery, Findlaw.com, http://technology.findlaw.com/electronic-discovery/electronic-discovery-guide/.

51. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011).

52. Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke L.J. 789, 790 (2010), *at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=dlj.

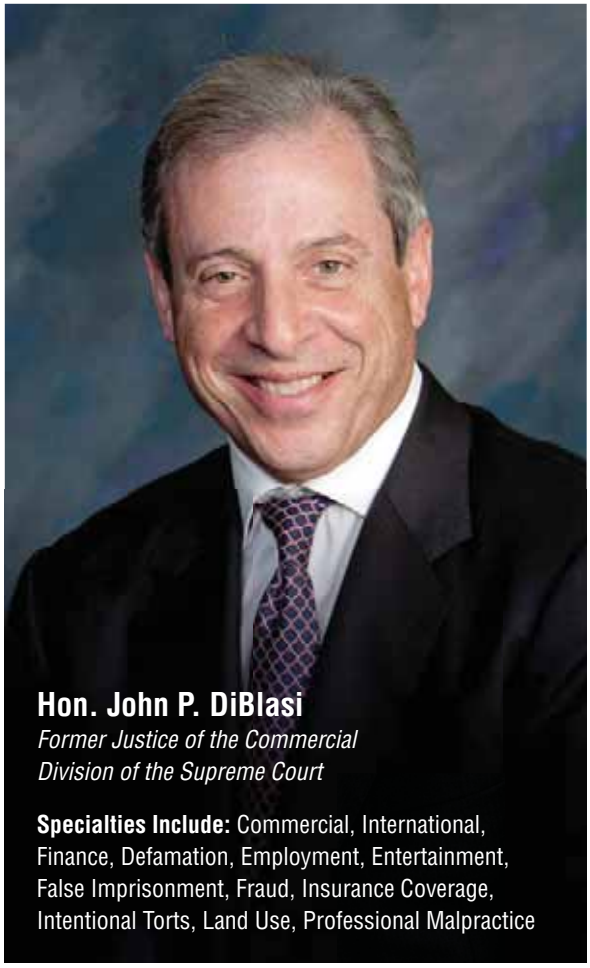
53. One such blog that was very helpful in writing this article is the Next Generation eDiscovery Law & Tech Blog. Though it is a commercial project, the blog provides an excellent resource for getting up to speed on social-media and e-discovery issues. Next Gen. eDiscovery Law & Tech Blog, X1Discovery, http://blog.x1discovery.com/.

54. We encourage readers to enter the discussion on the EASL blog. Please send your comments to eheckeresq@eheckeresq.com for inclusion in the blog.

NAM CHOSEN AS
THE #1 ADR FIRM

FOR THE SECOND YEAR IN A ROW IN THE NEW YORK LAW JOURNAL READER RANKINGS SURVEY

NAM CONGRATULATES HON. JOHN P. DIBLASI



Hon. John P. DiBlasi
Former Justice of the Commercial Division of the Supreme Court

Specialties Include: Commercial, International, Finance, Defamation, Employment, Entertainment, False Imprisonment, Fraud, Insurance Coverage, Intentional Torts, Land Use, Professional Malpractice

VOTED ONE OF THE TOP TWO BEST INDIVIDUAL MEDIATORS

In New York State for three consecutive years by the New York Law Journal Survey

New York Law Journal Reader Rankings — Top Ten Best Individual Mediator John DiBlasi (NAM) 2012

VOTED THE #1 BEST INTERNATIONAL MEDIATOR

New York Law Journal Reader Rankings — Winner Best International Mediator John DiBlasi (NAM) 2012

VOTED ONE OF THE TOP THREE BEST FINANCIAL MARKETS MEDIATORS

New York Law Journal Reader Rankings — Top Five Best Financial Markets Mediator John DiBlasi (NAM) 2012

NAM®
NATIONAL ARBITRATION AND MEDIATION®

The Better Solution®

122 East 42nd Street, Suite 803, New York, New York 10168

Additional Locations: Garden City, Brooklyn, Westchester and Buffalo (800) 358-2550 www.namadr.com

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 24 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice, Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. He serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

Physician/Patient Privilege: *Doe* Revisited?

Introduction

The September 2012 column, "I Thought That Was Confidential," discussed a June 2012 Second Department decision, *Doe v. Sutlinger Realty Corp.*,[1] where the appellate court affirmed a trial court order referring the disclosure of the plaintiff's HIV status to a special referee. During the course of disclosure, the defendant received records indicating that the plaintiff was HIV positive. At the deposition, the defendant attempted to question the plaintiff concerning his HIV status, and was rebuffed. The defendant moved to, *inter alia*, compel outstanding disclosure, including that relating to the plaintiff's HIV status. To date,[2] there are no reported decisions citing *Doe*.

Underlying the holding and potential impact of *Doe v. Sutlinger Realty Corp.* are issues involving the voluntary or inadvertent disclosure of a plaintiff's HIV infection, case law relating to claims of loss of enjoyment of life,[3] the burden of proof in demonstrating a "compelling need," issues concerning the speculative nature of certain evidence, and the prospect of "turning the fact-finding process into a series of mini-trials."[4]

No Compelling Need Established

In *Del Terzo v. The Hospital for Special Surgery*,[5] the First Department unanimously affirmed a trial court's denial of the defendant's motion in a personal injury action to preclude the plaintiff from offering evidence of future damages at trial or, alternatively, to compel the plaintiff to furnish authorizations permitting disclosure of the plaintiff's HIV-related information, alcohol/drug treatment information and mental health information. The court framed the parties' positions:

> Defendants argue that this information has a bearing on plaintiff's life expectancy and is therefore material to plaintiff's claims for future damages. Defendants generally rely on CPLR 3101(a) insofar as it provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." Plaintiff opposes defendant's arguments, invoking the protections of confidentiality afforded by Public Health Law § 2785(2) and Mental Hygiene Law §§ 22.05 and 33.13.[6]

The court analyzed the Public Health Law requirement that the party seeking disclosure of the HIV-related information demonstrate a compelling need:

> Citing CPLR 3101(a), defendants argue that plaintiff's medical records are material and necessary in the defense of this action because plaintiff has placed her life expectancy in controversy. Defendants therefore claim to have made a prima facie showing of a compelling need for disclosure. Defendants' argument appears to be based on the premise that a "compelling need" under Public Health Law § 2785(2) can be established by a showing that the information they seek is "material and necessary" within the purview of CPLR 3101(a).[7]

The First Department found this reasoning "flawed" and rejected the justification for seeking HIV-related and alcohol/drug treatment information:

> Public Health Law § 2785(1) provides: "Notwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except . . . in accordance with the provisions of this section." Such a "notwithstanding" clause in a statute operates as an exception to the provisions of law referenced in the clause. By operation of the "notwithstanding" clause in Public Health Law § 2785(1), all other provisions of law, including the "material and necessary" standard under CPLR 3101(a), are explicitly preempted by the "compelling need" standard under Public Health Law § 2785(2). Therefore, as a matter of statutory construction, we reject defendants' attempt to equate the two. We further note that defendants have not otherwise made a showing of a compelling need for HIV-related information in this medical malpractice case which does not involve any claim relating to an HIV infection. Nor have defendants even suggested, on the basis of the medical records provided, that there is any history of HIV or

AIDS. Indeed, defendants seem to be engaged in a fishing expedition.

Mental Hygiene Law § 22.05 provides that the records of a person who receives chemical dependence services shall be released only in accordance with Mental Hygiene Law § 33.13 and another section that is not relevant to this appeal. The pertinent part of section 33.13(c)(1) provides that mental health information shall not be released except "upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality." As a general matter, disclosure is warranted where records of a sensitive and confidential nature relate to the injury sued upon. In *Napoleoni* [*v. Union Hosp. of Bronx*, 207 A.D.2d 660, 662 (1st Dep't 1994)], we allowed discovery of treatment records pertaining to a mother's substance abuse during her pregnancy in a medical malpractice action brought on claims of negligence in prenatal care, labor and the delivery of a baby. The interests of justice standard under Mental Hygiene Law § 33.13 has not been met in this case where defendants seek the disclosure of confidential records on the basis of nothing more than a generalized assertion that substance abuse and mental illness can affect a person's level of stress, ability to work and life expectancy.[8]

Accordingly, neither the compelling need nor substantial interest of justice standards were met.

Two-Fold Burden of Proof

In a subsequent decision, *Budano v. Gurdon*,[9] the First Department again unanimously affirmed a trial court's denial of a defendant's request for the same categories of information:

> Plaintiff claims that he sustained physical injuries when he slipped and fell on a staircase in a building owned by defendant. Plaintiff alleged in his supplemental bill of particulars that his injuries "are believed to be permanent in their nature and/or consequences." Plaintiff, who was unemployed at the time of the incident, also alleged that he believed that the accident caused him to be incapacitated from employment and that such incapacitation would be permanent.
>
> At a discovery status conference, defendant requested that the court order plaintiff to authorize the release of his records from Lincoln Medical and Mental Health Center, where plaintiff was treated after the accident, relating to plaintiff's "substance abuse and/or substance treatments." The court denied the request. Plaintiff subsequently executed an authorization form and served it on defendant, but declined to check the boxes on the form specifically permitting inspection of records related to alcohol and drug treatment, mental health information and HIV-related information.
>
> Defendant moved to compel plaintiff to authorize the release of such health information. In the alternative, defendant requested an in camera inspection of plaintiff's Lincoln Hospital records, to be attended by the parties, or permission to serve a judicial subpoena directing Lincoln Hospital to produce such records. In support of the motion, counsel asserted that plaintiff had "admitted at his deposition that he has a drug and alcohol history for which he has received treatment in detoxification programs" and that plaintiff had "received such treatment before and after the subject incident." However, counsel failed to attach a deposition transcript or any other documents establish-

ing those facts. Counsel argued that plaintiff's alleged history of substance abuse raised doubt as to the cause of his fall. He further contended that plaintiff's alleged substance abuse could "have an effect on his prognosis, present health condition, and future medical care." He did not assert that plaintiff was HIV positive, nor did he address why that would be relevant to the litigation.

Plaintiff cross-moved for a protective order precluding production of his protected health information. In an affirmation, plaintiff's counsel argued that plaintiff had not put his mental health or any treatment for substance abuse or HIV at issue, and, as such, was entitled to a protective order against disclosure of such information. Plaintiff's counsel asserted that none of plaintiff's Lincoln Hospital medical records suggested that he had been under the influence of alcohol, drugs, or had HIV at the time of the accident, or that substance use hindered his ability to be treated medically and heal from his injuries. Plaintiff's counsel reported that, "given the nature of the hospital admissions, treatments, and quantity of records," Lincoln Hospital "could not redact or otherwise separate records pertaining to [protected health information] and produce only those records unrelated to such conditions." Counsel asserted that, in order to facilitate plaintiff's deposition, he had obtained and reviewed all of plaintiff's Lincoln Hospital medical records, and had produced "the few records that did not disclose "privileged [health] information." Counsel further noted that, during his deposition, plaintiff had denied drinking alcohol or using illegal drugs within the 24 hours preceding his accident. Counsel also argued that defendant's alternative request for an in camera inspection of plaintiff's medical records, to be attended by the parties, was improper and against the very purpose of in camera review. Conversely, counsel acknowledged that issuance of a subpoena duces tecum to Lincoln Hospital was appropriate, but requested that the subpoena direct Lincoln to produce any records to the court for its review. The court denied defendant's motion and granted plaintiff's cross motion for a protective order.[10]

Del Terzo analyzed the Public Health Law requirement that the party seeking disclosure demonstrate a compelling need.

The court's analysis of the burden of proof and explanation of the moving defendant's failure to meet that burden is worth careful reading:

> The burden of proving that a party's mental or physical condition is in controversy, for purposes of obtaining relevant hospital records, is on the party seeking the records. In *Koump* [*v. Smith*, 25 N.Y.2d 287, 300 (1969)], the plaintiff sought records that would establish that the defendant was operating his vehicle under the influence of alcohol at the time of the accident. The Court, in declining to order production of the records, stated as follows: "In the instant case, it is clear that the record developed below was not sufficient to support a conclusion that the defendant's physical condition is in controversy. The only support for the motion is the affidavit of the plaintiff's attorney. That affidavit, which does not appear to be based upon personal knowledge, contains no facts; it merely refers the court to the allegations of the complaint and concludes that defendant was intoxicated because a police report indicates that this was so. However, neither the police report nor a policeman's affidavit nor a doctor's affidavit is attached to the moving papers. Indeed, there is no competent evidence in the record to show whether defendant was even confined in Nyack Hospital or whether a blood test was taken."

Similarly in this case, it is impossible to tell from defendant's submissions, also consisting almost exclusively of the affirmation of an attorney not claiming to have personal knowledge, whether plaintiff has a drug or alcohol dependency or whether he has HIV. Defendant's counsel asserted that plaintiff admitted in his deposition that he had been treated for addiction, but he failed to annex the transcript so it is impossible for us to independently evaluate it. The affirmation was completely silent on the issue of HIV. Further, simply because plaintiff's counsel represented in his submission that Lincoln Hospital could not feasibly redact information concerning chemical dependency and HIV status from plaintiff's records does not establish that plaintiff had a substance abuse problem or was HIV positive.

In any event, even if defendant had established that plaintiff suffered from chemical dependency and mental illness and had HIV, the requested discovery would not be warranted. Defendant failed to submit an expert affidavit or any other evidence that would establish a connection between those conditions and the cause of the

> accident, nor did he make any effort to link those conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life. Without such support, "we are presented with nothing other than hypothetical speculations calculated to justify a fishing expedition."[11]

The First Department decision highlights a two-fold failure of proof: First, the not-uncommon failure of a moving party to produce proof in admissible form, in this case, affidavits of witnesses with actual knowledge of the facts at issue, and documentary proof in admissible form; second, the failure to submit expert proof in admissible form to establish the foundation nexus between the disclosure sought and the claims and defenses in the action.

Conclusion

Doe's rationale contrasts with the two holdings from the First Department:

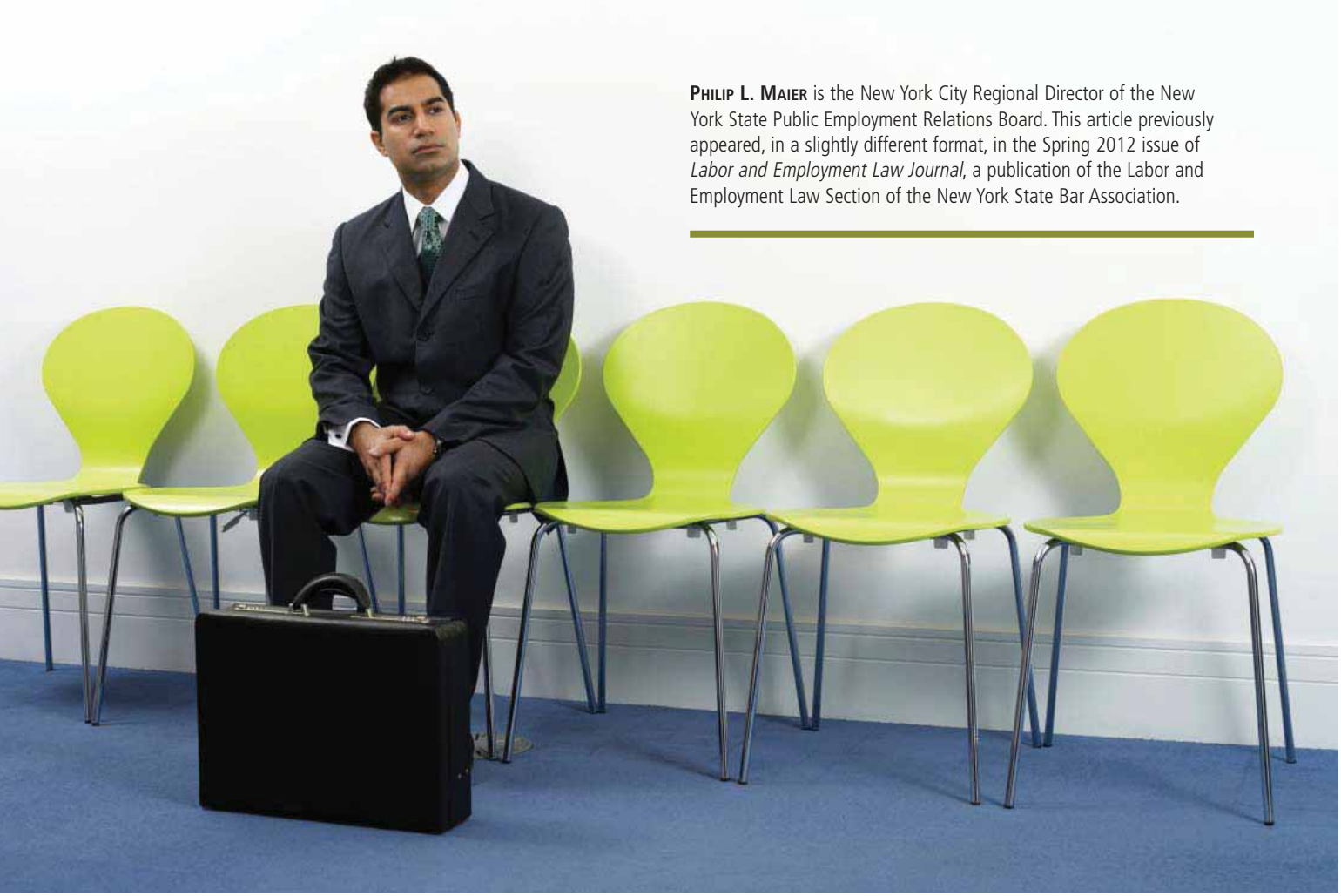
> The Supreme Court properly found that the plaintiff put his HIV status in issue by commencing this action and alleging that he suffered permanent injuries and a total disability as a result of the accident. Furthermore, the Supreme Court properly found that the plaintiff's life expectancy would be relevant to an award of damages, and that ignoring the plaintiff's HIV status would violate the defendant's right to a fair trial by seriously hindering the defendant's ability to mount a defense based on a claimed shortened life expectancy.[12]

In *Doe*, a foundation element was present that was conspicuously absent in the two First Department records: there was record proof that the plaintiff was HIV positive. However, that distinction cannot account for the different outcomes in the two appellate divisions since the First Department in *Budano* held "[i]n any event, even if defendant had established that plaintiff suffered from chemical dependency and mental illness and had HIV, the requested discovery would not be warranted."

The Second Department decision appears to broadly hold that the prima facie assertion that the plaintiff is, for example, HIV positive, and there is a claim for future damages, is sufficient to move to the next step of referral to a referee, which does not appear to be sufficient in the First Department.

The usual caveat prevails. In this, as in so many areas of practice, practitioners should search carefully for recent authority, particularly from the appellate division wherein the action is pending, for new developments. ■

1. 96 A.D.3d 898 (2d Dep't 2012).
2. January 23, 2013.
3. The September 2011 Burden of Proof column, "You May Say Something," NYSBA *Journal*, Sept. 2011, p. 16 and the October 2011 column, "All in the Family," NYSBA *Journal*, Oct. 2011, p. 18, Bill of Particulars columns discussed claims of loss of enjoyment of life, and the impact of such claims, on the scope of disclosure into a plaintiff's medical history.
4. *Andon v. 302-304 Mott St. Assoc.*, 94, N.Y.2d 740 (2000) (Court of Appeals quoting from underlying First Department opinion).
5. 95 A.D.3d 551 (1st Dep't 2012).
6. *Id.* at 552.
7. *Id.*
8. *Id.* at 552–53 (citations omitted).
9. 97 A.D.3d 497 (1st Dep't 2012).
10. *Id.* at 497–98.
11. *Id.* at 498–99 (citations omitted).
12. *Doe*, 96 A.D.3d 898 (citations omitted).



Philip L. Maier is the New York City Regional Director of the New York State Public Employment Relations Board. This article previously appeared, in a slightly different format, in the Spring 2012 issue of *Labor and Employment Law Journal*, a publication of the Labor and Employment Law Section of the New York State Bar Association.

Protection Against Employment Discrimination Based on Prior Criminal Convictions – Correction Law Article 23-A

By Philip L. Maier

New York state law provides limited protection for those individuals claiming discrimination in employment due to a prior criminal conviction. This statutory protection can be found in Article 23-A of the Correction Law, §§ 750–755, titled "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses" (the Act). The purpose of the Act, as stated in Governor Hugh Carey's memorandum approving the legislation, is to promote the reintegration of a past offender into society and to reduce the incidence of recidivism. It applies to both public and private employers to which an individual applies for a license or employment.[1] The Act's policy prohibiting discrimination in hiring an employee based upon a criminal record also prohibits terminations on that same basis.[2]

The significance of this statutory protection may increase, given the implementation of several early release programs resulting in a decrease in the prison population. According to the New York State Department of Corrections and Community Supervision, the prison population has dropped by 19% since its peak in December 1999, and nearly 8% from the beginning of 2007 through the end of 2009. While some of this reduction can be attributed to a lower crime rate, a number of newly enacted laws have resulted in the early release of mostly non-violent drug offenders.[3] Government is also under increasing financial constraints, giving an even greater incentive to find more cost-effective ways of addressing criminal behavior consistent with public safety. In light of the readmission to society of those who have a criminal conviction in their background, and the possibility that this trend will continue, it is even more important for employers and prospective employees to be aware of the protection the Act provides. This article will provide an overview of this statutory provision, highlighting significant case law interpreting it.[4]

Article 23-A of the Correction Law

Correction Law § 752 prevents discrimination against persons convicted of one or more criminal offenses when applying for any license or employment. The two specific exceptions carved out from this protection are when there is a direct relationship between the criminal offense and the license sought, or the issuance or continuation of the license or employment would create an unreasonable risk to "the safety or welfare of specific individuals or the general public."[5] The phrase "direct relationship" is defined by the statute but there is no definition for the phrase "unreasonable risk."[6]

Section 753 sets forth eight criteria that a public agency or private employer shall consider when making a determination pursuant to § 752.[7] If a person is denied a license or employment, the agency or employer shall, upon request, provide a written statement of reasons, within 30 days upon request, setting forth the reasons for the denial. Section 754 provides that in the event a person challenges an action by a public agency, that action is reviewable in an action pursuant to Article 78 of the Civil Practice Law and Rules. An action by a private employer is reviewable in a proceeding brought in the Division of Human Rights and, concurrently, the New York City Commission on Human Rights.[8]

The Court of Appeals devised the framework to analyze the exceptions in § 752 and the interplay between that provision and § 753 in *Bonacorsa v. Van Lindt*.[9] In that case, the Court held that the New York State Racing and Wagering Board (Board) did not abuse its discretion when it denied an owner-trainer-driver license to the petitioner. Bonacorsa had been convicted of federal charges in connection with a scheme to fix horse races. Subsequent to his time served, he received a certificate of good conduct from the New York State Board of Parole. The petitioner argued that in, light of this certificate, he was entitled to a presumption of rehabilitation under § 753(2), which gave him a prima facie entitlement to the license. The Board argued that the denial was appropriate because there was a direct relationship between the conviction and the license sought. The Court phrased the issue as to whether the presumption of rehabilitation applies when a license is denied based upon the direct relationship exception and, if so, whether the Board retains discretion to deny the license based upon the factors in § 753(1). It answered both questions in the affirmative and found that the Board acted properly in denying the license.

The Court recognized that as a general rule, employers cannot deny a license or employment solely on the basis of ex-offender status. The Court stated, however, that an analytical distinction is employed depending upon whether the direct relationship or unreasonable risk exception is at issue. The Court reached this conclusion because the phrase "direct relationship" is defined by statute and stated that the eight factors do not assist in making a determination as to whether a direct relationship exists.

It agreed with the petitioner that the presumption of rehabilitation created by a certificate of good standing nevertheless applies even though the direct relationship exception was applicable.[10] The Court construed the phrase "in making a determination pursuant to section seven hundred and fifty-two" found § 753 to mean that, notwithstanding a direct relationship, an employer has the discretion to determine, after reference to the eight factors, whether an employment application should be granted or a license should be issued.[11] The Court also stated that the eight factors should be considered to determine if an unreasonable risk exists and whether that exception therefore applies. In this regard, the Court construed the phrase "in making a determination pursuant to section seven hundred and fifty-two" to mean a determination as to whether the unreasonable risk exception actually applies.

Under both exceptions, however, even when a presumption of rehabilitation applies, it does not create a prima facie entitlement to the license or position, since it is only one of the eight factors to be considered.

Direct Relationship Exception

In *Marra v. City of White Plains*,[12] the Appellate Division reversed and remanded to the city for a determination whether a license to operate a rooming house should be denied to an applicant who had prior criminal convictions for burglary, receipt of stolen property, and attempted extortion and conspiracy. The city had denied the application on the basis, in part, of the exceptions set forth in § 752. The court rejected this conclusion, finding that the city failed to adequately consider the factors set forth in § 753. The court reviewed prior cases in which a license or employment had been denied on the basis of the existence of a "direct relationship." For example, the court stated the direct relationship exception is satisfied when the prior offense was related to the industry or occupation at issue[13] or if the elements of the criminal offense have a direct impact on the ability to perform duties related to the license or application.[14] The court concluded that the city did not properly weigh the factors set forth in § 753 and stated there was no support for the conclusion that granting the license would constitute an unreasonable risk.

In *Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation*,[15] the Court of Appeals found that a decision by the Department of Environmental Conservation denying an application to expand a landfill facility was supported by substantial evidence. The Commissioner had denied the petitioner and its principals' application because of federal tax-related crimes spanning several years, finding that this demonstrated a lack of fitness which outweighed the benefit of the landfill expansion. The Court agreed with the Appellate Division that the elements of the criminal conduct – "dishonesty, lack of integrity in conducting business, and a willingness to mislead the government" – had a direct relationship to the duties and responsibilities involved with holding the license for which the petitioner applied.[16] Accordingly, the judgment dismissing the petition was affirmed.

In *City of New York et al. v. New York City Civil Service Commission et al.*,[17] the Appellate Division confirmed a decision of the New York City Civil Service Commission reinstating the petitioner to the position of watershed maintainer. Huggins, the petitioner, had been deemed not qualified for the position, the duties of which entailed the inspection, repair, maintenance and operation of the City's watershed areas and reservoir and aqueduct systems. He had prior convictions for attempted robbery, sexual abuse, criminal possession of a weapon, and theft of transportation services. The Court found that there was a rational basis for the Commission's decision. There was no direct relationship between the offenses and the position, nor would he present a threat to public safety.

Unreasonable Risk Exception

The courts have also had the opportunity to review cases involving the unreasonable risk exception. In *Arrocha v. Board of Education of the City of New York*,[18] the Court of Appeals found that the Board of Education's decision to deny a teaching license was not arbitrary or capricious. In 1987, some nine years earlier, the petitioner, then 36, was convicted of selling cocaine to an undercover officer. The Court found that the Board had considered the evidence submitted by the petitioner in support of his application, and had reviewed the statutory criteria to determine whether he posed an unreasonable risk.

The Court stated that the presumption of rehabilitation which attached due to the certificate of relief from disabilities was just one of the eight factors the Board was obligated to weigh. It was not required to rebut the presumption but could evaluate that one factor in conjunction with the other evidence presented regarding the remaining criteria in Correction Law § 753.

In *Boatman v. New York State Department of Education*,[19] the Appellate Division reversed a Supreme Court decision which granted a petition finding a violation of Correction Law § 753. In that case, the petitioner had an 18-year-old felony drug conviction, a 14-year-old possession of a controlled substance conviction and a 10-year-old conviction for criminal mischief. These convictions were revealed during a background check performed in connection with his application for a custodial position at the district middle school. Boatman submitted only the certificate of relief from disabilities in support of his position at the administrative hearing.

The court reversed on the grounds that the underlying administrative decision was neither arbitrary nor capricious. The court stated that if the determination is supported by a rational basis, it is not the court's place to substitute its own judgment for that of the body it reviewed.[20] The court stated that the school district could come to a rational basis in finding that the petitioner constituted an unreasonable risk due to the fact that the crimes were committed as an adult and that he would have frequent contact with children. The court further noted that it is the petitioner's burden to establish that a clearance should have been granted, and this burden was not met.

Judicial Review of Employer Decisions

As demonstrated by the cases discussed, courts will not disturb the denial of an application for a license or employment when the employer has reviewed and weighed the statutory criteria, and in the context of the public sector, when the decision is not arbitrary or capricious. In *Grafer v. New York City Civil Service Commission*,[21] for example, the court held that there was a rational basis

LawPay

CREDIT CARD PROCESSING

THE CORRECT WAY TO ACCEPT PAYMENTS!

Trust your credit card transactions to the only merchant account provider recommended by 32 state and 48 local bar associations!

- ✓ Separate earned and unearned fees
- ✓ 100% protection of your Trust or IOLTA account
- ✓ Complies with ABA & State Bar Guidelines
- ✓ Safe, simple, and secure!

Reduce processing fees and avoid commingling funds through LawPay.

Secure web payments

Mobile Swiper iPhone, iPad, Android

VISA MasterCard AMERICAN EXPRESS DISCOVER

Process all major card brands through LawPay

866.376.0950
LawPay.com

TRUST YOUR TRANSACTIONS TO LAWPAY

THE PREMIER PROCESSOR FOR THE LEGAL INDUSTRY

to find an applicant not qualified for a firefighter position based on prior drunk driving convictions and his previous employment record.[22]

A recent ruling of the Court of Appeals, however, demonstrates that an employer's failure to consider the criteria set forth in § 753 may result in a finding that the employer violated the Act. In *Acosta v. New York City Department of Education, et al.*,[23] the Court affirmed an Appellate Division decision and held that the Department of Education (DOE) acted arbitrarily by failing to comply with the requirements of the Correction Law when it denied Acosta's application for a security clearance. The facts presented by the Court paint a sympathetic portrait of a petitioner, who at the age of 17, was convicted of first-degree robbery, and paroled after having served three years in jail. The Court concluded that, since that time, she had become "a productive and law-abiding member of society."[24] She earned a bachelor's degree, provided volunteer assistance to inmates, started a family, and held responsible positions at two separate law firms. She left her law firm position in order to spend more time with her family and held a part-time position with a not-for-profit corporation that provides educational services to the DOE. Her job duties were primarily concerned with clerical activities and she did not provide instruction to any students.

Having disclosed her prior conviction, Acosta was notified that she would be interviewed at the DOE's offices. In accordance with the advice on the letter informing her about the interview, she submitted a personal statement explaining the circumstances of her conviction, as well as documents demonstrating her achievements subsequent to her conviction. The DOE denied her application, finding that she posed an "unreasonable risk" to the safety and welfare of the school community due to the serious nature of her conviction. In accordance with its contract with the DOE, Acosta's employer subsequently terminated her employment since her application was denied.

The Court found that the DOE acted in an arbitrary manner because it failed to consider all the factors set forth in Correction Law § 753 when it determined that Acosta constituted an unreasonable risk. This record did not show that the DOE considered the documentation submitted in support of her application. Further, the affidavit submitted by the DOE stated that as a general policy it takes a closer look at first-time applicants for security clearances if they have criminal histories and have not worked with children. The Court concluded that this policy, together with the failure to consider all the information submitted, was nothing more than a pro forma denial of her application. The exceptions under the Correction Law may only be resorted to upon a consideration of each of the factors enumerated in Correction Law § 753.[25]

The dissent argued that the Court engaged in a reweighing of the factors and disagreed with the conclusion reached by the DOE. The real difference was not the procedural irregularities pointed to by the majority, but the fact that the majority would have come to a different conclusion than the DOE. Even if the DOE did make a mistake, this does not mean that it acted in such an arbitrary manner as to annul its ruling.

Courts will not disturb the denial of an application for a license or employment when the employer has reviewed and weighed the statutory criteria.

Ex-offenders do have limited statutory protection allowing them to be reintegrated into society despite their prior conviction(s). The standard of review, however, affords employers and entities issuing licenses a wide degree of latitude in passing upon whether one of the exceptions to this protection applies. Employers would nevertheless be well advised to be aware of the statutory protection offered and to be familiar with its exceptions. ■

1. Section 751. The Act does not apply when there is a mandatory "forfeiture, disability or bar imposed by law. . . ." An action brought against a public employer shall be pursuant to the provisions of article seventy eight of the civil practice law and rules and an action commenced against a private employer shall be commenced in the division of human rights. *See* § 755.

2. *Givens v. N.Y. City Hous. Auth.*, 249 A.D.2d 133 (1st Dep't 1998).

3. These programs include Shock Incarceration, Work Release, Comprehensive Alcohol and Substance Abuse Treatment, Willard Drug Treatment, Merit Time, and Limited Time Credit Allowance programs. Additionally, the Rockefeller Drug laws were revised granting the opportunity of an earlier release to inmates. See www.docs.state.ny.us/FactSheets/PrisonClosure2011.html.

4. Notwithstanding the protections afforded by the statute, an employee may still be fired for lying on an employment application. Therefore, the termination of an employee for failure to accurately disclose a criminal record does not result in employer liability. *See Smith v. Kingsborough Psychiatric Ctr.*, 35 A.D.3d 751 (2d Dep't 2006); *Stewart v. Civil Serv. Comm'n of N.Y.*, 84 A.D.2d 491 (1st Dep't 1982).

5. Section 752, titled "Unfair discrimination against persons previously convicted of one or more criminal offenses," states:

> No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:
>
> (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
>
> (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

6. Section 750(3) states that "'direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."

7. Those criteria are: the public policy in favor of encouraging employment of those previously convicted, the specific duties and responsibilities of the license or employment sought or held, the bearing the conviction will have on the person's fitness to perform one or more of the duties or responsibilities, the period of time which has passed since the offense(s) was committed, the person's age at the time the offense(s) was committed, the seriousness of the offense(s), any information produced in regard to the person's rehabilitation and good conduct, the legitimate interests of the agency or employer in protecting property, safety and the welfare of specific individuals and the general public. Section 753(2) also states that consideration shall be given to a certificate of disabilities or a certificate of good conduct issued to the applicant, and that such a certificate shall create a presumption of rehabilitation with regard to the offense(s).

8. *See also* Executive Law, Article 15, § 297(9) which provides that any person claiming to be aggrieved by an unlawful discriminatory practice retains the right to proceed in any court of appropriate jurisdiction.

9. 1 N.Y.2d 605 (1988).

10. Section 750(3) states that "'direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity or job in question."

11. *Bonacorsa*, 1 N.Y.2d 605 (citing *Marra v. City of White Plains*, 96 A.D.2d 17 (2d Dep't 1983)).

12. *Id.*

13. *Schmidt & Sons v. N.Y. State Liquor Auth.*, 73 A.D.2d 399 (1st Dep't), *aff'd*, 52 N.Y.2d 751 (1980) (conviction for fraud in interstate beer sales warranted denial of application of liquor license); *Barton Trucking Corp v. O'Connell*, 7 N.Y.2d 299 (1960) (conviction for extortion in a garment truck racketeering operation warranted denial of license to operate a truck in garment district). *See also Rosa v. City Univ. of N.Y.*, 13 A.D.2d 162 (1st Dep't), *lv. to appeal denied*, 5 N.Y.3d 705 (2004), public policy not violated when arbitrator upheld termination of business law and ethics professor who was convicted of stealing money from clients.

14. *Stewart v. Civil Serv. Comm'n*, 84 A.D.2d 491 (1st Dep't 1982) (prior convictions for assault, possession of a weapon, possession of stolen property and larceny warranted denial of employment as traffic enforcement agent).

15. 98 N.Y.2d 758 (2002).

16. *Id*. at 761.

17. 30 A.D.3d 227 (1st Dep't 2006).

18. 93 N.Y.2d 361 (1999).

19. 72 A.D.3d 1467 (3d Dep't 2010).

20. *Id.* (citing *Arrocha*, 93 N.Y.2d at 363). *See also Peckham v. Calogero*, 12 N.Y.3d 424 (2009); *Gallo v. State of N.Y. Office of Mental Retardation & Dev. Disabilities*, 37 A.D.3d 984 (3d Dep't 2007).

21. 181 A.D.2d 614 (1st Dep't 1992).

22. *See also Al Turi Landfill, Inc.*, 98 N.Y.2d 758; *Bonacorsa*,1 N.Y.2d 605.

23. 16 N.Y.3d 309 (2011).

24. *Id.* at 316.

25. *See also Gallo*, 37 A.D.3d 984; *Black v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 20 Misc. 3d 581 (Sup. Ct., Monroe Co. 2008).

Don't Get Lost in the *Singletree* Forest

Avoiding Expert Preclusion Under CPLR 3101(d)(1)(i)

By Patrick J. Brennan and Daniel I. Jedell

The Appellate Division, Second Department has finally shed light on the perplexing trend surrounding the timing of expert disclosure, which has plagued practitioners in recent years. New York courts long agreed that the identification and exchange of expert witnesses, pursuant to CPLR 3101(d)(1)(i), was permitted until near the time of trial. However, the Second Department's recent decisions dramatically departed from this understanding, seemingly requiring that expert disclosure be effectuated prior to the filing of the note of issue, the document that certifies the completion of discovery. And these decisions have increasingly been interpreted as creating a bright-line rule, warranting preclusion of summary judgment affidavits or trial testimony of experts who are not disclosed prior to the filing of the note of issue.

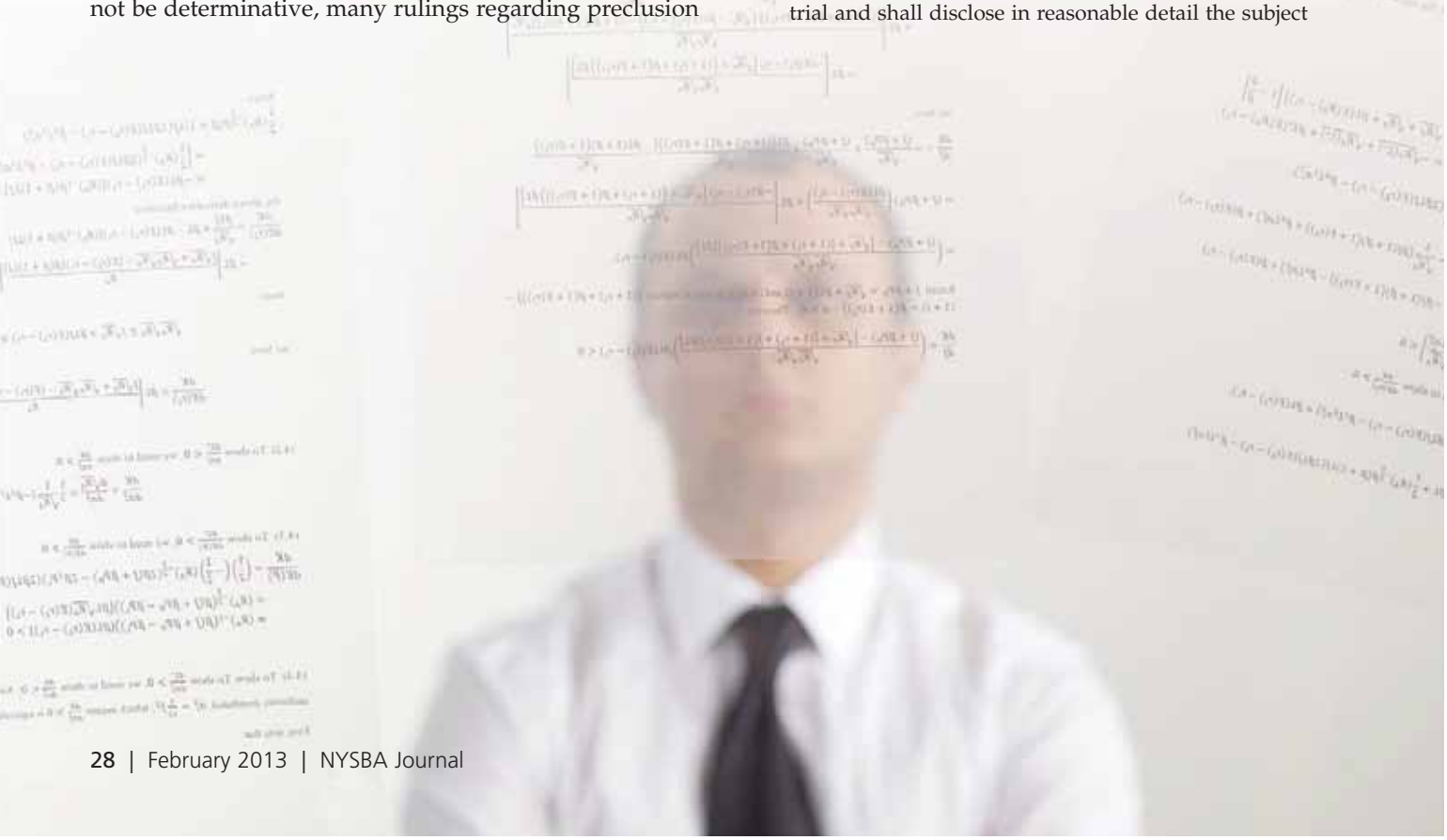
In 2012, however, the Second Department clarified this misconception, holding that a party's failure to disclose its experts prior to the filing of the note of issue is merely one factor a trial court may look to in considering preclusion.[1] While untimeliness alone will not be determinative, many rulings regarding preclusion have turned largely on whether the proponent's experts were disclosed during pre-trial discovery, making it clear that caution must be exercised.

The practical effect for litigants is two-fold: a party can be precluded from establishing prima facie entitlement to judgment as a matter of law and from offering expert testimony at trial, if that party fails to disclose his or her expert prior to the filing of the note of issue without "good cause" or a valid excuse. Accordingly, defendants should evaluate early in a litigation how they will handle the timing of expert disclosures. They are also encouraged to be aware of the evolution of CPLR 3101(d)(1)(i) – and the relevant case law – to avoid inadvertently waiving the right to obtain summary judgment or to defend the case at trial.

Expert Disclosure: A Brief Background

CPLR 3101(d)(1)(i), the only New York statute that addresses the timing of expert disclosure, provides in relevant part:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject



> matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

CPLR 3101(d)(1)(i) does not establish a specific time frame for expert disclosure and makes no mention of the filing of a note of issue in connection with identification of experts. In fact, the statute directs that preclusion should rarely be imposed as a sanction for late disclosure, providing that, "where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph." Because it is difficult to discern what the CPLR intends by "an insufficient period of time before the commencement of trial," such determination has been left to the discretion of the individual courts.

For many years, the First and Second Departments, although equally concerned with avoiding expert identification on the "eve of trial," applied discrete standards with respect to the timing of expert disclosure. The First Department imposed a challenging burden on the party opposing the expert testimony, requiring proof of the proponent's intentional or willful failure to disclose its expert and the existence of prejudice to the opposing party, in order to justify preclusion.[2] By contrast, the Second Department generally required the proponent of the expert testimony to show "good cause" for its own delay in disclosure.[3]

Singletree and Strictness in Summary Judgment

In 2008, the Second Department tightened its grip on expert disclosure, when it ruled that a trial court can preclude an expert's affidavit offered in opposition to a summary judgment motion where the expert was not disclosed prior to the filing of the note of issue.[4] The dissent questioned how an expert could be precluded on a summary judgment motion when expert disclosure is routinely permitted months after the filing of note of issue and where CPLR 3101(d)(1)(i) does not require disclosure of experts retained by a party for purposes other than providing trial testimony.

Despite these concerns, subsequent Second Department decisions continued to apply what has since been interpreted as a bright-line rule that expert disclosure made after the filing of the note of issue is untimely, and thus should not be considered.[5] In the context of summary judgment, preclusion was typically enforced to the detriment of plaintiffs until the Second Department expanded the reach of *Singletree* in 2011, by precluding an expert affidavit proffered by the defendant in support of its summary judgment motion.[6] The Second Department's decision in *Stolarski v. DeSimone* confirmed that *any* party's expert's testimony submitted in connection with a summary judgment motion would be subject to preclusion for failure to comply with CPLR 3101(d)(1)(i).

Now, after years of avoiding the Second Department's stricter approach, the First Department appears to embrace *Singletree.* In *Garcia v. City of New York*,[7] the First Department held that the trial court erred in not granting the defendant's summary judgment motion due to "plaintiff's failure to identify [its] expert during pretrial discovery as required by defendants' demand."

Trial Tribulations

In addition to the summary judgment context, the Second Department has routinely precluded experts from testifying at trial where expert disclosure was not exchanged prior to the filing of the note of issue.[8] Preclusion of experts is disastrous in medical malpractice actions, where expert testimony is necessary to prove or defend against an alleged deviation from the accepted standard of medical care and to establish or disprove causation. If the testimony of a party's expert is precluded, it will be virtually impossible for that party to make out a prima facie case (if the plaintiff's expert is precluded) or otherwise defend against the claims asserted (if the defendant's expert is precluded).

In one recent medical malpractice case, *Herrera v. Lever*,[9] the trial court determined it would be "inherently prejudicial" to permit the testimony of the plaintiff's expert at trial where the plaintiff failed to disclose the expert until 16 months after filing the note of issue. With Justice Battaglia qualifying the prejudice resulting from delay in expert disclosure as "inherent," the *Herrera* decision revealed just how far the preclusive principles of *Singletree* have been stretched.

Patrick J. Brennan (pbrennan@fkblaw.com) is a founding partner of the New York City defense litigation firm Furman Kornfeld & Brennan LLP. Mr. Brennan has over 25 years of experience as a trial lawyer and focuses on defending medical professionals, hospitals and diagnostic laboratories in high exposure personal injury cases. Mr. Brennan is a graduate of St. John's University School of Law.

Daniel I. Jedell (djedell@fkblaw.com) is an associate at Furman Kornfeld & Brennan LLP and practices in the firm's New York City office. He represents hospitals and individual physicians in medical malpractice and wrongful death actions, and handles all stages of pre-trial litigation. Mr. Jedell is a graduate of Brooklyn Law School, where he served as Articles Editor of the *Brooklyn Law Review* and as an International Business Law Fellow with The Dennis J. Block Center for the Study of International Business Law.

Reining in With *Rivers*

In October 2012, the Second Department dispelled the prevailing notion that expert disclosure is automatically rendered untimely if not effectuated during pre-trial discovery. In *Rivers v. Birnbaum*,[10] the appellate court "clarif[ied] that the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely."[11] Rather, a trial court retains discretion to consider an expert's affidavit, after considering all the relevant circumstances in a particular case, even where the court determines that expert disclosure was not made timely. The court noted that the fact that expert disclosure is made after the filing of the note of issue "is but one factor in determining whether disclosure is untimely."[12] While the majority decision does not identify what additional factors trial courts should consider, Justice Miller's concurrence offers some guidance:

> In considering whether preclusion is an appropriate penalty for noncompliance, a court should look to whether the party seeking to avoid preclusion has demonstrated good cause for its noncompliance, whether the noncompliance was willful or whether it served to prejudice the other party, and any other circumstances which may bear on the appropriateness of preclusion. These may include, but are not limited to, the length of time that has passed since the commencement of the litigation, the amount of time that has passed since expert disclosure was demanded, and the extent to which the nature of the case or the relevant theories asserted therein rendered it apparent that expert testimony would be necessary to prosecute or defend the matter.[13]

The *Rivers* decision calls for a return to the pre-*Singletree* First and Second Department standards governing the timeliness of expert disclosure. It appears likely that in re-applying those standards the courts will focus on the length of the delay and whether the need for disclosure was apparent from the nature of the case, to determine whether to preclude the parties' experts.

The Practical Effect for Litigants

The *Rivers* decision effectively restores the discretion of trial courts to determine, on a case-by-case basis, whether preclusion of expert testimony is warranted under CPLR 3101(d)(1)(i). Nonetheless, it would be imprudent to ignore the fact that in recent years both the First and Second Departments have seemingly favored preclusion of expert testimony where expert disclosure is made after the filing of the note of issue. As a general rule, it is wise to exchange expert disclosure with or before the filing of the note of issue. We are aware, however, that litigation strategy does not always permit for such a streamlined approach. In light of the foregoing decisions, a defendant would be prudent to arrange for the prompt exchange of its expert disclosure after service of the plaintiff's expert disclosure, particularly where the plaintiff files the note of issue immediately thereafter.

In addition, the *Rivers* court affirmed that a trial court has discretion, "under its general authority to supervise disclosure," to impose specific deadlines for disclosure of experts to be used in connection with summary judgment motions or who are expected to testify at trial.[14] As such, trial courts should set deadlines for the exchange of expert information and should enforce preclusion as a sanction where these deadlines are not met. However, in cases where no court-enforced timetable is set, parties facing a potential *Singletree*/*Garcia* objection to proffering the testimony of an expert who was not identified during pre-trial discovery must be proactive in offering a "valid excuse" for failure to identify the expert before the filing of the note of issue. Additionally, a defendant who proffers expert testimony in support of summary judgment after the note of issue has been filed should argue that automatic preclusion is clearly in contravention of CPLR 3101(d)(1)(i), particularly in light of *Rivers*.

The drastic penalty of preclusion of an expert can be fatal to a plaintiff's case or a defendant's ability to successfully challenge a lawsuit. Careful consideration and application of the limited guidance provided by the decisions discussed above are necessary to protect a client's vital interests. Special attention must be paid to this evolving area of law to avoid rulings with potentially disastrous consequences. ■

1. *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012).
2. *See Rojas v. Palese*, 94 A.D.3d 557 (1st Dep't 2012); *St. Hilaire v. White*, 305 A.D.2d 209 (1st Dep't 2003); *Downes v. Am. Monument Co.*, 283 A.D.2d 256 (1st Dep't 2001); *Flour City Architectural Metals, Inc. v. Sky-Lift Corp.*, 242 A.D.2d 471 (1st Dep't 1997); *McDermott v. Alvey, Inc.*, 198 A.D.2d 95 (1st Dep't 1993).
3. *See Lucian v. Schwartz*, 55 A.D.3d 687 (2d Dep't 2008); *Caccioppoli v. City of N.Y.*, 50 A.D.3d 1079 (2d Dep't 2008); *Hubbard v. Platzer*, 260 A.D.2d 605 (2d Dep't 1999); *Quinn v. Artcraft Constr., Inc.*, 203 A.D.2d 444 (2d Dep't 1994); *Corning v. Carlin*, 178 A.D.2d 576 (2d Dep't 1991).
4. *Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008).
5. *See Lombardi v Alpine Overhead Doors, Inc.*, 92 A.D.3d 921 (2d Dep't 2012); *Kopeloff v. Arctic Cat, Inc.*, 84 A.D.3d 890 (2d Dep't 2011); *Ehrenberg v. Starbucks Coffee Co.*, 82 A.D.3d 829 (2d Dep't 2011); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (2d Dep't 2009); *Wartski v. C.W. Post Campus of Long Island Univ.*, 63 A.D.3d 916 (2d Dep't 2009); *King v. Gregruss Mgmt. Corp.*, 57 A.D.3d 851 (2d Dep't 2008).
6. *Stolarski v. DeSimone*, 83 A.D.3d 1042 (2d Dep't 2011).
7. 98 A.D.3d 857, 858 (1st Dep't 2012).
8. *See Burnett v. Jeffers*, 90 A.D.3d 799 (2d Dep't 2011); *see Banister v. Marquis*, 87 A.D.3d 1046 (2d Dep't 2011); *Sushchenko v. Dyker Emergency Physicians Serv., P.C.*, 86 A.D.3d 638 (2d Dep't 2011).
9. 34 Misc. 3d 1239(A) (Sup. Ct., Kings Co. 2012).
10. 102 A.D.3d 26 (2d Dep't 2012).
11. *Id.* at 41.
12. *Id.*
13. *Id.* at 53.
14. *Id.* at 41.

Benjamin W. Hill
(bhill@dreyerboyajian.com) is a member of Dreyer Boyajian LLP, Albany, New York, where he focuses his practice on federal litigation, civil rights, personal injury, complex commercial litigation and criminal defense. He graduated *cum laude* from the Ohio State University Mortiz College of Law.

Sealed Records and Sex Abuse Cases Brought Under 42 U.S.C. § 1983

By Benjamin W. Hill

Introduction

Consider the following scenario: a county department of social services (DSS) approves a foster home and sends children in its custody to live in that home. Over a period of several years, DSS receives repeated reports of sexual abuse by a foster parent of that home. In each instance, Child Protective Services (CPS) investigates and interviews the required parties, but determines the reports to be unfounded. Subsequently, however, the accused is prosecuted and convicted. The victims bring a § 1983 suit against the county, asserting that DSS and CPS are liable for damages based on a theory of failure to protect. Specifically, the victims assert that CPS investigations were cursory, inadequate, predetermined, tainted by long-standing local relationships between DSS employees and the accused perpetrator, and that the interviews of the victims were actually coercive and abusive interrogations, resulting in false recantations.[1]

The key issue in the above case will be how successive accusations of abuse against the same perpetrator were determined to be unfounded, and whether such determinations were the result of the defendants' "deliberate indifference" to the plaintiffs' safety. The answer to these questions may be buried in DSS and CPS records that are "confidential" under N.Y. Social Services Law (SSL). This article is intended to provide an overview of New York's confidentiality provisions and explain why this species of § 1983 actions are better filed in federal court, where the Federal Rules of Evidence may trump state law confidentiality provisions.

The Deliberate Indifference Standard Under § 1983

Child abuse victims may recover against a county DSS for violations of constitutional rights under 42 U.S.C. § 1983 if they can prove that the municipal entity and its agents exhibited a "deliberate indifference" to the victims' welfare and safety.[2] Generally speaking, deliberate indifference "requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action" or inaction.[3] Deliberate indifference, however, does not require a showing of "ill-will or the affirmative acquiescence in mistreatment."[4] Rather, it may be inferred from "a pattern of omissions revealing deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse."[5]

In addition, "gross negligent conduct creates a strong presumption of deliberate indifference."[6] Gross negligence will be found when officials display an "indiffer-

ence to present legal duty" and a "manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence."[7] Finally, "repeated acts of negligence [can] be evidence of indifference."[8]

Thus, the deliberate indifference standard is a high one that requires either proof of disregard for a known risk or repeated acts of negligence and transgressions of statutory standards of care. However, DSS and CPS records that are relevant and potentially necessary to prove such claims are subject to strict confidentiality provisions, which can prohibit their disclosure in civil litigation.

Overview of New York State Reporting Procedures

County DSSs are responsible for the welfare of children in their custody and for investigating reports of child abuse. Within 24 hours of receiving a child abuse report, CPS must commence an investigation that must include an evaluation of the home environment, a determination as to the degree of risk the children are in, and the nature and cause of any condition described in the report.[9] Within that 24-hour period, CPS is required to have face-to-face or telephonic contact with the subjects and/or other persons named in the report and/or other persons with information about risk of serious harm to the child.[10] Within seven days of receiving the report, CPS must send to the Central Register of the New York State Office of Children and Family Services (OCFS) a preliminary report and within 60 days must conduct a full investigation to determine whether the report is "indicated" or "unfounded." A report will be indicated if there is "some credible evidence" to substantiate the accusation.[11] If a report is deemed unfounded, the investigation is over and no further proceedings are required.

It is important to recognize that just because a report of child abuse is deemed "unfounded" does not mean a child has not been abused.[12] Subsequent events may reveal that abuse has occurred notwithstanding CPS's contrary conclusion. Subsequent events may also reveal that CPS's investigation was conducted with a deliberate indifference to the safety and well-being of children, or that DSS's supervision of the home environment was deliberately indifferent to the children's safety. In such instances, the municipal entity may be liable for injuries caused by subsequent acts of abuse by the same abuser.[13]

New York Confidentiality Requirements

The law treats disclosure of indicated versus unfounded reports differently. Indicated reports may be released to a long list of persons and entities, including district attorneys, doctors, DSS and CPS personnel, persons named in the report and, most important, "a court, upon a finding that the information in the record is necessary for the determination of an issue before the court."[14] Unfounded reports are legally sealed and available only to (1) OCFS; (2) CPS, when investigating a subsequent report of abuse involving the same suspect; (3) the subject of the report (the accused); and (4) district attorneys and their investigators, to assist in the prosecution of persons who intentionally file false reports.[15]

Although the above agencies and individuals may gain access to sealed reports, "an unfounded report shall not be admissible in any judicial or administrative proceeding or action" except when proffered by the accused in a proceeding under Article 10 of the Family Court Act or a criminal proceeding.[16] Finally, unfounded reports must be "expunged ten years after the receipt of the report," as if they never existed.[17] Thus, an unfounded investigative report is under no circumstances admissible in a civil trial.[18] Notably, whereas the "subject" of the report – that is, the alleged perpetrator – can obtain access to an unfounded report, there is no statutory provision permitting the same access to the victims or their parents, even when the abuse has been proven beyond a reasonable doubt in a criminal proceeding.[19]

The only possible exception would be if the unfounded report is incorporated into a subsequent report that is indicated.[20] However, the incorporation of a previously unfounded report into an indicated report is not required but discretionary, as is the manner in which it is incorporated.[21] Thus, if a CPS social worker chooses not to incorporate the previous unfounded report(s), or does so in a manner that leaves behind certain documents or other information, that unincorporated information remains sealed under state law.[22] Moreover, at least one court has held that a plaintiff may not sidestep the confidentiality requirements by subpoenaing CPS/DSS employees to testify regarding the subject matter of the sealed reports.[23] In sum, the very evidence needed to prove deliberate indifference may, in certain circumstances, be unavailable under New York law.

> Federal courts considering § 1983 claims are not required to limit discovery based on state law confidentiality rules or privileges.

Thus, potential conflicts exist between 42 U.S.C. § 1983 and the confidentiality provisions included in New York Social Services Law Article 6. The simple solution would be to give New York state trial court judges the authority to conduct in camera reviews of unfounded reports to determine whether the information contained therein should be disclosed after balancing considerations of relevance and confidentiality. However, no such option exists under Article 6.

Applicability of SSL Confidentiality Provisions in Federal Court

Federal courts considering § 1983 claims are not required to limit discovery based on state law confidentiality rules or privileges.[24] As one court poignantly noted, it would make little sense to allow "state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purposes is to protect citizens from abuses of power by the state and local authorities."[25]

However, based on comity and federalism principles, federal courts will not disclose information made confidential under state law without first balancing the state's interest in non-disclosure against the federal interest in presenting relevant information to the trier of fact.[26] In that respect, the party invoking the state-law privilege in federal court "must make a substantial threshold showing that specific harms are likely to result from [] disclosure."[27] In the final analysis, state evidentiary privileges "must yield when outweighed by a federal interest."[28]

Therefore, unlike in state court where such documents are sealed and unavailable in civil litigation as a statutory matter, in federal court the party seeking to keep relevant documents confidential (the municipal entities, in this context) has the burden of showing that their disclosure will result in specific harms.[29] Even if such a showing is made, the federal court will still balance the interests of the respective parties in order to reach its decision. Thus, unlike state court judges, federal judges retain the discretion to undertake an in camera review of the documents, serving both sides' interests.

In sum, plaintiffs bringing § 1983 claims against DSS or CPS should be cautious about filing in state court lest their discovery be limited.

Conclusion

The confidentiality provisions in Article 6 are overbroad: they are designed to protect those wrongfully accused but can prejudice the wrongfully abused. The current statutory framework serves to protect county officials and employees from liability, to the prejudice of victims. State court judges should have the discretion to order confidential records disclosed when the documents sought are both relevant and necessary to prove a valid constitutional tort under § 1983. Because they do not, if a viable § 1983 claim exists, federal court is a preferable venue to bring this species of civil rights claim.

1. These facts are taken from *Pryor v. Serrano*, an unpublished Albany County decision. The Third Department summarized the relevant facts in *Pryor v. Serrano*, 305 A.D.2d 717 (3d Dep't 2003).
2. *Doe v. N.Y.C Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981).
3. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).
4. *Tylena M. v. Heartshare Children's Servs.*, 390 F. Supp. 2d 296, 307 (S.D.N.Y. 2005) (quoting *Doe*, 649 F.2d at 144).
5. *Doe*, 649 F.2d at 145.
6. *Id*. at 143.
7. *Id*. at n. 4.
8. *Id*. at 142.
9. 18 N.Y.C.R.R. § 432.2.
10. 18 N.Y.C.R.R. § 432.2(b)(3)(i).
11. 18 N.Y.C.R.R. § 432.2.
12. *See Mary L. v. N.Y. State Dep't of Soc. Servs.*, 244 A.D.2d 133 (3d Dep't 1998).
13. *Doe*, 649 F.2d at 144 ("If the agency had investigated [plaintiffs'] case with sufficient acuity and diligence to discover the abuse, it would have been able to prevent further abuse by withdrawing [them] from the home.").
14. "Protection of People with Special Needs Act," Ch. 501, S. 7749 (2012).
15. *Id*.
16. *Id*.
17. *Id*.
18. *See Allen v. Ciannamea*, 77 A.D.3d 1162 (3d Dep't 2010) (noting that, in a civil case, SSL § 422 imposes "strict confidentiality" on child abuse reports).
19. 18 N.Y.C.R.R. § 432.2.
20. *CPS Program Manual*, N.Y.S. Office of Children and Family Services 42–43 (2010), http://www.ocfs.state.ny.us/main/cps/cps_manual.asp.
21. *Id*.
22. *Id*.
23. *See People v. LV*, 182 Misc. 2d 912 (Sup. Ct., Rensselaer Co. 1999); *cf. In re A./D. Children*, 25 Misc. 3d 829 (Fam. Ct., Kings Co. 2009) (precluding unfounded report but allowing testimony).
24. *See Fortunatus v. Clinton Cnty.*, 2012 WL 4711992, at *6 (N.D.N.Y. Oct. 2, 2012) (citing cases for the proposition New York state law does not govern discoverability and confidentiality in federal civil rights actions).
25. *Lizotte v. N.Y.C. Health & Hosp. Corp.*, 1989 WL 260217, at *2 (S.D.N.Y. Nov. 28, 1989).
26. *Id.*; *see also Velez v. Reynolds*, 2003 WL 22126962, at *1 (S.D.N.Y. Sept. 15, 2003).
27. *DeLeon v. Putnam Valley Bd. of Educ.*, 228 F.R.D. 213 (S.D.N.Y. 2005).
28. *United States v. 31-33 York St.*, 930 F.2d 139, 141 (2d Cir. 1991).
29. *DeLeon*, 228 F.R.D. 213.

BY BARBARA BAUM LEVINE AND JAMES M. MCCARTHY

The Transformation of Adjudication in the New York State Workers' Compensation System – Redux

Just over ten years ago, we authored a *Journal* article[1] wherein we noted that the New York State Workers' Compensation Board (WCB or the Board) had embarked upon what appeared to be a conscious effort to transform its intra-agency adjudicatory processes and procedures and to reform as well the jurisprudence of the system and that of the courts to which it related, primarily the Appellate Division, Third Department.

In the years since 2002, particularly the last few, the WCB has become more assertive in its pursuit of this mission. What, however, is the reason or rationale behind it? Some speculate that an "oligarchic cabal"[2] operates to direct the WCB while others attribute the phenomenon to political indifference – appointees from as far back as the Pataki era continue in key decision-making roles at the agency. Although Governors Paterson and Cuomo have appointed or reappointed Republican commissioners, it is not at all clear that political party affiliation explains the WCB's conduct.

Whatever the motivation, the observable behavior of the agency must be considered to gain an appreciation of the effects and consequences of this transformation. The agency seems willing to defy and challenge any and all opposition to or criticism of its objectives, ignoring or marginalizing the Legislature, bar organizations, and stakeholders that have attempted to advise and counsel the WCB.

Background

New York's workers' compensation statute was enacted following the March 1911 Triangle Factory fire. The administration and application of this statutory scheme, enacted in 1914, was entrusted to the WCB (then known as the Industrial Commission) to referee or moderate the claims of injured workers for medical and wage benefits under the Workers' Compensation Law (WCL).

From 1914 to the mid 1990s, the WCB was constrained to follow the jurisprudence developed under the statutory scheme – largely upon cases decided at the Third Department – and coverage was expanded by way of legislative amendments. New York's WCL is a creature of the state Legislature and a derogation of the common law of torts. As such, this crucial public trust is the WCB's founding reason for existence:

> Characteristically, for most of the years of its existence, the WCB has conducted itself as a benign moderator of the rights of injured workers, their entitlement

> to benefits . . . . By statute (WCL § 21), the agency is bound to administer the rights and claims of injured workers with the assumption that every claim filed with the agency is valid unless rebutted by substantial evidence.[3]

This core function was fulfilled and public trust discharged over the intervening decades in the thousands of adjudicatory hearings held annually before the WCB, before triers of fact (called referees), and recorded by stenographers. The 1914 "bargain" among labor, employers, and the state was enhanced and preserved while the rights of the parties were protected in a disciplined hearing process in which due process and procedural due process marked its character. The agency's capacity to manage and conduct an unequalled volume of adjudicatory hearings across the state created a climate of public confidence and legislative satisfaction. The agency's well-established judicial system likely contributed to its exclusion from the provisions of the State Administrative Procedure Act, adopted in 1975.

Since enactment of the 1996 Omnibus Workers' Compensation Reform Act, however, the WCB has become an active participant in the transformation of its mission to the extent of litigating on its own behalf before the courts, as well as introducing major and minor revisions to the processes and procedures necessary to adjudication in the system.

The tension that has emerged between the agency and its constituent publics may be attributed to the increasing pressure and direction exerted upon it to achieve goals and objectives driven more by executive, managerial, and political forces than by judicial concerns. In other words, the WCB, which already possesses legislative authority by way of rule and regulation making, has taken on executive and judicial functions. All three traditional governmental functions are moving into confluence within the agency.

We selected some public matters of recent vintage which we believe signify the WCB's stance in this regard. In particular, with three[4] WCB panel decisions (known as Memoranda of Board Panel Decisions or MOBPDs), we had an opportunity to examine, in more detail and more intimately, the legal reasoning and implications of the agency's newer, more open pursuit of a doctrine known as attachment to the labor market, or ATLM.

Automated Digital Recording of Hearings

Transcripts of hearings are essential for appellate matters before courts of general jurisdiction and in the case of fraud for criminal purposes. One example of the WCB's efforts to transform its customary and historical mission arose in connection with its proposal to replace live stenographers (or verbatim reporters) with automated digital recording devices.

The agency's reason for this change was that it was having difficulty recruiting and keeping verbatim reporters, an assertion made without empirical or quantitative data or information. Although two similar and unsuccessful attempts had been made in past years, the WCB did not relate why it believed this new effort would succeed or why the prior undertakings failed.

The issue was sufficiently serious that the New York State Senate Labor Committee conducted a formal hearing in October 2009 to review the WCB's proposal. The Committee members particularly inquired of witnesses their interpretation of WCL § 122 which, in part, provides:

> A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified.

According to the Chair of the WCB, the provision in question was "not an explicit direction regarding how transcription should be accomplished, but is merely a reflection of how such minutes were taken when the statute was first enacted over 90 years ago."[5] Up to this point in time, the agency customarily provided a Board-employed reporter to swear witnesses and record the proceedings for the many thousands of hearings it conducts annually.

In his testimony, the agency head also asserted that a sufficient statutory framework existed to move ahead with the project and, if fully implemented, would require only minimal regulatory change. In any event, he added, the project would proceed only as a "pilot" program and the Legislature and stakeholders would be "kept in the loop" as the project proceeded.

Additionally, the agency sought to parse strictly § 122, arguing that it applied only to "an investigation" and

Barbara Baum Levine graduated from SUNY Binghamton and received her JD from Hofstra University School of Law. Ms. Levine currently is "of counsel" to the Long Island firm of Sherman, Federman, Sambur & McIntyre. As a past President of the Injured Workers Bar Association, she remains a member of the bar's Executive Committee and often lectures at CLE programs on Workers' Compensation. Ms. Levine has also served for 12 years as Vice President of the Triangle Shirtwaist Factory Fire Memorial.

James M. McCarthy is an alumnus of Fordham University and Brooklyn Law School and presently is "of counsel" to Rosado, Chechanover, Bayrasli & Dudley, a Long Island City firm. He is also Treasurer of the New York Injured Workers Alliance, a political action organization. Mr. McCarthy has served, along with Ms. Levine, as President of the Triangle Shirtwaist Factory Fire Memorial, which has awarded over $340,000 in scholarship aid to children of injured workers.

"not a hearing."[6] However, this reasoning is somewhat disingenuous and seems to contradict an existing regulatory provision. And no evidence or testimony was offered by the WCB to demonstrate the number of "investigations" staffed by Board-employed reporters versus those for hearings. (Neither author – and Ms. Levine is a former WCB ALJ – nor any attorneys who practice before the agency can attest to participating in an "investigation" where a stenographer was present.) In fact, at the time, 12 N.Y.C.R.R. § 300.9 (Conduct of hearings) provided:

> All witnesses shall testify under oath (or by affirmation) and a stenographic record of the proceedings in shorthand or stenotype shall be made and kept by the board. No other transcript of the proceedings shall be allowed.

In regard to the distinction between a "hearing" and an "investigation," WCL § 20 (titled "Determination of a Claim for Compensation") states, in part:

> The chair or board shall make or cause to be made such investigation as it deems necessary, and upon application of any party, shall order a hearing . . . .

Transcripts of hearings are essential for appellate matters before courts of general jurisdiction and in the case of fraud for criminal purposes.

Even if it is accepted that §§ 20 and 122 create some ambiguity, the agency's own regulation could not be clearer. Moreover, a review of the WCB's Annual Reports fails to reveal any mention of or data concerning the number of "investigations" it conducts in a given year. It is, of course, entirely possible to torque the language and argue that a regulation is not a statute in the same way an investigation is not a hearing or a "particular part thereof," as §§ 20 and 122 may be read. There was no assertion by the agency that a hearing is not an investigation.

The Chair of the WCB further testified that, upon the "thorough" review of the agency's General Counsel, it was concluded "that there is no other specific legislative prohibition to conducting the proposed pilot program" and that § 122 is merely an evidentiary statute.

The Senate committee concluded, after taking the testimony of dozens of witnesses, that the proposal left too many questions unanswered, including potential violation of the statute, and recommended that the budget for the project not be approved. Many of the witnesses opposed to the project noted its prescriptive effect upon due process and procedural due process. Despite legislative disfavor, the WCB secured expenditure authorization from the state Comptroller to execute a contract with a Canadian company in the amount of $917,000. This seems a substantial wager on an unproven process.

It is noteworthy too that, in late 2011, the agency amended 12 N.Y.C.R.R. § 300.09 to remove any reference to stenographers (part of the minor revisions necessary to achieve its objective). And, on August 12, 2012, Governor Cuomo vetoed a bill passed by the Legislature that would have required the presence of stenographers at hearings. The WCB, supported by the state's chief executive, marginalized the Legislature while further melding the executive, legislative, and judicial functions within the agency. The timing of the regulatory amendment and the veto of the legislative amendment strongly suggest that the legislative proposal was doomed before it reached the Governor's desk.

Medical Treatment Guidelines

Until December 2010, when the Medical Treatment Guidelines (MTGs)[7] were implemented through regulations, it had been well-settled that injured workers could, after the closing or finalization of a case, avail themselves of continuing symptomatic or palliative medical care to assist in continuing to work and/or moderate any residual chronic symptoms. This custom and practice was based upon WCL § 13, which provides in part:

> The employer shall be liable for the payment of the expenses of medical . . . treatment . . . for such period as the nature of the injury or the process of recovery may require.

Upon finalization or closing of a claim, permanently injured employees were advised that palliative or continuing symptomatic care was available to them on an "as needed basis." The underlying public policy justification for this practice was an acknowledgement that such treatment was far less expensive than any lost time from work that might result from the causally related injury or the modest medical costs of palliative treatment. For the non-earning permanently injured employee, continuing symptomatic treatment represented a resource to maintain the condition at maximum medical improvement (MMI) and address chronic symptoms.

What the WCB had omitted from its regulatory version of the MTGs was the definition of MMI forwarded to

the agency by an advisory task force created pursuant to the 2007 reforms which crafted the guidelines to include the following:

> The need for palliative or symptomatic treatment does not preclude a finding of MMI.

MMI, therefore, while a threshold finding to determine the permanency of injuries, implicitly acknowledges the potential need for continuing medical treatment. This definition holds also for closed claims where such treatment was authorized or presumed.

The general scheme of the MTGs prescribes or pre-authorizes, especially in early stages, a fixed number of treatments, primarily for neck and back injuries, without the necessity of obtaining approval from an employer or carrier. Pre-authorization was intended to ensure speedy delivery of treatment to the injured employee. A variance from the MTG prescriptions, submitted by a treating physician, would be necessary to authorize additional treatment. Such variances were many times the subject of a hearing request before a law judge. Practitioners report that the largest number of variances (some have indicated up to 75%) involves requests for such symptomatic care.

The consumption of judicial resources and precious hearing time for a largely routine issue appears to be an unintended consequence of rigid application and interpretation of the MTGs. Notwithstanding custom and the law, the WCB began to apply the MTGs retroactively to those claims which had the benefit of the prior practice, which obviated any necessity for renewal of medical authorization.

The agency has not offered an explanation for its action, which has caused some critics to speculate that denying medical care retroactively was the agency's response to insurer demands to decrease medical costs. The agency could simply have focused on application of the MTGs from December 2010 into the future, but it chose to be pro-active.

The outcry from injured workers and health care providers resulted in introduction of a legislative amendment, which as of this writing remains pending, to restrict retroactive application of the MTGs. However, in October of this year, the WCB initiated a new regulation amending the MTGs to permit 10 annual treatments without the necessity of obtaining a variance.

Managed Adjudication Path (MAP)

Since the introduction in the late 1990s of electronic and digital processing and computer access to claims materials, the WCB has sought to expand this application to other aspects, including the adjudication process. In this course, with MAP, the agency appears to have subjected a significant portion of adjudicatory processes to cyberprocessing and decision making without hearings.

Under a rubric of "business process improvement" or BPI, the agency has re-designed and commanded usage of scores of new and revised forms to channel data and information for translation into adjudication decisions. Not surprisingly and perhaps predictably, the agency noted that in 2009 it processed more than 20 million forms.[8]

Despite this paper deluge, adjudicatory hearings declined from 407,983 in 2001 to 266,046 in 2011,[9] a decline of 141,937 or 34.8%.

It is seldom that the 76,000-member New York State Bar Association (NYSBA) intercedes in a dispute, but the agency's proposal for a "managed adjudication path" presented an exception that the bar could not avoid. Once again, the agency had determined it would initiate adjudication reforms without consulting with or seeking advice from other sources. MAP, however, was not a simple administrative adjustment but one that threatened to proscribe the statutory right to a hearing at the core of agency jurisprudence.

Prompted by receipt of intra-agency emails[10] indicating that the WCB intended to increase the procedure and process of determining issues without hearings, in order to create a more streamlined hearing process, some members of the Torts, Insurance, and Compensation Law Section (TICL), an influential Section of the NYSBA, contacted the Chair of the WCB to discuss this initiative. The basis for the bar's concern centered on WCL § 20, which affords a party the right to a hearing.

In addition, the state bar also cited to the provisions of WCL § 25(2-b)(f), which affords the parties a right to a hearing where a party objects to a proposed decision by adjudicatory personnel (called conciliators). The WCB had skirted this provision by simply issuing revised proposed decisions when an objection was filed by either party. This, the NYSBA opined, contravened the provisions of the statute.

The tension between the NYSBA and the WCB over due process concerns for injured workers and employers dates back over a dozen years, originating from similar conduct by the agency with respect to amending the adjudication system. A 2000 letter[11] by the Injured Workers' Bar Association to the NYSBA cited the deep concerns of claimant counsel:

> [T]hese changes raise fundamental issues about due process and the core values of the Workers' Compensation system that bear further careful scrutiny by the Bar and by the legislature.

And in 2010,[12] the NYSBA adopted a resolution of opposition to MAP, stating:

> [T]he Association endorses the longstanding and historic principle that the due process rights of both injured New Yorkers and employers require and

> demand that the Workers' Compensation Board continue its charge in conducting hearings before a Law Judge to resolve questions of fact and law, legal and medical issues and other disputes that arise between the parties, scheduled without delay upon the request of a party or upon the Board's receipt of any information indicating a substantive dispute.

As previously, the WCB maintained that, under its interpretation of governing regulations and statutes, it had the authority to proceed.

A TICL subcommittee met with WCB leadership on several occasions in January 2010 to discuss its concerns that MAP jeopardized the right to a hearing and due process. One such meeting was scheduled for February 24, 2010. Despite the NYSBA's vigorous opposition, the WCB decided against any delay and announced it would proceed with implementation of MAP effective February 26, 2010. That announcement was made in a WCB in-house publication only two days after the meeting with TICL subcommittee members.[13]

The proposed changes attracted the attention of the Legislature, whereupon the state Senate Labor Committee conducted a public hearing in February 24, 2010. Subsequent to the public hearing, the Labor Committee Chair issued a letter to the Chair of the WCB urging a delay in implementation. The agency agreed to a delay pending "further discussion and feedback"; publication of "details of the Board's process" to "interested parties in full"; to encourage "a full and frank discussion about the concilliation [sic] process"; for the purpose of considering "all suggestions and proposals by stakeholders before a reform program is implemented."[14]

Ultimately, an ad hoc group of claimant and defense attorneys commenced litigation against the WCB to quash implementation of MAP. As of this writing, that action is pending.

Attachment to the Labor Market (ATLM)

ATLM's development as a legal doctrine has been traced by some to two cases from the early 1920s, one of which stated:

> It is his [the claimant's] duty to search for work of the kind for which he is fitted, and in that search he must not confine himself to applying only to his previous employer. He must make a reasonable search for employment elsewhere.[15]

The certitude of this pronouncement was seriously vitiated in early 1930 with the addition of § 15.5-a to the WCL, The rationale for its adoption was set forth in its bill jacket:[16]

> The proposal to allow the Industrial Board to determine a wage earning capacity in cases of partial disability where the wage earnings cannot be determined by actual earnings, is made to serve the interests of justice and efficient administration of the law. This covers the type of case where a partly incapacitated worker is unable to return to his former type of work and due to the resultant condition experiences extreme difficulty in securing any work at all on which the Board could base an estimate of his present earning capacity. Safeguards are thrown around this right placed in the board, however, by providing that any wage earning capacity so determined must clearly take into consideration the nature of his injury and his physical impairment and in no case can the new capacity determined upon which compensation will be based, be in excess of seventy-five per cent of his full time actual earnings.

The text of the provision reads:

> Determination of wage earning capacity. The wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings, provided, however, that if he has no such actual earnings the board may in the interest of justice fix such wage earning capacity as shall be reasonable, but not in excess of seventy-five per centum of his former full time earnings, having due regard to the nature of his injury and his physical impairment.

An injured worker, "unable to return to his former type of work," who "experience[s] extreme difficulty in securing any work at all," is entitled to have his or her wage-earning capacity established under the provision, *viz.*, the weekly wage benefit. The 75% limit on wage-earning capacity, along with consideration of the physical criteria, ensures the non-earning worker's circumstances are fairly evaluated and that he or she does not become a burden to the state, a purpose often cited by the courts to support and justify interpretation of the statutory scheme. By its terms and the accompanying memorandum, the provision guarantees the non-earning, non-working injured employee a minimum wage benefit of 25%. Its enactment at the inception of the Great Depression cannot be disregarded.

The ATLM doctrine was resurrected in the late 1990s by the WCB because the agency had been troubled by wage benefit claims where, in a number of cases, permanently injured workers had left their employments or, as the agency found, voluntarily retired from the labor market.

Over a decade, the Third Department had crafted, through a series of ATLM cases, a compromise view that can be summarized as such:[17]

> [I]f the permanent partial disability causes or contributes to the retirement [i.e. non-attachment to the labor market], the defense of voluntary withdrawal from the labor market is likely not to prevail against a claim for post-retirement reduced earnings benefits.

This reasoning, however, tacitly and implicitly acknowledges ATLM as a pre-condition to an award of

wage benefits. In contrast, the WCL has a number of provisions which when read together contradict such theory:

> "'Compensation' means the money allowance payable to an employee" (§2.6) and in ". . . any proceeding for the enforcement of a claim for compensation it shall be presumed in the absence of substantial evidence to the contrary . . . the claim comes within the provisions of this chapter . . ." (§21). Disability is ". . . the state of being disabled from earning full wages in the work at which the employee was last employed" (§37) and where ". . . an employee is disabled . . . he . . . shall be entitled to compensation for the duration of his disablement . . ." (§39) and compensation ". . . shall be payable during the continuation of such permanent disability. . . ." (§15.3(w)).

Zamora v. N.Y. Neurological Associates and ATLM

On May 1, 2012,[18] the Court of Appeals, in a 4-3 decision, upended the jurisprudence of ATLM following an appeal brought by the WCB. The Third Department had ruled in favor of the claimant and the agency litigated that finding, an astonishing reversal of the agency's historic function as referee.

The *Zamora* court denied wage benefits to the permanently injured employee because she applied for jobs that were beyond her physical capacity, a position argued by the WCB both within the agency and before the Third Department. No determination was offered as to whether those efforts were consistent with her residual physical capacities. Without fact finding with respect to the claimant's residual physical capacities, the conclusion that her search was unreasonable is questionable.

The *Zamora* majority determined that the Third Department had impermissibly created a doctrine of presumption for what it deemed only an inference with respect to the awarding of wage replacement benefits upon a finding of a permanent partial disability (PPD):

> There is no precedent in our decisions for this theory, which would illogically constrain the ability of the Board to find facts, and would shift the burden of proof from claimant to employer.[19]

As a legal principle, ATLM fails a principal threshold of legal reasoning. The doctrine has no overt or implied statutory foundation either by construction or interpretation; it appears to have been created by the WCB.

Ironically, the *Zamora* majority, while eschewing one presumption, validated yet another, *viz.*, that the permanently injured worker is employable or "fitted" as the 1923 decision stated. ATLM demands that the PPD claimant must conduct a work search whether or not employable and whether or not there exists reasonable opportunity to be competitive in the labor market.

Assuming for the sake of argument that ATLM represents public policy, a question arises as to whether such adjudication, which places more weight on the good of the community than on the rights of parties to the litigation, is sound.

> It is therefore an unsurprising conclusion that judges should confine themselves to the determination of the rights of individuals in dispute. More significant, however, is that this account allows judges to determine an individual's right by reference to the impact it would have on the community, but prohibits a judge from deciding an individual's right by reference to an enhanced state of the community to which no individual has a right. Where 'policy' refers to this last kind of justification of a judicial decision, then it is contrary to the judicial role to make decisions of policy.[20]

The checks and balances of government tend to favor legislative expression in the public policy function. As the authors' 2002 article noted, the WCB has been succeeding in making changes "without legislative approval."

The *Zamora* majority also stated that by "finding alternative work consistent with his or her physical limitations, or at least showing reasonable efforts at finding such work, the clamant can *prove* to the Board that the cause of his or her reduced income is a disability, rather than an unwillingness to work again" (emphasis added). But the duty to "prove" entitlement to wage benefits by undertaking an employment search represents a new and more difficult threshold simply because it requires an inquiry into personal motivation. And the Court was not clear on how such conduct would demonstrate either a "willingness to work" or create an inference of "unwillingness to work again."

Neither the WCB nor the courts have offered a definition or description of the labor market to which permanently injured workers must remain attached. It seems that the permanently injured worker must be ATLM whether or not he or she can actually secure employment; the duty must be performed, however quixotic it may seem. And, finally, ATLM sets the permanently injured worker on an employment search no matter the age, level of education, language or work skills or degree of physical impairment.

The agency appears to have subjected a significant portion of adjudicatory processes to cyberprocessing and decision making without hearings.

Zamora and Its Aftermath

Three post-*Zamora* decisions by the WCB (in MOBPDs) make the point.

In one case, the WCB re-opened a claim (for which re-opening the Board suspended, in part, its own rules), and the ALJ found that the claimant actually demonstrated a total industrial disability. According to WCB legal guidelines for hearings, the findings and conclusions of a law judge will be supported on appeal so long as they are founded in the law.[21] It must be noted that, in the intra-agency appellate process, the Board panel is not exposed to witnesses who provide testimony; this is solely the province of the ALJ. The MOBPD issued by the panel overruled the ALJ's finding and suspended the claimant's wage benefits, which he had been receiving for 11 years, for failing his ATLM duty.

In a second, the MOBPD found that a 65-year-old nursing assistant with a 75% physical limitation had not conducted a reasonable work search. The claimant, however, had continued to work for the employer for four years following the workplace injuries. In fact, the claimant had previously been found to have a permanent partial disability causing two years of lost work time with the same employer. The panel did not credit the claimant with a "willingness to work" or consider the fact that this claimant had a 6.4% chance to participate in securing employment versus 21.4% for a similarly situated individual without a disability.[22]

In the third case, the panel found that the claimant's attachment was sporadic, noting that she had contacted only three potential employers in a period of four months. A lack of English language skills also contributed to an unsuccessful search. Initially, the ALJ found the claimant was not attached during a three-month period when, as she had testified through a Mandarin interpreter, she was in China caring for her mother. The panel noted this and ruled, in effect, that such period of "voluntary vacation from the labor market" violated ATLM and no wage replacement was to be made.

The *Zamora* dissent had stated that "'[a]ttachment to the labor market' is a concept that is conspicuously absent from the Workers' Compensation Law."[23] The dissent had also asserted that ATLM breached the remedial legislative purpose of the WCL which was "framed on broad principles for the protection of the work[er]. Relief under it . . . rest[ed] on the economic and humanitarian principles that compensation should be given . . . [which is] not only for [the worker's] own benefit[,] but for the benefit of the state[,] which might otherwise be charged with [the worker's] support."[24]

The dissent's caution against employing economic theory to formulate a public policy, which, in turn, constitutes legal precedent, is instructive. The issue is further complicated because courts of general jurisdiction in New York and many other jurisdictions also adhere to the judicial principle that adjudication of rights, privileges, and benefits by state agencies is subject to their broad fact-finding authority to reach conclusions. There is no requirement that all 13 WCB Commissioners be attorneys and, therefore, they may be loath to challenge ATLM or to question its application.

The *Zamora* majority, in favoring ATLM and its application, overruled years of Third Department decisions, noting that the precedents were too restrictive of the fact-finding authority. This determination appears to have led to two potential problems: on one hand, the agency could ignore certain facts and their application or weight; on the other, the agency could apply ATLM without due consideration of other contemporaneous criteria developed specifically for the purpose of evaluating the disability, the injuries, and vocational/industrial effects of workplace injuries on earning capacity and employability.

Together with *Zamora*, these three decisions establish the following about ATLM:

1. The duty of attachment endures for the life of the claimant while receiving wage benefits.
2. The duty of attachment applies to all PPDs regardless of date of accident or date of PPD.
3. The duty of attachment applies to all PPDs up to 99% physical impairment.
4. The duty countenances no vacation for the claimant.
5. The frequency of the job search is unspecified.
6. The labor market to which the claimant must be attached is unspecified.
7. Claimants must be careful not to under-estimate physical limitations (as the claimant in *Zamora*) or it will be deemed an unreasonable search.
8. Claimants must be careful not to over-estimate residual physical capacity or be deemed to have conducted an unreasonable search.
9. ATLM is not mitigated or abrogated by degree of disability or vocational/industrial criteria.

The *Zamora* dissent characterized the majority's position as extending

> the rule regarding "attachment to the labor market" beyond the limits that can reasonably be imposed on the application of such a rule when considering the remedial and humanitarian roots of the critically important statute that we address today. . . . To impose barriers to access to those benefits, where there is no basis for such prerequisite, contravenes the law and violates basic principles of fairness for debilitated workers injured in the course of their employment.[25]

What is surprising about *Zamora* and the three MOBPDs is that the WCB had adopted, effective January 1, 2012, Disability Duration Guidelines (or DDGs),[26] which relate to employability issues. Had the agency employed the DDGs, a rational basis for determining the

appropriateness of an award of wage benefits, the fact-finding process and resulting inferential potential would have seemed less misplaced and tentative.

The agency's chair issued a Subject Number (046-472, dated November 3, 2010) outlining the purpose and contents of the DDGs including some of the following:

> –the claimant's impairment ranking and functional capabilities/losses.
>
> –[a form] designed to capture basic vocational information about the injured worker that is relevant to the injured worker's loss of wage earning capacity and potential to return to work. Injured workers who may have a non-schedule permanent impairment and who have not returned to work are encouraged to complete and submit Form VDF-1 as early as possible in the claim. Early submission of the vocational information should facilitate settlement discussions to resolve loss of wage earning capacity without the need for extended litigation.
>
> –a functional assessment component (Chapter 9.2) based on the Task Force's functional ability/loss guideline, which set forth standards for treating medical providers as well as carrier consultants to measure and report injured workers' abilities/losses across a range of work-related functions, including dynamic abilities (lifting, carrying, pushing), general tolerances (walking, sitting, standing), and specific tolerances (climbing, bending/stooping, kneeling, environmental).
>
> –guidance on how to determine loss of wage earning capacity (Chapter 9.3). They set forth relevant medical factors (impairment and functional ability/loss) and vocational factors (education, skills, English language proficiency, age, etc.) that the Board should consider in evaluating the impact of a permanent impairment on a claimant's wage earning capacity. They provide general guidance regarding the impact of medical and vocational factors on an injured worker's earning capacity.

These offer a considered basis for evaluating the employability of the claimant as well as determining an informed "wage earning capacity," as commanded in WCL § 15.5-a, while providing additional "safeguards" to the agency's duty to fulfill the purposes of the statutory scheme. Employing the DDGs would obviate the subjectivity of the present application of ATLM and help restore confidence in the WCB's adjudicatory responsibilities.

Inferences

Our 2002 article concluded with a quotation from Anthony Lewis, then a New York *Times* OpEd columnist, who said, "[W]hen governments short-cut the law, it's extremely dangerous."[27]

While it may be difficult to draw any conclusions concerning the conduct of the WCB, some inferences can be made, which may suggest solutions to policy makers.

In plain speak, one might be inclined to think that the agency has "lost its way." However, as noted previously, the WCB's merging of executive, judicial, and legislative functions within the agency are likely in response to the challenges of streamlining and cost-cutting. The issue generated by the agency with regard to the retrospective application of the MTGs reflects its response to external demands to lower the cost of medical care and treatment for injured workers. Cost concern may also be behind ATLM. In each of these areas, the WCB has taken an active role and even become a focus of the disputes. Overall, WCB's conduct seems far removed from its "core values" and, instead, is more representative of the changes sought by external forces who are less concerned about injured workers' and employers' interests.

ATLM has no overt or implied statutory foundation either by construction or interpretation; it appears to have been created by the WCB.

Historically, the WCB, as the Industrial Commission, was more independent from the state's executive branch of government and, for this reason, could focus its energies primarily on the judicial function of refereeing or moderating matters in the system. Financially and fiscally, the agency is funded by way of assessments upon insurance carriers; it is not reliant upon tax-levy sources. Over the years, however, the agency has increasingly been treated and regarded as a gubernatorial unit and has thus been subject to the waxing and waning of political winds. For example, the 13 Commissioners are appointed by the Governor; they also participate in judicial decision making as members of Board panels.

Political courage by the agency and courts could correct this errant trajectory and restore the WCB to its core functions. The first step, we believe, is to abandon the often-inflexible ATLM and implement the DDGs as means to determine awards of wage benefits. Labor, business, and the executive need to ease the pressure on the WCB and reconsider its mission, especially with respect to restoring judicial independence to achieve the gravamen of the original bargain among the parties.

Changes at the WCB have encouraged the agency to take a prosecutorial attitude toward claimants applying

for benefits. For example, claimants can no longer confront witnesses by means of the deposition procedure; MAP threatens to reduce the claimant's and employer's right to a hearing.

Unfortunately, political pressures continue. A recent report of the Public Policy Institute[28] (an arm of the Business Council of New York State) concluded there is a need for

> [a]chieving greater balance by shifting the culture at the WCB away from perceived presumption in the employee's favor.

Workers' compensation was instituted to benefit both employers and employees by removing workers' injuries from the tort litigation system. Over the years, there has been a culture shift that has allowed for more leniencies toward claimants in procedural matters, coupled with strict adherence for employers.

Thus, it has not been sufficient or satisfactory to some that the WCB's jurisprudence operated with presumptions favoring employees as the statute provides and the courts have held. However, the employer's primary benefit, shielding capital assets from tort litigation, was guaranteed in the original bargain and remains in effect. True equality between employers and employees would send workers' compensation claims back to the tort litigation system.

In New York's workers' compensation system, short-cuts are being conflated with a unitary set of governmental functions; this can be dangerous and is inimical to the interests of justice. And it may well be that the short-cuts are also short-sighted in that they tend to shift costs from the system to the state's citizenry. ■

1. Barbara Baum Levine & James M. McCarthy, *Gradual Changes Have Silently Transformed the Adjudication of Workers' Compensation Claims*, N.Y. St. B.J. (Oct. 2002), p. 40.

2. A former WCB Commissioner, Michael Berns, publishes a web blog on workers' compensation: Inside Workers Comp NY is available at www.insideworkerscompny.com. This phrase is a favorite of his.

3. Levine & McCarthy, *supra* note 1, p. 41.

4. MOBPDs represent decisions at the first level of appellate review within the WCB and are issued by panels comprised of three Commissioners. The authors are grateful to colleagues who shared decisions with us.

5. Testimony of Hon. Robert Beloten, Esq., WCB Chair, before the N.Y. State Senate Labor Committee, October 6, 2009.

6. "Assessment of Public Comment" a WCB document available at http://www.wcb.ny.gov/contentmain/wclaws/RecentlyAdopted/Part300_09_2011_Ass_Public_com.pdf.

7. The MTGs were the product of a Medical Guidelines Task Force created in conjunction with the 2007 WCL reforms. Mr. McCarthy was a member of that group which met over several years to develop the MTGs. The WCB was tasked with converting the MTGs into regulations and with their administration.

8. The WCCB website provides an enormous amount of data and information on the agency's activities including that of procurements. http://www.wcb.ny.gov/procurements/RFPC140312_WCBBPRRFP.pdf.

9. Comparative hearings data is available at the WCB website where the agency's Annual Reports can be downloaded. http://www.wcb.ny.gov. "Publications."

10. Details of the interchanges between the NYSBA and WCB about MAP are available at Search a "weblog" authored by Ronald Balter, Esq. for TICL http://www.nysbar.com/blogs/TICL/2010/02/workers_compensation_board_del_1.html.

11. The then President of the Injured Workers Bar Association, Edward Pitts, Esq., in a letter, dated January 21, 2000, to the NYSBA concerning a NYSBA "Report of the Special Committee on Administrative Adjudication."

12. Visit www.bcnys.org/inside/wc/2010/2170/letter_Due_ProcessRights.pdf to review the NYSBA letters which provide more details concerning the MAP issue.

13. *See* Balter "weblog" *supra* note 10.

14. *Id.*

15. *Dzink v. U.S. Railroad Adminis.*, 204 A.D. 164, 167 (3d Dep't 1923); *see Jordan v. Decorative Co.*, 230 N.Y. 522, 527 (1921) ("The statute was not adopted that sloth might be a source of profit."); New York Workers' Compensation Handbook (Ronald Balter, Esq. & Ronald Weiss, Esq., eds., 2009 ed.), § 5.34[2].

16. "Supporting memorandum to our bill amending the Workmen's Compensation Law generally." The memorandum is included in the bill jacket for the legislation. The reference to "our" may reflect the personal participation of Frances Perkins, the Industrial Commissioner under Governor Franklin Roosevelt.

17. New York Workers' Compensation Handbook, *supra* note 15.

18. *Zamora v. N.Y. Neurological Assocs.*, 19 N.Y.3d 186 (2012).

19. *Id.* at 192.

20. While this topic absorbs volumes, a pertinent discussion of public policy and adjudication is available. Stephen Guest, *The Role of the Courts in the Making of Policy*, 25 Univ. Queensland L.J., 307–28_(2006).

21. *See* 12 N.Y.C.R.R. § 300.36.

22. *See* http://www.bls.gov/news.releases/archives/disabl_06082012.htm.

23. *Zamora*, 19 N.Y.3d at 193.

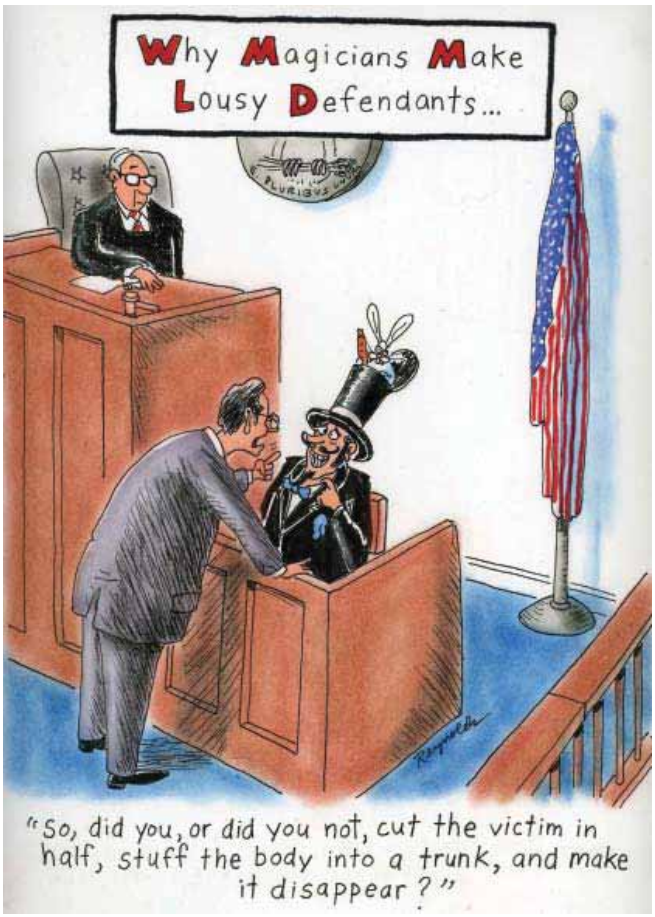
24. *Id.*

25. *Id.* at 195.

26. *See* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_472.jsp.

27. Anthony Lewis, *Conversations/The Long View, 50 Years of Covering War, Looking for Peace and Honoring Law*, N.Y. Times, Dec. 16, 2001, § 4, at 9.

28. Public Policy Institute, "Revisiting the Reforms," Oct. 2012, p. 24.



NYSBABOOKS

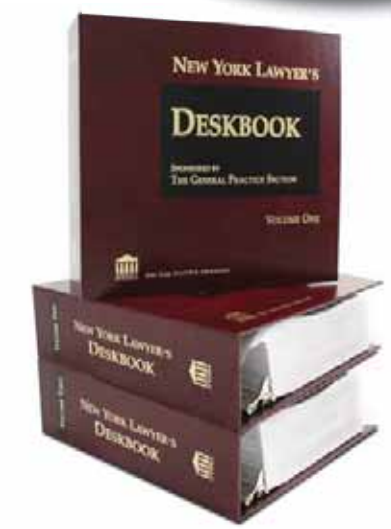
Winner of the ABA's Constabar Award

NEW!

New York Lawyer's Deskbook

Written and edited by leading practitioners, the *New York Lawyer's Deskbook* is a three-volume, 2,960 page resource, covering 27 different areas of practice. Each chapter offers a clear, basic review of its subject and the necessary steps for handling basic transactions in that area, giving both new and seasoned practitioners a solid footing in practice areas that may be unfamiliar to them.

2012 • PN: 4150 • 2,960 pages • List Price: $375 • **Member Price $295**

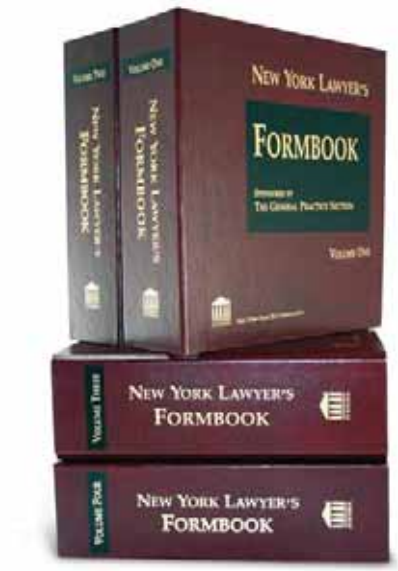


New York Lawyer's Formbook

The *New York Lawyer's Formbook* is a 4-volume, 3,970 page companion to the *Deskbook*. *Formbook*'s 23 sections, covering 23 different areas of practice, familiarize practitioners with the forms and various other materials used when handling basic transactions in each area. Many of these forms and materials are referenced in the *Deskbook*.

The *Deskbook* and *Formbook* are excellent resources by themselves, and when used together, their value is substantially increased. Annual revisions keep you up to date in all 27 areas of practice.

2012 • PN: 4155 • 3,970 pages • List Price: $375 • **Member Price $295**



To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB1665when ordering.

NYSBA

Daniel D. Molinoff is a New York writer and attorney. This article first appeared, in a slightly different format, in the August 2012 issue of the *Family Law Magazine*.

Joint Custody Revisited

By Daniel D. Molinoff

In 1973, my soon-to-be ex-wife and I became locked in legal combat as we waged war for custody of our two sons, then ages five and three. We hurled at each other the usual invectives alleging emotional abuse, child-rearing incompetence, fiscal irresponsibility and the need for mutual personality transplants. It became a two-year battle between sudden strangers, which decimated our savings, alienated our relatives, forced our friends to take sides and assured never-ending hostility no matter what the outcome. Our promise to love and cherish until death do us part was replaced by a divorce decree that guaranteed just the opposite.

As was the custom at the time, my college sweetheart and I, like all of our friends, married too young (I was 24; she, 21) and, like most of those friends, our marriage didn't last a decade. As was also conventional then, every one of my divorcing fraternity brothers walked away from their marriages with hardly a whimper: they left behind the house, the better TV, the newer car and . . . oh, yes, the kids! Having just graduated from law school, I decided I couldn't do that. I sued for sole custody knowing full well that, historically, my chances of winning were negligible.

At the pre-trial conference in Westchester County's Supreme Court, I suggested a radical compromise with which my wife was willing to go along. I proposed that she and I share the parenting of our children equally and make all major decisions concerning them jointly. This may be a commonplace notion today, but 40 years ago the idea was viewed with judicial consternation and suspicion. When I told the judge I wanted to spend half the time with our sons so that I could do homework with them, cook for them, and put them to bed at night, his Honor asked, with genuine disbelief, why I would want to do all of that. Much to his credit, though, the judge signed off on the agreement, and we became a new statistic. The joint custody concept and schedule we originated – in addition to equally dividing holidays and vacations – provided that, in a month-long cycle, the boys alternately would be with me three days one week and four days the next. As far as we knew, this was the first legally sanctioned arrangement of its kind on record. Our sons were the nation's first joint custody kids and their mother and I became reluctant pioneers in something we had settled for and weren't sure we wanted.

I'd like to be able to say that I developed the idea of shared parenting out of an altruistic sense of fair play but, in reality, it was a proposal born of fear and desperation. I was well aware that courts traditionally favored awarding custody to mothers and that fathers were relegated to the status of zoo parents who were allowed to spend only alternate weekends with the kids and perhaps have dinner with them on Wednesdays. So, for me, seeking joint custody was a matter of risk management: better 50% of the time than four overnights a month if I lost at trial.

Not surprisingly, what we did had both its supporters and its detractors. On May 5, 1975, the *Christian Science Monitor* was the first to report the story of our unique agreement and numerous radio and TV interviews soon followed. While Father's Rights groups loved the idea, some critics argued that joint custody was merely a ploy to reduce a man's child support obligation. Others (both men and women) felt that having a child spend half the week with a father was subversive and an assault on motherhood. Still others questioned a man's ability to be as nurturing as a woman. In the early '70s, however, the time was ripe for the kind of equality that joint custody proclaimed. During a period when the Women's Liberation Movement was declaring that women were entitled to equal pay, recognition and respect, it would have been disingenuous to contend that working wives, who were no longer stay-at-home moms, deserved more access to children than dads.

I'd also like to be able to report that with the divorce done and joint custody firmly in place, my ex-wife and I easily buried our differences and moved on with our lives, but that didn't happen. For five years our relationship was characterized by classic, post-divorce confrontations with each of us waving the Best-Interests-of-the-Child flag at the other. Telephone conversations continued to degenerate into the frustrated posturings of two people who were quickly perfecting the art of artless bickering. She didn't want to come to any of the kids' birthday parties at my house; I didn't want the boys going to Yankee games with her boyfriend.

We fought over the day-to-day details of how each of us was bringing up the kids: what TV shows they should or shouldn't watch, what they should or shouldn't eat, what time they should or shouldn't go to bed. I suspect that we often ended up unintentionally undermining the other's authority because we were each afraid that being the stricter parent might make the children love us less. We may have had joint custody but, with no guidelines or examples to follow, we continued to behave like the enemies we were accustomed to being. Ever vigilant, we fiercely protected ourselves against all incursions, real or imagined, on the time we each had scheduled with the boys. Fifty percent, after all, meant 50% – nothing more, nothing less. Flexibility was a foreign abstraction never given much consideration.

Then, in early 1980, my ex-wife called and suggested we jointly make the party for our oldest son's bar mitzvah that coming August. I refused. I remember thinking that shared custody did not necessarily mean the mixing together of our respective partisan families and friends, even for one evening. I countered that we should have separate parties after the temple ceremony. But this admittedly less-than-perfect Solomonesque solution was unacceptable to our son. Getting a jump on manhood by being more mature than I was at the moment, he told me that either his mother and father were going to be at the same party or he wasn't showing up at the synagogue.

And so my former spouse and my present wife worked together to plan the reception that commemorated much more than our son turning 13. We collectively took a deep breath and, from then on, the animosity slowly but discernibly dissipated and our joint custody relationship truly began. My ex-wife and I had finally made the transition from being merely tolerant of one another to maintaining a sort of wary civility, which eventually gave way to accepting what our shared parenting responsibilities actually were.

While the boys were still young, their mother and I began amicably exchanging weekends and altering our access schedule when needed and, as a testament to our more relaxed, newfound flexible approach, did not insist on make-up time when some custodial day or overnight unavoidably had to be missed. We also discussed and effectuated a more consistent, united front with regard to bedtimes, dessert consumption and when homework was supposed to be done. With our new spouses, we sat together at school performances and recitals and together we cheered for our sons at soccer and baseball games, and from the same side of the field. We invited each other to family functions involving the children – birthday and graduation parties among others – so the boys wouldn't have to choose which of our homes to go to. For years now my new family and I have spent Father's Day at my former wife's house and she and her new family have spent as many Thanksgivings at our house as we have at hers.

In the scores of joint custody cases I have handled in my law practice over the past 30 years or so, I have seen firsthand that a better understanding of how shared parenting should work has evolved. Divorces have not necessarily become any less bitter, but the contractually mandated obligation to communicate and cooperate, the twin requirements upon which joint custody is based, has become more clearly established. If, initially, there is an absence of those two elements, joint custody probably will not be agreed to or be court-ordered; if there isn't meaningful communication and cooperation pursuant to the contract, then an application can be made to the court to modify the arrangement. Generally, in today's gentler marriage breakups, battle lines have been redrawn and the rules governing divorce etiquette (or lack thereof) have been rewritten. The pressure has been on today's

joint custody parents to swallow their differences and, for the sake of the children, work in tandem to keep the peace rather than perpetuate the feud.

As a result, the post-marriage family has been reconfigured and a novel cultural dynamic, a new social construct, has been created. Today's joint custody families include not only the divorced couple and their kids, but their new spouses or significant others and *their* kids, all of which exponentially increases interaction, cooperation and, hopefully, cordiality between divorced or separated couples. With the number of divorces increasing nationwide (approximately 50% of first marriages end in divorce), and with the advent of joint custody, the American family has expanded both figuratively and numerically. Many of my joint custody clients have, the second time around, married other joint custody parents. I recently represented a 35-year-old joint custody "kid" who obtained joint custody of *his* daughter.

In the United States today, 35 states and the District of Columbia have statutes that explicitly provide that there is a presumption or strong preference for joint custody. (In New York, the courts can award joint custody, but there is no such presumption.) The presumption basically means that the courts in those states will automatically award joint custody unless one of the parties is able to prove why such an arrangement will *not* work. The underlying achievement of shared parenting, then, is that although it may be in the best interests of the parents to separate, children in joint custody families are no longer divorced from one of their parents. Because of this, there has been a seismic shift in the allocation of responsibility for bringing up the kids. In practical terms, because their access is not as abbreviated as it once was, divorced fathers have been able to build better relationships with their children. Motherhood now has been redefined to include fatherhood.

Whereas for generations it had been accepted that the dissolution of a marriage and the award of sole custody to the mother effectively severed the ties between a divorcing couple, shared custody parents remain inextricably linked together, making joint, not one-sided, decisions about how the children should be raised. In years past, the courts presided over the destruction of a marriage; now they help broker how best to preserve parent-child relationships. The marriage may be dissolved, but with joint custody, the family isn't. Obviously, as my ex-wife and I can attest, after a separation or divorce and the implementation of shared parenting, the animosity doesn't automatically disappear. Arguments over money and whether Aunt Tilly should be invited to Junior's sixth grade graduation will probably never end. But, at least theoretically, the concerns over care, access to and control of the children are not as prevalent and all-consuming as they are in sole custody situations.

In our case, it was a long struggle to overcome the competitive need to prove to our children that one of us was the better, more loving, more understanding parent. What it took us years to comprehend was that kids don't want their mothers and fathers jousting for supremacy; what they do want is for the anger between them, in all its many manifestations, simply to stop. Our sons are in their 40s now, with children of their own, and my ex-wife and I have come to realize not only that grandchildren are the best salve for old wounds, but that, thankfully, years ago, we chose a different, unconventional path that made possible a more contemporary family structure – one that truly served the best interests of our children, and ourselves. ■

NEW MEMBERS WELCOMED

FIRST DISTRICT
Parul Aggarwal
Kathleen Marie Amaro
Diane Florence Artal
Seth Hunter Bailey
Marc Balmazi
Khalid Bashjawish
Aditya Dhananjay Basrur
Susan Benham
Erika Marie Berg
Jennie Sarah Berman
Michael Bernfeld
Anne Sarah Bider
Carolyn Nicole Bidwell
Michael D. Blechman
Maria Angeles Bonany Munoz
Mark Andrew Boustouler
Lisa Nicole Bozman
Jacob Ian Bronsther
Joshua David Brookstein
Ian Craig Wildgoose Brown
Mari Byrne
Geoffrey Cajigas
Stephanie Margaret Capobianco
Ayesha Chatterjee
Zhi-ping Chen
Jungmin Cho
Courtney Anne Chua
Justin Conrad Clarke
Desiree Marie Claudio
John Francis Collins
Alexandro Cota
Darien James Covelens
Ann O'Neill Coxon
Jinelle Joni-gaye Craig
Daniel Patrick Curtin
Ryan Joseph Dattilo
Sandra Dawes
Francois Defourny
Cristine Marie Delaney
Nathan Z. Dershowitz
Chirag R. Desai
James Joseph Desjardins
Katherine Brady Dirks
Gregory Jacob Dubinsky
Erin Melissa Durkin
Victoria B. Eiger
Gerrald Adam Ellis
Daniel William Evans
Rosanne Facchini
Amy E.P. Fallone
David Aaron Finkelstein
Melissa Rachel Frank
Clark Andrew Freeman
Brian Elmer Fritz
Fabiana Marisa Furgal
Curtis Patrick Gadson
Glenn A. Garber
Jorge Luis Garcia
Jia Wei Ge
Sheila Marie Geraghty
Louise Le Yi Gong
Michael David Gottesman
Nir Ephraim Gozal
Nicholas Kevin Graves
Jonathan D. Grossberg
Matthew Thomas Gunlock
David Michael Gutt
Yared Hailemichael
Esther Katherine Hajjar
Nathaniel Philip Hall
Yi Han
Durre Shehwar Hanif
Andrea Hendrych
Richard Michael Hillman
Hayes Ragland Holderness
Wesley Charles Holmes
Anne E. Holth
Effat Rumana Hussain
Erica Rose Iverson
Vanessa Mattos Jacob Heck
Sungjin Joo
Esther Kapinos
David Cregan Keady
Julie Ann Keersmaekers
Brogiin Dwon Keeton
Reuben Kerben
Niki Khindri
Christina Yujin Kim
Jung Eun Kim
Talita Kiper
Jesse James Kramer
Beth A. Kressel
Allison J. Landwehr
Andrew Ryan Lang
Karen Langer
Matthew Aaron Lee
Wendy Lee
Auria Legendre
Yu-chi Liu
Ilona Logvinova
Meredith Woodley Louis
Marvin Jules Lowenthal
Huixing Lu
Amy Louise Martin
Ashley Allison Marton
Sarah Salhia Matari
Matthew Elliott Mawby
Jessica Mary McAndrews
Ryan Patrick McAuliffe
Sean Christian McDonagh
Jemma Lohr McPherson
Amanda Lee Melnick
Benjamin Scott Melnicki
Clyde Mitchell
Tanya Ivette Molina
Laura Mondragon
William Francis Mongan
Alana Montas
Lynette Morrow
Anthony Nicholas Mozzi
Jennifer Marie Murphy
Alex Neustein
Yuliya Neyman
Michael Stuart Nissenbaum
Caitlin Teresa O'Brien
Lisa Marie Padla
Sonya Pal
Anne Marie Palazzolo
James Papadakis
Sei Joon Park
Patricia Monique Pazner
Ryan Matthew Peisner
Jenny Ross Aquines Peleaz
David Pernas
Thomas D. Phelan
Richard Steven Piazza-LaForgia
Adam Eugene Pinto
Payom Mir Pirahesh
Andrew R. Pirrie
Laura Katherine Pitts
Adriane Price
Teresa Principe
Daniel Christopher Reiser
Adam Ivan Rich
Lisseth Adriana Rincon Manzano
Larkin Robson
Jonathan Avner Rosenberg
Stanley Charles Ruchelman
Joseph Winner Russo
Brianne Helen Ryer
Diana Olga Salgado
Michael Evan Sander
Ayse Nur Sanli
Steven Wayne Schuster
Robert Bryan Scott
Rajiv Dinesh Shah
Jeffrey B. Smith
Megan Keller Smith
Yannou Catherine Solomon
James Lawrence Sonne
Margaret Sowah
Alexander Harrison Spiegler
Jessica Leigh Sprague
Jeremy David Stallman
Elizabeth Sarah Steinfeld
Yamicha Stephenson
Maura Carroll Sullivan
John Joseph Suydam
Michael Robert Svetich
Dan Szajngarten
Nicole Anastasia Tague
Jeremy Alan Tark
Richard Lathen Thompson
Tallen Bora Todorovich
Bethany Noel Tolentino
Maria Soledad Torretta
Ariane Isabelle Tschumi
Mila Sarah Van Kempen
Andrew Kimball Vinci
Wendy Huang Waszmer
Joel Andrew Wattenbarger
Alan Roy Weiner
Sylwia Wewiora
Eric Howard Wexler
Diana Elizabeth Whitaker
Meredyth Ann Whitford
Jessica Carol Wilson
Patrick Mark Wilson
Alissa Christine Wimmer
Elizabeth Montyne Winokur
Seth J. Wolkofsky
Matthew Adam Wurgaft
Xiaowei Ye
David Scott Yellin
Marcus Yi
Elizabeth Anne Young
George David Zalepa
Nicole M. Zeiss
Yue Zhang
Yun Zhang
Jonathan Charles Zweig

SECOND DISTRICT
Dinneen Cato
Katelin Cavallaro
Thomas James Devine
Emmanuel Ogiefo Ebesunun
Cristina Ferreri
John J. Heagney
Stanice Sherwin John
Michael Kadosh
Joy Helen Kieras
Eva Melody Lamanna
Aviv Maman
Caroline Julie Miller
Brooke Quincy Myers
Roberto Portillo Togno
Nicholas John Ruberto
Paula Z. Segal
Alexander Jean Sutton
Anna Tay
La-Vaughnda Ankevia Taylor
Robert M. Tocker
Cynthia VyUyen Trinh
Mark Aaron Weiner
Courtenay Scanlan Wood
Beth Cristol Zweig

THIRD DISTRICT
Lydia Sabina Amamoo
Lisa A. Frisch
Erin Ashley Wright

FIFTH DISTRICT
Michael A. Price

SIXTH DISTRICT
Trentice Vontrell Bolar
Michelle Leslie Kenien

SEVENTH DISTRICT
Phoenix Hummel

EIGHTH DISTRICT
Erin Aleta Caswell
Joseph Collins
Bruce D. McAllister
Linda Arlene Michler
Andrew J. Olek

NINTH DISTRICT
Danielle Zoey Brown
Diane Boenig Cavanaugh
Ari Fox
Robert Charles Haynes
Christie L. Houlihan
Michelle Rose Inesta
Sabra Janko
Kitanya Ladonna Kelly
Wayne Charles Kruescher
Peter Lane
Glen Malia
Alexander Virgil Maugeri
Mallory Mary Irene Ress
Jennifer Marie Rosado
Natasha Marusja Saputo
Francis Joseph Stapleton
Zahava Stern
Damon John Velardi
Kimberly Jan Wright
Shin-yi Yu-yang

TENTH DISTRICT
Robert Joseph Anderson
Ronald Keith Brown
Min Suk Chung
Jennie Lynne Croyle
Rachael C. Davey
Alissa Marie Fideli
Jennifer Brooke Frey
Richard W. Hagner
Jonathan R. Marconi
Adam Christopher Neal
Imro Manny Rooi
Joshua Alan Sherer
Marrisa Jenna Trachtenberg
Melissa Zelli
Michael J. Zisser

ELEVENTH DISTRICT
Luosi Chen
Andrea S. Gross
Andrew David Grossman
Fatmir Jason Kajoshaj
Sharon Klein
Fanyu Kong
Elana Krupka
Ge Li
Tianren Li
Dane William Norman
Henry Okechukwu Obialo
Robert Christopher Recckia
Athanasios Tommy Sgouras
Candice Kay-ann Stephenson
Zhiyi Wang
Katarzyna Wilinska
Peter James Withey
Doen Zheng

TWELFTH DISTRICT
Anna Dokuchayeva
Larry Clarence Green
Deborah Ann Konopko

Christine Amanda Lachhmanen
Zarah Levin-Fragasso
April Meredith Marcus
Patria Eneyra Pichardo
Meagan Elizabeth Powers
Julissa Maria Torres

THIRTEENTH DISTRICT
Robin Shun Lee
Justine Louise Pate

OUT OF STATE
Joyce Victoria Adams
Sheila Ruby Adams
Hector M. Alvarado-Tizol
Jacinta Lynn Alves
William Eric Andersen
Olta Andoni
Nicolas Andre
Nahoko Asamizu
Paul Joseph Astolfi
Levan Bakhutashvili
Deborah Sanford Banse
Derrell Barber
Paula Rocco Barboza
Maria Costanza Barducci
Henry Allan Barkhausen
Frank P. Bevilacqua
Anuradha Bhargava
Adam Michael Birnbaum
Lara Jill Blecher
Sean Anthony Bogan
Jill Bradley
Adraea M. Brown
Daniel Anthony Brown
Eddie Andre Bruce-Jones
Rimma Bukhbinder
Harold William Bulger
Jing Cai
Daniel Joseph Callahan
Megan Rae-nobles Calme
Mary Whitlock Canter
Kristin A. Canty
Wiliam Conrad Carlson
Alejandra Daniela Carou
Megan Elizabeth Carr
Andrew Claude Case
Stephanie Graham Castellano
Janelle L. Castner
Roxane Castro
Ling-fang Chang
Wei-chien Chang
Mark Boris Chassman
Hui-chih Chen
Jyh-kwang Chen
Siyi Chen
Tsung-hsi Chen
Yu-en Cheng
Christina Cheung
Prudence Hansue Cho
Jiwon Choi
Youjin Choi
Michelle Iqbal Chowdhury
Sarah Corinne Clark
Ian Thomas Clarke-Fisher
Jacqueline Alena Clover
Clay Michael Cogman
Jamie Lynn Cohen
Miata Loretta Coleman
Rachel Leanne Cook
John Stephen Crimmins
Kenneth Hugh Crumpler
Nathan Maxwell Crystal
James David Cullen
Michael Giorgio D'Agostino
Shari Natalya D'Andrade
Mauro D'Iapico
Kathleen Mary Dalcortivo
Conrad C. Daly
David Morris Damast
Matthew Lee Dameron
Doneene Keemer Damon
Elisabeth Danon
Diana Asonaba Dapaah
Zachary Guy Darrow
Reese Davidson
Amy Gabrielle Davis
Diana Marie Davis
Michael Leonard Day
Matteo De Cesco
Guillaume Pierre De Rancourt
Thomas Lina Lucien Declerck
Luca Del Nunzio
Emmanuel Sidney Depas
Ruha Therese Devanesan
Ru Ding
Meghan Jane Donegan
Alexia Sandrine Emilie Drouet
Sean P. Duane
Delaine Marie Duncan
Lauren May Eaton
Mary Beth Ehalt
Elizabeth Marie Elices
Seth Eric Engel
Lynn Maiben Evans
Emily Yee-chi Fan
Chamali Fernando
Kanchana Nilmini Fernando
Mark Alan Fischer
Cameron R.B. Fiske
Kathryn Ashbrook Folkerth
Curtis Gartland Fox
Lorenzo Freddi
Ming Fu
Yihan Fu
Yuantao Fu
Zheng Gao
Jose Manuel Garcia Rebolledo
Miaozi Geng
Ian Lewis German
Andrew Charles Glassman
Jodi Alexandra Goldberg
Michael Goldman
Stephen Edward Gottlieb
Roman Dario Graf
Laura Kate Graham
Aisha Venita Granville
Rachel Anna Gray
Ty Robert Gray
Lee March Grayson
Nicholas Jeremy Greaves
Ivana Deyrup Greco
Rachelle R. Gruenberg
Na Guo
Qinzhi Guo
Christopher Robinson Hall
Dongwook Han
Jill Marie Hanson
Christine Lee Harper
Naurin Hashmi
Michelle Lorraine Hayward
Xiaolin He
Ganapati Kuppayya Hegde
Tamara Layne Hemingway
Susan Mary Henderson
Gabriel Henriksson
David Matthew Hill
Travis John Hill
Robert Joseph Hobaugh
Claudine Q. Homolash
Su Jin Hong
Louis Fox Hornstine
Maiko Hoshino
Shu-yu Huang
Xiangmei Huang
Xuefang Huang
Robert Charles Hussle
Edward G. Imperatore
Meena Jagannath
Ji Ho Jahng
Alon Januszewicz
David James Jarrett
Guy Marcebu Jean-Pierre
Lili Jian
Ying Jiang
Zheng Jin
Phyllis Leann Joe
Krystal Carlise Johnson
Julie Haggerty Jones
Kalvin N. Joshi
Peihuan Kao
John Elias Katsos
Havneet Kaur
Thomas James Kelly
Gregory Kenyota
Jihye Kim
Nolan Keith Klein
David Myungsoo Koh
Kathryn Ann Kopp
Mari Koshimoto
Jesse Lee Krantz
Adrian David Kuenzler
Hyong Keon Kwon
Marissa Ann Lalli
Sarah-Maria Lancrenon
Tanya Rahael Lane
Raj Lapsiwala
Gabriela Pinaud Laufer
Antonella Francheska Lavelanet
Na Ra Lee
Russell Philip Leino
Tracey Dominique Lewis
Mengkai Li
Xiaoyuan Li
Wei-ta Liao
Chu Liu
Juanjuan Liu
Yan Rong Liu
Chia-feng Lu
Steven Edward Lubot
Christina Zhao Yi Lui
Lingjun Ma
Qin Ma
Zhujun Ma
Jessica Jean Mahony
Katherine Alice Malone
Ankur Rajen Maniar
Sati Devi Maragh
Emilija Marcinkeviciute
David John Marck
Dov Yosef Markowitz
Timothy George Martin
Shadi Masri
Jeffrey Jay Mayer
Laura Louise McAllister Cox
Ronald Shawn McBride
F. Barry McCabe
Caireen Marie McCluskey
Michaela Lowry McCormack
Andrew Joseph McCormick
Jillian Lee McGuire
Jaimie A. McKean
Jami Wintz McKeon
Gareth Trevor McKinley
John Patrick McNulty
Joshua Meadow
Horacio Medal Ordonez
Shing-horng Mei
Shay Nisan Menuchin
Meredith Anne Merkin
George Lloyd Miller
Seth Allen Milligan
Michael Patrick Mills
Stephen Robert Mitchell
Song Hung Mo
Neel Chandrakant Modha
Felicity Anne Molan
Jakob Franz Molzbichler
Justine Mae Mongan
Michael Anthony Monteverde
Marlyn Paola Moreno Gonzalez
Holly Anne Morgan
Anne-claire Motte
Matthias Julian Mueller
Joamir Muller Romiti Alves
Timothy William Mungovan
John Kirk Murphy
Matthew Stuart Murphy
Howard William Myones
Matthew Pate Nagaoka
Diana Nardelli
Dominic Jerry Nardi
Mark Nawfal
Minerva Tan Nayan
Rebecca Nealon
Douglas Robert Nehm
William George Nestor
Ly Doan Ngo
Yan Ni
Abraham Northy
Margaret Ebob Noubissie
Lane Michael Nussbaum
Daniel Hill Nyman
Patrick O'Brien
Yoshitaka Ogue
Oluwatobi Abegbe Okeowo
Robert Jay Olmstead
Louisa Amaka Orajiaka

In Memoriam

Mario G. Aglipay
Quezon, Philippines

Barry H. Fentin
White Plains, NY

Michael B. Jones
Buffalo, NY

Seymour Krinsky
New York, NY

William Mundin Miles
New York, NY

Julia E. Roberts
Buffalo, NY

Arthur V. Savage
New York, NY

Jay Alan Scherline
Allentown, PA

Howard M. Simms
New York, NY

Robert S. Starr
White Plains, NY

Irwin M. Thrope
New York, NY

Matthew Con Orlando
Jenny West Love Osborne
Cedric K. Osivandi
Hauwa Onize Otori
Nadia Lenox Oussayef
Mingzi Ouyang
James Chikezie Ovuike
Lindsey Ann Owings
Kalpana Panuganti
Amalia Papadimitriou
Daniel Isaac Papermaster
Preeta Paragash
Lorena Pardo Lelo De Larrea
Henry McKean Parkin
Berj Khoren Parseghian
Christopher Michael Payne
James Inman Pearce
Polina Pecherskaya
Steven Ann Leo Peeters
Fei Pei
Gabriel Jose Pena
Yu-hsin Peng
Michael John Penner
Alexandra Perpina
Katherine Paulette Perryman
Nancy Ann Peterman
Erik Peters
Josselin Pitard
Minal Sudhirbhai Purohit
Bernard Edward Jude Quinn
Anton Ivanovich Radchenko
Lisa Nicole Rambo
Antonio J. Ramos
Andrew Todd Redman
Eric Matthew Reinarman
Mark Allen Ridder
Daniel Nealson Roberts
Kimberly Clarissa Rocque
Stephen Roman
Emma Elizabeth Roszko
Olivia Ruiz-Joffre
Jimin Ryu
Lulia Magdalena Sandu
Charlotte Sauvanet-Wolff
Richard Alfred Scholer
Anthony Cosimo Serrano
Sami Shaban
Yue Shao
Taige Shi
Darren Shield
Justin Andrew Shuler
Robert Kenneth Silverman
Hernan Simon Padros
Marie-amelie Simon
Jennie Unger Skelton
Wei Song
Xiaowei Song
Shoshana Sara Speiser
David J. Spellman
Daniel Cade Stafford
Joseph Louis Stanganelli
Constantine Peter Stevenson
Steven Ronald Storch
Kenji Alexander Strait
Jennifer Suh
Minjeong Grace Sur
Jason Scott Symons
Chengcheng Tang
Skyler Mark Tanner
Aleksandra Tasic
Ashley Lynn Tate
David Tavakalyan
Vincent Ken-jin Teh
David Andrew Ten Broeck
David Israel George Terner
Eleanor Deborah Thompson
Andrew Scott Thurmond
Binh Duy Tran
Marianne Trovato
Theodoros Ioannis Tsakalis
Emily Meadows Tucker
Johara Patrice Tucker
Chioma Uzondu Udeagbala
Lisa Valentovish
Arivee Natalie Vargas
Flavia Bahia Vidigal
M. Howard Vigderman
Daniel Brandt Vorhaus
Barbara Johanna Walch
Eileen Patricia Walsh
Fiona Mary Walsh
Michelle Mei Sheung Wan
Lingfei Wang
Ting Wang
Xiaoqian Wang
Lisa Diane Waters
Serena April Weckel-Purtell
Mark Aaron Weiner
Jessica Lee Weiss
Zachary David Wellbrock
Arthur Dwight Wellington
Michele West
Joseph Edward White
Anthony Charles Williams
Benjamin Brice Williams
Christopher Michael Witeck
Andreas Meinolf Woeller
Magda Mary-grace Woszczyk
Xifeng Xi
Yi Xiao
Zhengjie Xu
Xiaoyan Xue
Fan Yang
Liu Yang
Yang Yang
Yuanqing Yang
Mengke Ye
Rui Ye
Ya-lun Yen
Eui Yeol Yoo
Michael Christian Younker
Seong Wook Yu
Camilla Zanetti
Baohui Zhang
Rui Zhang
Ruoxi Zhang
Ying Zhang
Hexuan Zhao
Sicheng Zhou
Zixuan Zhou
Wenzhao Zhuo
Zhiqing Zou

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.TrialTheater.com>.

Story Time: Reading to Your Audience

Have you ever heard an attorney stumbling or stammering while reading depositions to the jury? Ever felt sorry for someone attempting (but unable) to effectively read a passage to the congregation at your place of worship? Or have you ever read something aloud to a group and then thought to yourself, "They must think I'm an idiot – that sounded awful."

Reading aloud requires different skills and preparation than that required to speak to an audience or read quietly to yourself. Regardless of whether you're reading stipulations to a jury, quoting from a favorite text, or delivering a prepared statement to the press corps, these tips will improve your presentation the next time you read aloud to an audience.

Read the Script in Advance

No matter how great your command of the English language, and no matter how well you read, you should read the document aloud *before* you read it to your audience. Words that you've read silently dozens of times before can become troublesome when spoken aloud. You don't want to stammer or trip over words in public. Find a quiet place and read the document. Not silently – read it aloud. There are several reasons why you should read the document in advance.

First, you want to ensure that the script is complete. We've all had the experience of reading through a contract or a fax, only to realize partway through that you're missing a critical page. It's better to discover the missing page in your office, rather than onstage or in the courtroom.

Second, you want to make sure that you can pronounce the words and capture the flow of the language. Think about reading any of Shakespeare's works aloud – you wouldn't want to pick up the text and just "wing it." Reading the document in advance, you will discover words you can't quite wrap your mouth around. Rather than fumbling your way around the word in public, you can practice pronouncing the word until it flows from your tongue with ease.

Third, you will discover that words written for the eye differ from words written for the ear. Things that made sense on the page aren't as clear when spoken aloud. Your job as the narrator will be to convey the writer's meaning to your audience. The audience won't be able to see the commas, parentheses, brackets, ellipses, colons, and other grammatical tools that the writer uses to promote understanding. Reading the document in advance will highlight the sections that require you to pause, change your pace, or vary your vocal inflection.

Mark Up Your Text

As you read through the material, use pens and highlighters to add staging comments. These comments will help prevent you from speaking in a monotone voice. Highlight or underline the key words that you will want to emphasize (the words that will carry the sentence). Add dividing lines or slashes ("//") between sentences to indicate extended pauses. Add directional lines over phrases to indicate when you should raise or lower your pitch. Write phonetic (foh-net-tick) spellings of difficult words or names so you don't mispronounce them. Add staging comments like "whisper," "slow down," or "look at the CEO" to the margins. No one else needs to read your script, so feel free to scribble all over it, adding anything that helps you get the message across.

Blow It Up

Make your text large enough to read. Words that were easy to read in your office (under perfect lighting and without any performance pressure) may be more difficult to read onstage or in court. If you are printing your own script, use 18-point font size or larger. If you will be reading a passage from a book, enlarge the text on your photocopier and tape it into the book. Make the script easy on your eyes, so that you will be free to concentrate on your delivery and connecting with the audience.

Maintain Eye Contact

Many lawyers make the mistake of talking to the script that they're reading from. They keep their eyes on the paper the entire time and ignore their audience. Don't talk to your script. You're presenting to an audience – connect with them through eye contact. This is a fourth reason to read the

Continued on Page 60

NYSBA's Online Career Center

Hundreds of job openings. Hundreds of attorneys. All in one place.

1. **Hundreds of Jobs**
2. **Easy Search Options**
3. **Employers- Post a Job and View Resumes**

Job seeker services include:

- Members post resumes for FREE
- Members get 14-days advanced access to new job postings
- Post resumes for one year
- Hundreds of jobs already available for review
- Save hours of searching over more general sites

Scan this code with your mobile device or go to **www.nysba.org/jobs**

Find what you're looking for at

www.nysba.org/Jobs

NYSBA

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I arrived at my office early one morning last week and found an unsolicited email on my server from Dr. Adam Zappel. In the email, Dr. Zappel wrote that a friend gave him my email address, and that he needs my help. Dr. Zappel had sought my representation in a prospective medical malpractice case, and included information inculpating himself in the misdiagnosis of a 14-year-old, Tim Trouble, who as it turned out had been regularly indulging in his parents' liquor cabinet. What he thought was a simple case of alcohol poisoning, turned out to be an untreated burst appendix, which if not removed, could have resulted in Tim's death. Dr. Zappel wrote in his email to me that he had a drug problem at the time and had been regularly taking painkillers when he made the error. Worse, Nurse Hailey Honest witnessed the event and has said she will testify against him if the suit arises. This occurred where Zappel is in current residence, St. James Infirmary.

Currently, I represent Our Savior Hospital, where Dr. Zappel previously worked. Our Savior's administrator suspects Dr. Zappel may be planning a qui tam case alleging that Our Savior is engaged in up-coding cases of the common swine-flu to a more deadly flesh-eating disease.

I believe that it would be in Our Savior's interest to know that Dr. Zappel may be embroiled in litigation and had a substance abuse problem. I am also worried that the unsolicited information in the email may conflict me out of defending the qui tam case.

I checked the Rules of Professional Conduct under Rule 1.18 which states that I cannot represent a client with interests materially adverse to those of a prospective client in a substantially related matter if I received information from the prospective client that could be "significantly harmful" to the prospective client. But, I also read that a person who gives adverse information without "any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client."

I believe that the information I learned about Dr. Zappel could be harmful to him, and that the cases are substantially related since they both concern alleged misdiagnoses. My question to the Forum: Is Dr. Zappel a prospective client?

Sincerely,

Vera Decent

Dear Vera Decent:

The question whether a person is a "prospective client" is governed by Rule 1.18(e) of the Rules of Professional Conduct (RPC). Put in simple terms, not every person who contacts a lawyer regarding a potential engagement is a prospective client. The following persons are *not* prospective clients:

A person who:

> (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or
>
> (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a) [of Rule 1.18].

It seems pretty clear that unless you entered into an email exchange with Dr. Zappel, his email to you was an unsolicited unilateral communication. Nevertheless, Dr. Zappel could be deemed a prospective client if he had a reasonable expectation that you would discuss the possibility of being retained as his counsel in connection with the malpractice action. Whether he had a reasonable expectation could depend on a variety of factors. What is your area of practice? Have you ever represented a party in a medical malpractice action? Could Dr. Zappel have looked you up on the Internet to find out your area of practice? If you have not held yourself out as an attorney who handles medical malpractice litigation, then you have a pretty strong argument that Dr. Zappel had no reasonable expectation that you would be willing to discuss the possibility of forming a client-lawyer relationship to defend him if he were sued for medical malpractice. Although it would seem that under these circumstances Dr. Zappel would not be deemed a prospective client under Rule 1.18(e)(1), that is not necessarily the only line of inquiry.

If it can be established that Dr. Zappel intended to provide you with confidential information so that he could potentially disqualify you from representing Our Savior if in the event he brought a qui tam action against the hospital, then he would not be entitled to the protection given to prospective clients. As a former employee of Our Savior, Dr. Zappel may have known that you have been the hospital's legal counsel in certain matters. In our view the language of his email creates a

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

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

suspicion that disqualification in the planned litigation may have been the real motive here. He claims that a "friend" gave him your email address. Who is this "friend"? Why is he soliciting your services by email? Couldn't he have just picked up the phone and called you? Why did he send you such a detailed initial communication outlining his potential legal problems?

Law firms should have established, internal procedures that deal with unsolicited email from persons allegedly seeking legal counsel. Although Comment [4] to Rule 1.18 outlines some suggestions for implementing procedures necessary to protect an attorney from receiving disqualifying information (i.e., "limit[ting] the initial interview to only such information as reasonably appears necessary for that purpose"), it would be best if your firm establishes clear procedures in the event anyone in your office receives unsolicited inquiries for legal counsel. For example, when unsolicited communications such as Dr. Zappel's email are received, it might be advisable for the firm to promptly issue a response declining the representation. In addition, if Dr. Zappel were considered a prospective client and you became conflicted because of your receipt of his email, then your firm could still represent the hospital if the appropriate screening mechanisms as prescribed in Rule 1.18(d)(2) are followed.

You have also asked whether the information contained in Dr. Zappel's email can be passed on to Our Savior, your existing client. As stated above, we believe that Dr. Zappel may have been trying to create a basis for your disqualification when he contacted you and does not enjoy the protection of a prospective client. But having said that, how do you, as a responsible lawyer, handle the confidential information that now, regrettably, is in your possession?

Comment [2] to Rule 1.18 states:

> Not all persons who communicate information to a lawyer are entitled to protection under [Rule 1.18]. As provided in paragraph (e) [of Rule 1.18], a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a) [of Rule 1.18]. Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. . . .

There is some authority which suggests that no privilege attaches to information contained in unsolicited communications sent to an attorney from a person who is *not* deemed a "prospective client." *See* N.Y City Bar Ass'n Formal Op. 2001-1. Having said that, it is safe to say that if one wanted to minimize the risk of disqualification, it may be best if the information Dr. Zappel disclosed to you is not communicated to Our Savior. As Rule 1.2(e) states, "[a] lawyer may exercise professional judgment to waive or fail to assert a right or position of the client . . . when doing so does not prejudice the rights of the client." In addition, Comment [7] to Rule 1.4 suggests that information may be withheld from a client under certain circumstances, specifically "when the client would be likely to react imprudently to an immediate communication." This Comment further states that withholding certain information is permitted as long as its purpose is not "to serve the lawyer's own interest or convenience or the interests or convenience of another person." *Id.*

In deciding whether to disclose, one must also consider Rule 1.1(c), which says:

> A lawyer shall not intentionally:
> (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
> (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

According to Professor Roy Simon, Rule 1.1(c)(1) "essentially obligates a lawyer to use all legal and ethical means reasonably available to seek the client's objectives." *See* Simon's New York Rules of Professional Conduct Annotated 67 (2012). Based upon this provision of the RPC, there could be an argument that you may be required to advise Our Savior as to the information contained in Dr. Zappel's email because information concerning the doctor's professional conduct may be relevant to the hospital as part of its defense against the qui tam action. Although the answer is not necessarily clear, you would not have to disclose the information communicated to you by Dr. Zappel if you conclude that Our Savior would not be prejudiced. As will be discussed further below, you can probably learn more about Dr. Zappel's prior conduct through your own independent investigation as counsel to Our Savior.

The reason for the overabundance of caution with regard to what Dr. Zappel told you is mostly because the contents of his email contain admissions – particularly the fact that he was under the influence of drugs while engaged in professional activities. This information most likely would not be generally known. Although normally we would look at such information under the provisions of Rule 1.6, which defines what constitutes "confidential information," in this case you may have a duty to protect the confidentiality of a potentially opposing party, namely Dr. Zappel. *See generally* James M. Altman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, N.Y. St. B.J. (Nov./Dec. 2010), p. 24 (internal citations omitted). Dr. Zappel could be considered a potential opposing party if you knew that he was considering commencing a qui tam case against your client. There also may be an argument that you owe Dr. Zappel (as a potentially opposing party not represented by counsel) a heightened obligation not to disclose the information

he communicated to you. Therefore, your conduct in dealing with him as an unrepresented party also may trigger obligations under Rule 3.4(a)(6) to conduct yourself in a manner that is not contrary to the RPC, which would include not disclosing the information that Dr. Zappel communicated to you.

Given the circumstances you have described, if the qui tam case against Our Savior does go forward, you can do your own independent investigation of Dr. Zappel (and any other doctors currently or formerly employed by Our Savior for that matter) to determine if in fact the hospital was encouraging its staff to "up-code" cases as well as any other relevant conduct that could expose the hospital to liability, including potential acts of malpractice as a result of misdiagnoses of patients. This leads to a potentially more difficult question: Are the malpractice and qui tam cases substantially related? If it can be established that there is a connection between Dr. Zappel's own professional conduct at his current employer, St. James Infirmary, as well as in his prior employment at Our Savior, then his conduct may be relevant to the qui tam action and the matters become substantially related. In all likelihood, Dr. Zappel would be deposed if he commenced the qui tam case against the hospital and would almost certainly be subject to lines of questioning concerning his own professional conduct, including anything that could affect his conduct as a physician (such as an addiction to drugs).

It is also important to address here your obligations as counsel to Our Savior. Rule 1.13 of the RPC governs a lawyer's obligations when representing an organization as a client. Specifically, Rule 1.13(b) states:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

Could Dr. Zappel qualify as a "person associated with the organization," and would you be required to inform Our Savior of the information contained in his email? Under this premise, since he is a former employee of Our Savior, the answer would most likely be no. That being said, you still possess knowledge concerning Dr. Zappel that would be of significant interest to Our Savior (i.e. his prior professional conduct while under the influence of drugs). Such conduct would almost certainly go to issues concerning the doctor's credibility in the context of the qui tam action. Although none of the information communicated to you by Dr. Zappel would be entitled to the protections given for confidential information as defined under Rule 1.6, the information should still not be disseminated to your client. As noted above, we would suggest that in the course of preparing to defend a potential qui tam action, you conduct your own independent investigation of former and current doctors and staff of the hospital. We believe that such an investigation would likely reveal if, in fact, certain employees had issues which would put their credibility into question – like Dr. Zappel.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I serve as outside counsel to a large multinational company. Jacob Sladder, the company's in-house counsel, has asked me to become involved in a matter involving a disgruntled former employee who claims that she was fired from the company after reporting that she was harassed by a number of her supervisors based upon her religious beliefs.

Sladder advised me that the company had received a claim letter from an attorney for the former employee, asserting that the company has a culture that promotes religious discrimination, demanding a fat settlement, and threatening suit if the matter is not resolved promptly. He explains, obviously within the boundaries of the attorney-client privilege, that he is concerned that the former employee's discrimination claims may have merit, both with respect to the individual complaining ex-employee and other potentially aggrieved employees. In particular, Sladder worries that company emails, both recent and extending back as far as five years, may include inculpating material. He explains that although he has not examined the emails and does not know whether they contain any smoking guns, statements to him from corporate employees lead him to believe that the contents of some messages may be problematic.

From my work with the company over the years, I am aware that under its records retention protocol, each month the company's management information system (MIS) personnel remove from the company's active system emails sent during the same month a year earlier, and that emails for each such purged month are retained on backup tapes, with a separate tape for each month. Because of the company's large-scale, worldwide operations, each month the company thus removes thousands of email mes-

sages. Inside counsel has asked me whether, on the basis of the letter from the lawyer for the former employee threatening litigation, the company has any obligation to alter its purge-and-retention procedure. What should I tell him?

The company's MIS personnel further informed me that as long as emails remain on the company's active system (that is, are less than a year old), they may be located and searched by author, recipient, or any words or combination of words that appear in the text. Once, however, they have been purged from the system and stored on tape, they are in effect "read only" and may not be searched by any of the means available for current emails.

The net result is that if litigation begins and the company is called upon to disgorge its relevant emails, the cost to search currently-maintained messages will be far less than the burden of searching the historical messages stored on the monthly tapes. I know that the company's emails include many items subject to the attorney-client privilege, and others that, although non-privileged, nonetheless contain sensitive business information that is unrelated to the claims asserted by the former employee and that the company does not want outsiders to see.

Accordingly, Sladder suggests that perhaps it is time to alter the company's records retention policy to provide for purging of emails, and storage on backup tapes, after six months or three months, not one year. If nothing else, he said, changing the policy would make it more difficult for this ex-employee, and other potential underfunded claimants, to get access to company emails. What advice do I give him?

Sincerely,
Noah Zark

your "last and best chance to convince the court . . . . Do not forego that [oral-argument] opportunity."[6]

Regardless whether you orally argue the motion, your papers should speak for themselves.

At oral argument, you can't come up with arguments different from those in your motion papers.

Moving for Partial Summary Judgment

The court may not grant partial summary judgment to the non-moving party in a matrimonial action.

In all other cases the court may, under CPLR 3212(e), grant partial summary judgment to part of one cause of action or to one or more causes of action.

It's partial because the court may grant summary judgment on the plaintiff's first cause of action but deny summary judgment on the plaintiff's second cause of action. As the moving party, you as the defendant may move for partial summary judgment on the plaintiff's first cause of action but not move for summary judgment on the plaintiff's second cause of action.

It's partial because the court may also grant summary judgment on part of the plaintiff's first cause of action but deny summary judgment on another part of the plaintiff's first cause of action, "as long as the part on which summary judgment is granted can be logically separate."[7] This might happen when the plaintiff's first cause of action is based on two theories with respect to the same wrong.

An example of partial summary judgment for part of a claim is moving for summary judgment on liability but seeking a trial on damages.

The court may grant partial summary judgment "on such terms as may be just."[8] The court has a "broad range of procedural tools: severance, stay, separate trial, [and] the imposing of conditions."[9]

Although CPLR 3212(e) discusses partial summary judgment as to "one or more causes of actions," partial summary judgment also applies to defenses. A plaintiff may move for partial summary judgment as to the defendant's first defense but not as to the defendant's second defense.

The rules get tricky when a defendant counterclaims. A defendant's counterclaim doesn't bar the court from granting summary judgment to the plaintiff.

The court might grant summary judgment to the plaintiff when the defendant's counterclaim isn't inextricably intertwined with the plaintiff's claim. The court might not grant summary judgment to the plaintiff when the defendant's counterclaim is inextricably intertwined with the plaintiff's claim. A defendant's counterclaim is inextricably intertwined with a plaintiff's claim when there's "so intimate a relationship between the main claim and the counterclaim that the latter falls substantively if the main claim prevails."[10]

If the court determines that a defendant's counterclaim is inextricably intertwined, the court will allow the plaintiff's claim and the defendant's counterclaim to proceed to trial; thus, the court would deny the summary-judgment motion.

If the court determines that a defendant's counterclaim isn't inextricably intertwined, the court may grant summary judgment on the plaintiff's main claim and stay entry of the judgment until the counterclaim is resolved at trial.[11]

If the plaintiff's main claim exceeds the counterclaim, the court may grant summary judgment for the plaintiff for the remainder and the plaintiff may have the right to seek immediate enforcement of the judgment. The court may hold the rest in abeyance for possible offset by whatever the defendant proves on the counterclaim.[12] If the defendant doesn't succeed on the counterclaim, the court may grant summary judgment for the plaintiff for the rest of the main claim.

If a defendant's counterclaim exceeds the plaintiff's claim and the court grants summary judgment for the plaintiff on its main claim, the court could protect the defendant by staying the entry or enforcement of the plaintiff's judgment until the counterclaim is resolved at trial.[13] If the plaintiff is solvent — ensuring that the plaintiff will pay the judgment if the defendant wins on the counterclaim — no need would exist for the court to stay the entry or enforcement of the judgment.[14] A plaintiff's solvency is important to the court's fashioning of its order and judgment.

When the defendant's counterclaim is independent of the plaintiff's claim — meaning that they aren't inextricably intertwined — the court may issue a conditional order. The court has "wide discretion in imposing conditions upon the grant of partial summary judgment so as to avoid possible prejudice to the party against whom that judgment is granted."[15] But the court's discretion "is not unlimited, and is to be exercised only if there exists some articulable reason for concluding that the failure to impose conditions might result in some prejudice, financial or otherwise

Opposing a summary-judgment motion with an attorney affirmation that contains unsubstantiated assertions, conclusory allegations, or speculation isn't enough to win.

. . . should that party subsequently prevail on the unsettled claims."[16] The court may require the defendant to post a bond staying enforcement of the plaintiff's summary judgment.[17] The bond would be conditioned on the defendant's making good on whatever the plaintiff is still entitled to after the defendant's claim is adjudicated.[18]

Opposing a Summary-Judgment Motion

Once your adversary moves for summary judgment, you'll need to consider whether to oppose the motion. Talk to your client. Explain the "stakes involved."[19] Also tell your client how much it will cost to oppose the motion.[20] Make sure your client understands the chances of success and failure in opposing the motion.[21] If you need affidavits from witnesses, tell your client what's required.[22] Give your client options: settle the case, seek additional disclosure, oppose the motion, oppose the motion and cross-move for summary judgment, and oppose the summary-judgment motion in part and assent to part of the motion.[23]

A formal response to a summary-judgment motion is an opposition. You may submit an affirmation in opposition to the summary-judgment motion. Refer in your attorney affirmation to any affidavit you're attaching in opposition. You should also refer to any helpful information you've obtained through disclosure. Those documents include EBT transcripts, responses to interrogatories, and notices to admit. Attach as exhibits to your opposition all the documents to which you refer in your attorney affirmation.

One way to oppose your adversary's motion is on procedural grounds. Object to the evidence in your adversary's motion; argue that the evidence isn't in admissible form; then oppose your adversary's motion on the merits.[24]

If the plaintiff moved for summary judgment, as the defendant you oppose the motion by explaining how the plaintiff hasn't met its initial burden. Also demonstrate, with evidence, that a triable issue of material fact exists. If the defendant moved for summary judgment, the plaintiff in opposing the motion should set out the material facts in dispute that warrant a trial to resolve the dispute. If the defendant has met its initial burden on summary judgment and proved an affirmative defense, the plaintiff should try to negate any element of the defendant's defense.

Opposing a summary-judgment motion with an attorney affirmation that contains unsubstantiated assertions, conclusory allegations, or speculation won't be enough to defeat the motion.[25]

Any affidavit you attach to your opposition must come from someone with personal knowledge of the facts.[26] Your affiant should authenticate the document(s) to which the affiant refers in the affidavit.[27] Attach those documents as exhibits. The documents you submit must be in admissible form. (The *Legal Writer* will discuss evidence in admissible form in the next issue of the *Journal*.)

On a summary-judgment motion, courts will not resolve issues of credibility.[28] The court will not decide from the affidavits you've attached whether your witnesses are telling the truth or whether your adversary's witnesses are telling the truth. The court will instead decide whether the discrepancy between the witnesses' stories creates a material issue of fact. If you demonstrate in your opposition papers that material issues of fact exist, the court will deny your adversary's motion.

Cross-Moving to Amend Your Pleadings

You might need to cross-move to amend your pleadings when you've omitted from your pleadings an essential element of a claim or defense.[29] Amending the pleadings might render your adversary's summary-judgment motion academic. Consult CPLR 3025(b) before moving to amend your pleadings.

Along with your notice of cross-motion and supporting papers, include a copy of your proposed amended pleadings. If you're seeking to amend the pleading after the note of issue was filed (or notice of trial, in lower courts like New York City Civil Court), you'll also need to explain the merit to amending your pleading and the reasonable excuse for the delay in moving for amending the pleading.[30] Tell the court how your adversary wasn't prejudiced by your delay in moving to amend the pleading.

Cross-Moving for Summary Judgment

Cross-moving for summary judgment is different from cross-moving to amend your pleadings. Cross-moving for summary judgment means that you're seeking a judgment on the papers.

Cross-move against the party who initially moved for summary judgment. If the plaintiff initially moved for summary judgment, the defendant may cross-move against the plaintiff.

When a case has multiple plaintiffs and defendants, here's how you can cross-move for summary judgment. Consider a case with plaintiffs Adams and Block and defendants Crane and Daniels. If Adams initially moves for summary judgment against Crane, Daniels may cross-move against Adams for summary judgment even if Adams's motion was against Crane. Adams, however, is required to serve Daniels with the initial motion, even though Adams isn't moving for summary judgment against Daniels. Likewise, if Crane initially moves for summary judgment against Block, Adams may cross-move against Crane.

Under CPLR 2215, you're permitted to cross-move with or without supporting papers. You might want to include an affirmation piecing together the facts of your case, the affidavits, and the exhibits you attach to your motion. Include in a cross-motion for summary judgment a notice of cross-motion, supporting affidavit(s), and other documents to support your position.

The papers you submit in your cross-motion might be similar or

almost identical to your opposition to your adversary's summary-judgment motion. Many litigators combine their cross-motion papers with their opposition papers. They label their documents this way: "Defendant's Cross-Motion for Summary Judgment and Affirmation in Opposition to Plaintiff's Summary-Judgment Motion." *Or:* "Plaintiff's Cross-Motion for Summary Judgment and Affirmation in Opposition to Defendant's Summary-Judgment Motion." Other litigators file two separate documents instead of combining the two.

Comply with CPLR 2215 service deadlines.

Your cross-motion for summary judgment is returnable on the same date as your adversary's opening motion. The court will hear both motions on the same date. The motions might have separate return dates if the court orders different dates or if the attorneys stipulate to different dates.[31]

Replying to Opposition Papers

You've moved for summary judgment and your adversary opposed your motion. Now it's time to reply to your adversary's opposition papers. Label your papers accordingly: "Defendant's Reply to Plaintiff's Affirmation in Opposition to Defendant's Summary-Judgment Motion." *Or:* "Plaintiff's Reply to Defendant's Affirmation in Opposition to Plaintiff's Summary-Judgment Motion."

After receiving your adversary's opposition papers, you might realize that your adversary has raised a triable issue of fact. If so, you may withdraw your summary-judgment motion. A court might impose sanctions if it finds that your motion is frivolous.

If your adversary hasn't opposed your summary-judgment motion, there's no need to file a reply. The court might, on default, grant your motion if it's unopposed, but only if your papers persuade the court that you've made out your prima facie case and that you're entitled to judgment as a matter of law.

You may not cure deficiencies in your summary-judgment motion by making new arguments or submitting new proof in your reply.

If your adversary opposed your motion, reply if there's a need to reply. Don't reply simply to have the last word.[32] Limit your reply to the matters your adversary raised in its opposition papers. You may not cure deficiencies in your summary-judgment motion by making new arguments or submitting new proof in your reply. If you've omitted something minor from your motion, a court will allow you to correct that error in a reply.[33] Don't repeat the same things you've argued in your summary-judgment motion. Don't waste the court's time.

If your adversary's proof in its opposition papers is inadmissible, address the argument of inadmissibility in your reply. Argue to the court that it shouldn't consider your adversary's proof.

A reply is authorized only if you've complied with CPLR 2214(b). Your adversary or the court may permit you more time to reply.

Some judges, especially in New York Supreme Court, require that you deliver to the judge all the papers (motion, opposition, and reply) several days before the return date. Know your court. Know your judge's rules.

Opposing a Cross-Motion for Summary Judgment

CPLR 2215, which covers cross-motions, doesn't address opposition papers to cross-motions.

Some practitioners oppose cross-motions as a matter of course. Some practitioners oppose cross-motions because a response might be necessary. Opposition papers might be necessary if your adversary's cross-motion papers are based on matters you didn't raise in your original summary-judgment motion. You'll need to address those matters. The court might grant your adversary's cross-motion because you failed to oppose the cross-motion.

In the upcoming issue of the *Journal*, the *Legal Writer* will continue with summary-judgment motions and will discuss, among other things, the evidence — and its admissibility — in support of or in opposition to a summary-judgment motion. ■

Gerald Lebovits (GLebovits@aol.com), a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column.

1. 1 Byer's Civil Motions § 77:108 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).

2. David Paul Horowitz, 2012 Motion Practice Update, N.Y. St. Jud. Inst., 12th Jud. Dist. Legal Update Program 1, 10 (Apr. 18, 2012).

3. *See Kozlowski v. Alcan Aluminum Corp.*, 209 A.D.2d 930, 931, 621 N.Y.S.2d 240, 241 (4th Dep't 1994) ("We reject plaintiffs' contention that the affidavit submitted by defendant's expert should not be considered because defendant failed to disclose the expert's identity in a reasonable time pursuant to CPLR 3101(d)(1)(i)."). *But see Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dep't 2008) ("The Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe, since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter.").

4. CPLR 2106.

5. *See Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E. 2d 718, 721 (1980) ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', *e.g.*, documents, transcripts.").

6. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:475, at 36-48. (2006; Dec. 2009 Supp.).

7. David D. Siegel, New York Practice § 285, at 485 (5th ed. 2011).

8. CPLR 3212(e).

9. Siegel, *supra* note 7, at § 285, at 485.

10. *Id.* at § 285, at 487; Byer's Civil Motions, *supra* note 1, at § 77:17 (citing *Pease & Elliman, Inc. v. 926 Park Ave. Corp.*, 23 A.D.2d 361, 362, 260 N.Y.S.2d 693, 695 (1st Dep't 1965) ("It was proper for Special Term to permit the severance of the second cause of action and the counterclaim interposed with respect thereto, and to direct the entry of judgment on the other causes of action as to which no defense either by way of pleading or affidavit had been submitted. Here, the severed action and related counterclaim are unrelated to the causes on which the plaintiff is entitled to recover. Hence, plaintiff should be awarded judgment unless it affirmatively appears that defendant will be prejudiced. Such might be the case if it appeared that plaintiff is financially unstable. There is no showing of legal prejudice and hence no basis for withholding judgment in favor of the plaintiff on the two causes of action as to which there is no factual issue."), *aff'd*, 17 N.Y.S.2d 992 271 N.Y.S.2d 992, 218 N.E.2d 700 (1966).

11. Siegel, *supra* note 7, at § 285, at 485-86.

12. *Id.* at § 285, at 486.

13. *Id.*

14. *Id.*

15. *Id.* (quoting *Robert Stigwood Org. v. Devon Co.*, 44 N.Y.2d 922, 923, 408 N.Y.S.2d 5, 6, 379 N.E.2d 1136, 1137 (1978).

16. *Id.*

17. *Id.* § 285, at 487.

18. *Id.*

19. Barr et al., *supra* note 6, § 37:464, at 36-47.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The *Legal Writer* explained in Part XXI of this series the burdens of proof when a party moves for summary judgment or opposes the motion. *See Drafting New York Civil-Litigation Documents: Part XXI — Summary-Judgment Motions Continued*, 85 N.Y. St. B.J. 64 (Jan. 2013).

25. Horowitz, *supra* note 2, at 16 (citations omitted); Byer's Civil Motions, *supra* note 1, at § 77:08.

26. For more on affidavits, see part XXI of this series.

27. Barr et al., *supra* note 6, at § 37:464, at 36-47.

28. Horowitz, *supra* note 2, at 13 (citations omitted).

29. Barr et al., *supra* note 6, at § 37:522, at 36-51.

30. *Id.*

31. 22 NYCRR 202.8, Uniform Civil Rules for the Supreme Court and the County Court.

32. Gerald Lebovits, The Legal Writer, *Or Forever Hold Your Peace: Reply Briefs*, 82 N.Y. St. B.J. 64, 64 & 58 (June 2010).

33. Horowitz, *supra* note 2, at 17 (citing *Brightly v. Liu*, 77 A.D.3d 874, 875, 910 N.Y.S.2d 114, 115 (2d Dep't 2010) (permitting plaintiff to correct affirmation and submit signed, notarized affidavit from the same chiropractor because chiropractor was not a physician)); *Riley v. Segall, Netuerov & Singer*, 82 A.D.3d 572, 572, 918 N.Y.S.2d 488, 488 (1st Dep't 2011) (holding that court should have considered the summary-judgment motion on its merits even though defendants omitted an exhibit, a letter, in its motion papers filed with the court but included it in its reply when plaintiffs received a copy of the exhibit as part of its copy).

CLASSIFIED NOTICES

RESPOND TO NOTICES AT:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

DEADLINE FOR SUBMISSIONS:
Six weeks prior to the first day of the month of publication.

NONMEMBERS:
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

MEMBERS:
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

SEND ADS WITH PAYMENT TO:
Network Media Partners
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
mschwartz@networkmediapartners.com

INCORPORATION SERVICES

Add business formation services to your practice without adding demands on your resources.

Help clients incorporate or form limited liability companies with America's leading provider of business formation services. We can also assist in out-of-state qualifications.

Call us today at 800-637-4898 or visit www.incorporate.com to learn more.

LEGAL NOTICE

I am looking for a lost Last Will and Testament of Ashraf H.M. Rizvi. Please call Firas Nesheiwat at (845) 473-4500 if you have any information.

REFER US YOUR DISABILITY INSURANCE CASES

Attorneys Dell & Schaefer - Our disability income division, managed by Gregory Dell, is comprised of eight attorneys that represent claimants throughout all stages (i.e. applications, denials, appeals, litigation & buy-outs) of a claim for individual or group (ERISA) long-term disability benefits. Mr. Dell is the author of a Westlaw Disability Insurance Law Treatise. Representing claimants throughout New York & nationwide. Referral Fees

212-691-6900, 800-828-7583,
www.diAttorney.com,
gdell@diAttorney.com.

WEB-BASED TIME & BILLING SOFTWARE

Developed specifically for solo practices, Time59 is easy to use and is priced at just $99.95 / YEAR for unlimited use. Use promo code NYSBA and get 4 FREE additional months. Complete information can be found at WWW.TIME59.COM

INDEX TO ADVERTISERS

Attorneys Dell & Schaefer Chartered	60
Firas Nesheiwat, Attorney at Law	60
Heslin Rothenberg Farley & Mesiti P.C.	45
International Genealogical Search, Inc.	19
LawPay	25
NAM	17
The Company Corporation	60
Time59	60
USI Affinity	4
West, a Thomson Reuters Business	cover 4

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/13 - 1/18/13 _____ 31

NEW LAW STUDENT MEMBERS
1/1/13 - 1/18/13 _____ 53

TOTAL REGULAR MEMBERS
AS OF 1/18/13 _____72,879

TOTAL LAW STUDENT MEMBERS
AS OF 1/18/13 _____3,480

TOTAL MEMBERSHIP AS OF
11/18/13 _____76,359

MOVING?
let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

OCA Attorney Registration
PO BOX 2806, Church Street Station
New York, New York 10008

TEL **212.428.2800**
FAX **212.428.2804**
Email **attyreg@courts.state.ny.us**

New York State Bar Association
MIS Department
One Elk Street, Albany, NY 12207

TEL **518.463.3200**
FAX **518.487.5579**
Email **mis@nysba.org**

PRESENTATION SKILLS FOR LAWYERS
CONTINUED FROM PAGE 50

material in advance. If you are familiar enough with the material, you can let your eyes wander from the page and connect with your audience. Use your finger to keep track of your place in the document, but maintain eye contact with your audience. A good rule of thumb is to look at your audience at least half the time. The best presenters can maintain eye contact with the audience over 75% of the time while reading from a script or document.

Remember, the reason that you're reading aloud is to communicate an idea, belief, or image to your audience. If you apply these tips the next time you read from prepared notes or from a document, you will help your audience pay attention to what you're saying and your presentation will be a success. ■

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Several readers have written to ask whether *loan* can now properly be substituted for the traditionally correct verb *lend*.

Answer: The verb *loan* has long been acceptable if one uses this test: language that is current, national, and reputable is correct. The only possible drawback is that last prong of the test: Is *loan* as a verb "reputable"? For example, the 125 members of the prestigious Usage Panel of *The American Heritage Dictionary* (Second College Edition, 1985) stated that although *loan* had long been used as a verb, especially in business, many persons consider *lend* the preferred form, both in general and in formal writing.

They added that *lend* must be used in idiomatic phrases like "lend an ear," "distance lends enchantment," and "moneylender." (Try substituting *loan* for *lend* in these phrases, and you'll agree.)

However, since 1985, in general usage, the verb *loan* has virtually replaced *lend* because people who speak English tend to shift words easily from one category to another, especially by creating verbs from nouns. Long ago the verb *stone* was coined from the noun *stone*; the verb *impact* from its noun; and the verb *to counter* from *counter*; along with hundreds of others.

Unfortunately, since *loan* is now used as a verb, the verb *lend* has all but disappeared. But should you continue to use it? The answer is probably "yes," especially in formal and legal writing, both of which tend to be conservative. Informally, however, if you abandon the verb *lend*, you will have plenty of company – and only a few detractors.

The loss of the verb *lend* is unfortunate because the loss of precision in language means the loss of distinctions. For example, not long ago *disinterested* meant "objective, without bias"; it was distinguished from *uninterested*, which meant "lacking interest." Then people began to use *disinterested* for *uninterested*. The adjective *uninterested* is now rarely used; and "disinterested" now often means "uninterested," not "objective," so a valuable distinction has been lost.

Currently the same loss is occurring in two adjectives – *reticent*, which means "characteristically reserved or hesitant to speak," and *reluctant*, meaning "averse or unwilling." On this morning's news, a senator commented that a government administrator, being questioned on a certain subject, was "reticent to speak." Calvin Coolidge (dubbed "Silent Cal") was reticent ("characteristically reserved"). But the administrator quoted was not "reticent," only reluctant to speak on that subject.

The substitution of *reticent* for *reluctant* is now common; if *reticent* replaces *reluctant* in this context, the English language will lose another valuable distinction. (Then how can we describe a person as being the opposite of "loquacious"?)

It seems a shame that the combination of careless thinking and sloppy usage can cause a loss in language precision.

Question: Which of the following sentences is correct? I think the first one is, but I see the second more often:

This one is different from that one.

This one is different than that one.

Answer: This question was submitted some time ago by New Jersey attorney James B. Smith, and his choice of *from* indicates that he has had instruction in grammar as an elementary student. But though *from* is still correct, almost all Americans prefer *than*, and it is now acceptable. The preference for *than* is probably based on the fact that *than* is used along with the comparative form of adjectives (*larger than*, *newer than*, and others).

Britons, on the other hand, prefer *different to* to *different than*. The choice of *different from* was endorsed by conservative grammarian H. W. Fowler in his *Dictionary of Modern English Usage*. Today both are overruled by English speakers in England and the United States.

However, the prestigious *Oxford English Dictionary* (OED) accepts both forms, although if you visit England, try to use *different to* or *different from*.

Potpourri

A Boston attorney sent an e-mail about a usage that is new in his area: If you are unmarried, you are not necessarily "single." You are single only if you are unmarried and also not in a "relationship." So, in Boston, watch your language: you may be "related" though you are unmarried. ■

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

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

Teresa Schiller
Associate Executive Director
tschilller@nysba.org

Richard J. Martin
Assistant Executive Director
rmartin@nysba.org

Executive Services
Andria Bentley, *Executive Services Counsel*
abentley@nysba.org

Kevin Getnick, *Executive Services Counsel*
kgetnick@nysba.org

Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

Media Services and Public Affairs
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

Mark Mahoney, *Associate Director*
mmahoney@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Brandon Vogel, *Media Writer*
bvogel@nysba.org

Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

MIS
Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Lucian Uveges, *Database Administrator*
luveges@nysba.org

Paul Wos, *Data Systems and Telecommunications Manager*
pwos@nysba.org

Web Site
Barbara Beauchamp, *Manager of Internet Services*
bbeauchamp@nysba.org

Governmental Relations
Richard Rifkin, *Senior Director*
rrifkin@nysba.org

Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin M. Kerwin, *Associate Director*
kkerwin@nysba.org

Continuing Legal Education
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org

CLE Programs
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

Carl Copps, *CLE Program Attorney*
ccopps@nysba.org

Kimberly Francis, *CLE Program Coordinator*
kfrancis@nysba.org

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

CLE Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org

Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

Law Practice Management
Katherine Suchocki, *Director*
ksuchocki@nysba.org

Finance
Kristin M. O'Brien, *Senior Director*
kobrien@nysba.org

Cynthia Gaynor, *Controller*
cgaynor@nysba.org

General Counsel Services
Kathleen R. Mulligan-Baxter, *General Counsel*
kbaxter@nysba.org

Law, Youth and Citizenship Program
Eileen Gerrish, *Director*
egerrish@nysba.org

Lawyer Referral and Information Service
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

Pro Bono Affairs
Gloria Herron Arthur, *Director*
garthur@nysba.org

Human Resources and Customer Service
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

Sonja Tompkins, *Manager*
stompkins@nysba.org

Member Services Division
Richard J. Martin, *Assistant Executive Director*
rmartin@nysba.org

Marketing

Membership Services
Patricia K. Wood, *Senior Director*
pwood@nysba.org

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

Section Services
Lisa J. Bataille, *Chief Section Liaison*
lbataille@nysba.org

Print and Facilities Operations
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

Building Maintenance

Design Services

Graphics

Print Shop
Gordon H. Ryan, *Director of Design, Printing and Fulfillment Services*
gryan@nysba.org

The New York Bar Foundation
Deborah Auspelmyer, *Foundation Administrator*
dauspelmyer@tnybf.org

THE NEW YORK BAR FOUNDATION

2012-2013 OFFICERS
Cristine Cioffi, *President*
2310 Nott Street East, Niskayuna, NY 12309

John J. Kenney, *Vice President*
10 East 40th Street, 35th Fl., New York, NY 10016

Patricia K. Bucklin, *Secretary*
One Elk Street, Albany, NY 12207

Richard Raysman, *Treasurer*
31 West 52nd Street, New York, NY 10019

DIRECTORS
James R. Barnes, *Albany*
Earamichia Brown, *New York*
Marion Hancock Fish, *Syracuse*
Sheila A. Gaddis, *Rochester*
Sharon Stern Gerstman, *Buffalo*
Michael E. Getnick, *Utica*
Robert L. Haig, *New York*
Frank M. Headley, Jr., *Scarsdale*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
Glenn Lau-Kee, *New York*
Susan B. Lindenauer, *New York*
Joseph V. McCarthy, *Buffalo*
Martin Minkowitz, *New York*
Patrick C. O'Reilly, *Buffalo*
Carla M. Palumbo, *Rochester*
Lesley Friedman Rosenthal, *New York*
Sanford J. Schlesinger, *New York*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO
James B. Ayers, *Albany*
Chair of The Fellows

Emily F. Franchina, *Garden City*
Vice Chair of The Fellows

JOURNAL BOARD MEMBERS EMERITI

Howard Angione
Immediate Past Editor-in-Chief

Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Willard DaSilva
Louis P. DiLorenzo
Philip H. Dixon
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Judith S. Kaye
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Gary A. Munneke
John B. Nesbitt
Kenneth P. Nolan
Eugene E. Peckham
Albert M. Rosenblatt
Lesley Friedman Rosenthal
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

2012-2013 OFFICERS

SEYMOUR W. JAMES, JR.
President
New York

DAVID M. SCHRAVER
President-Elect
Rochester

DAVID P. MIRANDA
Secretary
Albany

CLAIRE P. GUTEKUNST
Treasurer
New York

VINCENT E. DOYLE III
Immediate Past President
Buffalo

VICE-PRESIDENTS

FIRST DISTRICT
Catherine A. Christian, *New York*
Jay G. Safer, *New York*

SECOND DISTRICT
Manuel A. Romero, *Brooklyn*

THIRD DISTRICT
Lillian M. Moy, *Albany*

FOURTH DISTRICT
Rebecca A. Slezak, *Amsterdam*

FIFTH DISTRICT
Thomas E. Myers, *Syracuse*

SIXTH DISTRICT
Mark S. Gorgos, *Binghamton*

SEVENTH DISTRICT
June M. Castellano, *Rochester*

EIGHTH DISTRICT
Sharon Stern Gerstman, *Buffalo*

NINTH DISTRICT
Hon. Arlene Gordon-Oliver, *White Plains*

TENTH DISTRICT
Emily F. Franchina, *Garden City*

ELEVENTH DISTRICT
Richard M. Gutierrez, *Forest Hills*

TWELFTH DISTRICT
Steven E. Millon, *Bronx*

THIRTEENTH DISTRICT
Michael J. Gaffney, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
T. Andrew Brown
Hon. Margaret J. Finerty
Glenn Lau-Kee
Ellen G. Makofsky
Edwina Frances Martin
Sherry Levin Wallach
Oliver C. Young

NYSBA

MEMBERS OF THE HOUSE OF DELEGATES

FIRST DISTRICT
Aaron, Stewart D.
Abdelhamid, Reema Salah
Abella, Zachary J.
Abernethy, Samuel F.
† * Alcott, Mark H.
Baum, Simeon H.
Berman, Scott M.
Blessing, Peter H.
Brown, Earamichia
Brown, Terryl
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
Christian, Catherine A.
Clark, Jason Myles
* Cometa, Angelo T.
Davis, Megan P.
Davis, Tracee E.
Di Pietro, Sylvia E.
Donaldson, Xavier Robert
Dunne, Carey R.
Ellerin, Hon. Betty Weinberg
Eng, Gordon
Eppler, Klaus
Fahey, Stacey O'Haire
Feinberg, Ira M.
Finerty, Hon. Margaret J.
Fontaine, R. Nadine
* Forger, Alexander D.
Freedman, Hon. Helen E.
Friedman, Richard B.
Galligan, Michael W.
Glanstein, Joel C.
Green, Prof. Bruce A.
Gutekunst, Claire P.
Gutheil, Karen Fisher
Haig, Robert L.
Hanks, Kendyl T.
Hayes, Vilia B.
Hoffman, Stephen D.
Honig, Jonathan
Hoskins, Sharon T.
Jaglom, Andre R.
† James, Seymour W., Jr.
Kahn, Michele
Kaplan, Matthew E.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Kornfeld, John A.
Lau-Kee, Glenn
Lawton-Thames, Lynnore Sharise
† * Leber, Bernice K.
Lessard, Stephen Charles
Ling-Cohan, Hon. Doris
Lupkin, Jonathan D.
* MacCrate, Robert
Maltz, Richard M.
Marino, Thomas V.
Martin, Deborah L.
McNamara, Michael J.
Minkoff, Ronald
Minkowitz, Martin
Morales, Rosevelie Marquez
Nelson, Lester
Nijenhuis, Erika W.
Parker, Bret I.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Reed, Thomas A.
Richter, Hon. Rosalyn
Robb, Kathy Ellen Bouton
Robertson, Edwin David
Rosner, Seth
Rothstein, Alan
Safer, Jay G.
Scanlon, Kathleen Marie
Schwartz, Jodi J.
Serbaroli, Francis J.
* Seymour, Whitney North, Jr.
Shamoon, Rona G.
Siegel, Charles J.
Sigmond, Carol Ann
Silverman, Caryn M.
Smith, Asha Saran
Sonberg, Hon. Michael R.
* Standard, Kenneth G.
Stenson Desamours, Lisa M.
Stern, Mindy H.
Swanson, Richard P.
Tesser, Lewis F.
Ugurlayan, Anahid M.
Valet, Thomas P.
Walsh, Susan J.
Wiig, Daniel K.
Wolk, Lawrence J.
† * Younger, Stephen P.
Zuchlewski, Pearl

SECOND DISTRICT
Ajaiyeoba, Abayomi O.
Cohn, Steven D.
Doyaga, David J., Sr.
Fallek, Andrew M.
Gerber, Ethan B.
Kamins, Hon. Barry
Lugo, Betty
McKay, Hon. Joseph Kevin
Napoletano, Domenick
Richman, Steven H.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Nancy T.
Yeung-Ha, Pauline

THIRD DISTRICT
Ayers, James B.
Barnes, James R.
Baynes, Brendan Francis
Beckford, Marie B.
Burke, Walter T.
Cahill, Richard T., Jr.
Collura, Thomas J.
Crummey, Hon. Peter G.
Davidoff, Michael
Fernandez, Hermes
Gold, Sarah E.
Hanna, John, Jr.
Higgins, John Eric
Hurteau, Daniel Joseph
Hutter, Prof. Michael J., Jr.
Kahler, Annette I.
Kaplan, Edward Ian
Meacham, Norma G.
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Pettit, Stacy L.
Rivera, Sandra
Rosiny, Frank R.
Schofield, Robert T., IV
Schopf, Jonathan G.
* Yanas, John J.

FOURTH DISTRICT
Coffey, Peter V.
Hanson, Kristie Halloran
Hoag, Rosemary T.
McAuliffe, J. Gerard, Jr.
McMorris, Jeffrey E.
McNamara, Matthew Hawthorne
Nowotny, Maria G.
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Russell, Andrew J.
Slezak, Rebecca A.
Watkins, Patricia E.

FIFTH DISTRICT
DeMartino, Nicholas
Gall, Hon. Erin P.
Gensini, Gioia A.
Gerace, Donald Richard
† * Getnick, Michael E.
John, Mary C.
Karalunas, Hon. Deborah H.
Ludington, Hon. Spencer J.
Myers, Thomas E.
Pellow, David M.
Pontius, Nancy L.
* Richardson, M. Catherine
Stanislaus, Karen
Tsan, Clifford Gee-Tong
Woronov, Howard J.

SIXTH DISTRICT
Barreiro, Alyssa M.
Gorgos, Mark S.
Gutenberger, Kristin E.
Lanouette, Ronald Joseph, Jr.
† * Madigan, Kathryn Grant
Mayer, Rosanne
McKeegan, Bruce J.
Miller, Todd H.
Orband, James W.
Pogson, Christopher A.

SEVENTH DISTRICT
Bleakley, Paul Wendell
Brown, T. Andrew
Buholtz, Eileen E.
† * Buzard, A. Vincent
Castellano, June M.
Cecero, Diane M.
Giordano, Laurie A.
Hetherington, Bryan D.
Jackson, LaMarr J.
Lawrence, C. Bruce
McCafferty, Keith
McDonald, Elizabeth J.
* Moore, James C.
Moretti, Mark J.
Murray, Jessica R.
* Palermo, Anthony Robert
Quinlan, Christopher G.
† Schraver, David M.
Stapleton, T. David, Jr.
Tennant, David H.
Tilton, Samuel O.
* Vigdor, Justin L.
Walker, Connie O.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
† * Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerber, Daniel W.
Gerstman, Sharon Stern
Habberfield, Kevin M.
Hager, Rita Merino
† * Hassett, Paul Michael
Russ, Arthur A., Jr.
Ryan, Michael J.
Schwartz, Scott M.
Seitz, Raymond H.
Smith, Sheldon Keith
Sweet, Kathleen Marie
Young, Oliver C.

NINTH DISTRICT
Arnold, Dawn K.
Brown, Craig S.
Curley, Julie Cvek
Dorf, Jon A.
Enea, Anthony J.
Epps, Jerrice Duckette
Fay, Jody
Fedorchak, James Mark
† Fox, Michael L.
Gordon-Oliver, Hon. Arlene
Hilowitz, Lynne S.
Hollis, P. Daniel, III
Klein, David M.
Marwell, John S.
* Miller, Henry G.
* Ostertag, Robert L.
Pantaleo, Frances M.
Preston, Kevin Francis
Rauer, Brian Daniel
Riley, James K.
Ruderman, Jerold R.
Sachs, Joel H.
Singer, Rhonda K.
Starkman, Mark T.
Strauss, Hon. Forrest
Wallach, Sherry Levin
Weis, Robert A.

TENTH DISTRICT
* Bracken, John P.
Chase, Dennis R.
Collins, Richard D.
DeHaven, George K.
Ferris, William Taber, III
Fishberg, Gerard
Franchina, Emily F.
Genoa, Marilyn
Gross, John H.
Harper, Robert Matthew
Helfer, Cheryl M.
Karabatos, Elena
Karson, Scott M.
Leventhal, Steven G.
† * Levin, A. Thomas
Levy, Peter H.
Makofsky, Ellen G.
McEntee, John P.
Pachman, Matthew E.W
* Pruzansky, Joshua M.
* Rice, Thomas O.
Schoenfeld, Lisa R.
Shulman, Arthur E.
Tollin, Howard M.
Tully, Rosemarie
Warshawsky, Hon. Ira B.
Zuckerman, Richard K.

ELEVENTH DISTRICT
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Risi, Joseph J.
Taylor, Zenith T.
Terranova, Arthur N.
Wimpfheimer, Steven

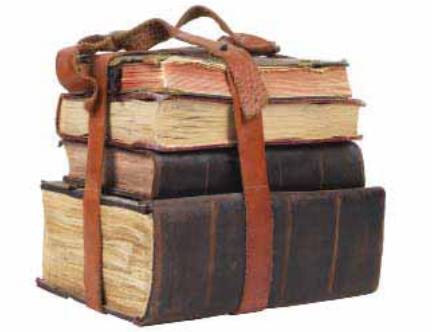
TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
Calderon, Carlos M.
DiLorenzo, Christopher M.
Friedberg, Alan B.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.

THIRTEENTH DISTRICT
Behrins, Jonathan B.
Cohen, Orin J.
Dollard, James A.
Gaffney, Michael J.
Hall, Thomas J.
Martin, Edwina Frances
Mulhall, Robert A.

OUT-OF-STATE
Kurs, Michael A.
Perlman, David B.
Ravin, Richard L.
Torrey, Claudia O.
* Walsh, Lawrence E.

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XXII — Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* discussed the burdens of proof when a plaintiff or a defendant moves for summary judgment. The *Legal Writer* also discussed the nuances to writing affidavits — the backbone of summary-judgment motions.

In this issue of the *Journal*, we continue our summary-judgment motions overview. We'll continue discussing affidavits, specifically expert-witness affidavits. We'll also discuss attorney affirmations, moving for partial summary judgment, opposing summary judgment, cross-moving to amend pleadings, cross-moving for summary judgment, replying to opposition papers, and opposing cross-motions for summary judgment.

Expert-Witness Affidavits

If you'd need an expert at trial to prove your claim or defense, you'll likely need an expert's affidavit for your summary-judgment motion or your opposition to a summary-judgment motion. In the affidavit, the expert's opinion should be supported with evidence. The expert's opinion cannot be conclusory or speculative.[1] Experts must explain the basis for their opinions and demonstrate their reliability. Experts must articulate their skill, training, education, knowledge, and experience.[2]

The best practice is to disclose to your adversary any expert witness before moving for summary judgment or before filing the note of issue (or notice of trial). At the summary-judgment phase, if you fail to disclose the expert witness, a court — depending on which department you're in — might not consider your expert's affidavit.[3]

Affirmations

Litigators typically submit affirmations as part of their summary-judgment motions or their opposition papers.

Affirmations are similar to affidavits. Both subject to the penalties of perjury someone who makes a false statement. Affirmations are different from affidavits in that affirmations dispense with the need for the individual to take an oath before a notary public.

Attorneys, physicians, osteopaths, and dentists are exempt from filing affidavits. They may submit affirmations.[4] The legislature assumes that these licensed professionals are subject not only to the penalties of perjury if they make a false statement but that they are also subject to disciplinary proceedings based on their New York license.

Litigators use attorney affirmations to set out the story of their clients' cases and to explain the documentary and testimonial evidence on which they're relying in moving for or opposing summary judgment.

Consecutively number each paragraph in the affirmation. Each paragraph should cover one topic, one fact, or one issue.

You may use an attorney affirmation to offer evidence in admissible form, such as sworn examination before trial (EBT) transcripts or documents whose authenticity is undisputed.[5] Identify in your attorney affirmation those exhibits you're including in your motion or opposition papers. *Example:* "Plaintiff's Exhibit 1." *Or:* "Defendant's Exhibit A." If you're discussing your adversary's exhibits in your attorney affirmation, refer the court to the exact exhibit. Make it easy for the court to go to the right exhibit and follow your argument.

Attorneys sometimes use attorney affirmations to proffer evidence of which they have no personal knowledge. Unless the attorney has first-hand knowledge of the facts, an attorney's affirmation has no probative value. Don't vouch for the facts contained in your affirmation. Only persons with knowledge can attest to facts.

Litigators use attorney affirmations to set out the story of their clients' cases.

Litigators often include in their attorney affirmations legal arguments and authority. The better practice is to make legal arguments in a brief or memorandum of law. Attorneys may not vouch for the truth of the law.

Some judges take motions on submissions — without oral argument. If the court takes the motion on submission, you won't have an opportunity to persuade orally.

Some judges require you to request oral argument when you move for summary judgment. Make sure to follow the judge's rules.

Some judges schedule oral argument for all motions or just for some motions like summary-judgment motions. At oral argument, consider it

CONTINUED ON PAGE 56

NYSBA**BOOKS**

NEW!

Enhance Your Practice with

New York Lawyers' Practical Skills Series . . .

Written by Attorneys for Attorneys.

Includes Forms on CD

Order Complete Set of 16 or Order Individual Titles

2012–2013 • PN: 40013GP • List Price: $800 | **NYSBA Members $600**

Practical Skills Series Individual Titles with Forms on CD
Business/Corporate Law and Practice
Criminal Law and Practice
Debt Collection and Judgment Enforcement
Elder Law, Special Needs Planning and Will Drafting
Limited Liability Companies
Matrimonial Law
Mechanic's Liens
Mortgages
Mortgage Foreclosures
Probate and Administration of Decedents' Estates
Real Estate Transactions-Commercial Property
Real Estate Transactions-Residential Property
Representing the Personal Injury Plaintiff in New York
Zoning and Land Use

NYSBA Members $90 | List $105
(If purchased separately)

Stand-alone Titles
(Without Forms on CD)

New York Residential Landlord-Tenant Law and Procedure
NYSBA Members $72 | List $80

Social Security Law and Practice
NYSBA Members $57 | List $65

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB1661 when ordering.

NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mis@nysba.org