NEW YORK STATE BAR ASSOCIATION

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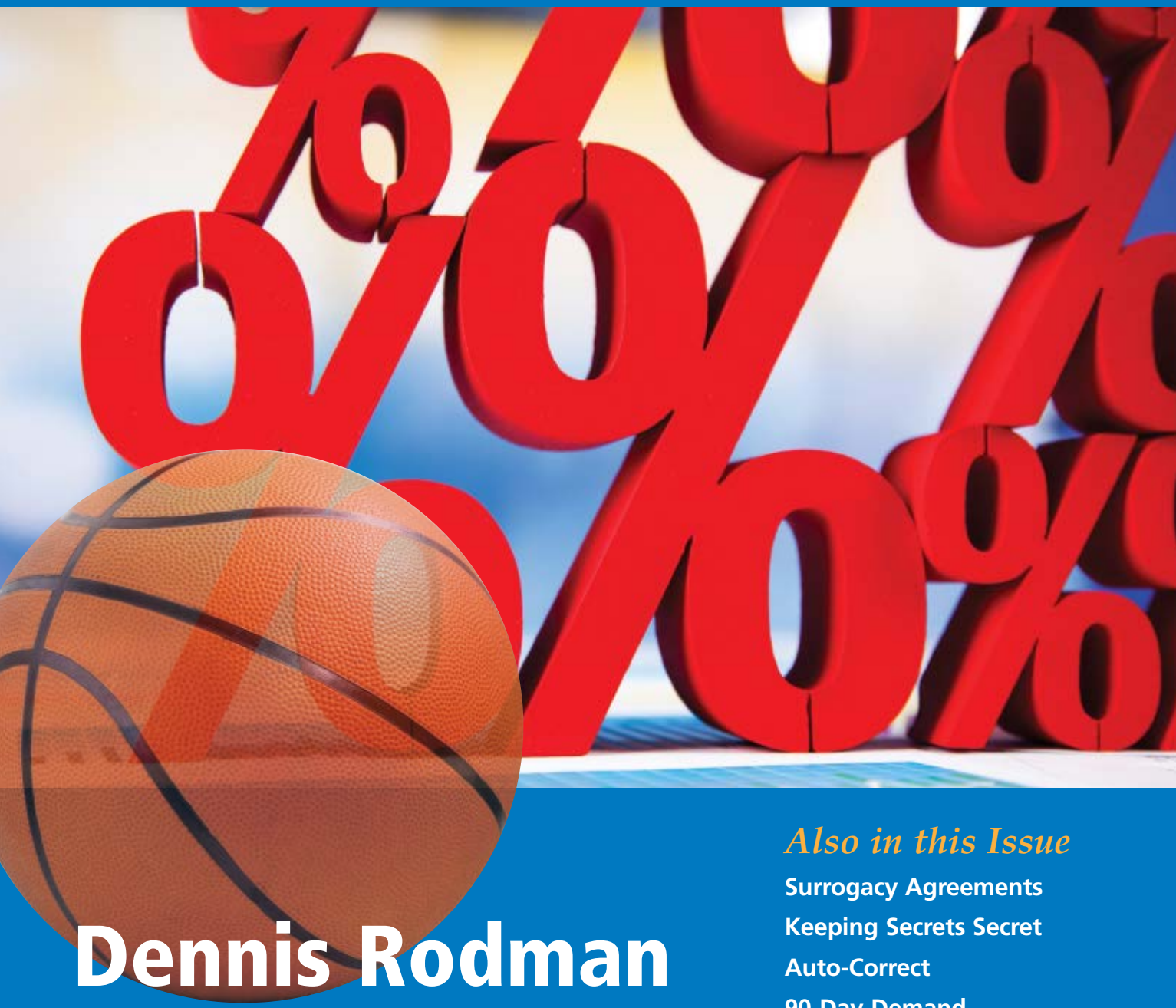

Dennis Rodman

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by Robert W. Wood

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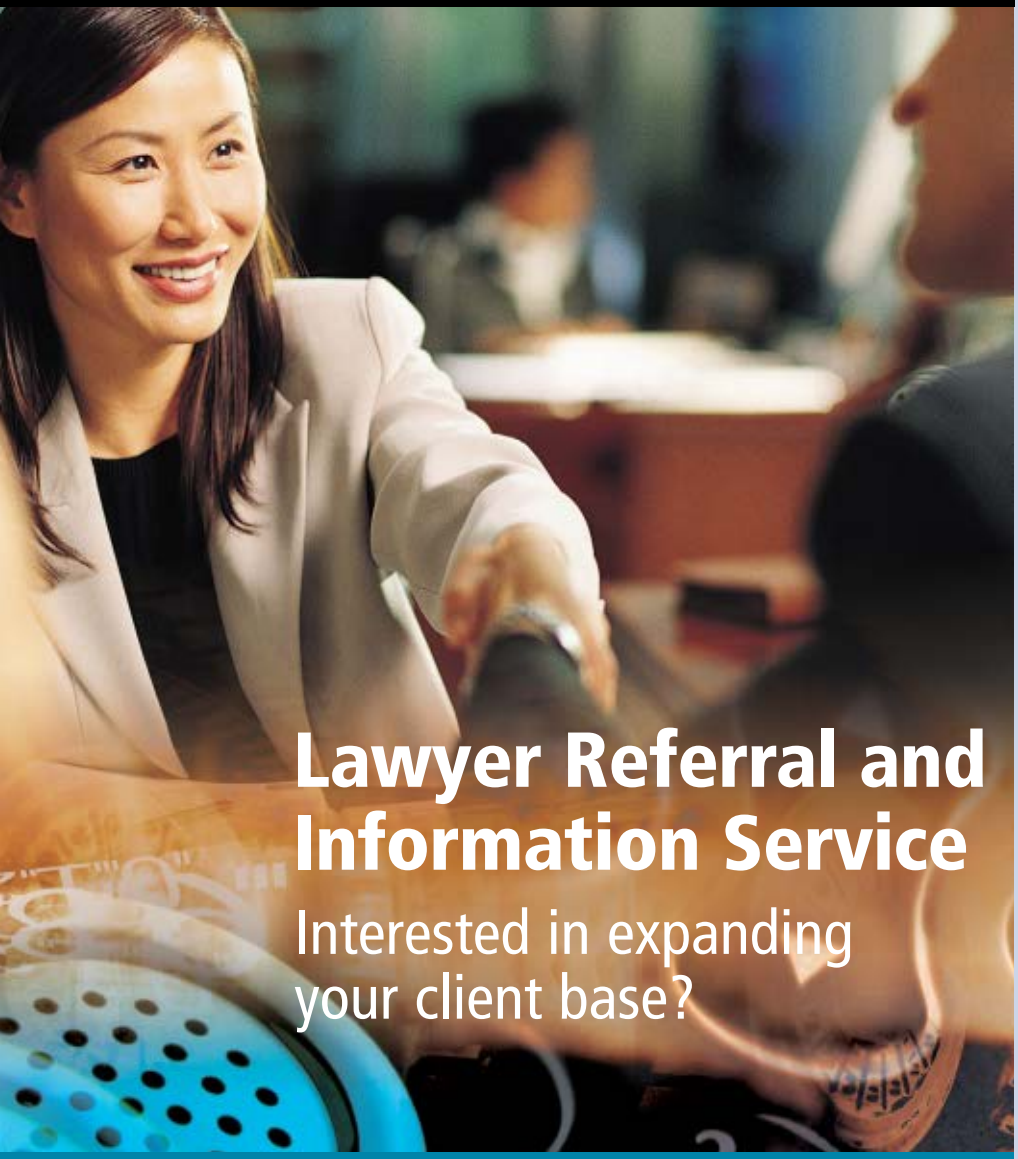

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EUGENE C. GERHART
(1912–2007)
Editor-in-Chief, 1961–1998

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DEPARTMENTS

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DAVID P. MIRANDA

Advocating for Our Clients, Our Members and Our Profession

"The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow . . ."

– Harper Lee
To Kill a Mockingbird

Throughout our country's history, lawyers have come under scrutiny, and sometimes unfairly maligned, not because of any misdeeds but for having represented unpopular clients. When Capt. Thomas Preston and eight British soldiers were charged with murder in the aftermath of the Boston Massacre, John Adams courageously undertook their representation after several other lawyers refused to defend them. Adams's courage was bolstered by his firm conviction that all persons accused of a crime were entitled to a fair trial and his unwavering belief in the rule of law.

John Adams's noble act reminds us that our profession is grounded in a core belief in strong professional ethics, and a duty of unfettered advocacy for our clients. This strong emphasis on the ethical underpinnings of our profession has informed the significant, positive roles attorneys have played in shaping our country – as leaders, as politicians, as educators, as community activists, even as leaders of private businesses. Our education and training and our core principles guide us in our efforts to step above the fray and advocate diligently for our clients. Our responsibility as officers of the court to ensure justice demands nothing less.

Bar associations generally, and our Association in particular, came into existence when lawyers and judges voluntarily came together to, in the words of our Bylaws, "foster a spirit of collegiality . . . [and] apply [their] knowledge and experience in the field of law to promote the public good." Today, as when our Association was founded, we rely primarily on our members' volunteer efforts to carry out this mission. As President, I have the privilege of seeing, and am grateful for, the time and energy our members dedicate to the good causes of our Association.

We advocate every day on behalf of our clients, and one of our Association's most important roles is to advocate on behalf of the attorneys of our state. Our Association studies, works on and helps shape the laws and policies impacting the legal profession and the public. For more than 130 years, our Association has taken a leading role in developing and refining the rules and procedures – the architectural bones – of our profession. Our Committee on Standards of Attorney Conduct studies the Rules of Professional Conduct and other rules governing attorneys and recommends changes to ensure that these standards are current and enable lawyers to represent and protect their clients appropriately. Other committees, such as our Committee on Civil Practice Law and Rules, develop proposals to improve our court system. And our newly formed Committee on the New York State Constitution will look for ways the very structure of our state government and court system can be improved. Our Association's leadership meets regularly with legislators in both Albany and Washington, D.C., to advocate for adequate court funding, legal services funding, and access to justice for the indigent.

One recent example of the impact our Association can have is our role in developing legislation to address wrongful convictions by requiring the taping of custodial interrogations and by requiring changes to witness identification procedures to minimize the potential for misidentification. Our immediate past president, Glenn Lau-Kee, worked with determination and diplomacy to broker an agreement between the District Attorneys Association of the State of New York and The Innocence Project on such legislation, which was introduced during the 2015 session. Additional credit is due to our Task Force on Wrongful Convictions, appointed by then-President Bernice K. Leber, which produced a comprehensive report in 2009 with recommendations to address this issue. Our Association will continue to advocate

DAVID P. MIRANDA can be reached at dmiranda@nysba.org.

for balanced reforms to our criminal justice system.

In addition to our important work on legal reforms to benefit all New Yorkers, we must advocate for the advocates, and as the Association's President, a major focus will be on improving our service to our Association's 74,000 members, who are not only in New York, but in the 50 states and many countries throughout the world. We are working on reshaping the way we reach out to different segments of our membership – each with distinct needs and experiences informed by the nature of their practice. To this end, we have identified three major segments of our profession and developed new strategies to be of greater value to them: first, law students, law professors, and young and newly admitted attorneys; second, government and public interest attorneys; and third, the largest segment of our membership, solo and small firm practitioners. We are working to better identify the distinct professional needs of each segment, and within each segment, and to tailor the Association's many services and benefits to each of these groups.

We continue to develop our Pathway to the Profession program – a program to help law students and new attorneys make the transition to the practice of law. Beginning June 1 of this year, every law student attending one of New York State's law schools will be able to register as a member of our Association. To better address the needs of attorneys in public service, the Association's Municipal Law Section is widening its focus to include state and government lawyers and is changing its name to the State and Local Government Section, just one element in our increased effort to let attorneys in public service know there is a place for them in our Association. Solo and small firm practitioners comprise the majority of our membership, and we will be reaching out regionally – traveling throughout the state for "Lunch on Us" focus group meetings with such practitioners, and developing essential CLE programs for this important and growing constituency. Finally, we continue to reach out to our international membership. Our members practice around the globe, with more than 50 chapters in cities worldwide.

It is my honor to serve the members of this Association and all the lawyers in our state. I am interested in talking with you about what our entire legal community and you as members need. Please do not hesitate to reach out to me at dmiranda@nysba.org. I would love to talk to you and hear your ideas on how we can better serve you, our legal community, and our noble profession. ■

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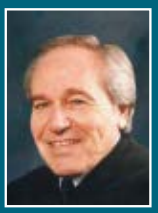

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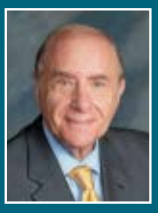

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Understanding Your Malpractice Insurance Policy
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July 22 Long Island

U.S. Supreme Court and N.Y. Court of Appeals Round-up
(live & webcast; 12:00 p.m. – 2:15 p.m.)
July 28 Albany

Client Intake: Best Practices for Attorneys
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August 6

Starting a Solo Practice in New York
(online video replay with live Q&A)
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Dennis Rodman

His Single-Handed, Lasting, Misunderstood Contribution to Settlement Agreements

By Robert W. Wood

Whether a case is settled or goes to judgment, resolution of a litigation usually involves income taxes. As a practical matter, there is usually far more flexibility when it comes to taxes in a settlement agreement.

However, the fundamental tax rules are basically the same whether money is paid under a settlement agreement or pursuant to a judgment.[1] Defendants consider taxes important because they usually deduct the settlement or judgment. Some payments must be capitalized and deducted over time; others, like payments to the government, are fines that cannot be deducted at all.[2] Legal settlements by individuals of their personal disputes may also be nondeductible. But most business defendants can deduct most litigation payments as business expenses.

Even civil punitive damages are tax deductible by businesses. That means defendants worry far less about tax issues than plaintiffs. Some defendants, however, do not worry sufficiently about the tax liabilities they may face if they fail to consider withholding of employment taxes or for payments to foreign plaintiffs.

Plaintiffs inevitably hope to minimize any taxes they will face on their recoveries. Some hope their recovery is tax-free on account of personal physical injuries or physical sickness under Section 104 of the Internal Revenue Code. Some hope for tax-free recovery of basis treatment.

Robert W. Wood is a tax lawyer with a nationwide practice (www.WoodLLP.com). The author of more than 30 books including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009 with 2012 Supplement, www.TaxInstitute.com), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

Plaintiffs who were defrauded or experienced property damage hope their recovery can be treated as merely restoring their lost or damaged property. They hope such a recovery is not taxable income, but rather can restore the basis in their property. In effect, a plaintiff who paid $100 for property, experienced damage to it in the amount of $25, might collect $25 in tax-free damages, and thereafter have an adjusted basis of $75 in the future.

Plaintiffs in employment cases hope their wage recoveries are small and their non-wage damages are large.

Plaintiffs in employment cases hope their wage recoveries are small and their non-wage damages are large. Perhaps some of their damages are in lieu of employee benefits and therefore are tax-favored. Some litigating employees claim physical injury or physical sickness damages, seeking tax-free treatment under Section 104.

Some plaintiffs recognize they will pay taxes on their recoveries, but hope for capital gain treatment rather than ordinary income. Regardless of the type of claim (contract, fraud, intellectual property, etc.), long-term capital gain looks better than ordinary income. Paying a 20% tax is better than paying a 39.6% tax.

Of course, litigation is varied, and there are many differences in fact patterns and in tax treatments. There may be a mixture of types of claims and different tax treatments. In a single case, there may be a tax-free recovery, some wages, some other income reported on a Form 1099, and some basis recovery or capital gain.

There may be interest or punitive damages, and there are often attorney-fee tax concerns. One axiom for plaintiffs is that punitive damages and interest are always taxed.[3] And since contingent legal fees are often payable by plaintiffs, they must worry about those too.

In 2005, the U.S. Supreme Court held that plaintiffs are generally treated as receiving 100% of their recovery.[4] This is so even if their lawyer is paid directly by the defendants, and even if the lawyer receives 100% of the settlement and disburses only the net two-thirds (or other share) to the plaintiff. There are exceptions, but this is the general rule.[5]

As a result, where any of the money is taxed to the plaintiff, there are questions about the type of tax deduction the plaintiff can claim for the associated legal fees. Understandably, plaintiffs do not like to end up with miscellaneous itemized deductions for their legal fees. Such deductions are subject to numerous limitations, and they can trigger the dreaded alternative minimum tax.

This is the classic context in which plaintiffs say, quite correctly, that they are being taxed on attorney fees paid to their lawyer.[6] This happens even though a plaintiff may never physically receive the lawyer's contingent fees. It is so even though the plaintiff's lawyer inevitably must also pay taxes on the same fees.

Thus, plaintiffs hope to minimize the tax impact of their attorney fees too, something that is not always easy. The result can depend on the type of case, the size and nature of the underlying taxable damages, and whether the legal fees are paid over time or are contingent. These tax issues can be challenging.

The Tax-Free Quagmire of Section 104

Many plaintiffs and many lawyers may assume that the tax issues in personal injury cases are simple. Some are, but some clearly are not, and mistakes can be costly. Section 104 of the Internal Revenue Code has posed thorny tax problems for decades, and especially since 1996.

For 70 years, the tax law said personal injury damages were tax-free. However, during the 1970s and 1980s, particularly as employment litigation increased, the IRS began to actively litigate the question of what was really an injury for this purpose. For example, how should recoveries for defamation be treated? And what about race, gender, and age discrimination?

The tax law was confusing, and thus many similarly situated plaintiffs were treated differently. In a number of employment cases, litigants allocated a few dollars to taxable wages, with the balance of the settlement coming under the heading of "emotional distress," which was thought to mean "tax-free." Then, in 1996, Section 104 was amended to say that there had to be *physical* injuries or *physical* sickness for damages to be tax-free.[7]

Over the same time, the IRS was litigating the treatment of interest and punitive damages. With the court cases the IRS won, and an additional statutory change in 1996, that treatment too was clarified. Now, it is quite clear that interest and punitive damages are taxable.

But the biggest change was in the "physical" requirement. Now, emotional distress damages are taxable unless they flow from physical injuries or physical sickness. The 1996 change was supposed to clear up all the confusion. It has not, of course, and if anything, there is more confusion.

Since then, there has been persistent controversy about what is physical and what is not. Numerous tax cases have gone to court, and the results have been mixed. But until Dennis Rodman came on the scene, there

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was almost no controversy about the tax treatment of confidentiality provisions.

Confidentiality provisions feature in almost every settlement agreement. Parties usually seek to keep the details of a settlement, especially the financial details, private. Yet in *Amos v. Commissioner of Internal Revenue*,[8] the Tax Court had to address whether a payment for confidentiality was taxable to the plaintiff who received it.

Since the debut of Mr. Rodman's settlement case, there have been nagging questions about how litigants should write confidentiality provisions in settlement agreements. What tax treatment could the parties expect from such provisions? And what should be done in writing them to recognize or sidestep those tax rules?

The Kick That Sparked Controversy

In January 1997, Dennis Rodman kicked TV cameraman Eugene Amos in the groin as he stood courtside at a basketball game. Mr. Amos went to the hospital briefly but was uninjured. Hoping to settle quickly and quietly, Mr. Rodman paid him $200,000. But a key feature of the settlement agreement was confidentiality.

The IRS *knew* Mr. Amos was not really injured. It also knew the only reason Mr. Rodman paid $200,000 for a minor bump worth far less was strict confidentiality. The Tax Court even found as a factual matter that confidentiality was the dominant reason for Mr. Rodman's payment.

Ultimately, the Tax Court in *Amos* held that $120,000 of the settlement could fairly be attributed to the physical injuries Mr. Amos *claimed* he suffered. The balance of $80,000, however, was really for confidentiality. And that, said the Tax Court, meant that the $80,000 fell into the broad catchall category of income subject to tax.

Rodman's 12-Year Itch

It has been 12 years since Mr. Rodman's contribution to the tax law. In some circles, there is still considerable worry about it. It is odd, since there has been no subsequent tax case I can find that follows *Amos* or that expands upon its reasoning.

The *Amos* case, it must be recognized, makes confidentiality a taxable item. Yet it does so on unique facts. Even then, it holds only $80,000 out of $200,000 to be taxable, when the court could perhaps have justified treating far more as subject to tax.

Over the last 12 years, confidentiality provisions still feature in virtually every settlement agreement. In true personal physical injury cases where (without interest or punitive damages) the parties all recognize that the entire recovery is tax-free, the presence of a confidentiality provision does not mean the IRS will come collect. In short, despite Mr. Rodman's kick, the tax sky has not fallen.

Nevertheless, all manner of solutions have been offered to fix this perceived tax problem. In my experience, the solutions are generally not suggested by tax lawyers. They are often proposed by well-meaning litigators or general practitioners.

I'm afraid that some suggestions are from worried practitioners who once took a tax class or who read of inflated versions of the tax problems posed by *Amos* on a personal injury firm's website. Sometimes their clients also get caught up in the Dennis Rodman hype. The normally sanguine details of a confidentiality provision can take on alarming proportions.

Among the Offered Solutions

1. Do Not Agree to Confidentiality in a Settlement Agreement

I do not see how this is very practical. At least one side in a settlement almost always wants confidentiality. Actually, though, both sides typically benefit from confidentiality. For example, plaintiffs should generally not want the amount of their settlement in the press, for tax and other reasons.

In any event, to settle cases, one must agree. To allow what is really a small, unique, and generally unimportant tax issue to drive an issue this fundamental seems unwise.

2. Demand Tax Indemnity

Agree to confidentiality, but make the defendant indemnify the plaintiff for tax consequences. In a 100% physical injury case, that would mean making the defendant guarantee that the proceeds are all tax free. This idea too seems completely impractical.

The tax law is such that getting this kind of tax indemnity from a defendant is not possible. Indeed, even in catastrophic injury cases, I have never encountered a defendant who would make this guarantee. Putting in appropriate and helpful tax language is one thing. Guaranteeing tax treatment is another.

3. Agree to Confidentiality, but Allocate a Fixed Dollar Amount – Preferably Small – to Confidentiality

That way, if it is taxable, this theory goes, it is only a *small* amount. For example, the suggestion may continue, in a $1 million serious injury case, perhaps $5,000 for confidentiality would do the trick?

Unfortunately, this too seems unworkable in most cases. A plaintiff may readily agree with this idea, figuring that tax on $5,000 would be no big deal. But a provision stating that confidentiality is worth only $5,000 is likely to mean that the plaintiff can go on television, talk about the settlement, or write a book about the case. Since the agreement allocates only $5,000 to confidentiality, the defendant's sole remedy for the breach would probably be to collect $5,000 from the plaintiff. Surely, the defendant will not agree.

4. Truly Bargain Over the Dollar Amount for Confidentiality

The parties can try to bargain at arm's length over the relative value of the confidentiality provision, coming up with a dollar figure. Yet the parties will surely differ, and it invites another round of discussions apart from the total value of the case. In any event, I find it happens rarely, and I believe it is generally a mistake, particularly if you are doing so for tax reasons.

Amos's True Effect

Perhaps a fair amount for a confidentiality provision with teeth in a $1 million case would be $100,000? $200,000? This really becomes a liquidated damages discussion. Here, the specific allocated amount for confidentiality could well be taxable.

At least the IRS could conceivably so argue based on *Amos*. It thus could be the one place where the *Amos* holding could possibly have effect, although even here the point can be debated. I still believe a settlement agreement can allocate 100% to tax-free damages despite a liquidated damages provision for confidentiality.

Moreover, if the plaintiff were to breach the confidentiality provision, intentionally or not, that figure would presumably be the damages. But I find that parties usually do not really want to bargain over the dollar amount that is payable for a breach of confidentiality. Besides, perhaps another reason not to do so is that it might conceivably be tempting fate concerning the possible IRS position – unlikely, I think, but possible.

In reality, most parties generally want confidentiality. And confidentiality may not be the *most* important part of resolving the case – the certainty and the amount of money usually are. But discretion is almost always a part of it. That is one reason why a specific dollar amount for confidentiality is often a mistake in terms of enforcement, and probably from a tax viewpoint too.

Without regard to tax consequences, suppose that a defendant wants confidentiality and wants large liquidated damages if it is breached? In my experience, that is uncommon, but where the parties do want this, if the parties can agree, the tax rules should not prevent it.

Even post-*Amos*, it is not clear whether the allocated liquidated damages would be taxable to the plaintiff when received. After all, *Amos* was not a serious injury case. It was questionable whether there even was *any* injury. There was a physical striking, but not much else. The Tax Court's exclusion of $120,000 for the injury and taxing $80,000 seemed generous to Mr. Amos.

Indeed, the case would not have been brought, in my judgment, if it had been a catastrophic injury case. Consider an auto rollover with a quadriplegic plaintiff. All of the damages in such a case would clearly be tax-free, as long as there are no punitive damages or interest, which are always taxable.

If the defendant required a liquidated damages confidentiality provision, would that amount be taxable? The IRS could make that argument, but I have not seen it, nor do I think it likely. Even if the IRS made the argument, the damages would hopefully still be treated as 100% attributable to physical injuries.

In short, the smoldering tax issues emanating from the *Amos* case have earned great notoriety. Given Mr. Rodman's other antics, however (to which we can add North Korea in the intervening years), I would bet that Mr. Rodman might find considerable satisfaction in the persistence of his mark on the tax law. ■

1. *See Estate of Longino v. C.I.R.*, 32 T.C. 904 (1959) (involving a settlement); *Levens v. Comm'r*, 1951 T.C. Memo LEXIS 45 (1951) (involving an arbitration award); *see also Sager Glove Corp. v. Comm'r*, 36 T.C. 1173 (1961), *aff'd*, 311 F.2d 210 (7th Cir. 1962).

2. *See* I.R.C. § 162(f). For a discussion of the IRS's position, *see* IRS, *Letter to Senator Grassley*, Apr. 1, 2003 (2003 TNT 68-20).

3. *See* Rev. Rul. 85-98, 1985-2 C.B. 51; *Wheeler v. Comm'r*, 58 T.C. 459 (1972).

4. *Comm'r v. Banks*, 543 U.S. 426 (2005).

5. *Id.* at 430 ("We hold that, as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee.").

6. *See, e.g., Noons v. Comm'r*, T.C. Memo 2000-106; *Benci-Woodward v. Comm'r*, T.C. Memo 1998-395, *aff'd*, 219 F.3d 941 (9th Cir. 2000); *Brenner v. Comm'r*, T.C. Memo 2001-127; *Spina v. Forest Preserve Dist. of Cook Cnty.*, 207 F. Supp. 2d 764 (N.D. Ill. 2002).

7. H.R. Conf. Rep. No. 104-737, at 301 (1996).

8. T.C. Memo. 2003-329.

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"Should It Be Excused?"

Introduction

Last issue's column concluded with a 1925 Court of Appeals decision, *Curry v. Mackenzie*,[1] by Judge Cardozo, where the Court of Appeals discussed the standard on review by the trial court when affidavits are submitted on summary judgment:

> The case must take the usual course if less than this appears. To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.[2]

The Context for Cardozo's "Feigned" Testimony Rule

In 1925, summary judgment was a very different animal from what it is today, as explained by N.Y.U. Professor of Law William E. Nelson:

> Summary judgment was one procedure developed for New York by the 1920 reforms prior to its inclusion in the Federal Rules. The early New York procedure, however, had a limited goal: it aimed only to eliminate the delay that a debtor could impose on a creditor by interposing frivolous defensive pleas to the creditor's suit to recover a debt.
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> * * *
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> As a result, a defendant who lacked a bona fide defense could not, as late as 1920, be prevented from falsely interposing a general denial to a complaint and thereby postponing the rendition of judgment against her by a period of time averaging twenty-four months.
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> * * *
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> To put an end to such dilatory tactics, the convention called by the legislature in 1920 to draft procedural rules included Rule 113 allowing summary judgment in the Rules of Civil Practice, with an effective date of October 1, 1921. The convention, however, did not make its rule applicable for the benefit of all litigants harmed by delay. Since the purpose of the rule was merely "to enable a creditor speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purposes of delay," it was made applicable only to "commercial cases," that is, to actions in which a plaintiff sought damages for a liquidated sum arising out of a contract. The cases routinely held that Rule 113 was inapplicable to other cases . . .
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> * * *
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> Under Rule 113, affidavits and documents appended thereto became the sole method for establishing facts. In order to move for summary judgment a plaintiff had to submit affidavits containing facts in support of every allegation material to the maintenance of her cause of action. Likewise, a defendant wishing to resist a summary judgment motion had to submit affidavits and other documentation supporting the factual basis of his defense. Judges would then examine the affidavits and attached documents to determine whether to grant or deny the motion.[3]

None of these cases involved a conflict between deposition testimony and either deposition corrections or a subsequent affidavit.

In *Alvord & Swift v. Stewart M. Muller Construction Co.*,[4] the Court of Appeals explained the historical origin, and limitations of, *Curry*'s "feigned" testimony rule:

> Long before enactment of the CPLR, on motion for summary judgment courts looked beyond the pleadings to discover the nature of the case. Even when deficiencies in the plaintiff's complaint have induced courts to grant summary judgment in favor of defendant, amendment of the complaint has frequently been permitted or directed, even by appellate courts. It has only been the dead hand of a criticized case that influenced courts to grant summary judgment for defendant when a plaintiff's submissions, but not its pleadings, made out a cause of action. With the advent of the modern principles underlying the CPLR, application of the archaic rule is no longer merited. It must be admitted, of course, that the archaic rule, although theoretically unsound, produces no pernicious harm so long as plaintiff may in a proper case be permitted to amend its complaint to allege the cause of action proved in its submissions, the applicable Statute of Limitations not barring the late amendment.[5]

Thus, in a very limited category of cases, *Curry* permitted a court in the era of the N.Y. Civil Practice Act to consider the veracity of statements recited in affidavits submitted on summary judgment motions. *Alvord* explains that modern procedure for amending pleadings under the CPLR has eliminated the need for the type of procedure employed in *Curry*.

So does a court have the ability to assess the credibility of an affiant's submission on summary judgment?

In 2012, in its decision in *Vega Restani Construction Corp.*,[6] the Court of Appeals made clear that a court, on summary judgment, may not make credibility determinations:

> It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof).[7]

An Anomaly of Current Practice Is That It Is Easier Today to Prevail on Summary Judgment Than at Trial

Today, trial courts, with appellate approval, are permitted to ignore two types of otherwise admissible evidence when such evidence is submitted in opposition to summary judgment motions. First, they may reject deposition corrections made pursuant to CPLR 3116(a), because the "reason" for the change is insufficient as a matter of law, a line of cases exemplified by *Ashford v. Tannenhauser*.[8] Second, they may reject affidavits submitted on summary judgment that controvert the affiant's deposition testimony, because the court determines that the affidavit is "feigned" or "tailored" to avoid the consequences of the prior deposition testimony, a line of cases exemplified by *Kudisch v. Grumpy Jack's, Inc.*[9]

At the heart, both lines of cases show an attempt by trial courts to preclude what they no doubt deems to be perjurious testimony. While this is a laudable goal, neither CPLR 3116(a) nor controlling Court of Appeals case law supports preclusion under these circumstances, since both intrude upon the fact-finding province of the jury.

The exclusion of purportedly "feigned" or "altered" testimony on summary judgment has the effect of imposing a lesser burden on a party moving for summary judgment than would be imposed upon that same party at trial. Two examples illustrate this fact.

> In 1925, summary judgment was a very different animal.

First, imagine that a party elects not to move for summary judgment, or is prevented from doing so by *Brill v. City of New York*.[10] At trial on direct examination, the plaintiff testifies as to a critical issue in the case in a manner entirely inconsistent with the testimony previously given by the plaintiff at deposition. Defense counsel, instead of proceeding directly to cross-examination, first lodges an objection at the conclusion of the direct testimony. The objection, citing *Ashford*, asks the court to disregard the "new" testimony as "feigned" and designed to avoid the consequences of the prior deposition testimony, asks that the court strike the "new" testimony. With the testimony stricken, defendant then moves for a directed verdict.

Second, imagine that at trial the plaintiff again testifies on direct and that testimony is completely at odds with the prior deposition testimony. Defense counsel, on cross-examination, and after setting the scene with a reading of the plaintiff's prior deposition testimony, asks the plaintiff, "Sir/Ma'am, why did you change your answer today from the answer given at your deposition two years ago?" The plaintiff replies, "because I was nervous," and defense counsel now moves to strike the trial testimony, again citing *Ashford*, and then moves for a directed verdict.

I know of no authority for a court to sustain either objection. Instead, as attorneys have done since a examination in a courtroom replaced trial by combat, opposing counsel will conduct a penetrating, detailed, and undoubtedly painful cross-examination of the witness. And jurors, having witnessed "the greatest legal engine ever invented for the discovery of truth,"[11] will undoubtedly render a just verdict.

Conclusion

Whether you agree or disagree that *Ashford* and *Kudisch*, et al., are correctly decided, the fact of the matter is that, under current appellate authority, we live in an *Ashford/Kudisch* world. September's column will examine some of the ethical and practical shoals in that world, and offer suggestions for successful navigation.

In the meanwhile, a happy Fourth of July to all, and try not to work too hard this summer. ■

1. 239 N.Y. 267 (1925).
2. *Id.* at 270.
3. Prof. William E. Nelson, *Civil Procedure in Twentieth Century New York*, 41 St. Louis L.J. 1157, 1170–72 (1997).
4. 46 N.Y.2d 276 (1978).
5. *Id.* at 281 (citations omitted).
6. 18 N.Y.3d 499, 505 (2012) (citations omitted).
7. *Id.* (citations omitted).
8. 108 A.D.3d 735 (2d Dep't 2013).
9. 112 A.D.3d 788 (2d Dep't 2013).
10. 2 N.Y.3d 648 (2004).
11. John H. Wigmore, quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999).

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Mommy (and Daddy) Dearest

Determining Parental Rights and Enforceability of Surrogacy Agreements

By William J. Giacomo and Angela DiBiasi

Introduction

Advances in reproductive technology raise difficult legal questions concerning the enforceability of surrogacy parenting agreements. For example, consider the recent divorce and custody battle involving television talk show host and comedian Sherri Shepherd. She and her then-husband entered into a surrogacy agreement whereby a donor egg was fertilized *in vitro*[1] with the sperm of Shepherd's husband and later implanted in a surrogate to carry the child.[2] By this surrogacy arrangement, the egg donor and Sherri Shepherd's husband are the biological parents – they each have a genetic tie to the resulting child. After conception, Sherri Shepherd and her husband filed for divorce. Shepherd is the financial "breadwinner" of the marriage; she does not want custody, parenting rights or child support obligations based on the fact that she did not give birth and has no genetic connection to the resulting child. These legal proceedings are further complicated by the fact that Sherri Shepherd filed for divorce in New Jersey (which has a similar stance to New York in deeming surrogacy agreements as unenforceable), while her husband filed for divorce in California (which recognizes the enforceability of surrogacy agreements).[3] The laws governing surrogacy agreements in the aforementioned states yield contrary results on the issue. The governing law in this area is new and evolving and, as such, the allocation of the legal rights and responsibilities depends upon which state has jurisdiction over the matter. This article will discuss the basic types of surrogacy agreements and examine the legal distinctions of their enforceability under New York and California law.

Background on Surrogacy Agreements

There are two forms of surrogacy: gestational and traditional. "In a gestational surrogacy, the surrogate mother is not genetically related to the child. Eggs are extracted from the intended mother or egg donor and mixed with sperm from the intended father or sperm donor in vitro."[4] Sherri Shepherd and her then-husband entered into a form of gestational surrogacy agreement. As such, neither Shepherd nor the surrogate have a genetic tie to the resulting child. In contrast, under a traditional surrogacy agreement, "the surrogate mother is artificially inseminated with the sperm of the intended father or sperm donor. The surrogate's own egg will be used, thus she will be the genetic mother of the resulting child."[5]

A traditional surrogacy agreement includes a waiver whereby the surrogate agrees to terminate her parental rights.

A written surrogacy agreement is usually executed by the parties seeking a surrogate as well as the surrogate who will carry the child. The terms of the agreement include the surrogate mother's obligation to carry the child in exchange for certain compensation paid to her. A traditional surrogacy agreement, where the surrogate mother provides her egg and is the biological mother of the resulting child, includes a waiver whereby the surrogate agrees to terminate her parental rights. The parties to a surrogacy agreement also agree to specific terms regarding medical care, finances, travel expenses, and the like, to be paid by the parties seeking the arrangement.[6]

Comparative Analysis of Enforceability of Surrogacy Agreements

New York Law

The issue of surrogate parenting contracts has been a controversial one in New York and action to address the issue was commenced by the New York State Legislature in 1992 in the wake of *In re Baby M*,[7] after several lower courts in New York had wrestled with the issue and reached somewhat conflicting determinations.[8]

The *Baby M* case, which was filed in New Jersey, involved a traditional surrogacy parenting agreement where "a married woman had been inseminated with . . . a 'purchasing' father's sperm who agreed to pay the woman a $10,000 fee. After the birth of the child, the woman refused to give up the child. While the trial court decreed enforcement of the surrogacy contract, the New Jersey Supreme Court held that the contract was unenforceable as against public policy."[9]

The Legislature enacted N.Y. Domestic Relations Law § 122 (DRL), effective July 1993, to address this issue, stating that "[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."[10] DRL § 121(4) defines a "[s]urrogate parenting contract" as an agreement in which "(a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and (b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation."[11] Interestingly, the Legislature did not state that such agreement was entered into in exchange for any monetary compensation. Furthermore, DRL § 124 provides that "the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations"[12] when determining parental issues relating to the resulting child. In other words, the fact that the surrogate mother bore a child pursuant to a surrogacy agreement cannot be used against her in a court of law if she seeks custody or parenting rights.

Referring back to Sherri Shepherd's surrogacy scenario, New York law (which is similar to New Jersey law) favors Shepherd since New York deems surrogacy agreements void and against public policy. Shepherd could be successful in avoiding child support for or parental obligations to the child resulting from an unenforceable surrogacy agreement. Her ex-husband and the egg donor, as the child's biological parents, could potentially be subject to statutory child support and parental obligations.

Two cases involving parental rights – one of a stepparent and the other of a spouse in a same-sex couple – raise related issues that are worth noting. In *Monroe County Department of Social Services v. Palermo*,[13] the Monroe County Department of Social Services appealed a Family Court Hearing Examiner's determination that the respondent/stepfather had no support obligations for his stepchildren, although he was directed to maintain "family" medical insurance coverage for them. The court ultimately held that the respondent/stepfather was not obligated to pay child support for the stepchildren, absent showing that the county social services department was unable to recover support from the children's biological fathers. In this case, the biological fathers' identities were known by the social services department, and the court noted that one stepchild was born of an extramarital relationship entered into by the mother years after she separated from the respondent/stepfather.[14] While the stepparent scenario is distinguishable from the surrogacy scenario since

the stepparent did not contractually arrange to bring the child into the world, it should be noted that in reviewing this stepparent situation the court similarly held that the biological parents have the primary responsibility for the child.[15]

Wendy G-M v. Erin G-M[16] concerned a same-sex married couple who entered into an agreement whereby one of the female spouses was inseminated with a donor's sperm, resulting in the birth of a child. The birth mother filed for divorce. Her spouse (who is not biologically connected to the child) sought access to the resulting child. The court held that under New York common law, she was presumed to be a parent of the child conceived from artificial insemination and born during the marriage of the same-sex couple, which marriage had occurred in another state before New York enacted its Marriage Equality Act.[17] The court found that "New York's public policy strongly favors the legitimacy of children, and that 'the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and most persuasive known to law.'"[18] This case is distinguishable from a surrogacy scenario in that it dealt with issues pertaining to the legitimacy of children and, as such, recognized parentage beyond biological ties to the resulting child. However, the court did not make a determination on the enforceability of the assisted reproduction agreement.

California Law

Contrary to New York, California recognizes the enforceability of surrogacy contracts. California's favorable approach to surrogacy agreements is acknowledged in surrogacy parenting agreement standardized forms, which contain a choice of law provision designating the applicability of California for dispute resolution.[19] In fact, such forms oftentimes specifically reference the California Supreme Court's decision in *Johnson v. Calvert*.[20]

The *Johnson* case involves a gestational surrogacy agreement where the egg is extracted from the intended mother, sperm extracted from the intended father and implanted into the surrogate; thus, the surrogate has no biological connection to the child.[21] After the birth, the "husband and wife brought suit seeking declaration that they were legal parents of child born of [a] woman in whom [the] couple's fertilized egg had been implanted."[22] The trial court held that husband and wife, as the biological and contractually intended parents, were the legal parents of the resulting child, and the surrogate had no parental rights to the child.[23] The surrogate appealed the trial court's determination, which was upheld by the Court of Appeals for the Fourth District and the Supreme Court of California.[24] The Supreme Court of California's decision examined the Uniform Parentage Act (the Act), which was repealed in 1994 and replaced with equivalent provisions in the Family Code.[25] Under California Family Code, a woman may establish maternity by proof of genetics, childbirth, or adoption.[26] In applying this standard, both the wife (as the egg donor) and the surrogate (as the child-bearer) had legitimate maternity claims via genetics and childbirth respectively. The court broke this "tie" in favor of the wife (as egg donor) who, prior to conception, was intended to be the mother and to raise and care for the child.[27] In its ruling, the court stated that surrogacy agreements are not inconsistent per se with public policy and recognized that the gestational surrogacy agreement was a factor to be considered by courts when determining parental rights under the circumstances presented.[28] The *Johnson* case "illustrates that gestational surrogacy poses fewer legal risks because the surrogate has no genetic tie to the child and consequently is less likely to be granted custody if she revokes her consent."[29]

It is important to recognize a key distinction between the gestational surrogacy that was the subject of *Johnson* versus Shepherd's gestational surrogacy arrangement. The *Johnson* case involved a gestational surrogacy agreement where the *egg is extracted from the intended mother*, and thus the surrogate has no biological connection to the child.[30] Under such circumstances, the court held that the legitimate maternity claims of Mrs. Calvert as the genetic mother and intended mother under the terms of the surrogacy parenting agreement prevailed. In contrast, Sherri Shepherd's gestational surrogacy arrangement involved an egg donor who is the genetic mother, and a surrogate who carried and delivered the child. This gestational surrogacy scenario raises unique issues of parental rights between the egg donor with a genetic tie to the child, the intended mother who initiated the procedure that resulted in the child, and the surrogate who carried and delivered the child.

In re Marriage of Moschetta[31] was a case of first impression for the California Court of Appeals to determine parental rights of a child born of a *traditional surrogacy* agreement after the intended parents had separated. Pursuant to the parties' traditional surrogacy agreement, the wife/intended parent had no genetic tie to the child since the surrogate provided the egg fertilized by the husband's sperm and carried the child to term. After the Moschettas took the child home, Mrs. Moschetta filed for legal separation and sought a determination that she was the "de facto mother" and entitled to custody of the child. The surrogate joined in the proceeding also asserting parental rights to the child.[32] "At [the 1992] trial no party asked the court to enforce the surrogacy contract; all agreed it was unenforceable. At the time they did not have the benefit of *Johnson v. Calvert* which held that *gestational* surrogacy contracts do not, on their face, offend public policy."[33] The trial court deemed the surrogate the child's legal mother. In the wake of *Johnson v. Calvert*, Mr. Moschetta appealed that determination. The appellate court upheld the trial court's determination that the biological surrogate mother was the legal mother of the child, thus leaving the intended mother Mrs. Moschetta

without parental rights.[34] The court distinguished this case from *Johnson* since *Moschetta* did not have the conflicting legitimate maternity claims based upon the Act's standard factors; rather, the Moschettas' surrogate was both the genetic mother and birth mother of the resulting child, and she did not consent to an adoption of the child by the intended mother. Accordingly, the appellate court held that it would be inappropriate to consider the validity of the surrogacy agreement where the Act resolved the parentage issue as the surrogate was both the genetic and birth mother of the child.[35]

Each state has varying approaches to surrogacy contracts.

In 1998, the California appellate court re-examined related issues in *In re Marriage of Buzzanca*.[36] The Buzzanca couple had an embryo genetically unrelated to them and arranged to have the embryo implanted into a surrogate, who would carry the child to term. Prior to the birth, Mr. Buzzanca filed for divorce and sought no responsibility for the child upon its birth. The trial court held that the child had no legal parents since the child had no connections either by birth or genetics.[37] The appellate court overturned the trial court and held that the Buzzanca couple were the legal parents, finding that genetic connection was not determinative. Rather, the court found that the parties' intentions rendered the Buzzancas the legal parents; thus Mr. Buzzanca was responsible to the child upon birth. The Buzzancas had initiated and consented to the procedure which resulted in the birth of a child and, as such, were estopped from denying their parental obligation to the child.[38]

In applying the current applicable laws in the state of California, Sherri Shepherd could assert the position that her gestational surrogacy arrangement is distinguishable from *Johnson*, since she is neither the genetic biological mother nor the child-bearing mother; her only role was as a signatory to the surrogacy agreement. Her ex-husband could rely on the *Buzzanca* holding to assert that he and Shepherd were the intended parents under the surrogacy agreement and thus are the legal parents responsible for child support obligations, irrespective of the fact that the intended mother (Shepherd) has no biological connection to the child.[39]

Other States' Laws Governing Surrogacy

Each state has varying approaches to surrogacy contracts. Examples of states generally considered as favoring enforceability of surrogacy agreements include California, Illinois, Arkansas, Maryland, and New Hampshire.[40] States that deem surrogacy contracts as void and against public policy include New York, Indiana, and Michigan.[41] Some states favor enforcing only gestational surrogacy contracts (i.e., Utah); some favor surrogacy contracts that do not require compensation (i.e., Oklahoma). Several states have not set forth any clear directives on the issue.[42]

Conclusion

Undoubtedly, the outcome of legal disputes involving the enforceability of traditional surrogacy agreements depends on which state's court has jurisdiction over the matter. If New York has jurisdiction, women who find themselves in Sherri Shepherd's position as the financial "breadwinner" spouse could successfully argue that they have no child support or other parental obligations pertaining to the resulting child of a surrogacy agreement deemed unenforceable by DRL § 122. The surrogate who carried and delivered the child could likewise assert that she has no obligations to the child resulting from the unenforceable surrogacy agreement. Sherri Shepherd's ex-husband and the egg donor, as the biological parents, would likely retain parental rights and bear the child support obligations for the resulting child.

On the other hand, if California has jurisdiction, the determination of parental rights is more complicated. Litigants who find themselves in Sherri Shepherd's position could assert that their gestational surrogacy agreement differs from the one involved in *Johnson* because the intended mother has no connection to the child by genetics or childbirth. As such, it could be argued that the court should look to the egg donor (as the genetic mother) and the surrogate (as the child bearer) when determining parental rights and obligations to the resulting child. Conversely, litigants who find themselves in Sherri Shepherd's ex-husband's position could rely on the *Buzzanca* holding to assert that the surrogacy agreement is enforceable and, accordingly, the intended parents should be deemed the legal parents of the resulting child, because they were personally responsible for setting the medical procedures in motion to create their child, irrespective of the fact that the intended mother has no genetic connection to the child.

The potentially differing outcomes reveal a need for further legislation in light of advances in reproductive technology and in the interest of consistency. "Although uniform approaches to surrogacy agreements have been suggested, none [of them] have been generally accepted."[43] ■

1. http://en.wikipedia.org/wiki/In_vitro_fertilisation ("the process by which an egg is fertilized by sperm outside of the body in vitro ('in glass') . . . cultured for 2–6 days in a growth medium and . . . then implanted in the same or another woman's uterus, with the intention of establishing a successful pregnancy").

2. *See generally* Hollie McKay, *Can Sherri Shepherd Walk Away From Unborn Surrogate Child?* (July 22, 2014), http://www.foxnews.com/entertainment/2014/07/22/can-sherri-shepherd-walk-away-from-unborn-surrogate-child/.

3. *See generally* Andrea Peyser, *Unborn Child Faces Uncertain Fate in Sherri Shepherd's Divorce War* (July 14, 2014), http://nypost.com/2014/07/14/unborn-child-faces-uncertain-fate-in-sherri-shepherds-divorce-war/.

4. Surrogate Mothers Online, LLC, *Definitions and Types of Surrogacy*, http://www.surromomsonline.com/articles/define.htm.

5. *Id.*

6. *See generally* as examples of traditional surrogacy agreements, www.surromomsonline.com/articles/ts_contract.htm; www.alllaw.com/forms/family/surrogate_parenting.

7. 109 N.J. 396 (Sup. Ct. 1988).

8. 45 N.Y. Jur. 2d Domestic Relations § 330.

9. Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law § 122 (McKinney 2010).

10. DRL § 122.

11. DRL § 121(4).

12. DRL § 124(1).

13. 192 A.D.2d 1114 (4th Dep't 1993).

14. *Id.* at 1114.

15. *Id.*; *see also* 46 N.Y. Jur. 2d Domestic Relations § 901.

16. 45 Misc. 3d 574 (Sup. Ct., Monroe Co. 2014).

17. *Id.* at 592.

18. *Id.* at 577.

19. *See generally* www.surromomsonline.com/articles/ts_contract.htm.

20. 5 Cal. 4th 84 (1993).

21. *Id.*; *see also* Surrogate Mothers Online, LLC *supra* note 4.

22. *Johnson*, 5 Cal. 4th at 84.

23. *Id.* at 88.

24. *Id.*

25. *Id.* at 89, n.5 ("Effective January 1, 1994, California Civil Code §§ 7000–7021 have been repealed and replaced with equivalent provisions in the Family Code. (Stats. 1992, ch. 162, § 4; see Fam. Code, §§ 7600–7650 [eff. Jan. 1, 1994]").

26. *Id.* at 84; *see also* Cal. Fam. Code §§ 7610(a), 7601(c), 7555.

27. *Johnson*, 5 Cal. 4th at 94.

28. *Id.* at 95.

29. Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. Contemp. Health L. & Pol'y, pp. 284–85 (2011).

30. *Id.*; *see also* Surrogate Mothers Online, LLC, *supra* note 4.

31. *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994).

32. *Id.* at 1223–24.

33. *Id.* at 1224 (internal citations omitted).

34. *Id.* at 1234–35; *see also* Cynthia E. Fruchtman, *Whose Pregnancy Is It?* (Jan. 2013), http://www.callawyer.com/clstory.cfm?eid=926465&wt.av=926465%201%Employment%20Law.

35. 25 Cal. App. 4th at 1231; *see also* 7 Willston on Contracts § 16:22 (4th ed. 2010).

36. 61 Cal. App. 4th 1410 (1998).

37. *Id.* at 1412.

38. Elaine A. Lisko, *California Appellate Courts Holds Divorcing Spouses Who Were Intended Parents of Child Resulting from Anonymous Egg and Sperm Donors and Brought to Term by Surrogate to Be Legal Parents of Child*, Health L. & Pol'y Inst., http://www.law.uh.edu/healthlaw/perspectives/Reproductive/980408Child.html.

39. *See Buzzanca*, 61 Cal. App. 4th 1410; *Artificial Insemination – Legal Aspects*, Center for Surrogate Parenting, Inc., https://www.creatingfamilies.com/intended-parents/default.aspx?id=&type=44#.

40. http://en.wikipedia.org/wiki/Surrogacy_laws_by_country#United_States.

41. *See* http://www.allaboutsurrogacy.com/surrogacylaws.htm; see statutory comparisons at http://www.law.uh.edu/healthlaw/perspectives/Reproductive/980408Child.html.

42. *Id.*

43. 7 Willston on Contracts § 16:22, n. 29.

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Keeping Your Secrets Secret

By James A. Johnson

A trade secret must be just that: secret. All inventions begin life as secrets and business related secrets are called trade secrets. Non-disclosure agreements are used to protect trade secrets and their value.

A trade secret is viewed by many as the stepchild of intellectual property. But, it is as important as patents, trademarks and copyrights. A patent is good, but if its idea is used in the conduct of business and derived from a formula, program, method, process or compilation of information that has independent economic value, the inventor must maintain its secrecy. The key is to protect trade secrets to avoid the expense of protracted litigation if an idea is stolen.

Business information that can qualify as trade secrets includes business strategies, plans, marketing schemes, pricing and costs. Virtually any information can be a trade secret so long as it is valuable, not generally known and kept secret. An inventor may need to protect a discovery prior to seeking patent protection because it could take several years to acquire a patent from the government. In addition, the inventor may want to disclose trade secret information to a prospective user, purchaser or financial backer before the patent is obtained. We live in the information age and trade secret law is specifically intended to protect information. Thus, trade secret protection is far broader than any other form of intellectual property. Yet, we need to develop a uniform standard of protecting trade secrets because of inconsistent application of what is known as the inevitable disclosure doctrine.

Patent Protection

Many inventors protect their patentable inventions as trade secrets during the initial stages of development. Later they seek patent protection when the invention is perfected, but at this juncture, the trade secret laws give the inventor the right to sue people who steal the invention. Another reason for utilizing trade secrets is that protection begins the moment the inventor discovers the secret. This is especially important where the invention may have a short commercial life that is constantly evolving, such as computer software.

Patent owners have exclusive legal rights in their invention – in effect a monopoly over their information. In contrast, trade secret owners have no monopoly over their information. A trade secret owner has the legal right to prevent only two groups of people from using or disclosing a trade secret without permission:

1. people who are bound by a duty of confidentiality not to disclose, and

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2. people who acquire the trade secret through improper means such as bribery, theft or industrial espionage.

Trade secret owners have no legal rights at all against anyone else. A trade secret automatically ceases to exist the moment it becomes public knowledge.

A trade secret is any information that is useful and private.[1] The Uniform Trade Secrets Act § 1(4) (UTSA) sets out what is protected as trade secrets:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, that: (i) derives independent economic value, actual or potential from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

Misappropriation

In general, misappropriation of trade secrets is governed by some form of UTSA.[3] In short, misappropriation means acquisition of a trade secret of another person by *improper means* or disclosure or use of a trade secret of another without consent.

Section 8 of UTSA states that "this Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the Act among states enacting it."[4] Some of the most difficult problems in the law of trade secrets involve the employer-employee relationship. The courts must strike a balance between the employer's interest in protecting trade secrets and the employee's interest in earning a living by fully utilizing his or her talents, skill and knowledge. Enter the inevitable disclosure doctrine.

The inevitable disclosure doctrine is a theory of relief used by employers to demonstrate that an injunction is necessary to prevent misappropriation of trade secrets by a former employee. The inevitable disclosure doctrine, in some jurisdictions, permits courts to enjoin an employee from working for the employer's competitors because of the threat of misappropriation. The employer must show that its employee had access to its trade secrets and that the former employee has similar responsibilities with the new employer. The employer must also show that it is inevitable that the former employee will disclose those trade secrets in the performance of his or her job duties for the new employer.[5]

Under the doctrine, a former employer is entitled to enjoin anticipated employment or other business activity that would result in inevitable disclosure. In some jurisdictions the doctrine is applicable without regard to whether there is any evidence of affirmative misconduct by the employee.[6] The court can grant a preliminary injunction against the employee from working for the competitor or from participating in certain kinds of work for the competitor.[7]

The leading case invoking the inevitable disclosure doctrine is *PepsiCo, Inc. v. Redmond*.[8] PepsiCo filed a lawsuit in federal district court seeking to enjoin its former employee William Redmond from assuming his new duties at Quaker and to prevent him from disclosing trade secrets or confidential information to Quaker.[9] On appeal, the Seventh Circuit affirmed the district court, noting that under the Illinois Trade Secrets Act (ITSA)[10] a court may enjoin the "'actual or threatened misappropriation' of a trade secret."[11] The decision to enjoin Redmond from joining Quaker for six months and permanently restraining him from using or disclosing any of PepsiCo's trade secrets or confidential information was because PepsiCo demonstrated a high degree of probability of inevitable and immediate use of trade secrets. The Seventh Circuit analyzed two prior trade secret cases in reaching its decision.[12]

States' Trade Secrets Laws and Applications

New York

The state of New York has not adopted the Uniform Trade Secrets Act, but has addressed the issue of inevitable disclosure in a bevy of cases. In *Estee Lauder Cos. Inc. v. Batra*, the district court held that a 12-month noncompetition agreement that prohibited a former executive whose office was in California from competing anywhere in the world was enforceable.[13] The employment agreement contained a New York forum selection clause and the court applied New York law even though it acknowledged California's strong public policy against enforcement of noncompeting agreements as evidenced in the California Business and Professions Code § 16600. New York had the greater interest and New York law applied. The court stated that its ruling was necessary to protect the former employer's trade secret information.[14]

In *Payment Alliance International, Inc. v. Ferreira*[15] the inevitable disclosure doctrine was used in a restrictive covenant, breach of contract employment case as a basis for establishing irreparable harm in the absence of actual misappropriation of trade secrets. The factors that the court used for guidance are

1. whether the employee's new position is identical to the old one, such that he or she could not reasonably be expected to fulfill the new job responsibilities without using the trade secrets of the former employer;
2. the extent to which the new employer is a direct competitor of the former employer;
3. the extent to which the secrets at issue would be valuable to the new employer; and
4. the nature of the industry and its trade secrets.

California

To further illustrate the disparity of the inevitable disclosure doctrine, we note that California has enacted its own version of the Uniform Trade Secrets Act.[16] The California

law allows for injunctive relief where threatened misappropriation is shown[17] – however, only if the employee manifests by words or conduct the threat of imminent use.[18] California has rejected the inevitable disclosure doctrine where a confidentiality agreement between the employer and employee is in place and converts the confidentiality agreement into a covenant not to compete.[19] In California, "threatened" misappropriation cannot be inferred from the fact that an employee began working for a direct competitor of the former employer immediately after terminating his or her employment, not even where it appears the employee will perform duties for the competitor that are the same or similar to the job duties with the former employer.[20] Nor can an individual be enjoined from competing with the former employer simply because the individual had access to and acquired the former employer's trade secrets.[21]

Texas

On September 1, 2013, Texas became the 47th state to be governed by some form of the Uniform Trade Secrets Act.[22] However, the Texas Uniform Trade Secrets Act (TUTSA) does not abrogate prior state law. The statute provides that the prior common law will still be applied to all acts of misappropriation that occurred before the new statute took effect as well as for all continuing acts. *Therefore, attorneys need to be aware of two different laws.*

Section 134A.002 of TUTSA lists definitions for trade secret, misappropriation, improper means, proper means and reverse engineering. It eliminates the continuous use requirement, which effectively broadens the definition of a trade secret from common law. The law defines "proper means" as discovery by independent development, reverse engineering unless prohibited, or any other means that is not improper.[23] This definition is not in UTSA, and no other state has adopted this definition.

TUTSA does not address the inevitable disclosure doctrine but allows the courts to develop this area of the law on a case-by-case basis.[24] However, in deciding whether the inevitable disclosure doctrine applies in TUTSA cases, the courts will consider Texas's strong public policy that every contract, combination or conspiracy in restraining trade or commerce is unlawful.[25]

Massachusetts

The Commonwealth of Massachusetts applies the inevitable disclosure doctrine but has not adopted it or the Uniform Trade Secrets Act. The court in *Marcam Corp. v. Orchard* granted an injunction against an employee to enforce a non-compete agreement despite bad faith.[26] The court stated that "it is difficult to conceive how all of the information stored in [the employee's] memory can be set aside as he applies himself to a competitor's business."[27]

However, Governor Deval Patrick in 2014 introduced Bill H.27, an act making uniform the law regarding trade secrets. As of this writing it has not been passed.

Michigan

Michigan lacks definitive case law on the inevitable disclosure doctrine. In *Allis-Chalmers Manufacturing Co. v. Continental Aviation & Engineering Corp.*, the court granted a limited injunction against an employee from performing certain duties during his job with a competitor because there was a threat he would inevitably use his former employer's trade secrets.[28] But in *Kelly Services, Inc. v. Greene,* it was determined that "for a party to make a claim of threatened misappropriation, whether under a theory of inevitable disclosure or otherwise, the party must establish more than an existence of generalized trade secrets and a competitor's employment of the party's former employee who had knowledge of trade secrets."[29]

Kelly Services, Inc. is an international staffing agency headquartered in Troy, Michigan, with branches in the state of Maine. This case, with a Michigan choice of law clause, alleges breach of contract, breach of fiduciary duty and misappropriation of trade secrets under the Michigan Uniform Trade Secrets Act (MUTSA).[30] Erin Greene had signed a contract with Kelly Services containing both non-compete and confidentiality clauses. Greene's duties at her new job at Maine Staffing were primarily clerical in nature and did not involve clerical or white collar personnel. She did not use any protected information from Kelly Services in her new position. Yet Kelly Services sought a preliminary injunction against Greene. It was denied.

Kelly Services, Inc. sets out Michigan law on non-compete clauses and their enforceability under the Michigan statute together with two separate cases in federal court in Michigan identical to the one here.[31] However, in the case sub judice the court espoused that Kelly Services had not shown sufficient likelihood that the non-compete clause will be enforceable against Greene because the Portland, Maine, office targets clients in different industries than Kelly Services. Thus, Kelly Services had no legitimate interest in preventing Greene from performing strictly clerical duties for a competitor.

Connecticut

Connecticut applies the inevitable disclosure doctrine in the absence of bad faith where a high degree of similarity between an employee's former and current employment makes it likely that the former employer's trade secrets will be disclosed either intentionally or inadvertently. Enforcement of a covenant not to compete is necessary to protect against such use and disclosure. However, any restriction on an employee's activities must be reasonable.[32]

Minnesota

Minnesota is another state lacking definitive case law regarding the inevitable disclosure doctrine. In *La Calhene, Inc. v. Spolyar*, the court enforced a non-compete agreement and enjoined an employee from working for

a competitor because he had intimate knowledge of his former employer's trade secrets. The court stated that it was all but inevitable that he would utilize that knowledge during his work with the competitor. In reaching its decision, the court applied a state statute that enjoined *actual or threatened misappropriation*.[33]

In *International Business Machines Corp. v. Seagate Technology, Inc.*, the court denied injunctive relief in the absence of an actual threat of misappropriation or an intent to disclose trade secrets.[34] The court went on to state that protection is a shield, not a sword, and in the absence of a finding of actual disclosure of or intent to disclose trade secrets, employees may pursue their chosen field of endeavor in direct competition with their prior employer.[35]

Trade Secrets Protection Act of 2014

A corporate employer with trade secrets and business in more than one state is especially at risk. Such employer cannot anticipate or prepare an effective confidentiality agreement with a prospective employee because of the different states' application of the inevitable disclosure doctrine. Some lawmakers believe that a uniform standard is needed. Enter the Trade Secrets Protection Act of 2014 in the House (HR 5233) with 18 co-sponsors and the Defend Trade Secrets Act of 2014 in the Senate (S2267), sponsored by Senators Chris Coons and Orrin Hatch. The bills provide for a five-year statute of limitations, which is longer than the three years under the Uniform Trade Secrets Act. In addition, the bills permit trial judges to issue protective orders during the litigation and authorize interlocutory appeals of orders denying confidential treatment. Moreover, the legislation has an extraterritorial effect applying to conduct outside of the United States, so long as some act in furtherance of the misappropriation was committed in the United States. Both bills create an ex parte seizure provision that is nonexistent in the UTSA. These bills, if passed, will eliminate state variations in the UTSA and will create a uniform national law that does not preempt state laws. Trade secrets owners will also have an option to sue in federal court.

Courts will be expressly authorized to issue ex parte injunctions for preservation and seizure of evidence. The applicant is required to notify the U.S. Attorney in that judicial district and provide proof that the defendant would destroy the evidence if given notice. However, a person who suffers damage by reason of a wrongful seizure has a cause of action against the applicant and shall be entitled to recover damages for lost profits, cost of materials, loss of goodwill and punitive damages if the seizure was sought in bad faith.

Conclusion

The trade secrets laws and applications of the states of Illinois, New York, California, Texas, Massachusetts, Michigan, Connecticut and Minnesota, as set out in this article, are just a sampling of the disparity in the application of the inevitable disclosure doctrine in connection with trade secrets. The remaining states are similarly inconsistent.

In many states you can obtain an injunction against the employee from working for your competitor if you can show that the employee would be unable to perform duties for your competitor without *inevitably* using or discussing your trade secrets. In other states no such protection is afforded. Results and remedies will differ depending on where the action is commenced. Stay tuned. ■

1. James Pooley, Trade Secrets § 1.01 (2010).
2. UTSA § 1(4) (1985).
3. UTSA § 1(4). As of this writing, 47 states have adopted some application of the Act.
4. UTSA § 8.
5. David W. Quinto & Stewart H. Singer, Trade Secrets 44, 56–57 (Oxford Univ. Press 2009).
6. *Moore v. Comm. Aircraft Interiors, LLC*, 278 P.3d 197, 202 (Wash Ct. App. 2012).
7. UTSA § 1985.
8. 54 F.3d 1262 (7th Cir. 1995).
9. *Id.* at 1265.
10. 765 ILCS 1065/1.
11. *PepsiCo*, 54 F.3d at 1267.
12. *Id.* at 1268 (citing *Teradyne, Inc. v. Clear Comm'ns Corp.*, 707 F. Supp. 353 (N.D. Ill. 1989); *AMP Inc. v. Fleischhacker*, 823 F.2d 1199 (7th Cir. 1987)).
13. 430 F. Supp. 2d 158 (S.D.N.Y. 2006); *see Eastman Kodak Co. v. Powers Film Prods., Inc.*, 189 A.D. 556 (4th Dep't 1919) – the genesis of the inevitable disclosure doctrine in *New York & Lumex, Inc. v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996).
14. *Estee Lauder*, 430 F. Supp. 2d at 173–74.
15. 530 F. Supp. 2d 477 (S.D.N.Y 2007).
16. Cal. Civ. Code §§ 3426–3426.11.
17. Cal. Civ. Code § 3426.2(a).
18. *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 316 (Cal. Ct. App. 2009).
19. *Whyte v. Schlage Lock Co*, 125 Cal. Rptr. 2d 277, 293 (Cal. Ct. App. 2009).
20. *Les Concierges, Inc. v. Roberson*, 2009 U.S. Dist. LEXIS 39414, *4 (N.D. Cal. 2009).
21. *Pellerin v. Honeywell Int'l, Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012).
22. Tex. Civ. Prac. & Rem. Code Ann. §§ 134A.001–134A.008.
23. Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(4).
24. *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18 (Tex. Ct. App. 1998) (petition dismissed).
25. Tex. Bus. & Com. § 15.05(a); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 782 (Tex. 2011).
26. *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 298–300 (D. Mass. 1995).
27. *Id.* at 297.
28. *Allis-Chalmers Mfg. Co. v. Cont'l Aviation & Eng'g Corp.*, 255 F. Supp. 645, 654 (E.D. Mich. 1966).
29. *Kelly Servs., Inc. v. Greene*, 535 F. Supp. 2d 180, 187(D. Me. 2008).
30. MCL § 445.1901–445.1910.
31. *Greene*, 535 F. Supp. 2d 180; *Kelly Servs., Inc. v. Noretto*, 495 F. Supp. 2d 645, 657 (E.D. Mich. 2007); *Kelly Servs., Inc. v. Eidnes*, 530 F. Supp. 2d 940 (E.D. Mich. 2008).
32. *Aetna Ret. Servs., Inc. v. Hug*, 1997 WL 396212 (Conn. Super. 1997); *Robert S. Weiss & Assocs. v. Wiederlight*, 208 Conn. 525, 529, n.2 (1988).
33. *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523, 531 (W.D. Wis. 1996) (applying Minnesota law).
34. *Int'l Bus. Mach. Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98, 101 (D. Minn. 1992).
35. *Id.* (quoting *E. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112 (8th Cir. 1969)).

From "Sua Sponte" to "Sea Sponge"

The Mixed Blessings of Auto-Correct

By Robert D. Lang

There was a time when lawyers, especially at large law firms, hired proofreaders to review closing documents and legal memoranda. Typically, the proofreaders were graduate students looking to earn some money at night while attending classes during the day. The proofreaders were usually placed in windowless offices where they had little or no contact with the personnel of the law firm – their job was to review documents, not to converse. Proofreaders performed a valuable function. As one stated:

> I spent nearly 22 years correcting transcripts. A couple of my transcript finds: "Oxymoron" came out "Nazi moron." "Panacea" came out "Pan of sea."[1]

These grad students, who once served a crucial role, have largely been replaced by spell-check and grammar-check, at a large cost savings for law firms.

Auto-correct, or "auto-fail," was designed to save time and money and catch mistakes in the final work product. Of course, this presupposes that computers and their operators function accurately and solve, rather than create, problems in the language of documents. However, there is a hidden danger of auto-correct, which often goes wholly unrecognized: the creation of entirely new words and new phrases, none of which were intended by the drafter. The PG version of "auto-fail" caused loving posts signed by grandmothers to change from "grandma" to "grandmaster."[2]

Such is the effect of auto-correct: new words can be created which, if not corrected (re-corrected?), become accepted words on their own. This is commonly referred to as the Cupertino effect: auto-correct replaces mis-

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spelled words or incorrect words, which are not in its dictionary. Replacement of the misspelled word "cooperation" with "Cupertino" resulted in this northern California city – where Apple and other Silicon Valley computer companies are headquartered – making its way into documents published by NATO, the United Nations, and other official bodies.[3]

One famous example of how auto-correct can backfire is the story of the lawyer who presented an appellate brief to the Ninth Circuit Court of Appeals, in which auto-correct had changed "*sua sponte*" to "sea sponge,"[4] resulting in the sentence: "[I]t is well settled that a trial court must instruct sea sponge on any defense, including a mistake of fact defense."

Return of the "Scrivener's Error"

It is ironic that lawyers who have made drafting mistakes due to relying on auto-correct may be catapulted back several hundred years to cite cases involving a "scrivener's error" to avoid being sued for malpractice and to reform agreements and trusts, codicils and contracts. Older lawyers who still rely on Rolodexes, and may even have a secretary who takes dictation, will nod their heads (often with more than a little gray hair) knowingly. Those lawyers who eagerly embrace technological changes in the practice of law may well have different comments to make.

The General Counsel for the Jacksonville Jaguars of the National Football League was fired because a scrivener's error had created a potential liability of approximately $4 million to the team. His draft of the contracts for the seven assistant coaches held that the contracts "shall terminate on the latter of January 31, 2012 with a day after the Jaguars' last football game of the 2012 season and playoffs . . .". The intent was that the contracts would terminate on the last day of the 2011, not the 2012, season. By definition, whether or not the Jaguars made the playoffs, the last game in a 2011 season would necessarily be on January 31, 2012 (or, actually, the date of the Super Bowl), as the 2012 NFL season did not begin until the fall of 2012.[5]

The slightest mistake of language can have the most severe consequences. Last year, when Orrick, Herrington & Sutcliffe announced the opening of an affiliated office in Ivory Coast (Cote D'Ivoire), what should have been a positive event instead resulted in adverse publicity. The two attorneys who had practiced in the affiliated office were "conseil juridique" and could not appear in court proceedings. However, the French translation of the press release described the two attorneys as "avocats." Avocats are governed by the local bar association, can offer legal advice on all matters and appear in the Ivorian courts to which they are admitted. The President of the Cote D'Ivoire Bar Association objected to the French description of the roles of the two attorneys and publicly stated that fraudulent use of the title of "avocat" in Cote D'Ivoire exposed the said individuals to criminal prosecution. The French version of the Orrick public announcement was revised. The law firm spokespersons stated that they "regret the error in the French translation of our press release."[6]

The Courts Weigh In

When courts are asked to view such errors, they often reach back to the old case law involving scriveners and drafting errors. When one thinks of scrivener, the image that may come to mind is from Dickens, with a frail old man, bent over, wearing reading glasses, looking over documents by the feeble light of a single candle, methodically reviewing rows and rows of numbers in dusty ledgers for hours on end.

The slightest mistake of language can have the most severe consequences.

Batzli

In *Minnesota Lawyers Mutual Insurance Co. v. Batzli*,[7] an attorney failed to draft an agreement conveying an interest in property because he did not notice the omission of certain property interests before the parties signed the agreement. Having realized his drafting error, the attorney discussed several options with his client and tried to move for a correction on the grounds that he had made a scrivener's error in drafting the agreement. However, the lower courts found that there was insufficient evidence to indicate that the drafting error was a scrivener's error and the Court of Appeals of Virginia affirmed the Circuit Court's denial of the motion.

Subsequently, the client filed a malpractice suit against the attorney drafter and his firm. Batzli's malpractice carrier, Minnesota Mutual, filed a motion in the Eastern District of Virginia seeking declaratory judgment that it was not required to defend Batzli against the client's suit. The carrier asserted that Batzli, at the time he filed the scrivener's error motion, was aware of facts that he knew, or should have known, would support a claim for money damages against him. The attorney drafter, in response to the demand for declaratory judgment, filed a counterclaim seeking declaratory judgment that his malpractice carrier was obligated to defend him against the malpractice suit brought by his client, and to indemnify him. Motions and cross-motions were denied.

At trial, the central issue was whether the attorney's notice to involve the malpractice carrier failed to comply with the policy's notice provisions. The District Court denied the carrier's motion for summary judgment on the alleged late notice of claim, noting that the client had never indicated an intention to sue and had maintained a positive attorney-client relationship with the lawyer.

On appeal, the Fourth Circuit Court of Appeals found that the jury had sufficient evidentiary basis to conclude that the attorney reasonably thought that his drafting error would not result in a claim from his client, though one was filed. Circuit Judge Shedd dissented, finding that the liability policy required only that the insured report an act, error or omission that would support a demand for damages, not that the demand would ultimately be successful, and that the fact that the attorney drafter was "shocked" that his proceeding to correct the error was denied was irrelevant. The attorney drafter knew he had made an error and candidly conceded "that he felt sick about it and had lost sleep over it."[8] Accordingly, the dissent found that there had been an error and that the attorney knew of the error and had failed to report the error timely to his carrier.

> One lesson well-learned from Watergate is that the cover-up can be worse than the original act of poor judgment.

Berrios

In *Berrios v. Jevic Transportation, Inc.*,[9] summary judgment was sought in an action by a plaintiff to reform an insurance policy due to an alleged scrivener's error. The policy limit, $1 million, was changed to $2 million; however, the increase in the policy on the documentation that was generated had a November 12, 2000, rather than November 12, 2001, effective date.

The court likened the alleged scrivener's error to a matter of mutual mistake of fact, which can often be traced to a typo or transcription error, of which there were many in the 19th century. The court further held that the parol evidence rule does not bar admission of extreme evidence related to unambiguous contracts where there is a mutual mistake and the agreement fails to reflect the prior complete understanding of the parties. The court concluded that there was a genuine issue of material fact as to when the coverage was to commence and that the parties would have to prove at trial that reformation of the policy coverage on account of mutual mistake was justified.

Schneider

In *Schneider v. Winstein*,[10] a legal malpractice suit was brought against an attorney and his law firm because that lawyer, in the context of a divorce agreement, failed to determine the implications of the difference in language between "$50,000 out of the husband's share" and "the first $50,000" when reviewing the terms of the judgment for the purpose of filing a post-trial motion. At trial, the court found that the plaintiff had waited more than two years before filing her malpractice complaints, although she had been aware for at least three years that she had a potential claim against her attorney. Addressing her claims, the Appellate Court noted that the court below implicitly found the language at issue constituted something other than a clerical or scrivener's error.[11]

Westgate at Williamsburg

In *Westgate at Williamsburg Condominium Association, Inc. v. Philip Richardson Co.*,[12] a site plan for the development of a condominium failed to include a specific, important parcel of land as part of the meter and bounds description. Although a number of changes were suggested prior to the closing, the property description failed to include the parcel in question. The trial court found that the description of the parcel was a scrivener's error. On appeal, the Supreme Court of Virginia reversed, holding that the error was neither typographical nor clerical, nor was there evidence that the description of a property had been improperly transposed and recited an erroneous deed book reference. The court found:

> [T]he fact that a party's intent was not fully reflected cannot be attributed to an error of the scrivener. Instead, the error lies with the party's inattention to the detail before him. . . . Mr. Kotaridis, himself, admitted: "[He] didn't look at [the property description and plat] carefully enough."[13]

International Union of Electronic Workers

In *International Union of Electronic Workers v. Murata Erie North America, Inc.*,[14] the language in a pension plan was incorrectly re-drafted following Congress's enactment of the Employee Retirement Income Security Act (ERISA). The federal court held that it was an issue of fact as to whether there was clear, precise, convincing proof of scrivener's error in the ERISA context so as to permit the importation of the equitable doctrine of reformation of contract. The Third Circuit recognized that a document may be reformed based upon parol evidence as a result of a scrivener's error in drafting a document, and further held that the application of the scrivener's error doctrine would be appropriate if the evidence shows that there would be a windfall to one of the parties as a result of such an error.[15]

Glepco

In *Glepco, LLC v. Reinstra*,[16] a married couple bid on a property at foreclosure sale, believing they were to acquire a three-acre lot with a house on it. After the sale, however, they discovered that the legal description of the

property included only the field portion of the land, and not the structure. While successfully buying the property, the couple brought an action to quiet title and reform the deed because of the erroneous legal description, which they argued was a result of a scrivener's error. The trial court granted the action to reform the title, determining that the legal description of the property did not express the full intentions of the bank and the prior owners, and was a result of a mutual mistake or scrivener's error. On appeal, the Washington Appellate Court affirmed, finding that the legal description of the property was inadequate due to the scrivener's error. In the end, the deed to the property correctly described the real estate that was purchased at the foreclosure sale.

What to Do?

One lesson well-learned from Watergate is that the cover-up can be worse than the original act of poor judgment; so too, for law firms when they discover that a scrivener's error has been made. In addition to the mistake of not promptly notifying their malpractice carrier, thereby running the risk of losing insurance protection, they run the risk of infuriating the client for whom the work was performed, or not performed, as the situation may be. Consider the $150 million malpractice suit filed in April 2007 by Charter Communications Inc. against its attorneys. The company had asked its lawyers to draft a provision that would automatically convert stock held by the co-founder of Microsoft into the stock of another company. The provision was added but an associate of the law firm later removed that provision from the final version of documents. The error was not caught at the time when the papers were executed in February 2000. In October 2002, during a routine review, the error was located. The client found that not only had the partners of the law firm known about the mistake six months before they told the client, but they also billed the client for time spent trying to correct their mistake.[17] One can imagine how billing the client for efforts to correct the firm's own error might have contributed to the client's anger.

In short, time-pressed attorneys appreciate auto-correct because it allows for typing and word processing "on the go." However, busy lawyers who do their drafting at the last minute may not allow sufficient time to review their own work for mistakes, and may therefore miss or switch letters in such key words as "statute" and end up with "statue." Moreover, with technology comes the elimination of the practice of having third parties proofread documents meticulously. Accordingly, simple drafting mistakes may prove more common – as is evident from the recent case law that hearkens back to those Dickensian days of scriveners.

The easiest way to avoid these errors is both evident and obvious: take sufficient time in drafting, proofreading, and editing. There are any number of "old-school" techniques useful to double-check for errors which auto-correct may miss or even create. Use different fonts on changes; red-line copies; be even more, not less, vigilant when cutting-and-pasting; or even have a standard editing agreement with a colleague so that you review his or her work with the favor returned.[18]

If this is done, references to *sua sponte*, even if seemingly magically transformed into sea sponge, will be caught and corrected before the papers leave the office and are sent to clients, the adversary and the court. ■

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"... and the cow jumped over the moon, not unlike your Daddy when he found out performance bonuses were being reinstated."

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Conflict Among the Departments

Does Service of a 90-Day Demand to Resume Prosecution and for a Note of Issue Constitute a Waiver of a Defendant's Right to Discovery?

By Kenneth R. Kirby

Introduction

A split currently exists among the departments of the Appellate Division regarding whether a defendant's service of a 90-Day Demand to Resume Prosecution and for a Note of Issue (90-Day Demand), in and of itself and absent unusual or special circumstances, constitutes a waiver of that defendant's right to any further discovery. The Second and Third Departments do *not* construe a defendant's mere service of a 90-Day Demand, without more, to constitute a waiver of any further discovery, whereas the Fourth Department has, in several cases, construed such service to effectuate such a waiver. While the First Department has not directly addressed the question, Justice Paul A. Victor of Supreme Court, Bronx County has written a thoughtful opinion[1] in which he assessed the arguments advanced in favor of each of these positions and then ruled that a defendant does not waive the right to discovery merely by serving a 90-Day Demand. The thesis of this article is that absent unusual circumstances justifying a finding of waiver, a defendant's mere service of a 90-Day Demand does not constitute a waiver of that defendant's right to any further discovery.

Analysis

While, at first blush, it might seem counterintuitive that a defendant should demand that a plaintiff both resume prosecution of the action and serve and file a note of issue within 90 days, only, in the event that the plaintiff files a note of issue despite discovery not being complete, to turn around and move to strike the note of issue, this defense stratagem must be considered in the broader civil litigation context: the burden to diligently prosecute a civil action *is on the plaintiff and not on the defendant*. As the court pointed out in *Sedita v. Moskow*, "[i]t was plaintiff's obligation to prosecute the case against [the defendants] and not the reverse."[2] In this broader context, it made perfect sense for a defendant to serve a 90-Day Demand to Resume Prosecution *and* for a Note of Issue,

because, historically, if the plaintiff neglected to ensure the completion of discovery but nonetheless served and filed a note of issue with a certificate of readiness (incorrectly attesting to the completion or waiver of discovery), a defendant could then move to vacate the note of issue without fear that service of the 90-Day Demand would be construed as a waiver of remaining or necessary discovery. But in light of the Fourth Department precedent, which holds that the service of a 90-Day Demand waives further discovery, what defendant, in the Fourth Department at least, will serve such a demand and risk waiving needed discovery?

In *Siragusa v. Teal's Express, Inc.*,[3] the Fourth Department held that a defendant confronted with a plaintiff who has not been available for deposition must resort to CPLR 3124 to compel such deposition rather than serve a CPLR 3216 90-Day Demand.[4] This begs the question: what defendant wishes to assist, or compel, a plaintiff to prosecute an action against the defendant? Few defendants wish to accelerate a plaintiff's prosecution of a civil case; yet many defendants, if a plaintiff allows a civil case to languish without taking affirmative steps to prosecute it once it has been commenced, wish to rid themselves of such cases *in the event a plaintiff should default in responding to a 90-Day Demand, but not at the expense of waiving necessary discovery*. For this reason, historically, most courts have not – at least in the absence of special circumstances dictating a contrary result[5] – construed a defendant's mere service of a 90-Day Demand to constitute or effectuate a waiver of that defendant's right to complete discovery or to further discovery.

Supporting the foregoing historical rule, the very language of a carefully drawn 90-Day Demand *not only demands that the plaintiff file and serve a note of issue within 90 days, but also demands that the plaintiff resume prosecution of the action,* a demand which inherently contemplates the plaintiff's completion of discovery within that 90-day window.[6] Hence, a plaintiff who has been served with a 90-Day Demand cannot assert that a defendant's demands for discovery made or continued during that 90-day period constitute a waiver of the server's 90-Day Demand that the plaintiff serve a note of issue within that same time frame.[7] A plaintiff who does so, does so at the peril of dismissal of the complaint for failure to comply with such a demand and/or with conditional orders of dismissal granted upon the defendant's motions to dismiss.[8]

Because it is pertinent to the issue of who bears the burden of prosecution in a civil action, it is worth noting that in his opinion in *Darko v. New York City Transit Authority*,[9] Justice Victor took cognizance[10] of the fact that it is a generally accepted tenet of civil litigation that it is the plaintiff's burden to prosecute his action.[11] Notwithstanding this burden, plaintiffs do not always diligently prosecute civil actions once commenced. In order to "set the stage" for a neglected or stalled civil case to be dismissed if the plaintiff does not comply with the 90-Day Demand, or, at a minimum and as a lesser alternative to dismissal, to compel the plaintiff to move a stalled case along to a conclusion,[12] defendants serve 90-Day Demands pursuant to CPLR 3216, previously confident[13] in the knowledge that if the plaintiff were to serve a note of issue falsely, erroneously, or inaccurately attesting to the completion or waiver of needed discovery (i.e., "pretrial proceedings"), they could routinely move, within 20 days, as required by 22 N.Y.C.R.R. § 202.21(e), to vacate the note of issue and strike the case from the court's trial calendar. Ordinarily, the note of issue would be vacated or, at a minimum, other court-approved arrangements would be made to accommodate the completion of necessary discovery.

> What defendant wishes to assist, or compel, a plaintiff to prosecute an action against the defendant?

However, the efficacy of the 90-Day Demand to accomplish either dismissal or compelling the plaintiff to move the case along to a conclusion[14] has, in the Fourth Department at least, been drastically diluted, if not entirely frustrated, by several opinions[15] construing the mere service of a 90-Day Demand to constitute a waiver of the serving party's rights to any further discovery.

CPLR 3216

With the foregoing providing context, we may now discuss the content of CPLR 3216. Subdivision (a) of Rule 3216 states, "Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or on motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits." As amended effective January 1, 2015, subdivision (b) imposes certain conditions precedent that must first be satisfied before a court may dismiss an action for want of prosecution under Rule 3216:

1. Issue must have been joined in the action.
2. One year must have elapsed since the joinder of issue.
3. The court or party seeking such relief shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand and further stating that the default by the party upon whom such notice is served in complying with such demand within such 90-day period will serve as a basis for a motion

> by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.[16] Where the written demand is made by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in prosecuting the action.

It is this third condition precedent that has become known as the "90-Day Demand for Note of Issue." However, this 90-Day Demand for Note of Issue demands not only that the recipient file and serve a note of issue within 90 days of service, but also that the recipient "resume prosecution of the action." Merely filing a note of issue with a statement of readiness that inaccurately states that discovery is complete or that recites that all discovery is, with certain exceptions, complete *is insufficient compliance with a CPLR 3216 90-Day Demand*,[17] leaving the plaintiff at risk of dismissal. Non-compliance with such a CPLR 3216 90-Day Demand authorizes the court "[to] take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action."[18] The court is not required to dismiss the action, however, because, as pointed out by Professor David D. Siegel in his Practice Commentaries to CPLR 3216, "(1) the 90-day period is not a statute of limitations and (2) it is therefore subject to the court's broad and pervasive power to extend time under CPLR 2004."[19]

If, in the event of a default, a plaintiff neglects either to file and serve a note of issue with a concomitant certificate of readiness within 90 days or to move for an extension of time within which to do so, CPLR 3216(a) authorizes a motion – even, a motion by the court on its own initiative[20] – to dismiss for want of prosecution, but only upon a showing of (i) strict compliance[21] with the requirements of subdivision (b) of that statute[22] and (ii) a plaintiff's failure within the requisite 90 days to either serve and file a note of issue or move for an extension of time within which to do so.[23] Assuming, alternatively, that a note of issue is timely filed and served following the service of the 90-Day Demand through the improper expedient of filing an incorrect or false certificate of readiness[24] attesting to trial readiness (despite the fact that all remaining or outstanding discovery was not actually completed or waived both within 90 days of that service[25] and before the plaintiff's filing and service, within that same period, of the note of issue), then the only option available to the defendant to compel the completion of outstanding or necessary discovery is for the defendant to move, within a strict 20-day window, for an order vacating the note of issue upon the ground that "a material fact in the certificate of readiness is incorrect."[26] Otherwise, a waiver of further discovery will automatically proceed from the defendant's failure to so move.[27]

Recognizing that a proper 90-Day Demand not only demands that the plaintiff file and serve a note of issue *but also* demands that a plaintiff "resume prosecution of the action" is vital to a correct analysis of whether the service of such a demand, without more and absent unusual circumstances, effects a waiver of any further discovery. The statutorily prescribed demand that a plaintiff "resume prosecution of the action"[28] presupposes that the plaintiff's prosecution is incomplete. And a case in which discovery is neither completed nor waived is not ready for trial.

A properly drawn 90-Day Demand not only requires a plaintiff to serve and file a note of issue within 90 days, but it also, inherently, affords a plaintiff 90 days within which to complete remaining discovery *before filing and serving the demanded note of issue along with a true certificate of readiness*. Thus courts that effectively construe that portion of a properly drawn 90-Day Demand out of existence by holding that the service of such a demand waives the server's rights to further discovery usurp the power of the legislature. As stated in McKinney's:

> Some statutes are framed in language so plain that an attempt to construe them is superfluous. The function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to *or to subtract from words having a definite meaning*, or to engraft exceptions where none exist *are trespasses by a court upon the legislative domain*.[29]

Considering that the statutorily prescribed words "resume prosecution of the action" are contained in the same statutorily authorized demand, surely the words "resume prosecution of the action" must, and do, without "need for [judicial] interpretation," encompass the completion of all steps necessary to bring an action to trial readiness, among which is the completion of all "pretrial proceedings," *including discovery*.

When courts construe the service of a 90-Day Demand as constituting the serving party's waiver of any further discovery, they eviscerate that portion of the statutorily prescribed 90-Day Demand and gainsay the usual legal meaning of the word "waiver," which is defined as "[t]he *voluntary* relinquishment or abandonment – express or implied – of a legal right or advantage."[30] As *Black's* continues, "[t]he party alleged to have waived a right must have had both knowledge of the existing right *and the intention of forgoing it*."[31] Considering that the completion of discovery is among the components prescribed by CPLR 3216(b)(3), of a plaintiff's "resum[ing] [the] prosecution of the action," by demanding that a plaintiff "resume prosecution" of the action, a defendant cannot be construed to have "inten[ded] [to] forgo[]" his existing right to discovery.

Contrary to the statutory language, and to decisions of the Appellate Division in the Second[32] and Third Departments[33] and by a trial court in the First Department,[34] Fourth Department decisional precedent improperly imposes upon a defendant an election of one or the other of two evils: either serve a 90-Day Demand and, under Fourth Department precedent, waive his right to

discovery, or, allow a case the plaintiff has neglected for an inordinate amount of time to continue to languish indefinitely, rendering its subsequent defense problematic should the plaintiff much later resume its prosecution. The defendant's only other course, under Fourth Department precedent, is to (involuntarily) abet the plaintiff's prosecution of the lawsuit by moving, pursuant to CPLR 3124, to compel disclosure or, in certain instances, examinations before trial, as was the Fourth Department's sole remedy in *Siragusa v. Teal's Express, Inc.*[35] (This, despite defense attorney John E. Mellon's averment, in reply in the *Siragusa* case, that "[t]he fact that defendant Bell did not move for an order for an examination before trial is of no moment here. *Parties are free to use whatever procedures are provided to them by the CPLR.*"[36])

> *discovery*[42] and to foster court policy establishing standards and goals for the completion of discovery and the expeditious trial of pending cases.[43]

Or, as the court even more succinctly observed in *Balaka v. Stork Restaurant, Inc.*,[44] "[i]t is a plaintiff's obligation to prosecute an action with reasonable diligence and to explain or excuse an unreasonable delay. It is not a defendant's obligation to enforce prompt prosecution of a cause of action and to pay a calendar fee for the trial of a separate issue of fact such as that raised by an affirmative defense of release."[45]

Holding that the service and filing of a 90-Day Demand does not waive a defendant's right to any further discovery is not unfair to plaintiffs.

Relegating a defendant to this sole remedy renders a defendant who does not wish to waive discovery rights by serving a 90-Day Demand an unwilling accomplice in the plaintiff's completion of remaining or outstanding discovery,[37] *which is the plaintiff's, not the defendant's, burden to effectuate*. This is contrary to the statutory scheme, for, as the court observed in *Darko*,[38] under case law applying CPLR 3216 and CPLR 2004,[39] a plaintiff confronted with a 90-Day Demand may either file and serve a note of issue accompanied by a true certificate of readiness accurately attesting to the completion or waiver of all discovery, or *move, before the expiration of that time, for an extension of time within which to so file and serve a note of issue*. This "mechanism set forth in *Grant* for extending the time to file a note of issue would be entirely unnecessary if the service of the CPLR 3216 demand in itself waived further discovery."[40] Justice Victor, in rejecting the Fourth Department's holding that "[i]f defendants sought to compel examinations before trial, their [sole] remedy was to move pursuant to CPLR 3124 for an order directing examination," then proceeded to elaborate:[41]

> *Grant*, by implication, dispels the notion that the service of a CPLR 3216 demand in itself waives further discovery. To the extent that *Grant* might be read as authorizing only completion of the discovery sought by the plaintiff, this Court holds that in view of the absence of any guidance from the First Department, and in view of the split in authority outlined above, the service of a 3216 demand does not waive discovery by any party. *To hold otherwise would severely limit the usefulness of CPLR 3216 as a tool to compel prosecution of an action, and would, in addition, eviscerate the underlying purpose of the service of the CPLR 3216 demand, which is to compel plaintiff to take responsibility for completing*

The reasoning in *Darko*[46] and in *Balaka*[47] is persuasive.

While the service of a 90-Day Demand for the filing and service of a note of issue alone, *unaccompanied by a demand that the plaintiff "resume prosecution of the action"* (CPLR 3216(b)(3)), might be construed to effectuate a defendant's waiver of his or her right to further discovery, a properly drafted 90-Day Demand that contains the statutory demand that the plaintiff "resume prosecution of the action" as well as serve and file a note of issue within 90 days cannot be so read without, as the court explained in *Darko*, "severely limit[ing] the usefulness of CPLR 3216 as a tool to compel [a plaintiff's] prosecution of an action, and [without] . . . eviscerat[ing] the underlying purpose of the service of the CPLR 3216 demand, which is to compel plaintiff to take responsibility for completing discovery."[48]

Holding that the service and filing of a 90-Day Demand does not waive a defendant's right to any further discovery is not unfair to plaintiffs, for a plaintiff who has been prevented, through no fault or neglect of his own, from filing a note of issue and certificate of readiness because some pretrial proceeding has not been completed may apply for relief from the court pursuant to 22 N.Y.C.R.R. § 202.21(d), which provides: "Where a party is prevented from filing a note of issue and certificate of readiness for any reasons beyond the control of the party, the court, upon motion supported by affidavit, *may permit the party to file a note of issue upon such terms as may be just*" (emphasis added). Therefore, it is not unjust to insist that if the plaintiff cannot both complete discovery and serve a note of issue within 90 days of service of the demand, he should either move for permission to file and serve a note of issue "upon such terms as may be just" or move during that 90-day period, pursuant to, *inter alia*, CPLR 2004,[49] for an extension of time both to complete discovery and to file and serve a note of issue.

Finally, not only did the court in *Darko* correctly reject the proposition that a defendant waives further discovery

by virtue of the service of a proper 90-Day Demand, it addressed and condemned the fairly pervasive problem of plaintiffs' attorneys filing notes of issue with certificates of readiness that either inaccurately state that all discovery is complete or has been waived, or that state so but then list as exceptions those items of discovery that are still open, as follows:

> Many attorneys in this Department believe that upon being served with a [CPLR] 3216 demand, they should immediately file a note of issue. Since the filing of a note of issue requires the concomitant filing of a statement of readiness, many plaintiff's attorneys either state "inaccurately" that discovery is complete (as was the case here), or they recite in the statement of readiness that all discovery is complete with certain exceptions, which they then list in the statement of readiness. This court condones neither of these approaches. One method is disingenuous, and the other results in a distortion of the court rules and the meaning of "readiness." The filing of a note of issue with an incorrect assertion that discovery is completed is not a sufficient response to a 3216 demand. In addition, if the plaintiff desires to file a note of issue without a statement of readiness, reserving the right to conduct discovery post-note of issue, the prior approval of the court is required.[50]

The *Darko* court's reasoning is sound, for, as this author noted in his article, "The Note of Issue Filing Requirement": "The purpose of requiring the concomitant filing and service of a certificate of readiness that attests to the trial-readiness of the case, together with the note of issue, is obvious – to ensure that no case reaches the trial calendar if it is not actually ready to be tried."[51]

Conclusion

Defendants – at least those in the Fourth Department – should not be restricted to CPLR 3124 instead of CPLR 3216[52] to address a plaintiff's neglect to prosecute an action by failing to fulfill a plaintiff's obligation to complete discovery. If so restricted, those defendants will be forced[53] to abet a plaintiff's prosecution of the lawsuit against them, despite the fact that it is the plaintiff's obligation to prosecute his or her own lawsuit with reasonable diligence[54] and, concomitantly, "to take responsibility for completing discovery."[55] This is particularly so in those instances where a plaintiff's prolonged neglect or quiescence suggests that the plaintiff is either disinterested in prosecuting (that is to say, has "abandoned") or no longer believes in the merit of his or her case.

In order, therefore, to obviate the confusion created by the conflict in the decisions of the Second and Third Departments, on the one hand, and of the Fourth Department, on the other hand, the author respectfully suggests that the Legislature amend CPLR 3216(b)(3), adding a sentence at the end that reads, "In no event shall the service of a written demand, whether by a party or by the court, which complies with the requirements of this paragraph, be construed to constitute or effectuate a waiver by the party so serving such written demand of his rights to disclosure or discovery from any other party or a non-party." In the alternative, in an appropriate case, the Court of Appeals must resolve this conflict among the Departments, and it should rule that a defendant's service of a proper 90-Day Demand to Resume Prosecution and for a Note of Issue, in and of and by itself, does *not* effectuate or constitute a waiver of that defendant's right to discovery, whether that discovery was previously demanded, before service of the 90-Day Demand, or that discovery is demanded after service of the 90-Day Demand. ■

1. *See Darko v. N.Y. City Transit Auth.*, 13 Misc. 3d 203 (Sup. Ct., Bronx Co. 2006).

2. 106 A.D.2d 564, 564 (2d Dep't 1984) (citing, *inter alia*, *Hutnik v. Brodsky*, 17 A.D.2d 808 (1st Dep't 1962), in which the First Department observed, "But the responsibility for the diligent prosecution of an action *rests with the plaintiff*." (emphasis added)).

3. 96 A.D.2d 749 (4th Dep't 1983).

4. Which service, the court held in that case, constituted the defendant's waiver of further discovery. *Id*. at 750.

5. And, in this regard, the lead Fourth Department case finding that the demanding defendant(s) had waived further discovery – to wit, *Siragusa*, 96 A.D.2d 749 – was not a case involving such sufficiently "special or unusual circumstances" as to justify a departure from the (then) usual, historical rule described in this sentence, for there "([Defense counsel Kendall's] last conversation with Mr. Shaad [plaintiff's counsel] regarding examinations before trial) was a telephone call from Mr. Shaad in which he stated that *plaintiff was going to Phoenix, Arizona and would be unavailable, but that he would produce plaintiff for deposition upon his return. Thereafter, deponent did not hear further from Mr. Shaad until the motion herein* (i.e., the motion to, *inter alia*, vacate the plaintiff's note of issue and concomitant certificate of readiness, in which plaintiff's counsel had erroneously reported that examinations before trial had been 'waived' [see certificate of readiness, p. 50, printed Record on Appeal])" (Paragraph 2, Mr. Kendall's Reply Affidavit, pp. 88–89, printed Record on Appeal in *Siragusa*, 96 A.D.2d 749) (emphasis supplied), by virtue of which averment (i) it was *not* unambiguously ". . . clear from the record that plaintiff did nothing to obstruct (or, at a minimum, impede or delay) defendants' discovery" (as the Appellate Division had, in its Memorandum, characterized the record) and (ii) the trial court had a justifiable basis, in the record, in the sound exercise of its broad supervisory discretion over both the conduct of discovery and its own calendar, to hold that "[t]he plaintiff's reliance upon the defendants to arrange for plaintiff's examination [both, in that case, the plaintiff's examination before trial and his independent medical examination] is not sufficient to defeat the defendants' motion. *Hutnik v. Brodsky*, 17 A.D.2d 808 (1st Dep't 1962)" (p. 4, Justice Inglehart's "Decision on Motions," p. 18, printed Record on Appeal). Hence, although as a branch of the Supreme Court it possessed the naked power to do so, in *Siragusa* (*id*.) the Fourth Department should not have substituted its discretion for that of the trial court, which, in light of the demonstrated incompleteness of discovery and of the plaintiff's aforesaid contribution to that incompleteness, did not abuse its discretion in vacating the note of issue. *See generally Vasquez v. State of N.Y.*, 12 A.D.3d 917, 920 (Crew III, J.P., Carpinello, J., dissenting) ("While it is clear that the Court of Claims could have interposed a monetary sanction in lieu of [CPLR 3216] dismissal, as the majority proposes here, we are unwilling to say, given the delay involved, that the court abused its considerable discretion in not doing so. In essence, the majority has elected to substitute its judgment for that of the Court of Claims, which is a choice to which we cannot subscribe.").

6. *See, e.g.*, *DeVore v. Lederman*, 14 A.D.3d 648, 648–49 (2d Dep't 2005) (holding, "Furthermore, *the additional language contained in the [90-day] notice demanding that the plaintiff comply with all previous discovery demands did not* render the 90-day notice null and void nor did it *exceed the scope of the statute since both parties had the right to conduct further discovery even after the 90-day demand was served*" (citations omitted) (emphasis added)).

7. With the caveat that once, during the 90-Day Demand time frame, a plaintiff does file and serve a note of issue with certificate of readiness, it then becomes incumbent upon a defendant who wishes further discovery to move within the 20 days afforded by 22 N.Y.C.R.R. § 202.21(e) to vacate the note of issue.

8. *Allone v. Univ. Hosp. of N.Y. Univ. Med. Ctr.*, 249 A.D.2d 430, 431–32 (2d Dep't 1998) (observing, "Where a party is served with a 90-day notice pursu-

ant to CPLR 3216 and fails to comply with the notice by filing a note of issue or by moving, before the default date, to either vacate the [90-day] notice or extend the 90-day period, that party must demonstrate both a justifiable excuse for the delay in properly responding to the 90-day notice and the existence of a meritorious cause of action" (citations omitted)).

9. 13 Misc. 3d 203 (Sup. Ct., Bronx Co. 2006).

10. *Id.* at 208 (observing that among the underlying purposes of the service of a CPLR 3216 90-Day Demand to Resume Prosecution and for a Note of Issue "is to compel plaintiff to take responsibility for completing discovery . . .").

11. *See e.g., Balaka v. Stork Rest.*, 3 A.D.2d 857, 857 (2d Dep't 1957) (holding, "It is a plaintiff's obligation to prosecute an action with reasonable diligence and to explain or excuse an unreasonable delay").

12. Regarding these dual strategic purposes for serving a 90-Day Demand, *see Carte v. Segall*, 134 A.D.2d 397, 398 (2d Dep't 1987): "CPLR 3216 provides a party confronted with a less than diligent adversary with a means to expedite the prosecution of the action by serving upon him a written demand that he file a note of issue within 90 days, *or, in the event of a default, risk dismissal of the action*" (emphasis supplied).

13. That is to say, before the line of Fourth Department cases with which the author takes issue.

14. Although a plaintiff who believes he or she cannot do so within the 90 days, may, pursuant to CPLR 2004, move, within the 90-Day Demand period, for an extension of time beyond the expiration of that 90-day period within which to both (i) complete discovery and (ii) file and serve a note of issue with a concomitant, true certificate of readiness attesting, accurately, to the completion or waiver of all pretrial proceedings, i.e., discovery. If the plaintiff does so within the 90-Day Demand period, a justifiable excuse for past delay but no demonstration of a good and meritorious cause of action will be required (*Grant v. City of N.Y.*, 17 A.D.3d 215, 216–17 (1st Dep't 2005)); *Vasquez v. State of N.Y.*, 12 A.D.3d 917, 919 (3d Dep't 2004); *Carte*, 134 A.D.2d at 398), but if the plaintiff delays to do so until after the 90-Day Demand period has passed, an affidavit of merits as well as justifiable excuse for the delay will be required (CPLR 3216(e) ("In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion [i.e., to dismiss] unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action").

15. *Siragusa v. Teal's Express, Inc.*, 96 A.D.2d 749, 750 (4th Dep't 1983); *Gray v. Crouse-Irving Mem. Hosp., Inc.*, 107 A.D.2d 1038, 1039 (4th Dep't 1985); *Wolanin v. Halliman*, 145 A.D.2d 967, 968 (4th Dep't 1988) ("It was an improvident exercise for Special Term to grant additional discovery and a physical examination of plaintiff. By demanding that plaintiff file a note of issue pursuant to CPLR 3216, defendants waived their right to have plaintiff examined or to obtain additional discovery" (citations omitted).); *King v. Milazzo*, 155 A.D.2d 1000, 1000 (4th Dep't 1989) ("Supreme Court erred in granting defendant Hopkins further discovery. By demanding that plaintiffs file a note of issue defendant was no longer entitled to further deposition" (citations omitted.)); *Witmer v. Biehls*, 219 A.D.2d 870, 870 (4th Dep't 1995) ("By demanding that plaintiff file a note of issue, with the concomitant necessity of filing a statement of readiness, defendant waived his right to further discovery. A demand for such filing is inconsistent with a demand for discovery" (citations omitted).).

16. For a case involving a court-served "certification order" that functioned as an appropriate 90-Day Demand that the plaintiff file and serve a note of issue upon pain of dismissal were the plaintiff to default in complying, *see Fenner v. Cnty. of Nassau*, 80 A.D.3d 555, 555–56 (2d Dep't 2011).

17. *Carte*, 134 A.D.2d 396, 396 (reversing the denial of the defendant's motion to vacate note of issue and strike the case from the trial calendar, upon the ground of incomplete discovery, and stating as follows: "As the plaintiffs concede, the court of first instance erroneously refused to strike the action from the calendar pending further discovery, in light of the extensive discovery which has yet to be completed, of which the plaintiffs were clearly cognizant when they filed the certificate of readiness falsely declaring that preliminary proceedings had been either completed or waived" (citation omitted); *Darko v. N.Y.C. Transit Auth.*, 13 Misc. 3d 203, 207 (Sup. Ct., Bronx Co. 2006) (citing, as authority, *Blackwell v. Long Island Coll. Hosp.*, 303 A.D.2d 615 (2d Dep't 2003), *Yona v. Beth Israel Med. Ctr.*, 285 A.D.2d 460 (2d Dep't 2001)). *But see Pagano v. Malpeso*, 41 A.D.3d 145, 146 (1st Dep't 2007) (If all of defendant's discovery requests have been satisfied, a note of issue with certificate of readiness that recited that all discovery was complete except for certain disclosure owed by the defendant to the plaintiff was a sufficient response to a CPLR 3216 90-Day Demand for a note of issue).

18. CPLR 3216(e).

19. 7B McKinney's Cons. L. of N.Y., CPLR 3216, C3216:26 (Siegel's Practice Commentaries) ("Extending the 90-Day Period"), p. 633. *See, e.g., Grant v. City of N.Y.*, 17 A.D.3d at 216–17; *Carte*, 134 A.D.2d at 398 ("In order to avoid a [CPLR 3216] default, a party served with a 90-day notice must comply either by timely filing a note of issue or moving for an extension of time within which to comply pursuant to CPLR 2004" (citations omitted)).

20. *See, e.g., Fenner*, 80 A.D.3d at 555–56 (reversing Special Term and denying the plaintiff's motion to vacate the prior dismissal of his complaint that had been effectuated pursuant to CPLR 3216 and the Supreme Court's own "certification order . . . directing the plaintiff to file a note of issue within 90 days, and warning that the complaint would be dismissed without further order of the Supreme Court if the plaintiff failed to comply with that directive, . . ." which certification order, the Appellate Division proceeded to rule, "had the same effect as a valid 90-day notice pursuant to CPLR 3216" (citations omitted)).

21. *See, e.g., Bauernfeind v. Albany Med. Ctr. Hosp.*, 154 A.D.2d 754, 755 (3d Dep't 1989); *Ciminelli Constr. Co. v. City of Buffalo*, 110 A.D.2d 1075, 1076 (4th Dep't 1985), *appeals dismissed*, 65 N.Y.2d 1053 (1985).

22. Because, critically, "courts have no inherent power to dismiss civil cases for failure to proceed and cannot do so in the absence of legislation" (citations omitted); *Holtzman v. Goldman*, 71 N.Y.2d 564, 573 (1988); *Di Roma v. Tripodi Eyewear Int'l, Inc.*, 219 A.D.2d 536, 538 (1st Dep't 1995) (Sullivan, J., dissenting on a different proposition (i.e., that summary judgment should not, in that case, have been denied to the plaintiff)).

23. There is no authority in the courts to dismiss a civil action for general delay (*Bauernfeind*, 154 A.D.2d at 755); rather, the service of a proper CPLR 3216 90-Day Demand is a prerequisite to the dismissal of any pre-note of issue action – that is to say, one that has not yet reached the trial calendar and which, therefore, would be governed by CPLR 3404 – for want of prosecution. *See Boricua Coll. v. L & T Constr. Co.*, 294 A.D.2d 170, 172–173 (1st Dep't 2002).

24. As was the situation in *Carte v. Segall*, 134 A.D.2d 396 (2d Dep't 1987), on account of which the Appellate Division reversed the court of first instance and (1) vacated the note of issue and (2) struck the action from the trial calendar so that discovery could be completed.

25. That discovery may proceed and, potentially, be completed during the 90 days following the service of a 90-Day Demand, thus serving as a predicate for a timely filing, within that same 90 days, of a note of issue and a truthful certificate of readiness accurately attesting to the completion or waiver of all pretrial proceedings, is confirmed by *DeVore v. Lederman*, 14 A.D.3d 648 (2d Dep't 2005) (in which dismissal of the action for failure to comply with a 90-Day Demand to resume prosecution and file and serve a note of issue was affirmed), in which the Appellate Division ruled, "Furthermore, the additional language contained in the [CPLR 3216] notice demanding that the plaintiff comply with all previous discovery demands did not render the 90-day notice null and void nor did it exceed the scope of the statute since both parties had the right to conduct further discovery even after the 90-day notice was served" (citations omitted). *Id*. at 648.

26. 22 N.Y.C.R.R. § 202.21(e).

27. *See id.*; *Laudico v. Sears, Roebuck & Co.*, 125 A.D.2d 960, 961 (4th Dep't 1986); *Stanovick v. Donner-Hanna Coke Corp. v. Modern Refractories Serv. Corp.*, 116 A.D.2d 1000, 1000 (4th Dep't 1986) (holding such a waiver applicable as against a third-party defendant); *Riggle v. Buffalo Gen. Hosp.*, 52 A.D.2d 751, 752–53 (4th Dep't 1976) (holding, *inter alia*, that even private agreements between or among counsel will not be allowed to circumvent this strict rule).

28. *See* CPLR 3216(b)(3).

29. 1 McKinneys Cons. L. of N.Y., § 76, "Statutes too clear for construction" p. 168 (main vol.) (emphasis added).

30. Black's Law Dictionary (Deluxe 9th ed.) (emphasis added).

31. *Id.* (emphasis added).

32. *EDP Hosp. Computer Sys., Inc. v. Bronx-Lebanon Hosp. Ctr.*, 13 A.D.3d 476, 478 (2d Dep't 2004) ("While the plaintiff, in its certificate of readiness, unequivocally waived any right to further discovery, the defendant did not waive such right simply by serving a demand pursuant to CPLR 3216" (citation omitted)). *See generally Allone v. Univ. Hosp. of N.Y. Univ. Med. Ctr.*, 249 A.D.2d 430 (2d Dep't 1998) (90-Day Demands were not abandoned or waived by the defendants' requests for further discovery).

33. *Baxt v. Cohen*, 96 A.D.2d 661, 661 (3d Dep't 1983) ("We have not been made aware of any authority for the proposition that, absent a showing of special circumstances, the filing of a 90-day demand effects a waiver of the demanding party's right to disclosure" (citations omitted)).

34. *Darko v. N.Y. City Transit Auth.*, 13 Misc. 3d 203, 206 (Sup. Ct., Bronx Co. 2006) ("In view of the divergence of authority between the Fourth Department, on the one hand, and the Second and Third Departments, on the other, and in the absence of a First Department case on point, this court now holds that the service of a CPLR 3216 90-day demand, whether by the defendant or by the court with the defendant's acquiescence, does not constitute a waiver of discovery.").

35. 96 A.D.2d 749, 749 (4th Dep't 1983).

36. *See* Mellon Reply Affidavit in *Siragusa* printed Record on Appeal, p. 91, ¶3 (emphasis added).

37. Unlike CPLR 3216, without the prospect, at least, that if the plaintiff fails either (1) to resume prosecution of the action and complete discovery in 90 days, or (2) to file and serve a note of issue and concomitant certificate of readiness within 90 days or (3) to move, within that 90 days, for an extension of time to complete discovery and file a note of issue, the action might then be "teed up" for a dismissal motion as prescribed in Rule 3216.

38. 13 Misc. 3d 203.

39. The court citing, in this regard, *Grant v. City of N.Y.*, 17 A.D.3d 215 (1st Dep't 2005).

40. *Darko*, 13 Misc. 3d at 208.

41. *Id*. at 206. (quoting *Siragusa v. Teal's Express, Inc., et al.*, 96 A.D.2d 749 (4th Dep't 1983)).

42. That is to say, "to prosecute an action with reasonable diligence" (*Balaka v. Stork Rest., Inc.*, 3 A.D.2d 857, 857 (2d Dep't 1957)).

43. *Darko*, 13 Misc. 3d at 208 (emphasis added).

44. 3 A.D.2d at 857.

45. *Id*.

46. *Darko*, 13 Misc. 3d at 207–08.

47. 3 A.D.2d at 857.

48. *Darko*, 13 Misc. 3d at 208.

49. Which states, "§ 2004. Extensions of time generally. Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

50. *Darko*, 13 Misc. 3d at 207 (citations omitted).

51. Kenneth R. Kirby, *The Note of Issue Filing Requirement*, N.Y. St. B.J. (June 2014), pp. 41–42.

52. Pursuant to *Siragusa*, 96 A.D.2d at 750 ("If defendants sought to compel examinations before trial, their remedy was to move pursuant to CPLR 3124 for an order directing examination.").

53. Involuntarily, that is, so long as the Fourth Department's position that service of a CPLR 3216 90-day demand effects a waiver of the demanding party's right to any further discovery remains the law in the Fourth Department.

54. *Cf.*, *Balaka*, 3 A.D.2d at 857 (holding that even when a defendant had moved for and obtained an order granting a prior, separate trial of the affirmative defense of accord and satisfaction, i.e., release. See, in regard to this prior order, *Balaka v. Stork Rest., Inc.*, 286 App. Div. 1018 (2d Dep't 1955)), stating:

> It is a plaintiff's obligation to prosecute an action with reasonable diligence and to explain or excuse an unreasonable delay. It is not a defendant's obligation to enforce prompt prosecution of a cause of action and to pay a calendar fee for the trial of a separate issue of fact such as that raised by an affirmative defense of release. When a separate trial of such an issue must be disposed of in favor of the plaintiff before he can obtain a trial of his cause of action, it is incumbent upon him to obtain a reasonably prompt trial of that issue of fact[].

Reversing order denying the defendant's motion to dismiss case as abandoned pursuant to former Civil Practice Act Rule 302 (predecessor statute to CPLR 3404; *see* "Legislative Studies and Reports," 7B McKinney's Cons. L. of N.Y., CPLR 3404, p. 100), but granting leave to the plaintiff-respondent to move, in the trial court, "to vacate dismissal and restore the case to the calendar upon papers showing that the cause of action asserted in the complaint is meritorious and giving an adequate excuse for the long delay in bringing the action to trial, particularly for the period since October 10, 1955."

55. *Darko*, 13 Misc. 3d at 208.

Frivolous Conduct

Ethical Considerations in Appellate Practice

By Thomas R. Newman

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Most New York attorneys are familiar with "Costs and Sanctions," Part 130 of the Rules of the Chief Administrator of the Courts, which requires that every pleading, written motion and other paper served on another party or filed or submitted to the court be signed by an attorney whose signature certifies that attorney's good-faith, informed belief that "the contentions therein are not frivolous."[1] The intent of Part 130 is "to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics."[2]

Conduct is only deemed frivolous for the purposes of Part 130 if

1. it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
2. it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
3. it asserts material factual statements that are false.

The Costs

Some attorneys may not realize that Part 130 and the discretionary monetary sanctions it authorizes the court to impose – up to $10,000 for any single occurrence of frivolous conduct – also applies to motions and briefs filed and submitted to an appellate court.

Frivolous appeals impose a substantial and costly burden on courts and respondents and our judicial resources should not be diverted to the processing and disposition of such appeals or motions.

However, just because an argument on appeal is unsuccessful does not mean it is frivolous or has been interposed solely to delay or prolong the litigation. A questionable and ultimately unsuccessful appeal may be taken simply due to overzealousness or inexperience of counsel. This does not warrant sanctions.[3]

Costs on appeal are ordinarily only a nominal sum – $500 on an appeal to the Court of Appeals and not more than $250 on an appeal to the Appellate Division[4] – although the party awarded costs is also entitled to reasonable disbursements, including printing costs,[5] which, after a lengthy trial, can run into six figures.

When costs are awarded as punishment for frivolous conduct, they may also include "reimbursement for actual expenses reasonably incurred and reasonable attorney's fees,"[6] but the total amount of all costs and sanctions is "in no event to exceed $10,000 for any single occurrence of frivolous conduct."[7]

An award of costs, or the imposition of sanctions, may be made either upon the motion of a party or upon the court's own initiative, but only after a reasonable opportunity to be heard, with the form of the hearing depending "upon the nature of the conduct and the circumstances of the case."[8]

However, where a party to an appeal expressly requested the imposition of sanctions pursuant to Rule 130-1, the Court of Appeals found that was "adequate notice that such relief would be considered and rendered a formal hearing unnecessary."[9]

An award of costs (including reasonable attorney fees) and/or the imposition of sanctions "shall be entered as a judgment of the court"[10] against either an attorney or a party to the litigation or against both. Where against an attorney, the judgment may be entered against the attorney personally or the firm or organization with which the attorney is associated and that has appeared as attorney of record in the action or appeal.

An award of *costs* is paid to the prevailing party. *Sanctions* against an attorney are paid to the Lawyers' Fund for Client Protection, while sanctions against a party who is not an attorney are paid to the clerk of the court for transmittal to the Commissioner of Taxation and Finance.

In addition to the costs that may be awarded under Part 130, CPLR 8303-a authorizes the imposition of "[c]osts upon frivolous claims and counterclaims in actions for damages for personal injury, injury to property or wrongful death" – also not to exceed $10,000.

Section 130-1.2 requires the court to issue a written decision setting forth the conduct on which the award is based, the reasons why the court found it to be frivolous, and why the amount awarded or imposed is appropriate.

A Few Appellate Decisions

Read some of those decisions. It is surprising how often the court treated the offending attorney leniently and did not refer the matter to the Appellate Division's Disciplinary Committee for public censure or even greater punishment. For example:

> Just because an argument on appeal is unsuccessful does not mean it is frivolous.

Henry Modell

In *Minister, Elders & Deacons of Reformed Protestant Dutch Church v. 198 Broadway, Inc.*,[11] Henry Modell & Co. (Modell) was the respondent in a holdover summary proceeding regarding commercial space at 198 Broadway in Manhattan ("respondent" as used here is not to be confused with the respondent on appeal as the prevailing party below). The underlying dispute concerned Modell's right to renew its sublease after the master tenant decided not to renew its master lease. In 1982, the Appellate Division awarded possession to the petitioner. Modell appealed to the Court of Appeals, which affirmed in 1983. There followed, in the words of the Court of Appeals, a "barrage of litigation," including

- a declaratory judgment action based on a new legal theory,
- an unsuccessful appeal to the Court of Appeals from the Appellate Division order dismissing that action,
- two post-appeal motions addressed to the Court of Appeals's disposition of that appeal, and
- two separate motions to vacate the dispossess judgment that the Court of Appeals upheld in 1983, based on purported "newly discovered evidence" and yet another legal theory.[12]

Following the trial court's denial of the second motion to vacate and Modell's unsuccessful attempts both to reargue and to appeal from this denial, Modell made another motion in the Court of Appeals, this time seeking "clarification" of its 1983 ruling.

Modell's motion was made almost *seven years* after the time for making such motions expired and the Court found it was frivolous, evidently "undertaken primarily to delay or prolong the resolution of the litigation" and thereby to "postpone the surrender of valuable commercial premises for as long as possible." Modell's argu-

ments were found to be "so lacking in factual or legal merit as to demonstrate an intention to use the courts not as a means of resolving a genuine legal dispute but rather as a mechanism to delay respondent's inevitable eviction."[13]

The Court of Appeals imposed a sanction of $2,500 on the moving party only and not on its attorneys, explaining the low amount as follows:

> We have taken into account the need to deter respondent from engaging in further frivolous motion practice in connection with this litigation, as well as the facts that petitioner has been unfairly deprived of the use of its property for a protracted period and that the time and attention of more than a dozen Judges of this State have been diverted unnecessarily.
>
> We have selected an amount within the lower range of permissible sanctions . . . because this is the first time that sanctions have been imposed by our court and we deem it prudent to proceed cautiously in this area.[14]

The Court then explained why the attorneys were not sanctioned:

> While an additional sanction on the attorneys in this case is authorized by the rules, we elect not to impose one, in the absence of a specific request for such relief by Modell's adversary.[15]

The lesson here is that if you think opposing counsel's conduct calls for sanctions, you must specifically ask for that relief.

Bell

In *Bell v. New York Higher Education Assistance Corp.*,[16] the Court of Appeals imposed sanctions under Part 130 in the sum of $1,000, finding an abuse of the judicial process and an imposition on opposition parties by John Bell's "fifth motion in a chain reflecting a strategy of dilatory, frivolous avoidance of a twenty-year-old student loan debt for two years' law school education." The Court's leniency is quite remarkable, considering that Bell had previously failed to pay the usual costs ($100) imposed by the Court on his prior motions.

Even less understandable is the Court of Appeals's reluctance to impose the maximum sanction of $10,000 when Bell next appeared there 11 years later with another frivolous appeal contesting the by-then almost 30-year-old unpaid law school loan. This time the Court fixed the sanction at $5,000.[17]

It is a fundamental rule of appellate practice that the litigants' rights are to be determined only on the basis of the material contained between the covers of the record on appeal. One of the more serious breaches of appellate decorum is to refer to matters outside the record. With rare exceptions, matters outside (or dehors) the record will not be considered on an appeal, and references to such material in an appellate brief are improper. Nevertheless, cases involving this most basic rule appear in the law reports with surprising regularity, despite published opinions that clearly state, "we decline to consider matters in the parties' briefs which are *de hors* the record on appeal."[18]

McManus

Home & City Savings Bank v. McManus[19] is such a case and it provides an important lesson for appellate counsel. That appeal arose out of a successful motion by defendant Victoria McManus to vacate a default judgment entered against her and co-defendant Robert McManus. The underlying action was commenced by the plaintiff after defendants had been in default on their mortgage payments for several months. When both defendants failed to answer or appear in the action, the plaintiff moved for and was awarded a default judgment which provided for the sale of Ms. McManus's residence securing the mortgage.

Six months later, Ms. McManus moved to vacate the default judgment alleging that upon receipt of the summons and complaint, she sent a check to the office of the plaintiff's counsel made payable to the plaintiff for the full amount set forth in the complaint as principal owed on the mortgage. In opposition, the plaintiff claimed that the check was never received by its counsel. Supreme Court granted the vacatur motion, and the plaintiff appealed.

The Appellate Division, Third Department reversed and denied the motion, finding the defendant failed to meet her burden of demonstrating both a reasonable excuse for the default and a meritorious defense.[20] While Ms. McManus claimed that she had tendered a check to the plaintiff after being served with the summons and complaint, she admitted that in the months following the alleged tender, she noticed from her bank statements that the check had not been negotiated. Notwithstanding this knowledge, she said that she ignored the plaintiff's action since she was not contacted by anyone.

The Court noted that in Ms. McManus's brief on appeal, her counsel explains the circumstances surrounding the default on the mortgage, including the fact that the McManuses were living apart during the pertinent period, that Mr. McManus had agreed to be responsible for the mortgage payments and that the default notices and acceleration letter from the plaintiff were sent to his new address. However, these facts were not contained in the defendant's affidavit and were not found elsewhere in the record. Under these circumstances, Supreme Court's grant of the vacatur motion was an improvident exercise of discretion.

It is also improper to annex to a brief affidavits and exhibits that were not presented to the court below and, therefore, are not properly made part of the record on appeal. The First and Second Departments expressly prohibit the attachment of unauthorized materials to an appellate brief.[21] The Fourth Department does not allow footnotes in a brief.[22]

Part 1200, Rules of Professional Conduct of the Joint Rules of the Appellate Divisions (RPC), provides in Rule 3.3, Conduct before a tribunal:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; . . .
>
> (c) The duties . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [privileged and other confidential information].

Cicio

In *Cicio v. City of New York*,[23] where the city's brief did not cite several directly controlling adverse cases that the city was involved in and had lost, the Appellate Division, Second Department found this "most disturbing and clearly inexcusable" and stated that "[h]ad even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayers would have been spared the costs of a frivolous appeal."[24] The "function of an appellate brief is to assist, not mislead, the court" and "[c]ounsel have an affirmative obligation to advise the court of adverse authorities, though they are, free to urge their reconsideration."[25]

Universal Minerals

In *In re Universal Minerals, Inc.*,[26] appellant's counsel did not brief a threshold jurisdictional issue and did not respond to the court's request to file a supplemental letter memorandum addressing that question. The Third Circuit noted,

> When counsel receives a request for information from this court, common courtesy would dictate that the request be at the least acknowledged. Above and beyond the dictates of courtesy, counsel have "a continuing duty to inform the Court of any development which may conceivably affect an outcome" of the litigation. . . . This is so, even where the new developments, new facts, or recently announced law may be unfavorable to the interests of the litigant.[27]

When the court's own research revealed a jurisdictional defect barring appellate review, the court affirmed, noting that "even if no jurisdictional bar existed to the present appeal, the unprofessional conduct of appellant's counsel in failing to respond to this Court's repeated inquiries, requires dismissal. . . . Accordingly, on either ground, the judgment of the district court will be affirmed."[28]

Proceed With Caution

Professor H. Richard Uviller of Columbia Law School, in his article *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, maintained that "a lawyer discussing law implicitly offers a professional opinion. The lawyer's ethical duty to the court is at least as strong as the duty he or she owes to the client in consultation: to give a fair and detached rendition of the law as he or she understands it."[29]

That does not mean you must make arguments against yourself, just that you must be fair in your presentation of the law.

Professor Uviller believed the Code of Professional Responsibility (now the RPC) was too tolerant of legal artifice, casting the affirmative disclosure obligation in the narrowest terms – *controlling legal authority directly adverse to the position of the client.*

Under the present formulation, a lawyer need not disclose well-reasoned decisions directly on point and adverse to the client's position but issued by a court in another jurisdiction, no matter how highly regarded that court or the author of the opinion may be. An extended, well-reasoned discussion of the point at issue from another case may be withheld if it is dicta because the court's decision rests on some other ground.

Appellate lawyers often make the statement "This is a case of first impression" in the argument portion of their briefs. Such a sweeping assertion suggests the issue has never previously been addressed and the court is not bound by any controlling precedent. It can be misleading and unhelpful to the court if, in fact, opinions of the same or a higher court discuss the point in dicta or decide closely related issues, and they are deliberately ignored and not brought to the court's attention.

Another example of a statement that may be misleading and false is, "The authorities are in conflict on the point." While decisions from out-of-state courts may conflict with N.Y. Court of Appeals or Appellate Division decisions, that is not a meaningful conflict of authorities – the New York decisions are controlling. On those infrequent occasions when decisions of the Appellate Division are truly in conflict, the issue is usually presented to the Court of Appeals for resolution of the conflict – either by a motion for leave to appeal or as of right with two dissents in the Appellate Division on a question of law.

Appellate lawyers do their best to distinguish or minimize the force of adverse authorities, which is perfectly proper, but, as Professor Uviller pointed out, "there comes a point at which the exercise is perverted: introducing false stress between cases, burying the strong elements of consistency, picking and trimming quotations to serve partisan purposes . . . must be counted among the ways that the law can be misrepresented."[30]

The Court of Appeals has found it necessary to lecture counsel on the proper way to read opinions so as to discern the holding of the court and the proper role of precedents in a brief. To begin with, opinions "must be read in the setting of the particular cases and as the product of

preoccupation with their special facts."[31] "The precedential value of a judicial opinion is limited to the question presented by the facts of the case before the court."[32]

And, as then-Judge Fuld put it, "no opinion is an authority beyond the point actually decided and no judge can write freely if every sentence is to be taken as a rule of law separate from its association."[33] Even the Supreme Court of the United States had to remind counsel of this:

> It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.[34]

It is counterproductive to try to bolster your argument with a mixture of "incomplete quotations and the marshalling of phrases plucked from various opinions and references to generalizations with which no one disagrees."[35] Use this tactic and you will only be doing yourself and your client a great disservice.

Candor toward the court is not only an ethical obligation, it is a basic principle of effective appellate advocacy. Your credibility before the court will become nil and you will have lost one of the most powerful weapons in the arsenal of an appellate advocate.

If your presentation of the applicable law is found to be incomplete, misleading, or inaccurate, it will destroy the reader's confidence in your brief as a whole. In courts such as our Court of Appeals and Appellate Departments, where the briefs are read in advance of argument, an unfavorable impression created by the brief may be carried over to the oral argument and make the court less receptive to your position.

"Facts do not cease to exist because they are ignored"[36] and neither do precedents. "The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless."[37] It would be the height of naiveté to hope that your adversary will not find cases that may be read against your position. And, even if you are so fortunate, the odds still favor one of the judges or law assistants coming across them during their independent research. You may as well face this fact when writing your brief, and if there is a case seemingly contrary to your position, you should attempt to distinguish it before your opponent has the opportunity to present it in the light most favorable to his or her case.

The duty to advise the court of adverse authorities is a continuing one. If a decision relied on in your brief is reversed or modified during the pendency of your appeal, you must inform the court. It is easy to avoid this kind of embarrassment and potential sanctions by shepardizing the principal cases cited in your brief – both before filing it and again before oral argument – to make sure they have not been reversed, overruled or distinguished by the issuing court to the point of extinction.

There is no more painful experience for an appellate lawyer than to be told during oral argument that he or she did not cite a controlling adverse authority, or relied on a case that had been reversed, or had taken a quotation out of context or unfairly truncated it – unless, perhaps, it is being criticized in open court for misstating facts in the record or being asked where something is found in the record and having to say, sheepishly, that it is not there.

Candor toward the court is not only an ethical obligation, it is a basic principle of effective appellate advocacy.

Today, the Court of Appeals issues some form of writing in every case, but that was not always so. The law reports are full of cases that were affirmed without opinion. It is, therefore, important to remember that an affirmance without opinion does not mean that the appellate court, be it the Appellate Division or the Court of Appeals, necessarily adopted all of the reasoning or language of the opinion in the court below.[38] While the higher court may actually agree with the reasoning of the court below, all the affirmance without opinion can safely be taken for is an approval of the result reached and not of all the reasons given or opinions expressed.

As an advocate you are certainly at liberty to shape your presentation of the facts and discussions of the applicable legal authorities so they present your client's position in its best light. It is essential, however, that your statement be fair and accurate and supported by evidence in the record or fair inferences to be drawn therefrom, and that the authorities you rely on actually stand for the proposition for which they are cited and that they have not been overruled or modified in any material respect.

Conclusion

In *Cicio*,[39] the Appellate Division found it necessary to remind counsel that the "process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state."

This self-evident proposition should be ingrained in every lawyer seeking admission to the New York Bar before appearing in front of the Committee on Character and Fitness. Even if a sense of ethics is lacking, knowledge that departures from ethical considerations

on appeal will almost always be counterproductive should be enough to dissuade any attorney from thinking about using them. The threat of sanctions or disciplinary proceedings should not be necessary, but they are in the court's arsenal and will be used against flagrant transgressors. And the public stain on the attorney's professional reputation is far greater punishment than the monetary sanction. ■

1. 22 N.Y.C.R.R. § 130-1.1a.
2. *Kernisan v. Taylor*, 171 A.D.2d 869 (2d Dep't 1999).
3. *Schulz v. State of N.Y.*, 175 A.D.2d 356, 358 (3d Dep't 1991) ("[W]e conclude that respondents' conduct, though perhaps too zealous, was not frivolous.").
4. CPLR 8204, 8203.
5. CPLR 8301(6).
6. 22 N.Y.C.R.R. § 130-1.1.
7. 22 N.Y.C.R.R. § 130-1.2.
8. *Dubai Bank v. Ayyub*, 187 A.D.2d 373, 374 (1st Dep't 1992) (quoting 22 N.Y.C.R.R. § 130-1.1(d)).
9. *Minister, Elders & Deacons of Reformed Prot. Dutch Church v. 198 Broadway, Inc.*, 76 N.Y.2d 411, 413 fn. (1990).
10. 22 N.Y.C.R.R. § 130-2.2.
11. 76 N.Y.2d 411.
12. *Id*. at 413–14.
13. *Id*. at 415.
14. *Id*.
15. *Id*.
16. 76 N.Y.2d 930, *reargument denied & cross-motion for sanctions, etc. denied*, 76 N.Y.2d 1015 (1990).
17. *Bell v. State of N.Y.*, 96 N.Y.2d 811, 812 (2001).
18. *See, e.g., R & J Yorek, Inc. v. MCL Constr., Inc.*, 173 A.D.2d 531, 532 (2d Dep't 1991).
19. 173 A.D.2d 1056 (3d Dep't 1991).
20. CPLR 5015(a)(1).
21. 22 N.Y.C.R.R. § 600.10(d)(1)(iii) (1st Dep't); 22 N.Y.C.R.R. § 670.10-c(h)(2) (2d Dep't) ("Unless otherwise authorized by order of the court, briefs may not contain maps, photographs or other addenda.").
22. 22 N.Y.C.R.R. § 1000.4(f)(6).
23. 98 A.D.2d 38, 39 (2d Dep't 1983).
24. *Id*. at 40.
25. *Id*.
26. 755 F.2d 309, 313 (3d Cir. 1985) (citing *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)).
27. *Id*. at 312–13.
28. *Id*. at 313 (internal citations omitted).
29. 6 Hofstra L. Rev. 729 (1978). Professor Uviller was Chief of the Appeals Bureau in the New York County District Attorney's Office.
30. *Id*.
31. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322 (1959) (internal citations omitted).
32. *J.A. Preston Corp. v. Fabrication Enters., Inc.*, 68 N.Y.2d 397, 407 (1986).
33. *People v. Olah*, 300 N.Y. 96, 101 (1949).
34. *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) (Jackson, J).
35. *Danann Realty Corp.*, 5 N.Y.2d at 322.
36. *Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427, 433 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir. 1962).
37. *Hill v. Norfolk & W. R. Co.*, 814 F.2d 1192, 1198 (7th Cir. 1987).
38. *Rogers v. Decker*, 131 N.Y. 490, 493 (1892); *Adrico Realty Corp. v. City of N.Y.*, 250 N.Y. 29, 44 (1928).
39. 98 A.D.2d at 40.

BY LOU GRUMET

Lou Grumet was the Executive Director of the N.Y. State School Boards Association for 14 years. While there, he was the winning plaintiff in the decade-long Kiryas Joel litigation. Prior to that he was the Assistant Commissioner of the N.Y. State Education Department for the Education of Children With Handicapping Conditions and the Special Assistant to Secretary of State Mario Cuomo, specializing in local government issues, as well as the Assistant Research Director of the N.Y. Commission on the Powers of Local Government. Since that time, he has served as Executive Director of the N.Y. State Society for Certified Public Accountants.

Will Someone Protect the Kids?

As we watch the evolving discussion on race relations, with the differing perspectives of police protection of the citizenry versus societal protection of minority rights, we realize how far we still are from our goal of one nation for all. We are fortunate to live in a nation with a highly developed system of hierarchical governments, which are circumscribed by a strong system of checks and balances, and supported by a consensus of the people that governmental actions are usually fair and legitimate. Our disputes are resolved at the ballot box and within the confines of our representative legislatures, and are tempered for excess by the judicial system. We provide an education system based on common standards for the education of every child, with protections to ensure that the majority cannot provide an inferior education for minority children. We know while there may be issues, the problems are not supposed to be systemic, and are not supposed to be rooted in discrimination.

But, as in law enforcement, if we do not guard access to our education system, as well as the systems that protect that access, minority children will suffer. It happened decades ago, in the pre-Civil Rights Act South. And, it may be happening again, albeit on a much smaller scale, in the East Ramapo Central School District in Rockland County, near the Tappan Zee Bridge.

For a number of years, the elected East Ramapo School Board has been effectively dominated by a highly organized group of ultra-Orthodox individuals. Due to its governing actions, this group has repeatedly been in confrontation with segments of the community, as well as state education and financial oversight authorities. It has been on the losing end of decision after decision. And, it has been widely condemned in the media and in some rabbinical and ministerial circles for taking actions that are seen to harm the interests of the overwhelming majority of black and Latino students. Furthermore, the board has been accused of serious and repeated actions to financially benefit private religious schools. It has also been accused of conducting most of its business behind closed doors.

Various groups within the community and various segments of the media have called for the State Education Department (SED), the Board of Regents, the Governor's office and the Legislature to investigate the situation and/or to step in to enforce state and federal regulations. Until recently, the state's response has been muted. Within the past year, there has been an independent state investigation, a report and recommendations, but still no action to protect the affected students.

History

East Ramapo was not always this way. After World War II and the construction of the Tappan Zee Bridge, Rockland County became the place for New York City's laborers, police officers and young couples in search of the American dream. The East Ramapo Central School District was formed out of seven small, sparsely populated districts to accommodate this burgeoning population. It grew into one of the largest and most

widely respected districts in the state.

The East Ramapo School Board President, Georgine Hyde, was a nationally known survivor of the Auschwitz and Theresienstadt concentration camps, who had served as President of the New York State School Boards Association when I was the executive director. More than 98% of the students graduated high school, and more than 90% went to college. It was as good as it got.

But by the late 1980s, things began to change. By 1989, almost 40% of the student population was non-white; by 2009, this figure had jumped to 93%. This shift was due to a mixture of immigrant population, aging property owners whose kids had grown up and left, and the fact that a large segment of the new immigrants were Hasidic or ultra-Orthodox. Today, more than 70% of the student-age population is reported as attending religious-based yeshivas. Today, only 75% of public school students graduate high school and only 40% go on to four-year colleges.

The School Board

The ultra-Orthodox community tired of paying high property taxes to support schools to which they did not send their children. Over the years, they began to organize and to vote against the school budgets. Soon they were voting them down. Then they began to run candidates for the school board who were committed to cutting programs and thus cutting taxes. Soon the ultra-Orthodox controlled the school board. This was not a battle along religious lines. It was about money and services. Even Georgine Hyde, a heroine to many in the Jewish community, was voted out by her ultra-Orthodox constituents.

The new board majority chose to implement their policies, reflective of the mandate they believed they achieved in the election. They cut services within the public schools, including afterschool programs, programs for underachievers and early childhood, gym, art, and music. They closed school facilities and began trying to sell some of those facilities to raise revenues. Class sizes rose, achievement scores dropped.

While the ultra-Orthodox population was organizing to pull out their voting strength, the middle-class populations, including black property owners, were selling their homes and fleeing. The Latino and Haitian population, for whatever reasons, were not voting in school board elections in sufficient numbers to reflect their population size, and thus the ultra-Orthodox solidified control. They controlled almost every seat on the board, and other interests became marginalized.

The goal of the new majority seemed to be to cut costs, and thus taxes, and slash those services to the bare legal minimum (and at times appeared to sink below that). The majority did not appear to deliberate on the educational impact on the affected students. They did, however, pay considerable attention to the disabled population who happened to be Orthodox.

Refocusing Education Dollars and Increasing Revenue Through Real Estate

The ultra-Orthodox are a fairly insular community with a high percentage of disabled children; 40% of the entire school budget goes to education for the disabled and their transportation. The new board recognized that the state and federal governments paid for most of the programming for disabled children, and that government funding was available for these youngsters in private and out-of-district placements if there were no appropriate placements in the public school district classrooms. In fact, since the establishment of the Kiryas Joel School in Orange County, a district established to serve only Satmar Hasidic pupils,[1] far and away the largest number of students served within Kiryas Joel were sent there from East Ramapo. There were more students from East Ramapo than from Kiryas Joel.

One of the reasons the ultra-Orthodox wanted to take over the school board was that the previous boards had refused to place a number of these youngsters in private yeshivas or out of district at public expense. The previous boards felt that appropriate, less restrictive placements were available within the East Ramapo public schools. The Orthodox claimed that the appropriate placements in the least restrictive environment was in a yeshiva, which was culturally familiar. Once the ultra-Orthodox gained control of the school board, they placed as many disabled youngsters in private yeshivas or out of district as they could, and expedited these expensive placements by ignoring and bypassing the due process placement procedures provided in state and federal law.

Due to the declining student population, the district had an inventory of its existing facilities and infrastructure done by a professional consultant, which determined that two buildings could be sold to raise revenue. The board majority chose to sell two buildings other than the ones recommended and in fact tried to sell them to ultra-Orthodox religious organizations for what appeared to be substantially less than market value.

As more and more local residents complained about what seemed to be an emerging pattern of shifting funding from the public school populations to the yeshivas and the attempted transfers of property to religious schools at below market value, the board meetings became increasingly contentious. One board member told the dissidents, "If you don't like it, move elsewhere." Board members and their attorneys lashed out at questioners at meetings, stifling discussion on substantial matters of public concern. The majority of meeting time and actions began to be taken in executive session, in avoidance of public access laws.

Aggravated citizens turned to SED and demanded investigations of the board actions. A crucial goal of statewide control is enforcement of uniform standards for all groups in all areas of the state. In order to do this credibly, the Board of Regents and SED are supposed to be insulated from local politics. However, in my view, they have at times failed to meet these responsibilities, especially in matters of racial and religious discrimination.[2]

The Whole and Its Parts

To understand the whole of what seems to be going on in East Ramapo, we need to look at all of the parts. One of those parts is the way the board controls the physical assets, such as district buildings. The ultra-Orthodox board concluded that the district owned considerably more classroom space than it needed and decided to close two elementary school buildings. The decision to sell may well have been reasonable and entirely justified. However, the way in which they were sold raised a number of very serious legal and ethical questions, which were brought to the attention of the state Commissioner for review.

The substance of the controversy surrounding the sales is that the buildings were not appropriately valued or appropriately offered for sale, that the sales themselves were not appropriately negotiated, and that the sales were in fact designed to hand the property over to religious schools at far below market value. Interestingly, while one of the sales was being reviewed and had been stayed by the Commissioner, the property was leased to the sole potential buyer for what appeared to have been a below-market rent, and a right to first refusal clause was included in the lease.

The Commissioner, in decisions discussed below, seemed hesitant to criticize the district's actions until the pattern became strikingly clear.

Appeals of Luciano and Hatton

In *Appeals of Luciano and Hatton*,[3] the State Education Commissioner dismissed an attempt to overturn the closing of the Hillcrest Elementary School. The petitioners had alleged less than arm's-length dealing and insufficient consideration of the education factors that would be impacted by the closing. The Commissioner said the board had the authority and discretion to decide to close unneeded schools and sell surplus property, as long as reasonable procedures were followed and sufficient deliberation was given to the decision. He noted that the district had hired a Suffolk Board of Cooperative Education Services organization (BOCES) to look at the issues, whose study had concluded that the population was declining. Over a several-year period, the results of the study were deliberated by committees and open forums, and parents and taxpayers were included. As a result, the Superintendent recommended the closing of the Colten Elementary School, which closed in 2009, and Hillcrest, which was set to close in 2010. Hillcrest was recommended for different reasons, however. It was thought to be easier to sell, and had geographic and transportation concerns. The district thought it could save money without hurting education programming. The Commissioner indicated that the recent influx of Haitian students into the district, which was increasing student population again, wouldn't greatly influence the fact pattern.

Appeal of White

The *Appeal of White*,[4] however, which concerned the district's decision to sell the Hillcrest property to a local yeshiva, Congregation Yeshiva Avir Yaakov, stopped the process. In 2010, the district decided to close the building and have it appraised for sale. It was valued at $5.9 million. The board authorized a request for a proposal to be issued, to be opened one month later, which seemed a rather short period. The RFP was duly advertised in one local newspaper and on the district website. Within the time frame, three bids were received, one for $1.6 million, one for $3.1 million, and one for $4.6 million. The board determined that the appraisal was inadequate and sought a second appraisal, which was returned to the board 19 days later. It valued the property at $3.2 million. Two days later, the board voted to accept the Congregation's bid. The petitions said the board acted out of self interest and not in the interest of the district.

In addition to relief, the petitioners requested that the Commissioner investigate ethical problems with the deal. The allegations dealt with the relationship between the board members and the religious school that was the potential buyer. The Commissioner dismissed that request because it is beyond the purpose of the appeal process. While he could have investigated these charges under his executive authority as commissioner, he did not do so.

On the merits of the appeal, however, the Commissioner noted that the board has a fiduciary duty to get the best price for property. It is required to take reasonable steps to ascertain the value and to get a reasonable price, and the Commissioner ruled the East Ramapo board did not do that in this instance. The board was obligated to deliberate on why the two appraisals, conducted within a very short time span, differed so substantially. The board had acted as soon as the second appraisal was completed, with no time allotted to a serious comparison, because priority was given to deliver the property to the Congregation. In addition, the first appraisal used comparisons with nearby property, while the second appraisal used comparisons with sites outside of the area, some in New Jersey. The Commissioner said it was unnecessary to consider the other allegations, although a number of them went to issues of governance that were his responsibility to assure were appropriate.

Appeal of Antonio Luciano

In *Appeal of Antonio Luciano*,[5] the petitioner asked the Commissioner to overturn East Ramapo's lease with the Congregation to whom they had unsuccessfully tried to sell the building. The lease was negotiated during the period the Commissioner was considering the appeal of the sale. The Hillcrest building was temporarily leased to a neighboring school district for a short period, then to the Congregation. The petitioner pointed out that the Colten school lease was over three times as much, and alleged that the Hillcrest building was being leased at vastly below market value. The petitioner also indicated there was no serious effort to market the building as a rental property. The Commissioner dismissed the appeal as moot, since the lease expired when he invalidated the sale. He pointed to differences in the comparison leases and said there was insufficient proof it was for below market value.

While on technical points the Commissioner's decision is defensible, the three cases seem to present a clear pattern of offering substantial property for sale at bargain-basement rates with insufficient checks and balances. It is one of the Commissioner's responsibilities to assure fiduciary cleanliness in property management activities.

Appeal of Brenda Carole Anderson

In the *Appeal of Brenda Carole Anderson*,[6] the petitioner challenged the sale of the Colten school to Congregation Bais Malka and sought the removal of the board members involved in the sale. In 2009, the district leased the closed Colten school to the Congregation for five years for a special education program. The lease contained a right of first refusal. Two separate appraisals from the same firm said the property was worth $6.6 to $6.8 million. A contract was negotiated to sell the building to the Congregation for $6.6 million, minus some significant credits, unless an RFP drew in a higher bid, which the Congregation was entitled to match. No such bids were received. The petitioner said the sale was not in the district's interest, and that the board had ignored the Commissioner's orders in the *Appeal of White* case regarding procedures for future property sales. The Commissioner said the board acted within its discretionary powers, even though he had issued a contrary directive to the same board in a similar case a short period of time earlier. (The issues of lack of advertising, lack of marketing, and an inadequate appraisal were pretty similar.) He rejected the argument that the Town of Ramapo's full value assessment, which was almost twice as high, was a fair comparison on the grounds he didn't know how the town reached that conclusion, even though that information is a matter of public record, and ruled against the petitioner.

The Commissioner had four cases with almost identical fact patterns, all in the same time frame. All four cases concerned the decision of the ultra-Orthodox majority of the East Ramapo School Board to sell two surplus buildings to ultra-Orthodox religious institutions at prices substantially below market value. And the Commissioner, though technically correct, appeared to ignore his responsibility to assure that the board was meeting its fiduciary responsibilities and to assure that public funding was not being used to subsidize religious institutions.

Circumventing Special Education Protections

The ultra-Orthodox board majority made a priority out of placing Orthodox special education students in a culturally friendly setting. To do so, they shifted district resources to their community. They sent large numbers of disabled students on public transportation to the Kiryas Joel programs every day, much in the way most districts send similar students to BOCES. They also began sending more and more disabled youngsters to private yeshivas.

As previously noted, state and federal governments pay for most of the programming for disabled children, and that funding is available for private and out-of-district placements if there are no appropriate placements in the public school district classroom. In order to do this efficiently, the board disregarded many of the procedures and activities required for such placements. In 2012, the state Commissioner ordered them to follow the rules. The board objected and brought an Article 78 proceeding against the Commissioner in Supreme Court, Albany County, in *East Ramapo School District v. John King et al*.

Acting Supreme Court Justice Michael Melkonian noted that the federal Individuals with Disabilities Education Act requires an individual education plan (IEP) to be developed for each child which should design an effective program that places the child as close to his or her non-disabled peers as possible. The district is required to appoint a Committee on Special Education (CSE) to supervise this process, which involves meeting with the student's parents to seek an agreement to a proposed plan. If there is any disagreement, they reach a "resolution agreement," and it goes to the board for approval. A monitoring site visit by SED staff in 2010 noted that it had discovered a substantial number of private placements with insufficiently documented justification. The district was ordered to fix the problems with documentation and parent notification. At a follow-up visit in 2012, the state noted a number of "patterns and practices" that were in violation of both state and federal placement regulations. In a letter, the state indicated that one district staffer had replaced the required multi-disciplinary team in the decision-making process. Essentially, the staffer was placing required Yiddish bilingual services in IEPs where there was no indication on the CSE-developed IEP that such services were required. This requirement became the basis for placement in the private yeshivas, which provided Yiddish bilingual services. The state said that if this process was not cor-

rected, federal aid would be suspended to the district.

The district responded that the decisions were agreed to by the parents, and that the CSE and board had no authority to differ with such an agreement. The state strongly rejected the response, saying the parental meetings were not held in compliance with the due process provisions of the regulations. It also pointed out that the hearings were basically a rubber stamping of placement decisions to private yeshivas and not serious deliberations of the youngsters' IEPs, as is required. If such a large number of disabled students needed Yiddish bilingual services, said the state, the district should develop such services. The state suspended federal aid, an unusual action. The district commenced the Article 78 proceeding to order the state to set aside its various findings of non-compliance.

Justice Melkonian decided that the state had taken no arbitrary and capricious action, and had acted appropriately and rationally. He dismissed the petition.

In the special education area, the State Education Department appears to have taken strong steps to stop the district from inappropriately channeling funds to private religious schools. It is somewhat puzzling that these actions occurred at precisely the same time period as the building lease and sale issues, which also involved potentially inappropriate channeling of resources to private religious facilities.

Segregating the District

The Rockland NAACP has been very active in trying to resolve the East Ramapo problems.[7] It makes the case that the shifting of resources from supporting the almost completely minority population in the public schools to the all-white children attending the yeshivas constitutes intentional and inappropriate acts of discrimination.

When the NAACP asked the state to intercede to help prevent these acts, SED officials told them it is pointless to remove board members for inappropriate activities, since they would be replaced by similar individuals. Repeated requests were made to the Governor's office to intervene, and Governor Cuomo asked the Regents to appoint independent outside fiscal monitor Henry Greenberg in June 2014. Greenberg issued a report with findings in November 2014.

The Board of Regents Chancellor and the Commissioner described Greenberg's report as asserting that "a fiscal, social and human crisis exists." They indicate that "the public school community continues to suffer from the District's fiscal mismanagement, poor governance, and lack of transparency. These factors, among others, have caused the public school community to lose faith in the district's Board of Education and brought this once great school district to the brink of collapse."

However, instead of taking any remedial actions, SED suggested going to the state Legislature for remedies. There was no attempt to use already existing powers to protect minority students and to ensure they received all of the ingredients of a basic education.

Prior to the state investigation, the U.S. Department of Education Office of Civil Rights was asked to get involved. It spent three years investigating, and the New York City office recently submitted a report to the national office. That report is not yet public.

Action was also taken to get the federal courts involved. In *Montessa v. Schwartz*, papers were filed in the Southern District of New York. The complaint, filed under the First and Fourteenth Amendments and various federal civil rights and disability rights statutes, charged the defendant board members with destroying educational programming for minority students and siphoning off funds to support private educational programming for white students. Among the details provided in the complaint are the costs to the district of providing for education in Kiryas Joel or private religious schools, which could be provided within the district, and that the millions of dollars needed to cover these expenses came by cutting educational services to the black and Latino students within the district.

The complaint indicated that in order to support increased funding to religious schools, arbitrary cuts have been made to greatly increase classroom size, eliminate 35% of the staff, eliminate summer programming and special programming, eliminate social workers, cut after-school activities, and eliminate instructional facilitators and middle school teams.

The complaint alleges that the district has an arrangement with a faith-based not-for-profit to distribute federal Title I funds for religious schools to be spent for religious purposes. Such funding is aimed at students in need and for secular education purposes, although it can go to private schools for such programs. The complaint claims there are insufficient safeguards to assure independent control of the funding to keep it from religious purposes. A state audit of the program was halted before it was completed. The complaint also says the district's outside auditor was fired after issuing a report stating that the district was not adequately monitoring the Title I or III funds.

The complaint also alleges that religious books were purchased with public tax dollars. The issue of the sale and lease of the two schools discussed above is detailed. It also points out that the state comptroller issued a report which said the district is not appropriately documenting its expenditures, especially in relation to its dealings with religious institutions.

Most significantly, the complaint charges that white special education students are sent to private placements, leaving almost totally segregated classes behind. The charge is that the schools are being intentionally segregated. A motion to dismiss was denied, and the case is in extended, and much delayed, discovery.

Checks and Balances

The problems of East Ramapo resemble those of many municipalities. Changing populations change the face and makeup of a community and can also change the ability and willingness of a community to support public services, such as education. Democracy relies on elections as a sorting process. Voter turnout patterns, however, have an impact. When one groups turns out in great strength, and others stay home and do not vote, issues that affect all can be determined only by those who vote. These patterns occur in many places.

However, we have constitutional and statutory provisions that set fairly clear limits to how much a majority can enforce its will on a minority. That is why we have state and federal education standards, civil rights laws, and state regulation over educational services. When actions cross the line, there are investigatory and resolution systems in place. The fairness of the system is assured against abuse by the majority.

Similarly, financial favoritism is inhibited by procedures that require competitive bidding, arm's-length dealing, public disclosure, independent appraisals, and serious deliberation processes. Again, when actions cross the line, there are investigatory and resolution systems in place. The fairness of the system is assured against abuse by the majority.

The East Ramapo School District has had a pattern of questionable governance since 2005 – that's a decade, or more important, almost an entire educational K-12 experience for the youngsters of East Ramapo. Concerned individuals have been asking the state to step in and investigate and to act if necessary to protect the minority in East Ramapo.

After a decade, the state has investigated and its findings support the allegations. State and court actions have given serious credibility to the claims of district injustice. Why hasn't the state looked into taking broader action to remediate the underlying issues?

Two basic issues of governance arise from this. One is that when a majority pushes aside the checks and balances that were set in place to protect the minority with standards and due process, minority citizens have reason to question whether they can trust their government to be fair.

The second is that when a group of children has gone through almost their entire K-12 experience without the state enforcing the very protections that guarantee them a free and appropriate public education, what remedies do they have to recover their lost chance for the educational experience the state constitution guaranteed them? ■

1. *See* Lou Grumet and Justin JaMail, *The Lessons of* Kiryas Joel, N.Y. St. B.J. (May 2011), p. 10.
2. *See id.*
3. Decision #16,153 (Sept. 15, 2010).
4. Decision #16,239 (June 6, 2011).
5. Decision #16,308 (Oct. 4, 2011).
6. Decision #16-438 (Dec. 24, 2012).
7. Rockland County was the location for one of the first desegregation cases, known as the Hillburn case, brought by Thurgood Marshall, then an NAACP lawyer, in 1943, 11 years before *Brown v. Board of Education*.

BY PETER SIVIGLIA

Peter Siviglia (psiviglia@aol.com) has practiced law in New York for 50 years. He is the author of Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating, Thomson Reuters, supplemented annually; Writing Contracts, a Distinct Discipline, Carolina Academic Press; and numerous articles on writing contracts and other legal topics, many of which have appeared in this Journal.

Note: If you have any questions on contract preparation that you would like addressed in this column, please let me know. If the topic is within my field of competence, I will endeavor to produce an article or reply directly. My e-mail address is psiviglia@aol.com. Please do not include attachments.

Opinion Letters: Refocusing

Opinion letters from counsel to the "other" party are required in a variety of transactions. Invariably they are required in acquisitions and from counsel to the borrower in lending transactions. Though my firm has often been requested to give and has given opinion letters, I do not recall requiring an opinion from counsel to the other party. They are as reliable as the opinions of the rating agencies of the subprime mortgage packages prior to the debt crisis.

A legal opinion deals – or at least it should deal – only with matters of law, and, as such, any attorney can render that opinion. Apart from a few easily and objectively verifiable items mentioned below, the opinion letter should never deal with facts, such as the warranties of the client – though, on occasion, I have seen lenders ask counsel for the borrower to opine as to certain of the borrower's warranties, such as litigation and contracts to which the borrower is party.

The basic questions that opinion letters address are

1. valid existence and good standing of the entity, which are verified by "certificates of good standing" issued by the appropriate governmental agency;
2. authority of the entity to enter into and perform the agreement, which is verified by examining applicable law and the applicable corporate documents, such as the certificate of incorporation and bylaws or the applicable LLC or partnership agreements;
3. proper authorization and execution of the agreement, which are verified by certificates issued by an appropriate officer of the entity (a) attesting to enabling resolutions adopted by the directors, shareholders, or other applicable body or bodies, and (b) identifying those persons authorized to sign and their signatures;
4. compliance with applicable law;
5. whether any governmental approvals are required in connection with the enforceability of the agreement and, if so, whether they have been obtained;
6. enforceability of the agreement against the entity;
7. in the case of a financing transaction, the perfection of any security interests.

Of the matters listed above, the crucial ones are items 6 and 7, enforceability of the agreement and perfection of security interests. Item 6 (enforceability) subsumes items 1 through 5, and item 7 (perfection) is verifiable by the examination of and compliance with applicable law regarding the security interests involved. As to these critical issues, under no circumstance should the client be expected to rely on the opinion of counsel to another party to the transaction.

Now, as suggested at the outset of this article, items 1, 2 and 3 do involve certain factual matters. With regard to those facts, the opinion letter – regardless of which counsel issues it – must contain appropriate qualifying disclosures. A sample of those qualifications and some others follow.

In General:

We have made such examination of the law and have examined such other documents as we have deemed necessary or appropriate to render this opinion, including, without limitation, the Certificate of Incorporation and Bylaws of the Company and certificates of resolutions and incumbency issued by the secretary of the Company. In our examination we have assumed the genuineness of all signatures, the authenticity and completeness of all documents submitted to us as originals, the conformity to original documents and completeness of all documents submitted to us as copies, and the authenticity of the originals where copies have been submitted. We have no reason to believe that these assumptions cannot be made.

Good Standing:

Our opinion with respect to the valid existence and good standing of the Company is based upon a certificate of good standing dated _____, 20___, and issued by [applicable governmental agency].

Bankruptcy:

Our opinion as to the enforceability of any agreement and the obligations of any party thereunder is subject to any applicable bankruptcy, insolvency or similar law from time to time in effect.

Law Outside Counsel's Jurisdiction:

We express no opinion with respect to the effect of any law, rule or regulation other than those of the State of New York.

* * *

It is obvious that the attorney on either side of the transaction can issue an opinion as to all these matters. In fact, if I were the client, I would insist that my own attorney issue an opinion regardless of whether the attorney for the other party issues one. I think it is the obligation of the client's attorney to issue that opinion. Here is an example that illustrates the point:

Long ago, in a far-away galaxy, I represented a European bank that was obtaining collateral to secure certain obligations owing to it. The party providing the collateral was not the debtor, and problems that could threaten the enforceability of the security arrangements existed because of the financial condition of the party pledging the collateral. At the initial meeting with the attorneys for the debtor and pledgor, the first words they said to me were, "Peter, we're only going to give you a qualified opinion." To which I immediately replied: "I wasn't going to ask you for opinions. I'll give the bank my own." I surely did not want on record qualified opinions from counsel to the other parties cataloging problems they thought might arise with the security arrangements.

As might be expected, the pledgor declared bankruptcy. During the bankruptcy proceeding, my security agreement snared a tax refund in excess of $1 million (a goodly sum in that bygone era). The refund sailed right through the bankruptcy proceeding into my client's account and was applied, without opposition, to the debt it secured.

The Final Analysis

In the final analysis, if a legal opinion is required in respect of "another" party to a transaction, that opinion should be given by counsel to the party for whose benefit the opinion is rendered. From the client's point of view, if an opinion is desired from counsel to the "other" party, that opinion should serve only as a supplemental opinion: It should not be relied upon by the client's counsel in rendering its own opinion. It is the obligation of counsel to do the "legal" due diligence for its client and not to allow its client to rely on the "legal" due diligence of another.

The sidebar to this article contains a sample opinion letter based on an opinion that our firm rendered to a major New York bank in connection with a financing for our client. ■

1. For additional comments and forms of opinion letters, please see Chapters 2B and 13 of Siviglia, *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters.

Sample Opinion Letter to Lender

ON LETTERHEAD OF ISSUING FIRM

Name and Address of Lender

Gentlepeople:

We are counsel to NAME OF CLIENT, a New York Corporation ("Borrower"), and we have acted in that capacity on behalf of Borrower in connection with a loan by you to Borrower of U.S. $DOLLARS under the loan agreement between you and Borrower dated DATE (the "Loan Agreement").

We have reviewed and are familiar with the Loan Agreement.

We have made such examination of the law and have examined such other documents as we have deemed necessary or appropriate to render this opinion, including, without limitation, the Certificate of Incorporation and Bylaws of Borrower and certificates of resolutions and incumbency issued by the secretary of Borrower. In our examination we have assumed the genuineness of all signatures, the authenticity and completeness of all documents submitted to us as originals, the conformity to original documents and completeness of all documents submitted to us as copies, and the authenticity of the originals where copies have been submitted. We have no reason to believe that these assumptions cannot be made.

Our opinion with respect to the valid existence and good standing of Borrower is based upon a certificate of good standing dated DATE and issued by the office of the Secretary of State of New York.

Our opinion as to the enforceability of the Loan Agreement and the obligations of Borrower thereunder is subject to any applicable bankruptcy, insolvency or similar law from time to time in effect.

We express no opinion with respect to the effect of any law, rule or regulation other than those of the State of New York.

Based upon and subject to the foregoing:

1. Borrower is a corporation duly incorporated and validly existing under the laws of the State of New York.

2. Borrower has the corporate right, power and authority to execute, deliver and perform the Loan Agreement.

3. The Loan Agreement and Borrower's obligations thereunder have been duly authorized by Borrower's board of directors, and no other approvals are required to authorize the execution, delivery and performance of the Loan Agreement by Borrower.

4. The Loan Agreement has been duly executed on behalf of Borrower by SPECIFY NAME AND TITLE OF SIGNATORY, and constitutes Borrower's legal, valid, binding and enforceable obligation.

5. The execution, delivery and performance of the Loan Agreement by Borrower will not contravene any provision of any applicable law, rule or regulation of the State of New York or the Certificate of Incorporation or Bylaws of Borrower.

Very truly yours,

BY DAVID G. ANDERSON

David G. Anderson (danderson@couchwhite.com) is an attorney at Couch White LLP in Albany, NY, where he is a member of the firm's Construction and Government Contracts practice groups. Prior to entering private practice, Mr. Anderson was a Judge Advocate for the U.S. Air Force. He received his B.S. from the University of Akron, an M.A. from Central Michigan University, his J.D. from the University of Tennessee, and an LLM from George Washington University.

New York's Law on Full Payment Checks: Has It Changed?

After completing your construction work, you receive substantial back charges – which you contest. Two months later, you receive a check for $40,000, with the words "payment in full" on the front. Your unpaid retainage is $100,000. You need the money. Should you cash the check?

For the past 30 years, the answer has been yes. You could cash this check "under protest" and then bring legal action to recover the unpaid $60,000. The words "under protest" (or similar language) printed above your endorsement preserved your rights to the unpaid balance.

Today, there is uncertainty. A recent article in the New York State Bar Association *Journal* (*Journal*) asserts that cashing a check "under protest" may no longer preserve one's rights to the unpaid balance.[1] Because, argues the *Journal* article, the December 17, 2014, revisions to New York's Uniform Commercial Code (Code) make it "likely" (except in a limited group of cases) that cashing the check will result in an accord and satisfaction of the dispute, even if the check is cashed "under protest."

Background

At common law, the effect of cashing a check marked "payment in full" was an accord and satisfaction in the amount of the check. The check was deemed, in effect, a settlement offer, and cashing the check deemed acceptance of that offer. In 1985, there was a nationwide debate as to whether the Code (specifically Article 1) had changed this common law rule. The N.Y. Court of Appeals, in *Horn Waterproofing Corp. v. Bushwick Iron & Steel*,[2] adopted the minority position and held that Article 1 of the Code permits one to cash a full payment check "under protest" without releasing the remaining debt.

The December 17, 2014 Code Revisions

The December 17, 2014 Code revisions, among other things, added § 102, which states that Article 1 "applies to a transaction to the extent that it is governed by another article of [the Code]."[3] Because service contracts (of which construction contracts are a subset) are not governed by another article of the Code, the *Journal* article reasons that Article 1 no longer applies to such contracts.[4] If Article 1 no longer applies, then its provisions, which allow one to cash a full payment check "under protest," no longer apply. Thus, if our construction contractor cashed the owner's $40,000 check "under protest," a court might ignore that language and find that the cashing of the check resulted in a settlement of the contractor's claim.

What Is the Law Today on Full Payment Checks?

Did those revisions reverse New York's long-standing law on payment in full checks? We won't know for certain until the courts address this issue. Although it is conceivable a court could interpret these Code revisions as reversing the law, it seems far more likely they will find no such thing, for the following reasons.

Code § 1-102 Does Not Change Existing New York Law

As noted, newly added Code § 1-102 states: "[Article 1] applies to a transaction *to the extent that it is governed by another article of this act*."[5] The *Journal* article reasons that because service contracts are not governed by another article of the Code, one cannot cash a full payment check "under protest."[6]

The article's conclusion – that the law on full payment checks has "likely" changed because of § 1-102 – is based on a misidentification of the transaction under review. The *Journal* article focuses on the "underlying" transaction (the service contract).[7] But the Court of Appeals, in *Horn Waterproofing Corp.*,[8] focused on the "settlement" transaction, deciding it was immaterial that the underlying transaction (the service contract) was not governed by the Code. In the Court's words:

> Regardless of whether the underlying transaction between the parties was a contract for the performance of services rather than for the sale of goods, defendant's tender of a check to plaintiff brought the attempted full payment or satisfaction of the underlying obligation within the scope of article 3, thereby rendering it a "Code-covered" transaction to which the provisions of [Article 1] are applicable.[9]

In short, under the Court's precedent, the test is whether the transaction – not the *underlying* transaction – is Code-covered. Thus the Court of Appeals interpreted Article 1 of the Code as allowing one to cash a check marked payment in full "under protest" and still recover the unpaid balance. And likewise, new § 1-102 looks only to the transaction itself. It states: "This article applies *to a transaction* to the extent that *it* is governed by

another article of this act."[10] The word "underlying" appears nowhere.

The Legislative History Does Not Evidence That New York Wanted to Change Its Law on Full Payment Checks

When the Legislature intends to reverse existing law, it almost always (1) identifies the change and (2) discusses why the change is needed and the factors it considered in making the change. This is particularly true when a change is commercially significant. The legislative history accompanying the December 17, 2014 Code revisions does not mention any change to the existing law on full payment checks.[11] The overriding need for commercial certainty and the absence of any notice to the business community substantially increase the likelihood of a court finding that the Legislature both intended to, and did, preserve New York's law on full payment checks.

The Legislature Took Steps to Avoid Changing New York's Law on Full Payment Checks

The December 17, 2014 Code revisions were intended to modernize New York's law – make it consistent with the model code. The model code, however, takes the opposite position from New York on full payment checks. The model code clarifies that its acceptance "under protest" provisions do *not* apply to an accord and satisfaction (full payment checks).[12] Significantly, New York did not enact this clarifying language. Instead, the clarifying language was removed. The *Journal* article notes this removal but contends that in adopting § 1-102, the Legislature may inadvertently have changed the law on full payment checks.[13]

It is unlikely a court would agree. In interpreting statutes, courts seek to discern the Legislature's intent. Enactment of a law that deliberately omits certain language strongly evidences a legislative intent that the omitted language not be given effect. For this reason, it is not surprising that other legal commentators have concluded that the Legislature left New York's law on full payment checks unchanged when it did not adopt the model code's clarification.[14]

It thus appears highly unlikely that the courts will find that the December 17, 2014 Code revisions reversed (or had any effect on) the New York law on full payment checks.

But Another Factor Is at Play

A change in New York's law on full payment checks is probably overdue. As the *Journal* article points out, only in New York can one cash a check offered in full settlement of a dispute and still be able to sue for the unpaid balance.[15] In the other 49 states, the consequences of cashing a check marked "payment in full" even under protest is a settlement (accord and satisfaction) in the amount of the check. Why should one be able to accept a settlement offer (made by check) and then bring legal action to recover the remaining amount? In 1985, the N.Y. Court of Appeals adopted what was then the minority position on this issue, in large part because the Court believed that to be the "fairer" position.[16] Other states disagreed and today only New York clings to the minority view. Independent of which position is better, uniformity of the law is an important consideration. To this end, New York's Code states: "This act must be liberally construed and applied to promote its underlying purposes and policies which are . . . (3) to make uniform the law among the various jurisdictions."[17]

But even if a reversal in New York's existing law is long overdue, it should come from the Legislature and not the courts.

Conclusion

Returning to the issue of whether you should cash the check. You need the money, but if you cash the check under protest and bring legal action to recover the balance, the debtor will assert (among other defenses) that by cashing the check you settled the $100,000 dispute for $40,000. The debtor will contend that the law on payment in full checks changed on December 17, 2014, with enactment of the revised New York Code and cite the *Journal* article for support. We recommend that before cashing the check you obtain legal advice.

In the meantime, let's hope that New York quickly passes legislation ending the uncertainty, so the business community will once again know for certain the consequences of cashing a full payment check. ■

1. Sandra J. Mullings, *The Curious Case of the Full Payment Check*, N.Y. St. B.J. (May 2015), 44–48.
2. 66 N.Y.2d 321 (1985).
3. N.Y. Uniform Commercial Code § 102 (UCC).
4. Mullings, *supra* note 1, at 46–47.
5. UCC § 1-102 (emphasis added).
6. Mullings, *supra* note 1, at 47.
7. *Id.*
8. 66 N.Y.2d at 327–30.
9. *Id.* at 332.
10. UCC § 1-102.
11. A9933/S7816 signed by Governor Cuomo on Dec. 17, 2014.
12. Revised UCC §§ 1-207, 3-311 (1990).
13. Mullings, *supra*, note 1 at 47.
14. *See, e.g.*, Barbara M. Goodstein, *The New York UCC Comes of Age: Part II*, N.Y.L.J. Corp. Update, Vol. 253, No. 24 (Feb 5, 2015) ("In addition, the Act adopted only part of revised § 1-308 (performance or acceptance and reservation of rights) *so as to preserve existing New York law on accord and satisfaction* – permitting an express reservation of rights to avoid an accord and satisfaction otherwise effected by a payment . . . ") (emphasis added); G. Ray Warner, *New York Amends Its UCC, but Problems Remain*, Greenberg Traurig Alert, Feb 2015 ("New York also maintained its non-uniform language for section 1-308 'reservation of rights' provision, *thus continuing the existing law of accord and satisfaction*.") (emphasis added); Janet M. Nadile, *Modernization of New York's Uniform Commercial Code*, The American Law Inst., CLE Webinar (Feb. 11, 2015), slide 4 ("Revised 1-308 Performance under Reservation of Rights – NY omitted subsection (b) which in the official text provides that this section does not apply to accord and satisfaction. *This preserves NY's non-uniform approach to accord and satisfaction* as set forth in *Horn Waterproofing Corp. v. Bushwick Iron & Steel . . .*") (emphasis added); Matthew F. Furlong, et al., *2014 Changes to the New York Uniform Commercial Code*, Lawflash Morgan, Lewis & Bockius, LLP Jan. 6, 2015 ("Because the bill does not include adoption of the 1990 revisions to Articles 3 and 4, the bill omits the uniform language in § 1-308(b) that a reservation of rights does not apply to an accord and satisfaction.").
15. Mullings, *supra*, note 1 at 46.
16. *Horn Waterproofing*, 66 N.Y.2d at 326–27.
17. UCC § 1-103(a).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I'm a commercial litigator in New York. I recently was asked to mediate a commercial contract case, which is pending in the Commercial Division in the Supreme Court of New York, for one of my clients who is the defendant in the action. The morning right before commencement of the mediation, my client informed me that his business has been doing "lousy" and that even if the parties were to reach a settlement, he nevertheless intends to file for bankruptcy before the settlement payment becomes due. During that conversation, he emphasized that this information is confidential and cannot be disclosed to anyone. During the mediation, plaintiff's counsel communicated a final demand to my client, which my client indicated he was willing to accept. I did not disclose the information that my client shared with me either to the mediator or plaintiff's counsel.

My question to the Forum: Did I have an obligation to disclose my client's confidences under the circumstances? What should I have done? Is there anything I should do at this time?

Sincerely,

Concerned Counsel

Dear Concerned Counsel:

Your letter raises a very important and often difficult question. When and under what circumstances, if any, does a lawyer have an obligation to disclose confidential information learned from the client during the course of the lawyer's representation of the client?

It is a fundamental principle of ethics that a lawyer is generally prohibited, with some exceptions, from revealing a client's confidential information. *See* Rule 1.6 of the New York Rules of Professional Conduct (NYRPC). But, that is not the end of the road. The NYRPC also prohibit lawyers from making false statements to a third person, assisting a client in conduct that the lawyer knows is illegal or fraudulent, or from simply engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* NYRPC Rules 4.1(a), 1.2(d), and 8.4(c). Indeed, while the public interest is generally best served by strict compliance with the rule requiring lawyers to preserve the confidentiality of information relating to their representation of clients, the confidentiality rule is subject to limited exceptions that, *inter alia*, are intended to deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of the judicial process. *See* Rule 1.6 [Comment 6].

Does your predicament place you in one of the limited exceptions to the confidentiality rule? Based on what you have described, we believe it does even though the mediation is by its very nature a confidential process.

Let us take a look at which Rules of Professional Conduct are implicated in negotiations and specifically the mediation context. As an initial matter, we note that the negotiation process creates an inherent tension for lawyers since "[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." ABA Model Rules of Professional Conduct, Preamble (1995). Indeed, the mediation process often presents ethical dilemmas since the art of negotiation frequently involves some level of misrepresentations, "posturing" and "puffery," particularly concerning each side's minimum settlement points as well as the exaggeration or emphasis of the strengths of one's position, and the minimization or deemphasis of the weaknesses of one's position. *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 439 (Apr. 12, 2006) (ABA, Formal Op.). Certain types of statements during negotiations, such as estimates of price or value placed on the subject of a transaction, or a party's intentions as to an acceptable settlement of a claim, are generally accepted conventions in negotiation and are ordinarily not deemed to be false statements of material fact, and therefore are not considered to run afoul of the ethical rules. *See* Rule 4.1 [Comment 2]. Additionally, it is recognized that the duty of zealous representation generally prohibits a lawyer in negotiations from voluntarily disclosing weaknesses in his or her client's case. *See* ABA, Formal Op. 375 (1993).

The flip side to those general principles is that the ethical rules governing lawyer truthfulness and the ethical prohibitions against lawyer misrepresentations apply in all environments, including the mediation context. *See* ABA, Formal Op. 439, at 8.

Specifically, Rule 4.1 of the NYRPC, Truthfulness in Statements to Others, has been found to govern a lawyer's conduct when negotiating either inside or outside of the mediation context. It provides "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Pursuant to this rule, a lawyer is required to be truthful when dealing with others on a client's behalf and is not permitted to make misrepresentations to another – mean-

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.

ing the lawyer cannot incorporate or affirm a statement of another that the lawyer knows is false. NYRPC Rule 4.1 [Comment 1]. Although lawyers generally do not have an affirmative duty to inform opposing parties of relevant facts, it is recognized that misleading statements or omissions of facts may be "the equivalent of affirmative false statements." NYRPC Rule 4.1 [Comment 1].

In addition, Rule 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or *assist a client*, *in conduct that the lawyer knows is illegal or fraudulent*, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client" (emphasis added). Rule 1.2(d) only applies when the lawyer "knows" that the client's conduct is illegal or fraudulent. It does not apply when it is merely "obvious" to others that the conduct is illegal or fraudulent, or when the lawyer simply believes or suspects but does not know that the client's proposed scheme is fraudulent or illegal. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, Simon's Annotations on Rule 1.2(d), at 108 (2015 ed.).

Moreover, Rule 8.4(c) of the NYRPC overlaps with Rule 4.1 providing that a lawyer may not engage in "dishonesty, fraud, deceit or misrepresentation."

Based on the facts provided, it appears that your client does not have the wherewithal or the intention to fund the settlement that was entered into during the mediation. In our opinion, this creates a real possibility that later on someone may cry foul and accuse your client of fraud. Your risk is that you could be charged with actual knowledge of your client's wrongdoing because you were told prior to the mediation that the client's business is doing "lousy" and that he intends to file for bankruptcy before any settlement payment becomes due. Consequently, you are likely to be found to be in violation of the aforementioned Rules for assisting the client in perpetuating that fraud even if all you did was remain silent as to your client's situation. The Rules recognize that "omissions [of material facts] are the equivalent of affirmative false statements." Rule 4.1 [Comment 1].

So, what should you have done under the circumstances? The NYRPC expressly tell us that when a lawyer's representation will result in violation of the Rules or other law, the lawyer must advise the client of any limitation on the lawyer's conduct and remonstrate with the client confidentially. *See* Simon's Annotations on Rule 1.2(d), at 110–11 (citing NYRPC Rules 1.4(a)(5)) (a lawyer shall consult with the client about any relevant limitation on his or her conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law) and 1.16(b)(1) (a lawyer shall withdraw from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law). A lawyer "cannot simply remain silent in the face of a request or expectation by the client for assistance the lawyer is forbidden to provide. The lawyer has to explain that the lawyer cannot give that assistance." Simon's Annotations on Rule 1.4(a)(5), at 139.

If the client is uncooperative and still wants to proceed after you have warned him that you cannot assist in his fraud, you are required to take reasonable remedial measures, including perhaps going so far as to tell the mediator that you no longer will participate in the mediation, and may be constrained to withdraw as counsel. We note that paragraph (b) to NYRPC Rule 1.6 simply permits, but does not require, a lawyer to disclose confidential information relating to the representation to, *inter alia*, prevent the client from committing a crime (Rule 1.6(b)(2)). However, Rule 1.16(b)(1) provides that a lawyer *shall* withdraw from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law.

It is unclear from the facts you provided whether your client did all the talking during the mediation or whether you assisted him in giving the other side the misimpression the client was in a position to fund the settlement. This is important because as your role on behalf of the client expands, so too does your responsibility for making sure that third parties are not misled. In other words, if you made representations during the mediation concerning your client's ability to fund the settlement, then your ethical obligations are substantially greater than if you were merely present when the client himself was speaking. But even if you simply remained silent during the negotiations, your silence under the circumstances may nevertheless have severe consequences.

Indeed, lawyers who make misrepresentations on behalf of clients or withhold material facts when negotiating a settlement in mediation or otherwise risk ethical discipline. *See generally Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. 2005) (lawyers sanctioned for making misrepresentations during settlement negotiations). They also risk civil liability for fraud, deceit, and legal malpractice. *See*, *e.g.*, *Taft v. Shaffer Trucking, Inc.*, 52 A.D.2d 255, 259 (4th Dep't 1976) (contribution cause of action upheld based upon an attorney's breach of the obligation "to conduct settlement negotiations in a fair and equitable manner without recourse to fraud or misrepresentation"); *Corva v. United Servs. Auto. Ass'n*, 108 A.D.2d 631 (1st Dep't 1985) (action against automobile insurer and its attorneys for misrepresenting policy limits in settlement of personal injury lawsuit); *see also Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301 (2d Cir. 1979), *cert. denied*, 449 U.S. 981 (1980) (allowing fraud suit where lawyer misrepresented the amount of available insurance coverage); *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 657 N.W.2d 711 (Iowa 2003) (lawyer who lied about client owning a business in negotiation to sell that business held liable for fraud). Not to mention that lawyers jeopardize their reputations and effectiveness in

future encounters with mediators and other lawyers. Once your reputation for honesty is compromised, you may find it exceedingly difficult to negotiate at all with other parties, having lost your credibility.

So, that leads us to your next question: What should you do now? We believe the best course for you to follow is to try to persuade your client to take any necessary preventive or corrective steps that will bring the client's conduct within the bounds of the law – meaning your client should come clean and disclose to the other side that he does not have the wherewithal to pay the settlement agreed to and see if the parties can negotiate a settlement that your client can honor. If the client refuses to take the necessary corrective action and your continued representation would further assist in the fraudulent conduct, including, *inter alia*, if it has not already occurred, the drafting and negotiation of the language of the settlement agreement, you must take the necessary steps to withdraw as counsel. *See* NYRPC Rule 1.16(b)(1).

In certain circumstances, withdrawal alone may be insufficient and the lawyer may be required to give notice of the fact of the withdrawal and to disaffirm any document, opinion or affirmation proffered to the other side. *See* Rules 1.6(b)(3) and Rule 4.1 [Comment 3]. Notably, the Court of Appeals, albeit not in the mediation context, has instructed that an attorney's duty to zealously represent a client is circumscribed by an "equally solemn duty to comply with the law and standards of professional conduct . . . *to prevent and disclose frauds*." *People v. DePallo*, 96 N.Y.2d 437 (2001) (emphasis added) (quoting *Nix v. Whiteside*, 475 U.S. 157, 173 (1985)).

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I specialize in commodities and securities regulation, as well as the tax consequences of transactions in securities and commodities. Almost 10 years ago, a client of mine in the financial services industry had devised a new transaction that he asked me to implement. The transaction implicated numerous novel questions in commodities and securities regulation, and I was concerned about solicitation were I to represent both my client as the originator and the investors to whom the idea was to be pitched. *See* Forum (Mar./Apr. 2007) N.Y. St. B.J., p. 52.

As it turned out, for reasons related entirely to market conditions, that transaction did not go forward. In the interim I have stayed close with this client, and now he has come to me with a similar concept. The client would like me to represent only him in his individual capacity and the vehicle as issuer's counsel. He would also like me to connect him with some investors whom I know and whom I have represented on unrelated matters, but not to hold myself out as representing any of these investors. My role will be to structure the transaction and to provide an opinion stating that the transaction is legal and outlining the specific consequences (as well as any risks). My opinion will be included in the marketing materials, and it is expected that I will make myself available to speak with investors and their advisors. The investors will all be sophisticated persons. However, we will not be able to control whether they will each have their own counsel.

What advice do you have for me?

Sincerely,

U. N. Certain

common-fund exception, no fund exists under the substantial-benefit exception.

Contempt Exception. A party who enforces a judgment in a contempt proceeding may collect its attorney fees in enforcing the contempt order.[19]

Attorney-Fee Statutes. More than 200 federal and about 2,000 state statutes provide for attorney-fee awards.[20] The statutes cover, among other things, civil rights, consumer protection, employment, and environment-protection lawsuits.[21] Under most of these statutes, only a successful party may recover its attorney fees.[22]

Read the statute carefully if you're moving to recover attorney fees under a statute. Federal, state, and city statutes differ. Some statutes allow for an attorney-fee award only in limited cases. The New York City Human Rights Law, for example, authorizes attorney fees in any civil action brought under its provisions.[23] The New York State Human Rights Law, however, provides for attorney fees only in cases alleging housing discrimination.[24]

Unless otherwise noted, the focus of this column will be on the contract exception to the American rule.

Attorney Fees: An Overview

The general rule in New York is that "attorneys' fees are incidents of litigation and a prevailing party may not collect from the loser unless an award is authorized by agreement between the parties, statute, or court rule."[25]

Demand for Attorney Fees. Before moving for attorney fees, make sure you've adequately demanded attorney fees as a claim in your complaint or as a counterclaim in your answer.[26] A court will determine that you haven't adequately pleaded your claim for attorney fees if your demand for attorney fees is contained only in your wherefore clause.[27] Move for attorney fees before entry of a judgment.[28] The *Legal Writer* will discuss the contents of your attorney-fee motion in the next issue of the *Journal*.

Ultimate Outcome. Your attorney-fee motion is premature if you've brought it before the "ultimate outcome" of a controversy has been reached irrespective whether it's on the merits.[29] An ultimate outcome is reached when it's clear that a party can't or won't commence another action on the same grounds.[30]

Different courts and different judges in the same courts use different ways to calculate attorney fees.

If your adversary brings a second case against you but on different grounds from the first case, you might be entitled to attorney fees for successfully defending the first case.[31]

Prevailing Party. Practitioners move for attorney fees based on a contract, statute, or court rule that allows a prevailing party to recover its reasonable attorney fees. After the litigation has concluded, practitioners who contend that their client is a prevailing party to the litigation will move to recover their attorney fees.

It isn't always self-evident who is the prevailing party.[32] The New York Court of Appeals has defined the prevailing party as the party who has achieved the "'central relief sought.'"[33] Whether you're a prevailing party "requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope."[34]

You might be the prevailing party even if you didn't prevail on all your claims.[35] After a court considers the true scope of the litigation, the court will likely determine that you're the prevailing party if you've obtained monetary relief and your adversary didn't.[36]

A court that ultimately dismisses your claim or counterclaim will likely determine that you're not the prevailing party.[37]

A court will likely find that you're not the prevailing party if your adversary, the plaintiff, obtained monetary relief on one of its claims but you won, in part, your motion to dismiss on the remaining claims in plaintiff's complaint.[38]

Mixed Outcome. Sometimes it's hard to determine who's the prevailing party if each party secures mixed results from the litigation. If the outcome of the litigation isn't "substantially favorable" to either side, neither party will be entitled to attorney fees.[39]

Reasonable Fees. A court may enforce an attorney-fee award only to the extent that the attorney fees are "reasonable and warranted for the services actually rendered."[40] The reason a court's calculation of attorney fees is confusing is the "amorphous concept of reasonableness. . . . With no definitive answer to this question, litigants and attorneys are left to rely on the subjective intuition of the judge rendering the fee award."[41] This subjectivity has "resulted in inconsistency, unpredictability, and a waste of judicial resources."[42]

Methods for Calculating Attorney Fees

Different courts and different judges in the same courts use different ways to calculate attorney fees.[43] Courts throughout the United States use six different methods, or variations of these methods, in calculating reasonable attorney fees: the percentage-of-recovery method; the lodestar method; the lodestar cross-check method; the pure factor-based method; the multifactor lodestar method; and the strict lodestar method. Other jurisdictions, such as Maryland and Nevada, give judges the discretion to choose the best method to calculate attorney fees.

Before you bring your motion for attorney fees (or oppose a motion for fees), look at the court's or the individual judge's earlier decisions to determine which method the court uses to calculate attorney fees.

Percentage-of-Recovery Method. Under this method, the attorney-fee award is based on a variable percentage of the amount the attorney recovered for the client. Courts that apply this method have "complete discretion

in selecting the appropriate percentage owed to the attorneys."[44] Courts determine what percentage to award an attorney by relying on such factors as the size of the attorney's monetary recovery and the "amount of benefit conferred" on the client.[45]

Lodestar Method. Under the lodestar method, courts arrive at a lodestar amount by multiplying the number of hours that an attorney spent litigating the case by the attorney's reasonable hourly rate — the time-rate calculation.[46] A court may adjust the lodestar amount "upward or downward . . . depending [] on the contingent nature of the case and the quality of the attorney's work."[47] Courts don't use the *Johnson* factors, explained below, in this calculation.[48]

Lodestar Cross-Check Method. This method combines the percentage-of-recovery method with the lodestar method.[49]

Pure Factor-Based Method. In the pure factor-based method (also referred to as the multifactor method), the court considers 12 factors:

1. the time and labor required for the litigation;
2. the novelty and difficulty of the questions presented in the case;
3. the skill required to perform the legal service properly;
4. the attorney's avoiding other work because the attorney accepted this case;
5. the customary fee charged by attorneys in the community for similar cases;
6. whether the attorney's fee is fixed or contingent;
7. the time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the attorney's experience, reputation, and ability;
10. the undesirability of the case;
11. the nature and length of the attorney's professional relationship with the client; and
12. fee awards in similar cases.[50]

These factors are known as the *Johnson* factors.[51]

Disagreements among the courts arise in "how and when to apply the *Johnson* factors when setting an attorney's hourly compensation rate and when determining which hours were reasonably expended."[52]

Multifactor Lodestar Method. Under this method, courts determine the initial lodestar amount, excluding duplicative or remedial hours from its calculation. Courts will then adjust the time-rate calculation upward or downward based on the facts and circumstances of the case.[53] A majority of state courts, including New York courts, will then "use the *Johnson* factors to adjust the product of the time-rate lodestar calculation."[54]

A minority of states, however, use a multiplier to adjust the time-rate calculation.[55] A multiplier is a "'factor applied to the lodestar amount to arrive at the final fee award.'"[56]

Strict Lodestar Method. Under the strict lodestar method, courts incorporate the *Johnson* factors into the time-rate lodestar calculation. Under this method, "'very little room for adjustment'" exists after the court calculates the time-rate lodestar method.[57]

Discretion. Some jurisdictions leave it to the judge's discretion to decide which method to use.[58]

The Practice in Federal and State Courts

The United States Supreme Court has adopted the following approach: It combines the lodestar method with the *Johnson* factors.[59] The Court's approach is to multiply the number of hours the attorney expended in the litigation by the attorney's reasonable hourly rate. The Court has explained that courts may use the *Johnson* factors to adjust the "time-rate lodestar upward or downward."[60] The Court has noted that many of the *Johnson* factors "'usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.'"[61]

Federal and state courts "overwhelmingly use the lodestar method to calculate attorneys' fees in fee-shifting cases."[62] Federal courts use the strict lodestar method.[63] Most state courts apply the multifactor lodestar method by using the *Johnson* factors to "adjust the time-rate calculation upward or downward based on the facts of the particular case."[64]

Federal district courts in the Second Circuit now refer to the lodestar method as the "presumptively reasonable fee."[65]

In the Second Circuit, judges may use either the percentage-of-recovery method or the lodestar method in common-fund cases.[66] In other circuits, courts have the discretion to choose between the percentage-of-recovery method or the lodestar method in common-fund cases.[67] Most jurisdictions favor the percentage-of-recovery method in common-fund cases.[68]

The First, Second, Third, and Fourth Departments in New York use the multi-factor lodestar method — by applying the *Johnson* factors — to compute attorney fees.[69] In class actions, the First, Second, Third, and Fourth Departments in New York use the lodestar method to calculate attorney fees.[70]

> A court may enforce an attorney-fee award only to the extent that the attorney fees are "reasonable and warranted for the services actually rendered."

Knowing how to apply the multifactor lodestar method in New York will be the focus of the next issue of the *Journal*, including how to compose (or oppose) the attorney-fee motion, and how to conduct (or defend) an attorney-fee hearing.

In the next issue of the *Journal*, the *Legal Writer* will continue with motions for attorney fees. ■

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1. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 Ind. Int'l & Comp. L. Rev. 583, 587 (2005) (citing John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1595 (1993)).

2. Matthew D. Klaiber, *A Uniform Fee-setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-based Mathematical Model*, 66 Md. L. Rev. 228, 231 (2007).

3. Jacob Singer, Note, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 St. John's L. Rev. 693, 695 (2010).

4. *Id*. (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796)).

5. *Id*.

6. *Id*. at 695–96 (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)).

7. *Id*. at 696 (quoting Joan Chipser, Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319, 321 (1977)).

8. *Id*. (citing Root, *supra* note 1, at 585).

9. *Id*.

10. Root, *supra* note 1, at 585.

11. *Id*. at 586.

12. *Id*. (quoting John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 29 (1984) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3748&context=lcp (last visited June 15, 2015)).

13. Klaiber, *supra* note 2, at 233.

14. Root, *supra* note 1, at 586.

15. *Id*. at 587 (citing Vargo, *supra* note 1, at 1581).

16. *Id*.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*. at 588.

21. *Id*.

22. *Id*.

23. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook § 38:160, at 38-66 (2010) (citing *Jattan v. Queens Coll. of City Univ. of N.Y.*, 64 A.D.3d 540, 541, 883 N.Y.S.2d 110, 112 (2d Dep't 2009)).

24. *Id*.

25. Aaron J. Broder, Trial Handbook for New York Lawyers § 34:6, at 743 (3d ed. 1996) (citing *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366, 548 N.E.2d 903, 904 (1989); *Gottlieb v Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 464, 605 N.Y.S.2d 213, 218, 626 N.E.2d 29, 34 (1993)).

26. Birnbaum, *supra* note 23, § 38:160, at 38-66.

27. *Id*. § 38:160, at 38-64 (citing *Vertical Computer Sys., Inc. v. Ross Sys., Inc.*, 59 A.D.3d 205, 206, 873 N.Y.S.2d 551, 553 (1st Dep't 2009)).

28. *Id*. § 38:160, at 38-66 (citing *Golden v. Multigas Distrib., Ltd.*, 256 A.D.2d 215, 216, 683 N.Y.S.2d 16, 17 (1st Dep't 1998) ("As for plaintiff's claim for attorneys' fees, there is no indication in the record that plaintiff made an application to the trial court for a determination of attorneys' fees recoverable under the parties' contract at any time prior to the entry of judgment, or that the trial court made any ruling precluding plaintiff from making such an application. The omission of a provision for attorneys' fees from the judgment is therefore not due to any error by the trial court, and we have no occasion to disturb it.")).

29. *Elkins v. Cinera Realty*, 61 A.D.2d 828, 828, 402 N.Y.S.2d 432, 433 (2d Dep't 1978).

30. *Roxborough Apt. Corp. v. Becker*, 177 Misc. 2d 408, 411, 676 N.Y.S.2d 821, 822 (Hous. Part Civ. Ct. Kings County 1998) (citing *Elkins*, 61 A.D.2d at 828, 402 N.Y.S.2d at 433; *accord N.V. Madison, Inc. v. Saurwein*, 103 Misc. 2d 996, 998–99, 431 N.Y.S.2d 251, 253 (App. Term 1st Dep't 1980).

31. *Scotia Assocs. v. Bond*, 126 Misc. 2d 885, 887, 484 N.Y.S.2d 479, 482 (Civ Ct. N.Y. County 1985).

32. Birnbaum, *supra* note 23, § 38:160, at 38-64.

33. *Id*. (quoting *Nestor v. McDowell*, 81 N.Y.2d 410, 416, 599 N.Y.S.2d 507, 510, 615 N.E.2d 991, 994 (1993).

34. *Excelsior 57th Corp. v. Winters*, 227 A.D.2d 146, 147, 641 N.Y.S.2d 675, 676 (1st Dep't 1996).

35. Birnbaum, *supra* note 23, § 38:160, at 38-65 (citing *Botwinick v. Duck Corp.*, 267 A.D.2d 115, 117, 700 N.Y.S.2d 143, 145 (1st Dep't 1999)).

36. *Id*.

37. *Id*. (citing *Vertical Computer Sys.*, 59 A.D.3d at 206, 873 N.Y.S.2d at 553).

38. *Townhouse Stock LLC v. Coby Housing Corp.*, 2007 N.Y. Slip Op. 32235(U), *1, 2007 WL 2175623, at *1 (Sup. Ct. N.Y. County 2007) ("Here, defendants succeeded in their dismissal motions, but they were not awarded any monetary relief. Thus, it is the plaintiffs that are the 'prevailing parties' in this case because they prevailed on the central claim in this action and were awarded substantial relief in connection with that claim.").

39. *Chainani v. Lucchino*, 94 A.D.3d 1492, 1494, 942 N.Y.S.2d 735, 737 (4th Dep't 2012) (citing *Berman v. Dominion Mgt. Co.*, 50 A.D.3d 605, 605, 859 N.Y.S.2d 407, 408 (1st Dep't 2008)); *LGS Realty Partners LLC v. Kyle*, 29 Misc. 3d 44, 46, 909 N.Y.S.2d 859, 860 (App. Term 1st Dep't 2010) (citing *Pelli v. Connors*, 7 A.D.3d 464, 464, 777 N.Y.S.2d 805, 805 (1st Dep't 2004); *Walentas v. Johnes*, 257 A.D.2d 352, 354, 683 N.Y.S.2d 56, 59 (1st Dep't), *appeal dismissed*, 93 N.Y.2d 958, 958, 694 N.Y.S.2d 635, 635, 716 N.E.2d 700, 700 (1999)).

40. Birnbaum, *supra* note 23, § 38:160, at 38-65 (citing *Yonkers Rib House, Inc. v. 1789 Cent. Park Corp.*, 63 A.D.3d 726, 726, 880 N.Y.S.2d 148, 149 (2d Dep't 2009)).

41. Klaiber, *supra* note 2, at 229.

42. *Id*.

43. *Id*. at 228; *see generally* Michael Kao, Comment, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. Rev. 825 (2004); Justin Lamb, Comment, *The Lodestar Process of Determining Attorney's Fees: Guiding Light or Black Hole?*, 27 J. Legal Prof. 203 (2003); Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977) (cited in Klaiber, *supra* note 2, at 229, 237).

44. Klaiber, *supra* note 2, at 231.

45. *Id*. at 235.

46. *Id*. at 236 (citing *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117–18 (3d Cir. 1976) (*Lindy II*)).

47. *Id*.

48. *Id*. at 244 n. 111.

49. *Id*. at 231, 249–50.

50. *Id*. at 230–31 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)).

51. *Id*. at 237 (discussing *Johnson*, 488 F.2d at 717–20).

52. *Id*. at 242.

53. *Id*. at 242, 244.

54. *Id*. at 244.

55. *Id*. at 245.

56. *Id*. at 243 n. 102 (quoting Kao, *supra* note 43, at 829).

57. *Id*. at 243 (quoting Kao, *supra* note 43, at 834).

58. *Id*. at 231, 245 (noting that Maryland and Nevada use this approach).

59. *Id*. at 238 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)); *Blanchard v. Bergeron*,

489 U.S. 87, 94 (1989).

60. *Id*.

61. *Id*. at 239 (quoting *Hensley*, 461 U.S. at 434 n.9).

62. *Id*. at 242.

63. *Id*.

64. *Id*.

65. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany & Albany County Bd. of Elections*, 522 F.3d 182, 183 (2d Cir. 2008).

66. Klaiber, *supra* note 2, at 246 n.130 (citing *Wal-Mart Stores, Inc., Visa U.S.A. Inc.*, 396 F.3d 96, 121–22 (2d Cir. 2005)).

67. *Id*. at 246–47.

68. *Id*.

69. *S.T.A. Parking Corp. v. Lancer Ins. Co.*, 128 A.D.3d 479, 479, 2015 WL 2237539, at *1 (1st Dep't 2015); *Morgan & Finnegan v. Howe Chem. Co., Inc.*, 210 A.D.2d 62, 63, 619 N.Y.S.2d 719, 720 (1st Dep't 1994); *In re Rahmey v. Blum*, 95 A.D.2d 294, 300–05, 466 N.Y.S.2d 350, 356–60 (2d Dep't 1983); *Katzer v. County of Rensselaer*, 1 A.D.3d 764, 766, 767 N.Y.S.2d 474, 476–77 (3d Dep't 2003); *Podhorecki v. Lauer's Furniture Stores, Inc.*, 201 A.D.2d 947, 947–48, 607 N.Y.S.2d 818, 819–20 (4th Dep't 1994).

70. *Matakov v. Kel-Tech Constr., Inc.*, 84 A.D.3d 677, 678, 924 N.Y.S.2d 344, 346 (1st Dep't 2011) (applying lodestar method in class action) (citing *Nager v. Teachers' Retirement Sys. of City of N.Y.*, 57 A.D.3d 389, 390, 869 N.Y.S.2d 492, 493 (1st Dep't 2008), *lv. denied*, 13 N.Y.3d 702, 702, 886 N.Y.S.2d 93, 93, 914 N.E.2d 1011, 1011 (2009)); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 75, 808 N.Y.S.2d 766, 776 (2d Dep't 2006); *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 165–66, 865 N.Y.S.2d 706, 708–09 (3d Dep't 2008) (applying lodestar in class action but reducing amount of attorney-fee award because it exceeded what plaintiff sought), *aff'd* ,15 N.Y.3d 375, 379, 912 N.Y.S.2d 504, 505, 938 N.E.2d 937, 938 (2010) (noting that New York does not apply common-fund exception to class actions); *Ciura v. Muto*, 24 A.D.3d 1209, 1210, 808 N.Y.S.2d 842, 843 (4th Dep't 2005) (applying lodestar method in class action but noting that courts [in the Fourth Department] should "consider factors such as 'the novelty and difficulty of the questions presented . . . [and] the skill requisite to perform the legal services properly'") (citations omitted).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLIII — Motions for Attorney Fees

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed trial and post-trial motions. In this issue and the next, we'll discuss motions for attorney fees, sometimes called attorney's fees or attorneys' fees, but which the *Legal Writer* calls attorney fees because the fees belong to the client, not the attorney. We'll provide a brief historical overview of attorney fees and how courts calculate attorney fees, including the percentage-of-recovery method, the lodestar method, and the pure factor-based method. We'll also address what it means to be a prevailing party, the contents of your attorney-fee motion, your papers opposing an attorney-fee motion, and attorney-fee hearings.

Litigating a case is expensive. For clients, attorney fees "probably comprise the greatest expense"[1] of litigation. As a practitioner, you need to know how to recover your attorney fees so that your client will be reimbursed. But moving for attorney fees can be a daunting task. The law isn't uniform; it's murky and constantly changing. Different courts, and different judges in those courts, use different methods to calculate attorney fees: "[T]he only consistent aspect of court-awarded attorneys' fees is the sheer inconsistency of the fee-setting process."[2] In this issue, the *Legal Writer* will clarify some issues arising in moving for attorney fees.

Attorney Fees: A Brief History

The United States initially followed the English rule on attorney fees: The losing party had to pay the prevailing party's attorney fees.[3] But in 1976, the Supreme Court rejected the English rule and created its own rule: Each party must pay its own attorney fees.[4] The Supreme Court recognized that "'even if [the American rule is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.'"[5] In developing the American rule, the Court considered two public policies: (1) Parties shouldn't be punished for suing; and (2) the court system would be substantially burdened if courts had to decide what constitutes reasonable attorney fees.[6] Soon, an anti-American rule movement developed. Its followers argued that "'under [the American rule,] the successful party is never fully compensated because such party must pay [its] counsel fees which may be as much or more than the total recovery in the suit.'"[7] Despite the anti-American-rule movement, the American rule still stands.

Exceptions to the American Rule

Judges and legislators across the United States have carved out six equitable exceptions to the American rule, allowing litigants to recover their legal fees.[8] The exceptions cover (1) contracts; (2) bad faith; (3) common funds; (4) substantial benefit; (5) contempt; and (6) attorney-fee statutes.[9]

Contract Exception. Parties may include an attorney-fee provision in a contract in the event they'll have to litigate on the contract. Courts will enforce a contractual attorney-fee provision unless the provision violates public policy.

Bad-Faith Exception. Courts may award attorney fees if the parties or their attorneys act in bad faith "in the filing of the lawsuit . . . [or] before or after the course of the proceeding."[10] Courts have defined "bad faith" as conduct that's unwarranted, baseless, or vexatious.[11] The bad-faith exception aims to deter "'illegitimate behavior in the courtroom, and sometimes outside it.'"[12]

Common-Fund Exception. Courts apply the common-fund exception in antitrust litigation, mass-disaster torts, and class actions. Under the common-fund exception, courts are "permit[ted] to extract the attorney's fee from the recovery fund awarded to a class of prevailing litigants."[13] Courts will "dispers[e] the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund being drawn from [it] through court order."[14] Before a court disperses the litigation costs, three conditions must be met: "[A] fund must exist; . . . a court must be able to exert control over the fund; and . . . fund beneficiaries must be identifiable so the court can shift the attorney fees to those benefitting from the litigation."[15]

Substantial-Benefit Exception. The substantial-benefit exception is similar to the common-fund exception: Nonparties must share the litigation expenses; absent parties won't be enriched unjustly at the expense of the party bringing the lawsuit.[16] A court will exert control over an entity made up of "beneficiaries in order to disperse the fee award."[17] The substantial-benefit exception applies to pecuniary and non-pecuniary benefits.[18] Unlike the

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Theodore Peter Nikolis
Michael Lifu Niu
Kristen Gabriela Niven
Thomas Patrick O'Malley
Joanne Rose Oleksyk
Ricardo Enrique Oquendo
Miguel Francisco Oria
Alejandro Gonzalez Ortega
Ramona Miranda Ortega
Arlene Juliette Ortiz-Leytte
Dayo Mariam Oshilaja
Jieun Paik
Kathryn Marian Pando
Gabrielle Paolini
John Papaspanos
Lesa G. Pascal
Jesse Ray Passmore
Manish Patel
Sudeep Paul
Andrew Joseph Pearlman
Chiara Michele Pellus
Kristen Michelle Peltonen
Adam Ross Peltz
Steven William Peretz
Wade Geoffrey Perrin
Evan Jason Peters
Erick Vezina Posser
Julia Wenjing Qi
Pengchao Qiu
Pierre-matthis Brice Vassili Quin
Marcella Gabriella Rabinovich
Ajay Gul Rajani
Kaviyuvraj Vishankar Ramkissoon
Aneet Rana
Christina Nicole Randall-James
Ayda Rashidian
Dacia Ann Read
Tara Lindsay Rhoades
Kate Rosalie Richardson
Eric D Rinder
Andrew Taylor Ringwood
Bettina Kay Roberts
Charlene O. Roderman
Amy Jessica Rossignol
Andrew Ross Rubin
Ashley Paige Ruocco
Andrea Simone Ryken
Martha Caroline Rysinski
Tushara Laka Saint Vitus
Luiza Salata
Lauren Victoria Saltiel
Theodore David Samets
Michelle Anne Sargent
Ross Malek Sarraf
Nicole Sayegh
Joseph Samuel Schaedler
Joseph Michael Schofield
Michael David Schwartz
Rebecca Lynn Searle
David Jonathan Selesnick
Mark Semotiuk

Katherine Sexton
Rachel Jay Shapiro
Marc D. Shepsman
Elisheva Sherman
Mona Moonyoung Shin
Yangho Charles Shin
Alex D. Silagi
Jeffrey Scott Silberman
Rachel Kate Silverman
Julie Ann Simeone
Michael Joseph Simeone
Shefali Tina Singh
David Ryan Smith
Jonathan James Smith
Alexander Lee Smorczewski
Madeline Rose Snider
Hanchang Sohn
Peter Joseph Spaziani
Thayne Staddard
Adiella Cyril Stadler
Jessica Anne Stanton
Daniel Lawrence Sternberg
Miriam R Sternberg
Michael Philip Stromquist
David Michael Stuckey
Derek Ryan Stueben
Elizabeth Jarvie Sullivan
Nicole Renee Sullivan
Eric Bryant Swartz
Phillip Allen Syers
Luke Thomas Taeschler
David Joseph Tassa
Brittany Marie Taylor
Linden Edsel Thomas
John Jenner Thompson
Robert Bruce Thompson
Shea Nicole Thompson
Rukayatu Tijani
Laura Lee Timko
Kevin E. Timson
Loretta Anne Tracy
Mark P. Trinchero
Kunaal Ashok Trivedi
Grant Wing Fung Tse
Nnawuihe Chukwuma Ukabiala
Christopher Everett Ullman
Cindy Unegbu
Jason Aron Uris
Carlos Javier Vaca Valverde
Patrick Henry Vergara
Sharmila R. Vialva
Mark Charles Viera
Claire Alyson Vinyard
Anna Denisse Vladau Cordier
Amy Kathleen Vogltanz
Ian T. Volek
Zachary Volk
Shawn Dustin Wagner
Kaitlin Alexa Wallace
Alex Wang
Zixuan Wang
Dina M. Wegh
Adrien Ana Weibgen
Colum Joseph Weiden
Olivia Anne Weil
Adrienne Aileen Weiner
Ruth A. Weinstein
Sagan Alessandra Weiss
Jennifer Elyse Weisser
Charles Stephen Welcome
Daniel Joseph Werb
Ariel Charlotte Werner
Clarissa Ann Wertman
Wesley Lanier White
Braden O'Gara Wilhelm
Keien John Williams
Besorah Won
Caitlin L Wood
Justine Katherine Woods
Matthew Becker Wright
Nina Ning Xue
Mark Dillon Young
Matthew David Young
Feng Zheng
Szyuan Shannon Zhu

SECOND DISTRICT
Vayola Kama Abraham
Daniella Ester Adler
Lauren Michelle Arnel
Joseph Hersch Aron
Catherine Patricia Barreda
Todd Gerard Beattie
Lezlie A. Benham
Michael D. Benjamin
Jonathan B. Berger
Theresa Paulina Borden
Danielle Anne Bautista Cardona
Chaim Alexander Cohen
Christine Colvert
Jonathan Engel
Sarah Elizabeth Evans-Devita
Aleksandr Lowenthal Felstiner
Dennis H. Flesch
Scott Allen Foletta
Ada Adrienne George
Ahron Shlomo Golding
Marc C. Gottlieb
Patrick Momsen Grady
Laura Ann Green
Igor Gridenko
Lauren Groetch
Carlos Alberto Gutierrez
Anastasia Louise Holoboff
Erin Elizabeth Keenan
Yevgeniya Kuznetsoff
Shermin Lakha
Zahyr K.R. Lauren
Do Kyung Lee
Judith Rachel Leibowitz
Dean Nicholas Liakas
Robert J. Lum
Ian Michael MacDougall
Christopher Louis Mamone
Daniel Hassan Maziad
Laura Rowland McKenzie
John Bederman Mickley
Christopher Miles
Dalourny Nemorin
Nhu Y Thi Ngo
Kathryn Ariana Palillo
Silki P. Patel
Jannine Ramlochan
Matthew David Reisman
Richard Rozhik
Matthew Tyler Schock
Yasmin Ashley Sinclair
Jessica Marie Singer
Jessica Leah Sklarsky
Andrew Dawson Smith
Brittany Stern
Meghan Kathryn Sullivan
Jessica Yount Swaim
Nicole Renee Tarpey
Michael C. Teitel
Stephanie Rose Vetch
Robert John Williams
Boris Yankovich

THIRD DISTRICT
Silvia Andrejuk
Scarlett Antoinette Camargo
Christopher Robert Camastro
Ryan Matthew Carty
Stephen White Dunn
Allison Jean Gold
Joshua Nicholas Gregg
Linda Harmonick
Dustin Bradley Howard
Grace E. Mellen
Gregory David Pratt
Joshua Rodriguez
Versely Rosales
Raymond Joseph Shalhoub
Mark Andrew Singer
Kyra Keefanora Thornton
Christopher John Wagner
Tyler Waterfield
Jessica Weiner
Michael Christian Wetmore
Patricia Margaret Wilson

FOURTH DISTRICT
John Winslow Becker
Raphael Denis Philippe Chabaneix
Beatrice Nicole Costanzo
Mary A. Dutcher
Philip Samuel Mazzotti
Shawn Peter Murrane
Olivia Katherine O'Malley
Melissa A. Perry
Shawntel Randi
Julia Ann Steciuk
Gretchen Elaine Tessmer

FIFTH DISTRICT
Jordan Nicole Aiello
Joshua Paul Bannister
Nelson Kenneth Bauersfeld
Joseph Paul Cummings
Jonathan Tyler Dal Pos
Jonathan Dalpos
John Anthony Del Duco
Jamie William Dening
Gregory Paul Fair
Stephen Mark Ganetis
Sara A. Goldfarb
Cory M. Graham
Joshua Charles Husband
Emily E. Johnson
Austin Charles Murnane
Dennis J. Nave
Angela Mary Reed
Megan Taylor Suttell
Kent Syverud
Alyssa Van Auken
Vance Manifold Waggoner
Jaclyn Christa Weissgerber
Sara J. Wolkensdorfer

SIXTH DISTRICT
So Yeon Chang
David P. Desantis
Barry Joseph Fitzgerald
Gilbert Harmon
Sharon Hickey
Young Wook Lee
David M. Quinn
Damien Rose

SEVENTH DISTRICT
Verona Benjamin
Amanda Lauren Darby
Vicente Manuel Dejesus-rueff
Jason Paul Dionisio
Jeffrey M. Donigan
Yonatan Shai Herzbrun
Thomas Michael Hillman
John I. Karin
Sarah Marie Lobe
Marybeth Rose McCarthy
Dominique Josette Mendez
John Christopher Mijangos
Anne Florence Modica
Megan O'Leary
Janelle Inez Olsen
Efi Palaiologou
Lindsey M. Pieper
Antonette P. Price
Melissa Marie Slaughter
Justin David Valle
Michele Elise Viterise

EIGHTH DISTRICT
Gabriella Ernestine Agostinelli
Brendan Thomas Anderson
Titee Marion Beckerink
Matthew James Bird
Justin David Brown
Alison M. Camp
Daniel John Corbitt
Molly Maureen Deacon
Gregory Edward Denning
Ann Catherine Dillon
Gary R. Ebersole
Jamie Lynn Griebner
Marissa Marie Hill
Chifeng Jiang
Melissa Jane Joy
Eric James Judson
Amanda J. LeGasse
Nicole Terese Capton Marques
William John Miller
Samuel Robert Monin
Rexford Haynes Morgan
Alexandria Blair Moss
Jillian E. Nowak
James R. O'Connor
Jessica M. Peraza
Dominic James Pompo
Alison Elizabeth Romanowski
Christopher Thomas Ruska
John Thomas Ryan
Kelsey Lynn Smith
Tina Y. Song
Ashley Loren Swan
Michael Thomas Szczygiel
Therese A. Young

NINTH DISTRICT
Glen-Peter Ahlers
Ojeiku Christopher Aisiku
Jonathan Arthur Alvarez
Erik Alves
Natalie Marie Annesi
Kenneth Jake Aufsesser
Josanna Berkow
Anthony Joseph Bragaglia
Theresa R. Cayton
Amanda Sara Ciccone
Kenneth Michael Contrata
Patrick D. Coughlin
Lauren Ann Creegan
Katherine Blake Davies
Dante David De Leo
Claire Depauw Dichiara
Brian Joseph Donnellan
Patricie Drake
Daniel K. Duker-Gold
Leigh Ashley Ellis
Thomas M. Geiger
Sara Ashley Gibson
Megan Allison Harris
Catherine Marie Hatt
Melissa Anne Jangl
Kelly Nicole Jines-Storey
David A. Kempinger
Meredith Jeanne Kenyon
Jacqueline Kay Lamer
Cory Alexander Larkin
Matthew Aaron Lebowitz
Kimberly Gamble Lovelace
Jessica Anne Martinez
Megan Lammon McFarland
Christopher Michael McKniff
Philip Anthony Mercadante
Kristen Marie Motel
Arthur Joseph Muller
DeAnna Pace
Lenny Rosenthal
Saryah Michael Sober
Diana M. Squillante
Katharine Rose Wendle
Sarah Nicole Wilson
Rebecca Ilana Wohl
Sean M. Zaroogian

TENTH DISTRICT
Carly Hannah Arrowood
Amrita Ashok Khan
Matthew Ryan Auer
Susan C. Barlow
Paige Danielle Bartholomew
Talia Nicole Beard
Alison Megan Boyle
Darren Quincy Brooks
Sharon Abel Campo
Kristen Ann Carroll
Danielle Elizabeth Chin
Mitchell S. Dank
Matthew Joseph Deluca
Alexander Ciro Depalo
Tara Marie Depalo
Maria Catherine Donovan
Daniel S. Dornfeld
Laura Mackenzie Dowtin
Robert Andrew Drummond
Paul Vincent Fabiszewski
Kathleen Ann Farrell
Eric Fidel
Timothy E. T. Finnegan

Thomas James Frank
Robert Michael Garafola
David Reuven Gilboa
Victoria Rose Gionesi
Daniela Giordano
Jacqueline Lisa Giorgio
Lee Matthew Goldberg
Gabriel Michael Goldenberg
Daniel Willi Grimm
Colleen Hoeffling
Phillip Erik Hornberger
Sean David Howland
Ashley Ann Hughes
Ryan Oliver Hughes
Artur Gabriel Jagielski
Daniel Anthony Johnston
Caitlin A. Kavanagh
Raymond Anthony Klein
Jason Daniel Krumenaker
Jeffrey I. Malina
Robert Michael Manners
Brittany Mary Mazur
Kieran McCarthy
Garett Metcalf
Asia-sierra Taniesha Millette
Toni Lee Mincieli
Christopher Gregory Miner
Rachel Helena Ying-xian Mourad
Dong Phuong Van Nguyen
Amelia Rose Nicoletti
Kelsey Linda O'Brien
Michelle Therese Parker
Alissa Piccione
Lauren Faith Riesenfeld
Diana E. Rivkin
Michael Steven Romero
Farshad David Saed
Jennifer Marie Santos
Richard Lestin Schroeder
Garin Scollan
Patrick Zimmermann Scotti
Benjamin P. Siegel
Vasilios Skulikidis
Robert Daniel Stanton
James Evan Stephens
Pargol Tabibi
Tarin Tomlinson-Laine
Kelly Torres
Zachary Thomas Tortora
Katie Ann Trotta
Mateo Jani Vila
Gabrielle Marie Vinci
Svetlana Walker
Heshani D. Wijemanne
Lily Mae Wittmeier
Han Yan

ELEVENTH DISTRICT

Asia Nicole Archey
Jaclyn Brooke Aruch
Pardis Camarda
Eugena Veronica Choe
Jae Ryung Chung
Michelle Virginia Collison
Oksana Davydova
Priscilla Deleon
Adam Michael Diker
Nicholas McKenna Easterday
Kurtis Robert Falcone
Alana Raquel Glaubiger
Matthew Raymond Gorman
Juliette Louise Guillemot
Robin Mindy Herman
Neil Lawrence Herrmann
Everett Kory Hopkins
Zeno Michael Houston
Jeffrey Hughes
Katsuyuki Inagaki
Fotini Karamouzis
Donald Kernisant
Umar Ali Khan
David Ko
Dong-won Lee
Steven Jinwoo Lee
Yoo Na Lim
Chang Liu
Heather Marion Lothrop
Adam Michael Love
Kui Ma
Md Golam Mostofa
Nicole M. Murdocca
Mariah E. Murphy
Jessica Leigh Nellis
Matthew Sean Perry
Hayley M. Pine
Muriel Shawna Raggi
Amina Rashad
Samantha Rashid
Sophia Albina Ray
Philippo Salvio
Elizabeth Rachel Sprotzer
Eugene David Toussaint
Ariel Xue

TWELFTH DISTRICT

Maeve McKenna Callagy
Melissa Cecilia Cartaya
Hsinyi Junie Chang
Kelvin Dionel Collado
Angela Albay De Castro
Matthew Charles Desaro
Benjamin Kurtis Kleinman
Alexandra Amanda MacDougall
Bianca Mojica
Jose A. Rodriguez

THIRTEENTH DISTRICT

Sharon K. Covino
Heba-alla Nassef Gore
Salvatore Lapetina
Andrew Sy

OUT OF STATE

Wystan Michael Ackerman
Yutaka Adachi
Sauda Onozare Ahmed
Sifat Ahmed
David Seiyong Ahn
Daniel Aaron Akkerman
Australia Alba Munoz
Jordan Saul Cooke Altman
Erika Lynn Amarante
Kelly Rose Anderson
Benedicte Simone Andre
Eric Andrew
Ida Fassil Araya-Brumskine
Michael Daniel Arena
Omeed Reza Arlani
Sergio Antonio Athanasso
Erin Marie Atwood
Michael Joseph Azakie
Tracy U. Azinge
JeongHyun Baak
John M. Badagliacca
Priya Mahesh Badlani
Mario Gabriele Bai
Ryan Behrens Bailey
Natalia Christina Barker
Alexander W. Barnett-Howell
Luca Luigi Barone
Roland Barral
Rachel Deborah Barreto
Peace Akol Beattie
Jason Gabriele Beckham
Prabhkaran Singh Bedi
Sasha Belinkie
Daniel Rene Belzil
Olfa Ben Aicha
Itai Ben Shalom
Hideki Ben
Sara Rose Bennett
Ryan William Bingham
Kathryn Delveaux Bonacorsi
Max Bonici
Marlene Botros
Marc Douglas Bouchacourt
Todd L. Boudreau
Henry James Brewster
Chelsea Elizabeth Brint
Bayard Patrick Brown
Carolyn Julia Brown
Matthias Amiel Brown
Elizabeth Letitia Bryan
John W. Bryant
Alexander Bucholtz
Alixandra Buckelew
Steven J. Bushinsky
John Thomas Bycraft
Montano Christopher Cabezas
Guo Cai
Timothy Harold Caine
Clement Nicolas Dominique Camion
Kurt Nicholas Campanile
Charles Carluccio
Alei Alexandria Carrington
Austin Robert Caster
Ya-chi Chan
Hui Min Chang
Niamh Ni Cheallachain
Ana Chechelashvili
Justina Eping Chen
Allison Cheung
Kristen Wei Yunn Chin
Heuiseok Choe
Hye Young Choi
Taimoor Jawed Choudhry
Anastasiia Chunaeva
Bona Chung
Ludek Chvosta
Fay Lamanna Clark
Jared Clark
Michael Alex Cohen
Steven Dale Cole
David Michael Collado
Anne M. Collart
Stephen Wooder Conlon
Lauren Brophy Cooper
Jenna Coudin
Axel Michel Victor Cousin
Mary Snowden Crawley
Jaime Manuel Crowe
Bethany Rose Crowhurst
Cheyne Elyse Aroha Cudby
Armando Cuevas Brun
Margaux Curie
Isabelle Susan Margaret Curran
Andrew J. Curtin
Andrea L D'Ambra
Anthony Joseph D'Artiglio
Samit D'Cunha
Laura D'Elia
Anne-Karine Dabo
Hing Dai
Lauren Jesse Dalton
Sean Thomas Daly
Suchana Das
John D. Demmy
Jonathan Henry Dende
Yifei Deng
Emre Can Develi
Patrick M. Deyhle
Huizhong Ding
Meagan Kate Du Jardin
Yang Du
Sixto Duarte
Diego Francisco Duran De La Vega
Mitchell Thomas Emmert
Paul Llewelyn Escarcelle-Rees
Kelly Renea Faber
Nicholas Andrew Fedewa
Michael Colin Feinberg
Bofei Feng
Michael Fernberg
Cameron Adams Ferrante
Mara Vania Milagros Olivares Fider
Marion Z. Fischer
Kellye-rae Jannille Fisher
Michael Fitzpatrick
Richard Paul Flaggert
Alyssa Ann Flaherty
Brenda Flockhart-Shanks
Michael Edward Foley
Erika Elizabeth Follmer
Patricia Fontes Lessa
Carlton Eliot Forbes
Chong Fu
Kaori Fujita
Jamie Mariko Fukumoto
Alison Gina Gabinelli
Jose Ignacio Garcia Cueto
Antonio Garcia R. De Medeiros Netto
Adam Garcia
Kaefer Jesus Garcia
Darren Spencer Gardner
Isioma Rita Gbandi
Tamar Ketsia Gelin
Michael David Gendall
Elizabeth Germain
Felix Kroum Gherardi
Yeganeh Gibson
Merri Jo Gillette
Joseph Liway Gillman
Cecilia Ann Glass
Evan Miles Goldberg
Deborah F. Goldman
Mario Gonzalez
Radoslaw Goral
Natalie Gordon
Sarah Copeland Grady
Elizabeth Chapman Grant
Chapin Kyle Gregor
Bamidele O. Grillo
Andrea Sara Grossman
Chao Gu
Claire Maia Guehenno
Roxanne Marie Gutierrez Teissonniere
Yolonda Patrice Harrison
Garry Daniel Hartlieb
Kimberly Ann Hartman
Jeffrey Rodger Hartwig
Mohammad Sajjad Hassan Pour Ezzati
Jonathan Scott Hawkins
Sheila Hayre
Tiancheng He
Yongyi He
Jenna Felice Heckler
Joceline Martha Herman
Maxwell Dane Herman
Dora Natalia Hernandez
Irene Virginia Hernandez
Lily Katharine Hines
Victoria Lucy Eva Margot Hinn
Jennifer Lynn Hogg
Paul David Marcus Holden
Ryu Kwang Hoo
Eric Samuel Horowitz
Timothy E. Horton
Lauren Tiffany Howard
Qianyu Hu
Stephanie Hu
Helen Yao Huang
Christopher Michael Hudak
Maxwell Jacob Hyman
Natsuko Ishikawa
Sho Iwamoto
Dai Iwasaki
Neal Allen Jacobs
Lei Jiang
Xiaoxi Jin
Leonard V. Jones
Gina Maria Joyce
Jin Jung
Maheen Kaleem
Stephanie Wai-yin Kam
Jorge Hershel Kamine
Shadi Karimi
Viktoriia Karpova
Michael F. Kashtan
Evi T. Katsantonis
Alex B. Kaufman
Mikhail Sergeevich Kazantsev
Christopher John Keating
Dolores Rita Kelley
Zahran Khan
Yohei Kijima
Hey In Kim
Hye In Kim
Hyun Ki Kim
Saeyoung Kim
Lynette Kiprotich
Daniel Brule Kirkeby
Stephen Matthew Klein
Anne Kline
Misaki Kodama
Yi Na Koh
Gary Kent Koos
Christopher Andrew

Kozlowski
Sara Elizabeth Kucsan
Ira Jay Kurzban
David Tai Wai Lai
Emma Louise Langford
Chloe M. S. Lapoujade
Marco Cesare Laurita
Nathan Andrew Leavitt
Alexander Ho Lee
Elizabeth Min Lee
Yoonhee Lee
Michael Joseph Lehet
Julie Leiba Gharagouzloo
Xiaohan Leng
Vincent Charles Lesch
Jeffrey Michael Lewis
Dela Leybovich
Mengyuan Li
Ran Li
Sze Wai Li
Ying Tung Vivian Li
Cheng Jean Liang
David Lichtenberg
Joanne M. Lim
Hsin-i Lin
Po-ju Lin
Posen Lin
Yu-hsiang Lin
Qianfu Liu
Tingting Liu
Tamara Livshiz
Cory Matthew Lizarraga
Bill G. Lomuscio
Michael Anthony Losco
Kenneth Calam Louis
Samantha Lowen
Bryan Edward Lucas
Scott C. Lucchesi
Victoria Antoinette Lucido
Frederick Ali Lumpkin
Grace D. Mack
Henry F. Makeham
Monica Paige Maloney
Clare Marie Mannion
Chastity M. Marshall
Carol Anne Martinsen
Makenna-Elise Massiah
Cyril Mawana Matswetu
Joshua M. Mayo
James Bowman McAllister
Christopher Everett McArthur
David McBride
Rachel A McCammon
Daniel Ryan McCartney
Teresa McLoughlin Rice
Meghan McSweeney
David Wilder Merritt
Christopher James Messina
Zachary Meyer
Armen Lavrenti Mikayelyan
Jesus Javier Milian
Jason Andrew Miller
Tina O. Miller
Ronald Brett Minsky
Pushkal Mishra
Suguru Miyata
Noriko Miyazaki Sakamoto
Jennifer Noelle Monnet
Lori Lynn Moraine
Oscar Luis Moret
Jamelia Natasha Morgan
Leila Morshed Mohseni
Ronald H. Morton
Catherine Risdon Murphy
Orla Marie Murphy
Sarah Tagrit Mustafa
Charles Abraham Naggar
Niamh Aine Ni Cheallachain
Victor Thomas Henry Nilsson
Jamie Alexander Niskanen-Singer
Ariel Nicole Noffke
Benjamin Joseph Raphael Nunez
Elaine Marie O'Connor
Zachary Stephen O'Dell
Bernadette Marie O'Donnell
Timothy Robert Oberleiton
Kyu Chang Oh
Kristin Jane Tomoe Oketani
James Lawrence Ollen-Smith
Oliver Ostertag
Burc Ozcelik
Kaitlyn A. Pacelli
Xinrui Pan
Jeesun Park
Jiho Park
Amit Bharat Patel
Olga Patrick
Alexis Patterson
Christie Ann Pazdzierski
Olga Pedley
Vanessa Pena
Qiusha Peng
Cesar Oscar Perez Colon
Svetlana Alexandra Pikalova
Julie McKenna Pinette
Tara Jordan Plochocki
Stephen Michael Polozie
Nicole M. Procida
Miguel Angel Pruneda
Clark Alan Quigley
Soleiman Raie
Sneha Prakash Raj
Phillip Rakhunov
Jennifer Ann Randolph
Brajesh Ranjan
Long Rao
Malavika Abhay Rao
Nazanin Rassouli
Alistair Y. Raymond
Jennifer Lynn Read
Brian Francis Reddy
Sassi Riar
Cecilia Andrea Rinaldi
Gladira Robels-Santiago
Michael Roitman
Barry Maxwell Ronner
Danielle Beth Rosenthal
Theodore Noah Rosini
Dominik Rostocki
Yael Grace Rouach Cabilly
James Lewis Rumpf
Kwang Hoo Ryu
Salim Sabbagh
Salim Sabbaugh
Chase Stephen Sackett
Sammy Said
James Deguerre Saintvil
Dk Nadeeya Pg Hj Mohd Salleh
George Chris Saltos
Daniel Joseph Schmidt
Weatherly Ann Schwab
Douglas William Scott
Kristi Scriven
Erin Marie Semler
Violette Serres-Duchein
Stephanie Rae Setterington
Mita Shah
Neeli Shailesh Shah
Amira Zakaria Shaker
Leslie Joan Shanley
David Gregory Shannon
Siddhanth Sharma
Kartik Chaturvedula Shastry
Yujie Shen
Amber Leigh Shepherd
Timothy Michael Shepherd
Elizabeth Jeong-ah Shin
Heywon Shin
Binhee Shon
Haadia Ashraf Siddiqi
Barbara Tahina Silber
Corey Gene Singer
Anni Singh
Allana Thelma Smith
Matthew Smith
Sara Elisabeth Smith
Stuart J. Smith
Prerna S. Soni
Joseph Brandon Spinelli
Eleanor Laurel Pullin Spottswood
Andrew M. Spurchise
Colby Andrew Steele
Adrienne Mansker Steiner
Michael Bernd Steiner
Samuel A. Stern
Philip D. Stoller
Brian Leigh Strauss
Edward A. Sturchio
Yeajin Suh
Christina Marie Sumpio
Shinya Suzuki
Rachel Victoria Tafaro
Mohamed A. A. O Taha
Christopher Michael Tansey
Yuichiro Tashiro
Jason Edward Tauches
Elizabeth Pueki Taufa
Assamen Mekonnen Tessema
Camille Natalia Teynier
Matthew Seidel Tilghman
Christopher Robert Tillotson
Marc F. Tohme
Vansha Tolani
Shaun Patrick Tooker
Rocco Eugene Torrenti
Justine Alix Touzet
Hoang Duc Tran
Christina Troiano
Min Ni Tsai
Shelby Tuszynski
Ingrida Uleviciute
Laura Ulrich
Nathaniel Ulrich
Kye A. Ulscht
Siomara M. Umaña
Eda Uyar
Andres Edwin Valles
James Howard Van Dyke
Mary Sameera Van Houten
Jomar Alejandro Vargas
Alina Vengerov
Michael Patrick Vernon
Olesya K. Vernyi
Peter John Veysey
Steven Vezos
Sibylle Marie Vieille-Cessay
Michael E. Wachtel
Timothy Sullivan Wachter
Salma Mohsen Waheedi
Ana Sofia S. Walsh
Shang Wan
Tzu-Yuan Wang
Wei Wang
Zhichao Wang
James Joseph Ward
Stephen Wellinghorst
Kendra Lynn Wergin
Peter Bjorn Fredrik Westerlind Wigstrom
Karen Marie White
Aarin Michele Williams
Joanne Leigh Williams
William David Williams
Chak Lun Wong
Chun Ho Wong
Martin Wong
Nora Wong
Tatfu Wong
Leigh Anne Woodruff
Jialu Wu
Ping-chien Wu
Yin Wu
Zhuo Wu
Blerta Xhiku
Siqi Xu
Tianwen Xu
Kang Xue
Yuki Yamada
Hiroshi Yamauchi
Sean Joseph Yan
Luyu Yang
Ming Ming Yang
Arthur Nathaniel Yaskey
Sarah Stewart Yeager
Jordan Alexander Yeagley
Joseph E. Zahner
Alex Benjamin Zerden
Sean William Zerillo
Chenbin Zhang
Cheng Zhang
Chi Zhang
Hui Zhang
Nan Zhang
Yue Zhang
Bei Zhu
Yu Zhuo
Laura Yvonne Zielinski
Jeremy Alan Zucker
Jill Elizabeth Zumbach