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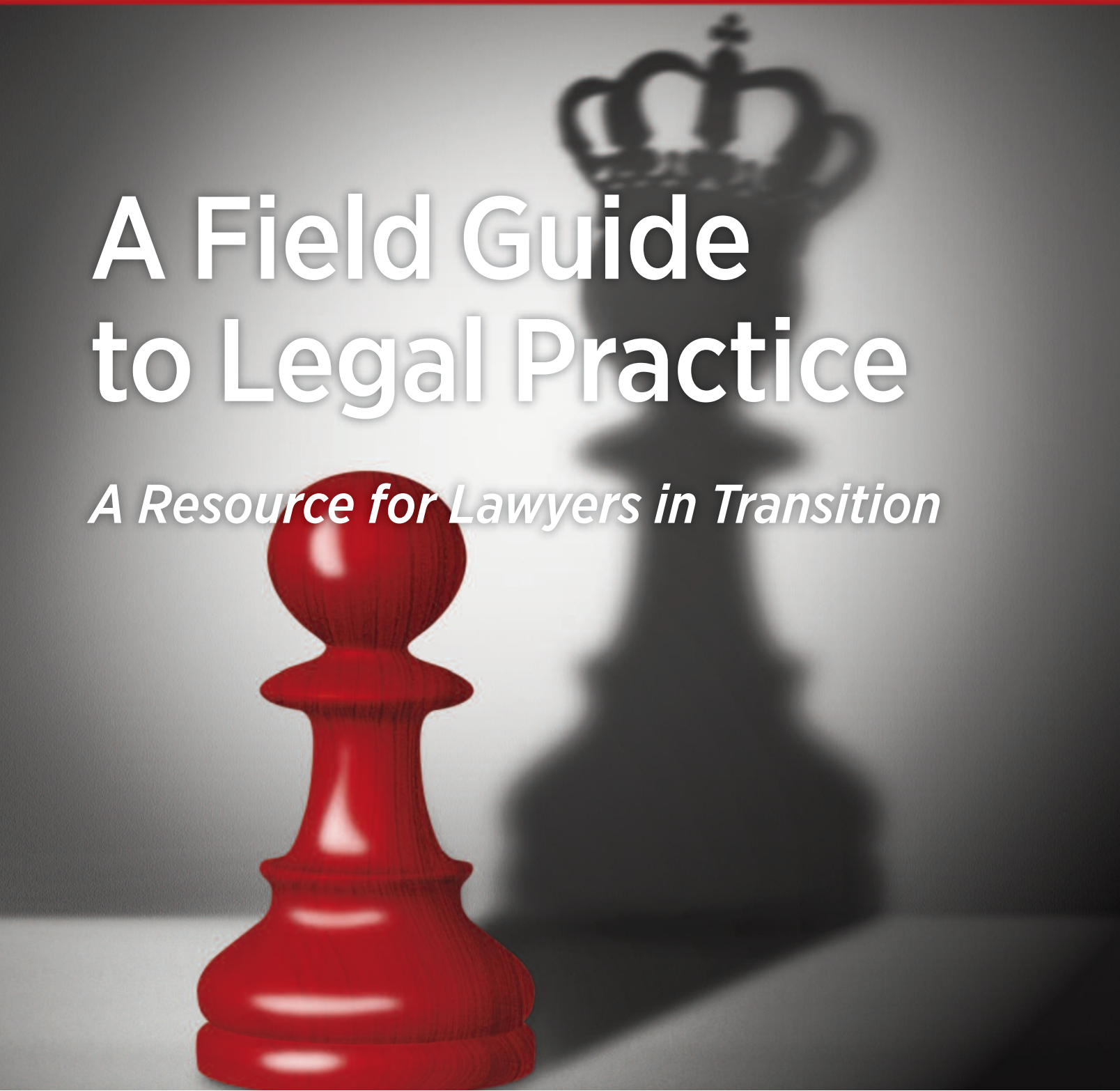

A Field Guide to Legal Practice

A Resource for Lawyers in Transition

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MESSAGE FROM THE SPECIAL EDITORS

Christine D. Petruzzell

Susan Nardone

As we publish this special digital edition of *New Jersey Lawyer Magazine* for attorneys who are newly admitted to practice in New Jersey or transitioning to a new phase of practice, an observation by Oliver Wendell Holmes Jr. in 1881 comes to mind: "The life of the law has not been logic; it has been experience." Guided by that principle, we are pleased to present a series of broad-ranging articles that will supplement the legal theory you mastered in law school and help guide those of you moving into a solo or small-firm practice. The chosen articles are reprints culled from two decades of the magazine, updated, when necessary, to reflect changes in the law. The collection is grounded in the experience of seasoned members of the bar who address fundamental issues in a useful, how-to style.

The topics addressed offer essential and practical advice, including suggestions on effective and persuasive legal writing; ethical considerations for attorney marketing, issues related to financial dealings with clients, and confidentiality requirements under the Rules of Professional Conduct; ethical considerations for practicing in the cloud; and issues related to attorneys' fees, mediation and law office management. In short, we have attempted to assemble in one place, and in a digital edition readily accessible to our readers at all times, the type of practical advice that one might otherwise seek by walking down the hall to speak with a more experienced colleague.

As Oscar Wilde once said: "Experience is simply the name we give our mistakes." The articles that follow are presented to help you tap into the experience of seasoned professionals to build a successful, fulfilling legal career, and circumvent at least some of the common practice mistakes along the way.

A final note: As special editors of this edition we would like to thank Managing Editor Cheryl Baisden for her invaluable and professional guidance, institutional knowledge, and ready accessibility throughout this project in assisting us to assemble this unique edition of the magazine.

Christine D. Petruzzell *is a member of Wilentz, Goldman & Spitzer and practices corporate and commercial litigation. She is a member of the* New Jersey Lawyer Magazine *Editorial Board.* ***Susan L. Nardone*** *is a director in the employment and labor law department at Gibbons and a member of the firm's e-discovery task force. She is a member of the* New Jersey Lawyer Magazine *Editorial Board.*

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Transitioning From Law Firm Associate to Solo Practitioner

by Jeffrey J. Brookner

As an associate at a big law firm, I enjoyed the relative comfort of having a reliable flow of work to keep me busy, an extensive support staff to help me work efficiently, and a steady income to feed my family. I was occasionally tempted by the prospect of greater freedom and shorter hours as a solo practitioner. But leaving the comfortable, if sometimes restrictive, cocoon of a big law firm for the comparatively chaotic life of a solo practitioner was a daunting prospect. Eventually, though, I took the plunge.

The decision to go solo was the result of considerable research and planning. During the process, I was pleasantly surprised to find a wealth of free, readily available information on establishing a solo practice. Advice about a wide variety of topics, from office development to marketing, is just a Google search away. Rather than focusing narrowly on any one of these topics, this article addresses the process of going solo from the unique perspective of a law firm associate.

Are You Ready to Take the Plunge?

The first decision is whether you really want to head out on your own. For most associates considering the move to solo practice, the primary lure is the opportunity to be your own boss. Solo practice offers the freedom to set your own hours, the freedom to accept or reject client engagements, the freedom to wear whatever clothes make you feel comfortable, etc. But these new freedoms also come with new responsibilities. Being your own boss must be weighed against being your own secretary, paralegal, librarian, copy service, etc. While you might envision building a practice that can afford the luxury of a support staff, few novice solos start out with one.

You also must consider whether you can stomach having a balance sheet that resembles a yo-yo. As an associate, you probably take for granted getting the same paycheck every two weeks. Solos fervently pray for great months in which their incomes substantially exceed their former salary. Those months will come, but there will also be months, or even quarters, with little if any income. If you don't think you can handle the stress of waiting for the next client to hire you, or the next check to come in, you might want to keep the steady salary your current job offers.

You also have to decide whether you can make enough to support your lifestyle. It isn't easy, but it isn't as hard as you may think. I have heard it said that the typical breakeven point comes when you can bill (and collect for) 50 percent as many hours at 60 percent the rate. This is only a rule of thumb, but it has been consistent with my experience.

Consider, for example, an associate who bills 2,000 hours at $250 per hour. Assuming a 90 percent collection rate, the firm's revenue is $450,000, but the associate's salary would probably be in the range of $100,000. If that associate becomes a solo and can bill 1,000 hours (50 percent) at $150 per hour (60 percent), his or her billings will be $150,000. Net of unpaid receivables, modest expenses, and healthcare costs, the solo practitioner can expect to make roughly what he or she did before—despite working half as many hours.

Incremental increases in these percentages impact the bottom line disproportionately. If the hypothetical associate can bill 70 percent as many hours (1,400) at 80 percent the hourly rate ($200), billings will be $280,000 and take-home pay will be more than twice his or her previous salary. Of course, finding clients who will pay you 80 percent as much for 70 percent as many hours is easier said than done. Only you can decide whether you want to take the risk.

Don't Jump Too Soon

If you decide to take the plunge, you have to get serious about your business plan. There are many details to attend to—forming a corporate entity, getting a taxpayer ID number,

deciding where to locate your office, purchasing a computer and software, opening bank accounts, registering with IOLTA, getting business cards, arranging for insurance coverage, etc.—before you open your doors for business. You should get your arms around these details while you still have the security of a steady income. Saving them for the lame-duck two weeks after you give notice is much too late.

Instead, make use of the lame-duck period to cultivate relationships. Being a successful solo is all about relationships—with former colleagues, former adversaries, former clients, former classmates, etc. Your colleagues at the firm can be an invaluable resource after you leave. They can serve as mentors. They can answer questions outside your specialty. They can help reunite you with research you conducted or forms you prepared years ago. Plus, they might refer clients to you. All too often, departing associates destroy these valuable relationships by burning bridges on their way out. Developing a practice will take years. Getting a good start is important, but not as important as establishing and maintaining relationships.

One common mistake is leaving too hastily, paying short shrift to exit memos and other file-transition tasks. Many associates mentally check out after giving their notice; they arrive late and depart early for the obligatory two weeks. Doing so is a huge mistake. I gave notice that I was leaving to set up my own firm, but I didn't specify a departure date. I ended up staying on for almost five more weeks, making sure all of the loose ends in my files were properly tied up. I worked past midnight several nights to get an appellate brief out the door. I think I made the right decision. My colleagues noticed, and so did several clients.

Breaking the News to Clients

Deciding when and how to tell clients you are leaving is often a touchy issue. In fact, the *ABA Journal* identified this as one of its top 10 ethics traps.[1] You should resist the urge to tell clients you are leaving until after you tell the firm. Scheming behind your employer's back to divert corporate opportunities to your new practice is sleazy at best, tortious at worst.[2]

When you do inform clients you are leaving, the notice should be entirely neutral. Under RPC 7.1, communications to a potential client cannot "compare [your] services with another lawyer's services," or otherwise be "false or misleading." Additionally, a communication that asks a client to follow you to your new firm will be treated as an advertisement, subject to the strict rules in RPC 7.3(b)(5). Thus, it is preferable to send a neutral letter (perhaps even jointly with the firm) that says little more than you are leaving and provides details on how you can be reached. Yes, there is some risk that the firm will 'get to' the clients first, perhaps firming up the relationship before you have a chance to reach out to them. But that is better than finding yourself before an ethics panel trying to justify your actions, or in a courtroom fighting over whether a temporary restraining order should be entered.

Another issue to think about is whether you should even try to reach out to certain clients in connection with your new firm. I'm not talking about undesirable clients; I'm talking about clients you did not bring to the firm in the first place. Legally and ethically, you can represent any client of the firm who chooses to follow you. But trying to 'steal' a client who 'belongs' to another attorney in the firm will sour your relationship with that attorney, if not the entire firm. Only you know your firm's culture well enough to predict the reaction if you take a particular client with you to your new firm.

While I won't say that you should never step on toes, I will say that you should tread lightly. If leaving a client behind will help keep you in good graces with your former firm, consider your options carefully.

If you are unsure how an attorney will react if you try to take a particular client away, talk with him or her. When I left my job, I had one case that was weeks away from trial. Requiring another attorney to get up to speed would have been horribly inefficient. I went to the originating partner and asked him what I should do. He advised the client to hire my new firm for the trial, which she did. But if he had wanted to reassign the matter to another associate at the firm, I wouldn't have made any attempt to secure the business. The long-term relationship was far more important to me than the one-time revenue.

Regardless, whether you are trying to take existing matters with you, or you merely want to remain in consideration for future matters, it is critical you consider the impact your departure may have on your clients. Explain to them what your departure means for them. Offer to do whatever is necessary to make the process painless—and costless—for them.

Packing Your Bags

Another consideration to keep in mind as you develop you business plan is what to take with you on your new adventure. As discussed earlier, most new solos will find they don't need to (or can't afford to) hire an employee. But if you do plan to hire staff immediately, you will save yourself a lot of stress, and training time, by taking a secretary or paralegal from the firm with you. They will already know your files, your clients, and your idiosyncrasies. And it is unlikely your former firm will be nearly as concerned about losing an employee as they would be about losing clients. They may even be glad you saved them the burden of reassigning, or terminating, an

employee who is no longer needed in his or her former position.

Taking forms and continuing legal education materials, on the other hand, can be problematic. Having a good bank of forms and research files is nice in most practice areas, and invaluable in some. Resist the urge to download the firm's form database on your way out the door. The odds are low that you will ever get caught, but that does not make it right. If you have your own personal files, you are probably entitled to take them with you, although some would argue that the files belong to the firm if they were compiled on firm time. I don't know the right answer to this one, but you should give it some thought.

A Few Final Thoughts

There are no hard-and-fast rules to guide you on moving from a position as a law firm associate to a solo practitioner; every situation, and every attorney, is unique. But keeping the concepts outlined here in mind will help make the transition smoother. Overall, keeping your eye on the goal is the key, and focusing on gathering rather than alienating colleagues and clients is essential to both your short- and long-term success. ⚖

Endnotes

1. Top 10 Ethics Traps, *ABA Journal*, Nov. 2007, found at abajournal.com/magazine/article/top_10_ ethics _traps.
2. *See generally Meehan v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1989).

Jeffrey J. Brookner *left his employment with Wilentz, Goldman & Spitzer in Jan. 2010, to found his solo practice, Brookner Law Offices, LLC, in Bridgewater. His practice focuses on trial and appellate litigation, as well as estate planning.*

(Originally published June 2012.)

The Lawyer's Office and Other Requirements

by David H. Dugan III

In setting up a law practice, New Jersey lawyers must meet certain conditions established by the Supreme Court. This article considers briefly the basic ones—the requirements for an office, bank accounts, safekeeping client property and retaining records.

Office

Rule 1:21-1(a), which sets forth qualifications for the practice of law in New Jersey, includes requirements for the lawyer's office. Traditionally, the rule required a "*bona fide*" office, which had to be an actual, physical place with a staff person present during normal business hours. In 2004 the Supreme Court relaxed the rule somewhat, allowing the *bona fide* office to be located outside of New Jersey. For an analysis of this version of the rule see ACPE Opinion 718 (2010). However, the increasingly archaic fundamentals of the rule remained.

In 2013 the Supreme Court adopted a totally new office rule. The *bona fide* requirement was deleted. As revised by the Court, Rule 1:21-1(a) now requires only that the practicing lawyer be reasonably and reliably accessible to clients, counsel and courts. Lawyers who choose to practice without a fixed, physical office location are required by the rule to designate a place where their files and records may be inspected and papers may be delivered or served. Those lawyers must also designate the clerk of the Supreme Court as their agent for service of process. Significantly, Rule 1:21-1(a) includes references to RPC 1.4, making that, in effect, a standard by which the lawyer's accessibility to clients is measured.

The office requirement portion of Rule 1:21-1(a) reads as follows:

> (1) An attorney need not maintain a fixed physical location, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.
>
> (2) An attorney who does not maintain a fixed physical location for the practice of law in this State, but who meets all other qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in subsection (a)(1) of this rule….
>
> (3) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(1).
>
> (4) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

Bank Accounts

Regardless of where their offices (if any) may be located, attorneys who practice law in New Jersey must maintain attorney trust and business accounts in the firm name in approved New Jersey financial institutions.[1] The trust account must qualify as an IOLTA account (Interest on Lawyers Trust Accounts) per Rule 1:28A, unless the account qualifies for an exception under the rule.

Safekeeping Property

The duty to safeguard client funds and property is found in RPC 1.15 and Rule 1:21-6, which is incorporated by reference into RPC 1.15.[2] Failure to observe these record keeping requirements is itself an ethics violation, apart from any misappropriation (RPC 1.15(d)). The Office of Attorney Ethics (OAE) conducts random audits in order to monitor attorney compliance. OAE's random audit staff has authored a booklet that outlines the New Jersey record-keeping requirements, which is available without charge.

RPC 1.15 does not contain the word "misappropriation." Rather, speaking positively, the rule commands the lawyer to "hold" client property "separate" from the lawyer's own property. The negative prohibition against misappropriation has been derived from the rule by inference, but is a well-established ethical precept.[3] It includes a temporary use of the client's funds as well as outright theft.[4] It also includes taking client funds the lawyer may be holding in escrow.[5] Dishonesty or an intent to steal or defraud are not required as proof of violation.[6]

Retaining Records

Client files and financial records must be retained for a period of seven years after the event they record.[7] Some records, by their nature, must be preserved even longer.[8] Files may be scanned into digital format and retained electronically unless their nature requires they be retained as originals (such as wills and deeds).[9] ⚖

Endnotes

1. R. 1:21-6(a).
2. *See Trust and Business Accounting for Attorneys* by David E. Johnson Jr. (NJICLE 2008).
3. *See In re Wilson*, 81 N.J. 451 (1979); *In re Johnson*, 105 N.J. 249 (1987).
4. *See In re Wilson, supra* at 455(footnote 1); *Matter of Freimark*, 152 N.J. 45 (1997).
5. *See In re Hollendonner*, 102 N.J. 21 (1985); *Matter of Gifis*, 156 N.J. 323 (1998).
6. *See In re Cavuto*, 160 N.J. 185 (1999).
7. RPC 1.15(a).
8. *See* ACPE Opinion 692 (2001) and ACPE Opinion 692 Supplement (2002).
9. ACPE Opinion 701 (2006).

David H. Dugan III *is a sole practitioner in Marlton. His practice is restricted to legal ethics matters and includes providing ethics counsel to other lawyers, serving as an expert witness in legal malpractice and lawyer discipline cases, and representing lawyers who face disciplinary charges.*

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Lawyer, Protect Thyself

by William W. Voorhees Jr.

In the 1970s and 80s, the insurance business, and particularly the legal malpractice insurance business, was very different from today. Insurance rates were relatively stable, and by and large, a lawyer who was sued could expect his or her claim to be handled by an experienced claims examiner and sophisticated insurance defense counsel specializing in legal malpractice.

During the 1990s, the insurance industry in general, and the legal malpractice insurance industry in specific, began to change. Insurance companies were regularly bought and sold, as if they were commodities. Insurers who had never written legal malpractice insurance began to look at the substantial premium dollar available in New Jersey's legal malpractice insurance market. *Traditional* insurance companies began to write legal malpractice insurance, with sometimes disastrous results. Problems with New Jersey's legal malpractice program played a part in the demise of the Legion Insurance Company and the Reliance Insurance Company, and had an adverse impact upon the Kemper Companies.

Insurers thus started paying attention to the bottom line, and frequently disclaimed coverage. The world of insurance coverage is arcane; the denizens of which speak a language few, other than insurance coverage specialists, understand. Here are a few of the things attorneys should know, in order to protect themselves in the event their legal malpractice insurer attempts to disclaim coverage.

Fee Shifting

First, the good news. Let's suppose for a moment that an attorney has been sued for legal malpractice, has turned the matter over to the malpractice insurance company, and, much to his or her astonishment, receives either a disclaimer or a reservation of rights-something that is likely these days. What can an attorney possibly do to help him or herself in this situation, considering the fact that the insurance company is a monolith in the business of litigating and the attorney is hardly in a position to throw thousands of dollars into defending, and perhaps paying, a legal malpractice claim, never mind fighting the insurance company?

No matter what, the attorney should not walk away from the problem. New Jersey Court Rule 4:42-9(6) is the great equalizer: It provides for fee shifting against an insurance company if the attorney is a successful claimant in a coverage action upon his or her legal malpractice insurance policy.

If an attorney receives a disclaimer or reservation of rights, experienced coverage counsel should be able to provide a quick read on the attorney's possibilities of success. In many cases, all the insured need do is to stand up for him or herself, and file a declaratory judgment action. In those instances, the carrier may realize that its coverage position is weak, at best. Rather than continue to fight only to, at the end of the day, have to pay defense fees as well as for fee shifting in the coverage case, many carriers can become more reasonable, and an agreement can be reached which provides the attorney with a defense and indemnity—the very things for which he or she has paid so dearly in premiums.

Not every case is a winner from the insured lawyer's point of view. Sometimes the insurance company asserts a coverage position that is justified. However, considering that attorneys have so much at stake, they should take the time and effort to make a determination regarding their chances of success.

The Late Notice Exclusion

This is the exclusion *du jour* with legal malpractice insurance carriers throughout the country. In the author's judgment, it is invoked in one form or another more frequently than any other exclusion.

An insurance application asks not only about any claims against an attorney, but asks whether the attorney knows of any state of facts that *might* lead to a claim against him or her. Additionally, most legal malpractice insurance policies have an exclusion that provides that there is no coverage if the

attorney, before the inception date of the policy, had reason to believe that a claim might be made against him or her. The typical insurance company mantra goes something like this: "You knew the facts, therefore you must have known that there might be a claim, and therefore there is no coverage for you."

Fortunately, malpractice insurance carriers are finding it harder and harder to sustain disclaimers of this type. If a carrier disclaims because of an alleged prior knowledge exclusion, an attorney should review *Liebling v. Garden State Indem.*[1] and the cases cited therein. *Liebling* stands for the proposition that in order for an insurance carrier to succeed in disclaiming under a prior knowledge exclusion, the insurer must show not only that the attorney knew that a certain state of facts constituted malpractice, but also that he or she had every reason to believe that those facts would develop into a claim. This is a difficult burden to meet.

An attorney should not be intimidated by a prior knowledge disclaimer. If the insurer does not change its position, an attorney should obtain coverage counsel.

The Retro Date

Many legal malpractice insurance policies in effect today have a so-called retroactive or retro date, usually the date when coverage was first incepted with the carrier issuing the policy. In plain English, what this means is that although the policy is a claims made policy, it will not cover occurrences before the retroactive date.

Attempts to limit the retroactivity of a claims made policy in this fashion specifically have been disallowed by New Jersey's Supreme Court in all but the rarest cases.[2] Nonetheless, many companies still include such provisions. If an attorney has a retro date in a policy and the malpractice carrier disclaims because of it, the attorney should be able to successfully dispute the disclaimer, in court if necessary, and have counsel fees paid by the carrier.

Applying the Deductible to Defense Costs

Defense costs may not be charged against any deductible amount. Although many legal malpractice insurance policies written today provide otherwise, New Jersey law allows application of the deductible to indemnity only.[3] Accordingly, attorneys should not let a malpractice insurance carrier automatically apply the deductible to the defense costs without reviewing the policy and applicable law.

Inappropriate Non-Renewal

New Jersey does not permit insurance companies to non-renew their insureds, except for certain very specific reasons.[4] In recent years, several legal malpractice insurance companies decided not to write any further policies in New Jersey. Rather than go through the complex process of obtaining regulatory approval to withdraw, some simply non-renewed their insureds. While this might present an opportunity to shop for replacement coverage at a better rate, if an attorney has difficulty getting coverage, or if replacement coverage is more expensive, he or she should resist any attempt by an insurer to non-renew their policy without regulatory approval in such cases.

The So-Called Reservation of Rights Letter

Most New Jersey attorneys are under the impression that their malpractice insurer can make the unilateral choice to defend a claim with counsel of the insurer's choosing, while at the same time reserving rights to disclaim coverage for part of the malpractice insurance complaint. It cannot.

Problems of this type typically arise when the malpractice complaint alleges alternative theories of liability, some of which are covered under the policy and some of which are not. Negligence, breach of contract and breaches of fiduciary duty are claims that generally are covered. Claims for fraud, intentional acts and punitive damages are not. The so-called reservation of rights letter usually indicates that panel counsel of choice has been assigned to defend the case, but that the claims for punitive damages, etc., will not be covered. The letter, by its wording, can give the insured attorney the impression that he or she has no choice in the matter. There is indeed a choice. The insured must be given the opportunity to either accept or reject such a conditional proffer of a defense.[5]

What the typical reservation of rights letter also does not reveal is one of the insurance industry's secrets: In cases such as this (*i.e.*, where the carrier agrees to defend but reserves a right to disclaim), *the insured is frequently entitled to his or her own counsel at the carrier's expense*.[6]

Why would an attorney want his or her claim to be handled by personal counsel rather than by panel counsel or house counsel for the carrier? There are several reasons.

First, insurance defense firms charge relatively low hourly rates in return for a volume of business and the certainty of payment. In all likelihood, the name partner who telephones an attorney when the case first arrives on his or her desk will not be doing the bulk of the work. Rather, it will be done by attorneys with much less experience. This harsh reality of leveraging is made necessary by the lower hourly rates charged to the carrier. Thus, an attorney may have more confidence in knowing that his or her case is being handled by one lawyer with considerable experience, who does not have a foot in the insurance company's camp.

Second, the attorney may wish to

defend the case fully and try it, if necessary. A malpractice insurer looks at a case not as a stand-alone issue, but rather as one of many cases in which cost effectiveness is paramount, not an individual's personal or financial (*i.e.,* the deductible) interests. Even if an attorney has a consent clause in a policy, the carrier can make it virtually impossible for an attorney to say no when the carrier really wants to settle.

If an attorney has a claim for outstanding fees, it is even more important to have counsel of his or her choice with undivided loyalty. The attorney may well wish to adopt the tactic of getting the insurance company to pay as much money as possible, and to negotiate with his or her former client's attorney to receive payment of most of his or her fee. In effect, the insurance company would be funding at least part of the attorney's fee payment. It would be virtually impossible for panel or house counsel to adopt a strategy such as this.

Conclusion

The long and the short of it is that if an attorney receives a reservation of rights letter from his or her malpractice insurer, the advice of knowledgeable counsel should be sought before deciding whether to accept the proffered defense with major reservations. ⚖

Endnotes

1. 337 N.J. Super. 447 (App. Div.), *certif. denied*, 169 NJ. (2001).
2. *See Sparks v. St. Paul Ins. Co.*, 100 N.J. 325 (1985).
3. N.J.A.C. 11:13-7.3 (defense costs within policy limits).
4. N.J.A.C. 11:1-20.4. (cancellation and non-renewal underwriting guidelines). *See also* N.J.A.C. 11:2-29.1 *et seq*. (insurer withdrawals).
5. *See Merchants Indem. Corp. v. Eggleston*, 37 NJ. 114 (1972).
6. *See e.g., Dunne v. Fireman's Fund American Ins. Co*. 69 N.J. 244 (1976); *City Council of Elizabeth v. Fumero*, 143 NJ. Super. 275 (Law Div. 1975).

William W. Voorhees Jr. *practiced in Morristown, and devoted his practice almost exclusively to legal malpractice and insurance coverage matters. During his career he represented both insurers and insureds. He passed away in 2012.*

(Originally published in February 2006.)

Financial Dealings with Clients

by Alice M. Plastoris

The practice of law, no matter how noble an endeavor, is still a business, and the goal of any business is to be profitable. Lawyers, whether sole proprietors or in a firm, are entitled to be and should be compensated for the services they provide. In order for that to happen, lawyers should, within the confines of the ethics rules and court rules, use good business sense and practices in running their practice, and in their financial dealings with clients.

After determining who or what is the target client base and obtaining that business, there are certain business practices that must be in place to govern how clients retain the lawyer, and how the lawyer will get paid during the representation and after the representation has concluded. In order to accomplish this, the lawyer should address the following points: 1) retainer agreements and determining the scope of the representation; 2) the method of payment including credit cards; and 3) collecting his or her fees for services rendered.

Disclosure and the Initial Consultation

RPC 1.4(b) requires an attorney to provide the client with enough information reasonably necessary to permit them to make informed decisions regarding the representation. The attorney must discuss this with the client during the initial consultation, addressing issues including the fee arrangement and scope of the representation. If the lawyer decides to decline the representation, it should be addressed in writing to the client.[1]

Scope of the Representation

Once the lawyer has met with the client and determined who the client is, the type of legal matter and what services are to be performed, the lawyer and the client must agree upon the scope and objectives of the representation. RPC 1.2(a) provides that a lawyer shall abide by the client's decision concerning the scope and objectives of the representation. A lawyer may limit the scope of the representation if doing so is reasonable under the circumstances, and the client gives consent.[2]

Any limitation should be thoroughly discussed with the client and set forth in the retainer agreement.[3] For example, in the *Laufer* case the attorney limited the representation to the drafting of the marital settlement agreement in a divorce based on the representations of the client.[4]

Retainer Agreements

At the outset of an attorney-client relationship, the attorney should provide the client with a written retainer agreement to be signed by the client and the attorney.[5] This document benefits both the client and the lawyer by setting forth the scope of the representation, the services to be provided, and the type of fees to be charged. The retainer agreement will govern the expectations and duties of both parties to the agreement. It also serves as a basis of the contract for services to be rendered and the payment by the client for those services. The retainer agreement should clearly set forth the scope of the representation, including the services to be rendered, the services not being rendered and the type of fees and costs to be charged.[6]

The fees charged to the client must be reasonable.[7] The type of fee arrangement and the amount of the fee must be reasonable. The factors to be considered in determining reasonableness are set forth in RPC 1.5.[8]

Depending on the type of matter, the fee arrangement may vary. A lawyer may charge an initial consultation fee.[9] In general, the types of fee arrangements are as follows:

1. contingency fee;
2. hourly rate;
3. flat fee; or
4. hybrid of hourly fee or flat fee and contingency fee.

RPC 1.5(h) simply requires a written fee agreement with the client when a lawyer has not regularly represented the client. However, it is prudent business practice to have a written fee agreement with a client for every representation.

Contingency Fee

A written fee agreement is mandatory in contingency fee cases[10] and in civil family actions.[11] RPC 1.5(c) provides the requirements of a contingency fee arrangement with a client that must be followed. Contingency fee arrangements are not allowed in civil family actions or criminal cases.[12] Contingent fees pursuant to Rule 1:21-7 in civil family actions are only permitted regarding claims based on tortuous conduct of another, and shall have a separate fee agreement.[13]

A contingency fee arrangement must contain the percentages for compensation to the attorney.[14] It must state the method by which the fee is to be determined and other expenses to be deducted from the recovery to be paid to the lawyer.[15] Upon the conclusion of the contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination.[16]

Fee Sharing

In general, fee sharing with another lawyer not in the same firm is prohibited. RPC 1.5(e) governs fee sharing between lawyers not in the same law firm. Fee sharing is permitted *only* if all of the following factors are met: 1) the division of the fee is proportionate to the services performed by each attorney; 2) the client is notified in writing of the fee division; 3) the client consents; and 4) the total fee is reasonable.[17]

Independence of Lawyer

In today's economy, more and more parents are paying for the legal fees of their children. In those circumstances, please keep in mind that the third party paying the legal fees is not the client, and should not control the representation. The duty is to the client, and the attorney-client privilege applies solely to the client. RPC 5.4 governs the professional independence of a lawyer. A lawyer shall not permit a person who recommends, employs or pays for legal services for another to direct or regulate the lawyer's professional judgment in rendering legal services.[18] However, as a practical matter, the third party agreeing to pay the legal fees should execute the retainer agreement as the guarantor, in addition to the actual client.

Costs

A retainer agreement should also set forth what costs and out-of-pocket expenses the client will be responsible for paying during the representation. The costs charged should be reasonable and necessary.[19] A lawyer may only charge clients reasonable expenses actually incurred by the lawyer.[20] Expense items are not to be transformed into a profit center by imposing a fixed monthly office charge. Expenses must actually be incurred on behalf of the client for their particular legal matter.[21]

Civil Family Actions

Retainer agreements in civil family actions are specifically governed by Rule 5:3-5. Every agreement for legal services *must* be in writing and signed by both the attorney and the client. The client must receive a fully executed copy.[22]

The retainer agreement must have annexed to it the *Statement of Clients Rights and Responsibilities* signed by the client, in the form appearing in Appendix XVIII of the court rules.[23]

The retainer agreement *must* include:[24]

1. a description of the legal services to be provided;
2. a description of legal services *not* encompassed by the agreement, such as real estate transactions, municipal court, tort claims, appeals, domestic violence proceedings, etc.
3. the method by which the fee will be computed;
4. the amount of the initial retainer and how it will be applied;
5. when bills are rendered, which shall be no less frequently than once every 90 days, provided services are rendered within the period;[25]
6. the name of the primary attorney having responsibility for the representation and hourly rate;
7. whether and in what manner the initial retainer is required to be replenished;
8. when payments are to be made;
9. whether interest will be charged including the rate;
10. statement of expenses and disbursements for which the client is responsible and how they will be billed;
11. the effect of counsel fees awarded on application to the court pursuant to Rule 5:3-5(c) and Rule 4:42-9;
12. the availability of complementary dispute resolution (CDR) programs.

Limitations on Retainer Agreements

As previously stated, contingency fees are prohibited in criminal and family actions. The court rules also prohibit a lawyer from holding a security interest or mortgage or other lien on the client's property interest to insure payment of fees during the representation.[26] A lawyer may take a security interest in the property of a *former* client after the conclusion of the matter, in accordance with RPC 1.8(c).[27]

In a civil family action, the retainer agreement shall *not* include a provision for a non-refundable retainer.[28]

A lawyer also shall *not* limit the lawyer's liability to the client for malpractice in the retainer agreement.[29]

A lawyer shall *not* acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client, *except*:[30]

1. a lien granted by law to secure a lawyer's fee and expenses; or[31]
2. a contract for a reasonable contingency fee.[32]

Award of Counsel Fees

In certain instances, the court may award counsel fees to a party.[33] A retainer agreement should provide that even if fees are awarded by the court to be paid by another party to the litigation, the client is still responsible for payment of the attorney's fees for services rendered to them by the lawyer or law firm, unless the matter is a contingency fee case or other arrangements are made with the client regarding the attorney fee award.

Withdrawing From Representation

A retainer agreement should also advise the client of all reasons why a lawyer may withdraw from the representation of the client.[34] A lawyer may withdraw either by consent of the client or by requesting permission from the court, if litigation is pending, and for the following reasons:

1) the client insists the lawyer do something illegal;
2) the client does not follow the lawyer's advice;
3) the client does not answer telephone calls or letters;
4) the client does not cooperate;
5) the client tells a lie under oath or tells the lawyer the client will do so;
6) the client fails to pay for legal services on time; or
7) for other good or valid reasons.

If litigation is not pending, a lawyer may withdraw upon notice to the client for any of the reasons stated above.

Method of Payment

In running a practice or law firm, a lawyer must determine the method of payment to be accepted from clients. Of course the most obvious method of payment from a client is cash or check. When receiving payments from clients, a lawyer must abide by Rule 1:21-6 regarding bookkeeping records for their business and trust accounts. A lawyer is also required to retain these records for seven years after the event or representation, including copies of all retainer agreements, client statements and bills rendered.[35]

Many lawyers and law firms accept credit cards such as Visa, MasterCard, American Express and Discover card. In order to accept credit cards, the lawyer must enter into a merchant services agreement with a bank or other merchant services provider. The fees for accepting credit cards vary depending on the institution providing the service and the type of card being accepted. For example, Visa and MasterCard fees are typically one to 1.5 percent of the charged amount, but American Express can be as high as three percent or more. A lawyer or law firm must also decide whether to purchase the credit card machine or lease it.

Accepting credit cards improves cash flow, and many times can insure payment. It also lessens the risk of having the lawyer's fees discharged in bankruptcy because the lawyer has already been paid, so the client will list the credit card in the bankruptcy. When sending statements and bills to the client, include a form advising that the firm accepts credit card payments, and provide a space for the client to fill in the credit card information to pay the bill.

The fees associated with the credit card charges to the merchant services provider are essentially bank charges, and deductible business expenses. The minimal processing cost to the lawyer of accepting credit cards is far outweighed by the dual benefits of improved cash flow into the business and ensuring payment by the client.

A lawyer must also decide whether the credit card charges will be electronically deposited into their business account, trust account or a combination of both, when setting up the merchant services account. This will depend on the type of transactions anticipated, and the cost to acquire the equipment. Many merchant services companies only lease equipment, or require there be a separate machine for each account. Diligent inquiry and negotiation is prudent when embarking on the merchant services adventure.

There is, however, a serious pitfall to be considered when accepting credit cards. Lawyers should be aware that the consumer has the right to dispute the transaction or report a fraudulent use of the credit card (even when there is none). For example, a client charges a retainer or makes a payment and then becomes unhappy and does not want to pay the attorney's fees, so they dispute the charge with Visa. If this happens, the merchant services company will take the funds from the account where they were deposited. The credit will occur prior to receiving written notice of the dispute, which arrives in the mail approximately 14 days later. In the meantime, the bank account and cash flow is seriously disrupted. If the deposit was made to the attorney trust account and already disbursed, this can cause a serious problem for the lawyer.

An even more serious problem occurs more frequently in civil family actions, where the parties have a joint credit card. For example, one spouse charges the retainer for legal fees to the joint

credit card. The other spouse notifies the credit card company that the transaction with the law firm was "fraudulent." This situation initially is a nightmare, especially if the funds were deposited into the lawyer's trust account. Because the transaction is reported as fraudulent, the merchant services company will put a hold on *all* charge transactions to your firm, even if the other charge transactions are undisputed payments made by other clients. The result is major cash flow disruption, bounced checks because the funds are removed from the bank account and credits given to other clients for payments made are put on hold because you have not received the funds. This hold under the merchant services agreement can last as long as 364 days.

If this happens, the following steps *must* be taken:

1. Immediately respond *in writing* to the merchant services company with a copy of the retainer agreement, invoice for services rendered and signed receipt by the client (the authorized joint card holder), and explain the representation and providing of services to the client.
2. Immediately notify the client that made the payment with the credit card, requesting they contact the credit card company and advising that the payment will not be credited to the retainer or outstanding balance owed.
3. If there is a court order requiring the payment of fees, provide a copy of the order.
4. Make an application to the court to compel payment and withdrawal of the fraud charge. If the fraud charge is made by the other spouse or other cardholder, ask the court to require that party to pay all damages incurred (*i.e.*, bank charges) and compel that the party takes *all* steps to withdraw the fraud complaint immediately and remove the hold on the merchant services account and restore all funds. Then send this order to the merchant services company.

It is very important, when accepting credit cards, to have a signed retainer agreement with each client, and to keep all bills, statements and signed receipts by the client.

Getting Paid

Ensuring an attorney will get paid for providing legal services to clients begins at the outset of the representation. First, discuss the representation and the responsibility of the client to pay for services rendered. Second, prepare a retainer agreement, review it with the client, and have it executed; having a signed retainer agreement is the bedrock of getting paid. Also, send regular bills to the client for services rendered, and regularly communicate with the client regarding the fees that are due to avoid carrying a large receivable, resulting in the need to sue the client later.

In contingency cases, an attorney assumes some risk because the outcome of the case determines the compensation for the lawyer. So upon the initial meeting with the client, garner enough information to determine the merits of the case and the likelihood of success and getting paid.

An attorney must also be aware of actions in which a fee is allowable, which are governed by Rule 4:42-9. Attorney fees may be awarded in the following types of matters:

1. family actions;[36]
2. out of a fund in court;
3. in a probate action;
4. in an action for the foreclosure of a mortgage;
5. in an action to foreclose a tax certificate(s);
6. in an action upon a liability or indemnity policy of insurance in favor of a successful claimant;
7. as expressly provided by these rules with respect to any action; and
8. in all cases where attorney's fees are permitted by statute.

In all application for fees pursuant to Rule 4:42-9 or other rule or statute, a lawyer must submit an affidavit of services that complies with Rule 4:42-9(b) and (c) and in family actions with Rule 5:3-5. The fees must also be reasonable pursuant to RPC 1.5, and the affidavit must set forth the requirements contained in RPC 1.5(a).

Attorney Charging Lien

Once a representation has terminated, an attorney is entitled to an attorney lien for services rendered. Pursuant to N.J.S.A. 2A:13-5 and 2A:13-6, an attorney is entitled to a lien for services rendered in the action. The lien attaches to any proceeds or property received by the client by way of settlement, judgment, decision or final order. Notice should be given by the attorney of the lien and the amount sought to the client, successor counsel, if any, and opposing counsel. In many instances, a motion should be filed with the court to perfect the lien. Any application for a lien must comply with Rule 1:20A-6 (pre-action notice).

Collection of Fees

Before a lawyer can sue a client for fees owed for services rendered, Rule 1:20A-6 requires that the client be served with a pre-action notice.

Rule 1:20A-6 provides as follows:

> No lawsuit to recover fees may be filed until the expiration of the 30 day period herein giving Pre-Action Notice to the client; however, this shall not pre-

> vent a lawyer from instituting an ancillary legal action. Pre-Action Notice shall be given in writing, which shall be sent by certified and regular mail to the last known address of the client, or, alternatively, hand delivered to the client...

The notice must also contain the name and address of the current secretary of the fee committee in the district where the lawyer maintains an office.[37] The notice must specifically advise the client of the right to request fee arbitration within 30 days; if the client does not promptly do so, he or she will lose the right to initiate fee arbitration.[38] If the client does not request fee arbitration, and the lawyer files a collection suit against the client for fees, the complaint must allege giving the pre-action notice to the client or be dismissed.[39]

A collection complaint against a client should contain a separate count based on contract, book account, *quantum meruit* and reasonable value of services. The complaint should allege and attach the retainer agreement signed by the client and attorney, the pre-action notice with proof of service and the statements sent to the client for services rendered and the failure of the client to make payment. Depending on the amount of fees owed, the complaint should be filed in either the New Jersey Superior Court, Law Division or Special Civil Part.

Fee Arbitration

Rule 1:20A-3 governs fee arbitration proceedings with the client. If a collection action has been filed or a fee hearing ordered on an attorney lien application, the filing of a fee arbitration by the client *stays* the collection proceedings until there is a fee determination.[40] The lawyer has the obligation to notify the court of the stay pending the outcome of the fee arbitration.

Fee arbitration determinations are binding on the client and the attorney, and once the proceedings have commenced it is the sole forum to determine the reasonableness of the fee.[41] All fee arbitration proceedings are confidential.[42] There are limited grounds for appeal of a fee arbitration award. All appeals are made to the Disciplinary Review Board.[43] No court has jurisdiction to review the fee arbitration determination.[44]

Rule 1:20A-3(e) governs the enforcement of a fee arbitration award. If the fee determination by the committee is not paid within 30 days, the amount may be entered as a judgment in the collection suit (that was stayed) or by a summary action pursuant to Rule 4:67 to obtain a judgment in the amount of the fee award.

If the court in the underlying action entered an order for the attorney charging lien, then the order to show cause for entry of a judgment in the amount of the fee award should be filed with that court in a summary fashion. If a collection action was filed and stayed by the fee arbitration, a motion for summary judgment should be filed in the collection suit to enter judgment. If no prior proceedings were filed and stayed by the fee arbitration, then a summary action by way of order to show cause and complaint pursuant to Rule 4:67 should be filed with the court to enter judgment in the amount of the award.

Once judgment has been entered, it should be docketed with the New Jersey Superior Court in Trenton as a statewide lien/judgment, and the attorney should utilize all remedies to collect the judgment, such as a writ of execution on assets or wage garnishment, to name two.[45] Once the judgment is entered, post-judgment interest will accrue on the amount owed until paid.[46]

When the judgment is paid by the client, a warrant to satisfy the judgment must be provided by the lawyer. ⚖

Endnotes

1. RPC 1.16.
2. RPC 1.2(c).
3. *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003), *certif. denied*, 177 N.J. 233 (2003).
4. *Id.*
5. RPC 1.5; R. 5:3-5; R. 1:21-7.
6. *Lerner*, 359 N.J. Super. 201 (App. Div. 2003), *certif. denied*, 177 N.J. 233 (2003).
7. RPC 1.5.
8. RPC 1.5(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
   (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
   (2) the likelihood, if apparent to the client, that the acceptance of a particular employment will preclude other employment by the lawyer;
   (3) the fee customarily charged in the locality for similar legal services;
   (4) the amount involved and the results obtained;
   (5) the time limitations imposed by the client or by the circumstances;
   (6) the nature and length of the professional relationship with the client;
   (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
   (8) whether the fee is fixed or contingent.
9. RPC 7.1(a)(4)(i).
10. RPC 1.5; R. 1:21-7.
11. R. 5:3-5.
12. RPC 1.5(d).
13. R. 1:21-7.
14. R. 1:21-7(c).
15. RPC 1.5(c).
16. RPC 1.5(c).

17. RPC 1.5(e).
18. RPC 5.4.
19. R. 4:42-8.
20. ABA Model Rules of Professional Conduct 1.5(a) (2000).
21. *See Scullen v. State Farm Ins. Co.*, 345 N.J. Super. 431, 441-42 (App. Div. 2001).
22. R. 5:3-5(a).
23. Sylvia Pressler and Peter Verniero, Current N.J. Court Rules (Gann 2011), Appendix XVIII, p 2601.
24. R. 5:3-5(a)(1) through (10).
25. This is a good practice for any hourly rate retention when providing legal services. It allows the client to see the services rendered, the costs and expenses incurred and increases regular cash flow to the lawyer.
26. RPC 1.8; R. 5:3-5(b).
27. R. 5:3-5(b).
28. R. 5:3-5(b).
29. RPC 1.8(h).
30. RPC 1.8(i).
31. N.J.S.A. 2A:13-5 and 2A:13-6.
32. RPC 1.5.
33. R. 4:42-9; R.5:3-5(c).
34. RPC 1.16; R. 5:3-5.
35. R. 1:21-6(c).
36. R. 5:3-5(c).
37. R. 1:20A-6.
38. R. 1:20A-6.
39. R. 1:20A-6.
40. R. 1:20A-3(a).
41. R. 1:20A-3.
42. R. 1:20A-5.
43. R. 1:20A-3(d).
44. R. 1:20A-3(e).
45. R. 4:56.
46. R. 4:42-11.

Alice M. Plastoris *is a sole practitioner in Morristown, primarily practicing matrimonial and family law, municipal court and chancery practice, including foreclosure defense and estate litigation. She is a current member of the District X Fee Arbitration Committee and former member of the District X Ethics Committee.*

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Fee Arrangements With Clients

by Frederick J. Dennehy

The objective of a fee agreement is not just compliance with specific dos and don'ts contained in the Rules of Professional Conduct or Court Rules. It is unambiguous communication about the basis of the fee arrangement and the services that will be performed for the client. Having a clear and precise fee agreement enables counsel to think more clearly about what he or she is about to undertake for the client. And in some instances it does more. It forces counsel to decide who is the client and who is *not* the client.

In the transactional context, for instance, counsel may end up meeting with a number of individuals who want to form a business entity. At that moment, they are all friends and they all have a common goal. But in order to avoid conflicts of interest, the practitioner must decide as soon as possible whether he or she is representing one of them, a limited group of them, or the business entity that they may want to form. The fee agreement forces counsel to that.

The first ethical obligation in the fee context is disclosure. RPC 1.4(b) requires attorneys to provide clients with the information reasonably necessary to permit them to make informed decisions regarding a representation.[1] Without disclosure of all relevant information to the client, the client's choice of a fee arrangement has been held to be "illusory."[2] The second requirement—and the fundamental guideline—in fee arrangements is set forth in RPC 1.5(a). That rule says the fee charged to the client has to be reasonable.

"Reasonable" means at least two things:

1. The type of fee arrangement entered into has to be fair; and
2. The amount of the fee has to be fair.

The Reasonableness Requirement of RPC 1.5 Applies to the Type of Fee Arrangement

The leading case on types of fee arrangements is *In re Reisdorf*,[3] where the Supreme Court found that a contingent fee arrangement between a lawyer and widow in a contested probate matter was unfair and unreasonable because there was only a minimal risk of nonpayment assumed by the attorney, and the attorney had not informed the client—who didn't have much money—that under Rule 4:42-9, the attorney's fee may be paid from the estate without regard to the amount of the client's recovery.

Reisdorf stands for at least two principles. First, an attorney has to assume some risk of nonpayment to justify a fee based on a contingency instead of the value of services rendered.

Second, no type of agreement can be reasonable unless the client knows enough to make an informed choice about it. This applies to all fees, contingent and otherwise.

The Choice of a Contingency Fee or a Different Arrangement

The first choice typically is whether to employ a contingency arrangement or not.

Court Rule 1:21-7(b) says that contingent fee arrangements cannot be used in a fee agreement unless the client is first given a chance to retain the attorney on the basis of the reasonable value of his or her services. This choice has to be mentioned in the engagement letter.

ABA Formal Opinion 94-389 provides a long list of factors that should be reviewed between an attorney and a client before there is agreement upon a contingency arrangement. The opinion isn't binding on New Jersey attorneys, but it is useful as a guideline for discussion, or for an attachment to the engagement letter.

The Requirement of a Signed Writing

All contingent fee arrangements have to be in writing, and signed by the client, whether the client is a longstanding one or not. A duplicate has to be given to the client. This applies as well to negative contingency agreements or any other arrangements where a lawyer charges a premium based on the result achieved. This procedure is different from the procedure for non-contingency situations, where the client does not have to sign the agreement, and where a fee agreement may not be necessary for longstanding clients.

Alternatives to Contingency Arrangements

The alternative to a contingency fee is not necessarily a straight hourly rate. The fee can be based on the reasonable value of the services rendered, so it can be a fixed fee that covers either the complete representation, or each portion of the representation, if it is a multipart representation. Fees can be hourly, hourly with caps, or modified contingency fees (a reduced hourly or fixed rate together with a reduced fee contingent on specified results). Fees can also be stated in the alternative. For example, a lawyer can charge the higher of: 1) a rate based on time, or 2) the attorney fees awarded by the court under a fee shifting rule.

Non-Refundable Retainers

RPC 1.16 (d) requires that the lawyer refund "any advance payment of a fee that has not been earned." Cases decided under the RPCs have ruled that retainers, like other fees, must either be earned or returned.

But a retainer may be deemed earned if the lawyer stands ready to provide the requested representation, or if the lawyer turns down other employment because of a conflict of interest or anticipated time constraints. Retainers, therefore, may be non-refundable. If the fee is not refundable, the attorney has to state as much in the engagement letter.

The New Jersey Supreme Court Advisory Committee on Professional Ethics in its Opinion 644 held that "a retainer may be fully earned and therefore non-refundable when the lawyer stands ready to provide anticipated representation, whether or not it actually materializes."[4] Typically, a lawyer who charges a non-refundable fee has special experience or a reputation in the area of practice in question.

Opinion 644, however, also warned that non-refundable retainers are ethical only when the "fee arrangement is fair and reasonable under the circumstances of the particular representation."[5] In *DeGraaff v. Fusco*,[6] the Appellate Division held that a non-refundable retainer, while not unethical *per se*, was subject to partial return if contravening events should render it "unconscionable" for the attorney to keep it. There, an attorney took $15,000 to help a woman's son in a federal criminal matter. It was resolved quickly, with little intervention by the attorney, and there was no explanation of the basis for the fee.

Not Only the Type of Fee Arrangement Has to be Reasonable, but the Amount of the Fee Has to be Reasonable

Factors

RPC 1.5(a) lists a number of factors to be included in deciding whether the amount of a fee is reasonable or not:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Bear them clearly in mind when setting the fee, so they can be referenced if the fee needs to be defended to the court or the client.

A Written Statement of Basis for Fee Calculation

Regardless of the type of fee arrangement, RPC 1.5(b) requires that the basis of the fee be communicated in writing to any client the lawyer has not regularly represented. Interpret "regularly" warily—and err on the side of formalizing the agreement. Disclose in the engagement letter all charges for which the client will be financially responsible. Disputes can easily be avoided by providing a clear, written statement to each client at the beginning of each separate matter, describing the precise manner in which payment is expected. It helps the client and the practitioner. The alternative is a good deal of unnecessary grief.

Probably the most comprehensive recent statement on this topic is by the Appellate Division in *Alpert, Goldberg v. Quinn*,[7] which examined a unique form of retainer agreement and the entitlement of a law firm to be paid for work done pursuant to that agreement.

The *Alpert* retainer agreement had set forth the hourly fee to be charged, and the fact that there would be a charge for expenses and a discount based upon timely payment. It also specified that "details on any of the items in our policies will be provided to you upon request; whether or not you request them you will be bound by our standard

practices and firm policies in these and other regards, so feel free to ask."[8] These details were embodied in a so-called master retainer, which consisted of 18 single-spaced typewritten pages. Among the things it provided were:

1. If the firm withdraws from the client's matter and is further entangled with the client, its time will be billable to and payable by the client, together with expenses;
2. Balances owed and unpaid beyond 30 days would bear interest at the rate of 12%;
3. If there is a fee dispute or any proceedings relating to or arising from the attorney fees and expenses, the client will continue to pay the hourly fees and expenses for any time and expense that continues to be incurred by the firm by virtue of any fee dispute or related proceedings;
4. The client will pay fees for any time and expense incurred by the firm in seeking to be relieved of counsel and in dealing with a successor firm.[9]

The Appellate Division, in reviewing this unusual arrangement, stressed that an attorney, when contracting for a fee, has to act as a fiduciary, and satisfy his or her fiduciary obligation to the client. It said a fee agreement is not circumscribed by the dictates of contract law.

If a client does not know what charges and costs beyond the hourly rate he or she will be exposed to, how can the client be expected to make an informed decision concerning representation? RPC 1.5(b) requires the attorney to present a new client in writing, at the time of retention, all of the fees and costs for which the client will be charged, as well as the terms and conditions that would be imposed. A reference in a retainer agreement to another document like a master retainer that would provide details is not sufficient.

Wherever there is a potential for confusion regarding what services will be included within the fee charged, the description is particularly important. If it's not clear, the agreement can be invalidated, or counsel can be held accountable for doing something he or she never intended to do. Counsel may (and should) 'unbundle' services, (*i.e.*, make it clear that a specific task or tasks is being undertaken rather than service as the client's 'general lawyer'). But counsel has to disclose that fact to the client.

If the fee is subject to increase on an annual basis, it should be clearly stated. And when the attorney receives a retainer in advance, RPC 1.5(b) requires that it be specified whether the advance payment is a retainer or a fixed fee.

Timing

Under RPC 1.5(b), the fee arrangement in a non-contingency case has to be made either before or within a reasonable time after beginning the representation. "Reasonable time" simply means a sufficient time to allow for the client to receive the fee letter, review it, and if necessary, contact the attorney to register disagreement. But there is no requirement that the client sign the letter or even acknowledge receipt.

Nor is there a requirement that a letter be sent to a client who is "regularly represented." The idea behind this exception is that an understanding regarding the basis for the fee has already evolved. But it is never a good idea to rely on this. It is best always to send a letter for each matter.

Conscionability and Fairness

As noted above, general contract principles do not trump fiduciary duty in fee agreements. In the case *Cohen v. Radio-Electronics Officers*,[10] there was an agreement for legal services that would be renewed automatically each year unless either party provided written notice of termination six months before the termination date. The agreement called for an attorney fee of $100,000 per year. The client in *Cohen* terminated the agreement, but not during the specified termination period. The attorney tried to obtain his full $100,000 fee for the year following the decision by the client to terminate on the grounds that the termination notice didn't comply with the contract. The trial court ruled for the attorney, but the Appellate Division held that general contract principles don't apply to attorney fee agreements, and that to charge $100,000 knowing the attorney would not be called upon by his client for any services was unconscionable and went against the essence of RPC 1.5.[11]

The Appellate Division has also said that when attorneys can reasonably foresee that anticipated counsel fees are "disproportionate" to the amount in dispute, or that they have exceeded it, the attorney is obligated to communicate that fact to the client.[12]

Reasonableness of Contingency Fees

The reasonableness requirement of RPC 1.5(a) applies to contingent fees as well as hourly fees. Beyond the general reasonableness requirement, Rule 1:21-7(c), which applies to injuries from non-business torts, establishes a sliding scale for certain contingent matters. Furthermore, there is a procedure to ask the court for a higher fee in some instances, under Rule 1:27-7(f). It applies to all attorneys, in New Jersey and out of state.[13]

In the case of a non-business tort matter, expenses must be deducted before calculating the contingent fee. After the contingent fee matter is over, RPC 1.5(c) says the lawyer has to provide the client with a written statement of the outcome of the matter, and, if there is a recovery, show the client how it was determined.

The specific percentage limitations set forth in Rule 1:21-7(c) apply to most negligence matters, including automobile accidents, slip and fall cases and products liability matters. But, they do not apply to "business torts" such as fraud or interference with contractual relations or employment cases.

When an attorney in a personal injury case reduces liens, assignments and claims against the proceeds through negotiations resulting in compromise, that additional benefit to the client can be added to the net recovery for the purposes of calculating the attorney's fee. But a provision to that effect must be in the engagement letter.

The net recovery on which the fee is to be based does not include pre-judgment interest that may be added to the judgment in tort actions through Rule 4:42-11(a)(b). Post-judgment interest, on the other hand, is included in the net recovery on the basis that delay in payment of a judgment will cause economic harm to the attorney as well as the client.[14]

Disbursements

The reasonableness requirement of RPC 1.5(a) applies equally to charges to clients for services provided by paralegals and other non-attorney personnel. Attorneys cannot delegate tasks to paralegals that the attorneys could perform in a more cost-effective way. But they can charge, at their own hourly rate, for the actual time spent supervising or reviewing the work of paralegals.

If a client has agreed to pay for paralegal time in addition to attorney time, the attorney cannot charge paralegal fees for a task that could have been performed by less skilled workers. Rule 4:42-9(b) governs court-awarded fees for paralegal services, and defines "paraprofessional services" to be "specifically delegated tasks which are legal in nature [performed] under the direction and supervisor of attorneys which tasks an attorney would otherwise be obliged to perform."

If the client has agreed to pay other types of out-of-pocket expenses after being fully informed, the attorney can recover them as well. This includes filing fees; payment to investigators, experts, and paralegals; and the cost of telephone calls, as well as travel and hotel expenses incurred on behalf of the client. But in *In re Estate of Reisen*,[15] the court said "overhead of the firm," such as postage, photocopying and telephone, should generally be borne by the firm and not charged to the client. That is, therefore, the default rule.

In *Estate of Reisen*, there was no specific agreement in the retainer letter about who would be responsible for what. That is the key, and it reinforces the need to include all terms in an engagement letter.

There is no New Jersey opinion that addresses whether an attorney can generate a profit on services like photocopying and other expenses. The comment to Model Rule 1.5 says that "a lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer."[16]

ABA Formal Opinion 93-379 is nonbinding in New Jersey, but can serve as a guideline. The opinion approved expense charges for more than the actual cost to the attorney, as long as the client was aware of the amount above the actual cost of the service being charged, and agreed to it. The opinion noted that the lawyer's stock and trade is "the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." It also suggested that, where the client has agreed to it, the client may be charged for general office overhead, such as "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like." Even when photocopying is considered part of overhead and not charged to the client, expenses generated by and "unusual and voluminous number of copies" can be charged.[17]

The most important thing to remember as far as disbursements go is that failure to disclose any of the components of a bill, including a profit margin on reimbursable services and materials, might be construed as overreaching and a violation of RPC 1.5(a), as well as possibly conduct involving dishonesty in violation of RPC 8.4(c).

Charges for Divided Time

An attorney cannot include charges to one client for time spent equally on another client. For example, assume counsel has three separate cases with motions scheduled to be heard in the same court on the same day, and spends a total of three hours in court. Each of the three clients cannot be billed for a full three hours. The total time spent would have to be apportioned to each file. If counsel travels on behalf of one client but uses the travel time to work on another client's file, both clients cannot be charged for the travel time. And if old work product can be reused, counsel does not re-earn the hours previously billed when the work product was originally generated. ABA Opinion 93-379 states that "a lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of those economies on to the client."

Termination Letter

When a matter is concluded, a letter should be sent to the client informing him or her of the fact. It makes it clear duty to the client has ended, and it may prevent future conflicts of interest.

Unauthorized Provisions in the Retainer Agreement

There are a variety of provisions that ethically may not be part of a retainer agreement with a client. These include:

Authorization to Settle

There can be no language in a retainer agreement or letter of solicitation permitting an attorney to settle a case without first allowing the client to review and approve the terms of the settlement.

Restrictive Termination Provisions

A client has an absolute right to dismiss an attorney. A restrictive termination provision in a retainer agreement violates public policy and cannot be enforced by the attorney.

Limitations on Liability

A lawyer cannot enter into an agreement prospectively limiting liability for malpractice, unless: 1) the client fails to act in accordance with the lawyer's advice, and 2) the lawyer's representation of the client continues at the lawyer's request. New Jersey's prohibition is different from the Model Rule version. For example, Model Rule 1.8(h) allows an attorney and a client to limit the lawyer's liability by advance agreement when the client is represented by independent counsel.

Collection Fee Provisions

Where a retainer agreement provides for counsel fees, including collection fees, it is generally enforceable as long as the provision is fair and reasonable.[18]

Limitations on Scope of Representation

When a lawyer and client agree to some form of limitation on the nature of the work to be performed by the lawyer, that agreement should obviously be memorialized in writing, and describe itself plainly as a limitation of services.

Commercial Arbitration Provisions

The Appellate Division, in *Kamaratos v. Palias*,[19] concluded that a retainer agreement may include a provision mandating the commercial arbitration of any fee disputes, as long as the provision in question *sufficiently* discloses its consequences.

Specifically, the provision has to disclose that it eliminates the rights to pursue the dispute in court and through a jury trial. Also, it has to inform the client of the potential additional costs associated with commercial arbitration, and the limitations on the right to appeal an arbitration award. The court also suggested that a valid arbitration provision would have to set forth the qualifications of the arbitration panel, and disclose that a commercial arbitration might be conducted by non-lawyers. In addition, "an enforceable agreement should contain a clear statement that the client has an absolute right to proceed at the Fee Arbitration Committee level.[20]

Thus, it appears that a commercial arbitration provision in a retainer agreement can ensure that the fee dispute will not be conducted in the courts, although the client, in effect, will be able to select whether the dispute is handled in a court rule-based or other commercial arbitration. If the fee dispute also requires resolution of a malpractice issue through arbitration, the rationale may not apply. *Kamaratos* expressly declined to address that question.

Advance Waiver of Conflict

A number of retainer agreements include a provision for an advance waiver of a conflict that arises after the execution of the retainer agreement. In most jurisdictions, that kind of advance waiver is not enforceable, because the full context is not available to the client when the waiver is being signed. Because it has to be informed, knowing and voluntary, it is doubtful it would be upheld in New Jersey.

Billing Standards

In a recent unpublished opinion, Federal District Court Judge Susan Wigenton slashed approximately 12 percent of a law firm's fee request because the method of billing could have led to or obscured overbilling.[21]

The opinion stated that the application for fees contained billings in 15-minute increments rather than what the judge called the "industry standard" of "six minutes." The judge ruled that, under the practice a billing for 30 minutes could result for something that actually took 20.

Judge Wigenton also sliced off time because of "block billing," which bunches different services together rather than breaking down the time to show how much was spent on each differentiated task. Block billing is not disallowed, but fees billed by that method will be upheld as reasonable only if the listed activities reasonably correspond to the number of hours billed. In other words, they will be more carefully scrutinized.

If there are too many vague entries, the entire entry is not tossed out. Instead, the court determines whether there is a reasonable correlation between the listed activities and the time spent. The court cited Third Circuit precedent that a party blocks bills "at its own peril." The court also refused to allow fees for preparing the fee application, blaming the inability to agree on the amount of fees on confusion arising out of the law firm's billing practices. The court refused to reward "any ambiguity associated with [the firm's] invoices by awarding fees or costs for the application." ⚖

Endnotes

1. Similarly, RPC 2.1 requires an attorney to "render candid advice" in

representing a client.

2. *In re Reisdorf*, 80 N.J. 319, 322 (1979).
3. *Id*.
4. 126 N.J.L.J. 966 (1990).
5. *Id*.
6. *DeGraaff v. Fusco*, 282 N.J. Super. 315, 320-21 (App. Div. 1995).
7. 410 N.J. Super. 510 (App. Div. 2009), *certif. den*. 203 N.J. 93 (2010).
8. *Id*. at 520.
9. *Id*. at 521.
10. 275 N.J. Super. 241 (App. Div. 1994), *modified* 146 N.J. 140 (1996).
11. *Id*. at 259-60.
12. *Chestone v. Chestone*, 322 N.J. Super. 250, 259 (App. Div. 1999). The Appellate Division expressed concern about and disallowed fees and costs in excess of $80,000 for handling a motion for modification of child support that was resolved by the judge without testimony when there was no serious dispute about the parties' relative financial situations; *see, Loro v. Colliamo*, 354 N.J. Super. 212 (App. Div. 2002).
13. *See Estate of Vaflades v. Sheppard Bus Service*, 192 N.J. Super. 301 (Law Div. 1983).
14. R. 1:21-7(d).
15. 313 N.J. Super. 623 (Ch. Div. 1998).
16. *See* ABA Annotated Model Rules of Professional Conduct, Sixth Ed., Comment to R. 1.5, p. 75.
17. *Estate of Reisen*, 313 N.J. Super. at 636.
18. For a case involving an unreasonable collection fee provision, *see Gruber & Colabella, P.A. v. Erickson*, 345 N.J. Super. 248, 252-53 (Law Div. 2001).
19. 360 N.J. Super. 76, 82, 86-87 (App. Div. 2003).
20. R. 1:20A.
21. *USA v. NCH Corporation, et al*, New Jersey District Court, entered Sept. 10, 2010.

Frederick J. Dennehy *is a shareholder at Wilentz, Goldman & Spitzer, P.A. He has extensive experience in ethics and malpractice defense work, and provides expert opinions on matters of ethics, conflicts of interest and various other aspects of the Rules of Professional Conduct. He was the recipient of the* New Jersey Law Journal's *Co-Lawyer of the Year Award in 2008 and the New Jersey State Bar Association's Professional Lawyer of the Year Award in 2006.* *The author would like to thank Karin Sage, Esq. for her assistance with this article.*

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No Fees for You!

by Marshall D. Bilder and Robert J. McGuire

In one of *Seinfeld*'s more memorable episodes, Jerry Seinfeld forewarns Elaine Benes and George Costanza about the importance of complying with the Soup Nazi's stringent ordering rules. When Elaine disregards them, the Soup Nazi tells her "No SOUP for you!" George, too, initially walks away soupless when he ignores ordering protocol (complaining that he has not received free bread), but later he's rewarded with a delicious lobster bisque when he follows procedure.

New Jersey, like Seinfeld's Soup Nazi, makes very particular demands of those seeking attorneys' fees. Courts may award such fees in limited circumstances, and then only when proper procedure has been followed. This article addresses those scenarios in which attorneys mistakenly believe a court may award fees, and those in which a party can lose the opportunity for fee recovery by not properly structuring a transaction, or by misstepping in seeking the award.

The General Rule Against Recovery of Attorneys' Fees

New Jersey generally follows the American Rule, which requires litigants to pay their own legal fees regardless of which party prevails.[1] Opportunities to recover fees under New Jersey law are limited. Rule 4:42-9 provides certain exceptions to the American Rule, and permits the recovery of legal fees in eight very limited circumstances. New Jersey courts recognize an additional exception in those instances where the parties have validly contracted for the shifting of fees.[2]

The general disinclination to award fees was acknowledged in *Van Horn v. City of Trenton*,[3] when the New Jersey Supreme Court observed that the courts have "rigorously enforced" the "narrowness" of the exceptions to the American Rule, "lest they grow to consume the general rule itself."

Because fee awards often may constitute a substantial recovery, parties pursue them whenever possible, including in those instances where they are not recoverable. Attorneys should recognize the instances in which litigants can and cannot recover fees. They also should avoid certain traps that can deprive a party of an otherwise-recoverable fee award. Examples of several instances in which a party cannot recover fees, some of which can arise through a party's own missteps, are addressed in this article.

The Availability of Fees Related to Insurance Coverage Actions

Pursuant to Rule 4:42-9(a)(6), a plaintiff who prevails on a claim for insurance coverage under an indemnity or liability policy may recover the fees expended in the coverage action. Many attorneys believe fees are recoverable in all successful claims for insurance coverage, based on a misperception about the scope of Rule 4:42-9(a)(6). This confusion may arise in part because many other states permit fee recoveries by insureds who prevail in a wider variety of insurance coverage actions than New Jersey, including first-party coverage claims.[4]

New Jersey typically does not permit recovery of fees for a first-party insurer's refusal to provide coverage. In this state, those amounts cannot be awarded unless the insurer's denial was in bad faith.[5] In addition, even with respect to a claim for coverage under an indemnity or liability policy, recovery of fees under Rule 4:42-9(a)(6) requires that the party "prevail" in the coverage action. Thus, if an insured settles a coverage action with its insurer, who reserves the right to contest the coverage issue in the future, the insured may not recover fees under Rule 4:42-9(a)(6).[6]

Rule 4:42-9(a)(6) does not permit recovery of fees in all actions related to indemnity or liability policies; it involves only instances in which an insured makes a successful claim against an insurer for coverage under an existing liability or indemnity policy related to a claim by a third party against the insured. Thus, if an individual is sued and his or her auto, malpractice or homeowners carrier refuses to honor the obligation to defend and/or indemnify, the individual is entitled to an

award of reasonable attorneys' fees if he or she successfully sues the carrier to obtain coverage. However, the individual who successfully sues his or her homeowners carrier for coverage for damage to his or her house caused by a falling tree will be informed, "No fees for you!"[7]

Contractual Provisions Regarding Fee Shifting for Collection Costs

A party who has negotiated a contract or secured a note that includes a term requiring a defaulting party to pay "costs of collection" might expect the amounts recoverable to include the attorneys' fees incurred in attempting to collect a judgment secured against the other party. That may not be so.

In *Hatch v. T & L Associates*,[8] the Appellate Division rejected a request for attorneys' fees incurred in trying to collect a judgment entered after default on a promissory note. The note required the borrower to pay "the Lender's costs of collection, including reasonable attorney's fees."[9] The Appellate Division, recognizing the state's general disinclination to award attorneys' fees, refused to permit recovery of the fees expended attempting to collect the judgment, finding an absence of evidence that the recovery of such fees was contemplated when the parties originally contracted. The court further held that an obligation to pay attorneys' fees related to judgment collection had to be "clearly and specifically provided for," and that the note in that matter did not contain such a clear and specific provision.

Given *Hatch*, a party drafting a contract or instrument should take care to ensure that the document clearly and specifically states that the "costs of collection" and "attorneys' fees" includes the fees incurred with respect to collection of any future judgment.

Fees Incurred to Enforce a Settlement

Many attorneys implement the settlement of a case through the execution of a settlement agreement and releases between the parties, and the filing of a stipulation of dismissal with prejudice, indicating that the matter has been amicably adjusted but not containing the terms of the settlement. By not including the terms of the settlement as part of the filing dismissing the action, a party may lose the opportunity to collect fees expended to enforce the settlement.

In *Attardo v. Murphy*,[10] the Appellate Division declined to award fees in conjunction with a successful motion to enforce a settlement, noting the absence of any authority for such an award under Rule 4:42-9 or Rule 1:10-3 (which allows an award of fees for motions filed to provide relief to litigants, but only in connection with proceedings to enforce an order or judgment). *Attardo* strongly suggests that the court would have awarded fees for the motion to enforce the settlement if the settlement terms had been encompassed in a judgment or order.

Parties often decline to make the terms of a settlement part of a court filing for various reasons, including the desire that the settlement amount remain confidential. Given *Attardo*, if an attorney suspects that a subsequent motion to enforce the settlement may be necessary, he or she should consider incorporating the settlement into a court order or judgment, which can create an opportunity for fee recovery if the client later must move to enforce the settlement. Alternatively, consideration should be given to including in the settlement agreement itself a provision for payment of attorneys' fees related to any proceedings required to enforce the settlement.

Fees Related to Frivolous Litigation

Can a party prevail in an action and demonstrate that an adversary's filing was frivolous, but still *not* recover fees under Rule 1:4-8, the "frivolous litigation" court rule? Surprisingly, the answer is yes. In a decision the New Jersey Supreme Court declined to review, an Appellate Division panel determined that pro se plaintiffs or defendants cannot recover fees under Rule 1:4-8.[11] This is true even if the *pro se* party is an attorney, because "compensate[ing] an attorney for his lost hours would confer on the attorney a special status over that of other litigants who may also be subject to frivolous claims and are appearing *pro se*." Previous Appellate Division decisions had reached conflicting decisions on the issue.[12]

Settlement of a matter within the 28-day safe harbor window for withdrawal of an allegedly frivolous filing may likewise preclude a fee award under Rule 1:4-8, even if the filing in question is not actually withdrawn within 28 days, as required by Rule 1:4-8(b)(1). In *First Atlantic Federal v. Perez*,[13] the Appellate Division held that settlement of a matter within the "safe harbor" period "effectively qualified for the rule's protection" from claims for fees under the rule, even if the complaint was not actually dismissed within the 28-day period.

It seems further that no matter how meritless an appeal might appear, fees related to a frivolous appeal may not be recoverable. Appellate Division panels in *Community Hosp v. Blume Goldfaden*[14] and *Zavodnick v. Leven*[15] both held that the Frivolous Litigation Act does not apply to a frivolous appeal. Each of those matters analyzed the issue only with respect to whether the frivolous litigation statute, at N.J.S.A. 2A:15-59.1, permitted a fee award related to an appeal. Neither court considered whether Rule 1:4-8 would permit such an award.

Although Rule 2:11-4 permits an award of fees in connection with an appeal in certain instances (typically where Rule 4:42-9 provides that fees may be recovered for that type of action) and allows a fee award "as a sanction for violation...of the rules for

prosecution of appeals," the rule does not explicitly permit an award because an appeal has been determined to be frivolous. Indeed, the comments to Rule 2:11-4 observe that "[t]he text of Rule 1:4-8 would appear to suggest that the frivolous-fee rule is...inapplicable to frivolous appeals."[16] Therefore, although a preclusion of fee awards related to frivolous appeals is disappointing, no reported decision has permitted fee recovery in such circumstances.

Even When a Court is Permitted to Award Fees, the Court Can Reject or Reduce the Potential Award

Applicants for fees should bear in mind that even when New Jersey law authorizes an award of attorneys' fees, the court is not required to award the fees actually charged or sought. Rather, the court is permitted to award a "reasonable fee" that is determined first by calculating a "lodestar"—a reasonable hourly attorney charge multiplied by the number of hours reasonably expended on the matter for which fees may be awarded.[17]

In determining the lodestar, the court compares the hourly rate sought against the rates charged for similar services by attorneys in the community with "comparable skill, experience, and reputation" to determine an hourly billing rate that is "fair, realistic, and accurate."[18] The court then determines the hours that were reasonably expended pursuing the claim.[19] The lodestar amount may be enhanced in cases involving contingency fee arrangement.[20] However, it is only these reasonable fees that the court may award.

Once the reasonable number of hours expended have been ascertained and a reasonable hourly rate determined, the court still may reduce the lodestar if the prevailing party achieved only modest success in relation to the relief sought.[21] This restriction could, for instance, preclude an award for the full amount of fees sought, or the fees actually incurred in a matter in which the fee award would exceed the compensatory damages recovered by a successful plaintiff, if the court believes that reasonably competent counsel could have secured a similar outcome without the expenditure of a similar fee amount.

Although the New Jersey Supreme Court has not precluded fee awards that exceed the other damages recovered, that Court has observed:

> Fee-shifting cases are not an invitation to prolix or repetitious legal maneuvering. Courts should consider the extent to which a defendant's discovery posture, or a plaintiffs, has caused any excess expenses to be incurred. Courts reviewing fee allowances should assess what legal services reasonably competent counsel would consider as required to vindicate the protected legal or constitutional rights. Neither the tortoise nor the hare should be the model for compensation. The trial court's responsibility to review carefully the lodestar fee request is heightened in cases in which the fee requested is disproportionate to the damages recovered. In such cases the trial court should evaluate not only the damages prospectively recoverable and actually recovered, but also the interest to be vindicated in the context of the statutory objectives, as well as any circumstances incidental to the litigation that directly or indirectly affected the extent of counsel's efforts. Based on that evaluation, if the court determines that the hours expended "exceed those that competent counsel reasonably would have expended to achieve a comparable result, a trial court may exercise its discretion to exclude excessive hours from the lodestar calculation."[23]

Thus, the full amount of fees sought, even if they were actually incurred, may not be recoverable.

Also, in a case in which a party asserts several causes of action, the fee award should not include amounts for causes of action that are "distinctly different" from the claim for which fees may be awarded.[24] If the additional causes of action involve a "common core of facts" or "related legal theories" to the claim for which fees may be awarded, the court should focus on the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation" in determining what fees to award, and may still reduce the fee award to reflect a lack of total success by the claimant.[25]

Even in those limited instances where fees may be recovered, and in which the fees sought might be considered reasonable, the unwary can still lose out on an award due to errors in seeking the award. First, timing is important. Rule 4:42-9(d) states that the allowance of fees must be "included in the judgment or order stating the determination," and precludes the issuance of a separate order granting a fee award. New Jersey courts have sometimes allowed belated fee requests by way of motions to amend judgments that were filed within the time limit for the filing of motions to amend judgments,[26] or have extended the time to apply for attorneys' fees to the more generous period afforded by Rule 4:50-1 for good cause shown.[27] But the fact that those cases required appeals of the fee rulings shows how a delay in seeking a fee award could compromise, delay—or worse yet, forfeit—a client's entitlement to fees.

Finally, to maximize fee recovery and avoid delay in an award, counsel should submit a properly supported and detailed fee application. In a case where a court may award fees for some, but not all, of the legal work performed, for example, the party seeking fees must isolate and request only those fees that

are recoverable, or must demonstrate why those fees cannot be separately identified.[28] Counsel seeking a fee award is well advised to submit a clear and detailed fee application that will permit the court to perform the required analysis of the requested award in an expeditious fashion. In all matters in which a prevailing party may be entitled to fees, including those in which a contingent fee agreement has been reached, the creation and retention of detailed contemporaneous time records ensures the best chance to recover all fees.[29]

Conclusion

New Jersey permits the recovery of legal fees only in carefully defined and narrowly construed exceptions to the American Rule. Knowledge of the limits the courts have placed on such awards, and of the requirements for the proper timing and content of a fee application, can enable an attorney to provide advice concerning the structuring of transactions, to properly frame pleadings, and to create and implement a case strategy that maximizes a client's recovery. Such knowledge also serves to prevent the embarrassment of a fee application when an award is not authorized, or the submission of a defective or untimely fee application, resulting in the dreaded ruling, "No fees for you!" ⚖

Endnotes

1. *Mason v. City of Hoboken*, 196 N.J. 51, 70 (2008).
2. *State of New Jersey, D.E.P. v. Ventron Corp*., 94 N.J. 473, 505 (1983).
3. 80 N.J. 528, 538 (1979).
4. *See e.g., Olympic Steamship Co. v. Centennial Insurance Co.*, 881 P.2s 673, 681 (Wash. 1991) (applying Washington law and permitting recovery of fees in all successful coverage actions); New Hampshire RSA 491:22; Ariz. Rev. Stat. Ann. §12-341.01 (2010) (allowing legal fees in all successful breach of contract actions).
5. *Pickett v. Lloyd's*, 131 N.J. 457 (1993).
6. *Transamerica Ins. Co. v. National Roofing, Inc*., 108 N.J. 59 (1987).
7. The court, in *Giri v. Medical Inter-Insurance*, 251 N.J. Super. 148 (App. Div. 1991), therefore denied a fee award sought by an insured who had prevailed in an action concerning the non-renewal of medical malpractice coverage. Rule 4:42-9(a)(6) likewise does not extend to suits related to insurance policies in which third parties are indirect recipients of the insurance proceeds, such as an employer's disability policy covering its employees. *See Shore v. Equitable Life Assur. Soc'y*, 397 N.J. Super. 614, 656-26 (App. Div. 1998), *aff'd o.b.*, 199 N.J. 310 (2009).
8. No. A-5364-97T5 (App. Div. April 1, 1999).
9. *Id*.
10. 2005 WL 2334360 (App. Div.).
11. *Alpert, Goldberg v. Quinn*, 410 N.J. Super. 510, 545-46 (App. Div. 2009), *certif. denied*, 203 N.J. 93 (2010).
12. *See Port-O-San Corp. v. Teamsters Local Union*, 363 N.J. Super. 431, 441 n.5 (App. Div. 2003), *quoting dictum* in *Brach, Eichler, P.C. v. Ezekwo*, 345 N.J. Super. 1, 17 (App. Div. 2001).
13. 391 N.J. Super. 419, 433 (App. Div. 2007).
14. 381 N.J. Super. 119, 129 (App. Div. 2005).
15. 340 N.J. Super. 94-103 (App. Div. 2001).
16. Sylvia Pressler and Peter Verniero, *Current N.J. Court Rules* (Gann), Comment 2, R. 2:11-4.
17. *Rendine v. Pantzer*, 141 N.J. 292, 334-35 (1995).
18. *Id.*
19. *Furst v. Einstein Moomjy*, 182 N.J. 1, 22 (2004).
20. *Rendine, supra*, note 17 at 337-38.
21. *Furst, supra*, note 19 at 23.
22. *Szczepanski v. Newcomb Medical Center, Inc*. 141 N.J. 346, 366-67 (1995).
23. *Id*. at 366-67, *quoting Rendine, supra*, note 17 at 336.
24. *Silva v. Autos of Amboy*, 267 N.J. Super. 546, 556-57 (App. Div. 1993).
25. *Id*.
26. *Cruza v. Siegel*, 296 N.J. Super. 187, 190 (App. Div. 1997); *Franklin Med. v. Newark Public Sch*., 362 N.J. Super. 494, 516-17 (App. Div. 2003).
27. *Ricci v. Corporate Exp. of the East*, 344 N.J. Super. 39, 48 (App. Div. 2001), *certif. denied*, 171 N.J. 42 (2002).
28. *Id.*
29. *See Szczepanski, supra*, note 22 at 367 ("The use of contemporaneously recorded time records is the preferred practice to verify hours expended by counsel in connection with a counsel-fee application").

Marshall D. Bilder *is a director with Sterns & Weinroth, PC., in Trenton, and concentrates his practice in complex commercial litigation, including professional liability matters.* ***Robert J. McGuire*** *is counsel to Sterns & Weinroth, and practices in the areas of complex commercial litigation, professional liability, and first-party insurance coverage matters.*

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Attorney Ethics

Considerations for the Solo

by Brian J. Fruehling

For many newly minted attorneys, or those attorneys who have left large firms and recently hung out their own shingle, dealing directly with clients can present certain challenges. The newly solo or small firm practitioner must be vigilant in complying with attorney ethics requirements, and would be well served to spend some time reviewing the Rules of Professional Conduct (RPCs). Particular attention should be given to the rules governing client communications.

At large law firms, often there is a buffer or bureaucracy separating the young attorney from the client. The large law firm typically has a partner in charge of a 'client matter.' In fact, in some instances the associate attorney never meets or even speaks with the client. The associate might report to a junior partner, who in turn reports to a senior partner, for example. In a large firm, therefore, the responsibility for maintaining client communication and satisfaction rests not with the associate attorney but with those higher up in the law firm.

Associate attorneys who only remain at large firms for one or two years, probably will not have had the opportunity to master the skill of dealing directly with clients in a lawyerly manner. As a result, the associate attorney is likely not well equipped to handle client needs and demands. Similarly, the recently admitted solo practitioner may lack experience in dealing directly with clients. Therefore, inexperienced newly solo or small firm attorneys would be well advised to seek mentoring from seasoned practitioners, whether it be in the form of attending seminars or simply contacting their senior brethren by telephone, or through other informal settings, to discuss office concerns.

All attorneys, regardless of their level of experience, must be aware of and comply with the Rules of Professional Responsibility governing the bar of New Jersey, and should read and periodically review the RPCs. Lawyers are presumed to know the RPCs, advisory opinions issued by the New Jersey Supreme Court's Committee on Advisory Opinions, ethics opinions applying the RPCs, and the Rules of Court. Intent to violate an ethics rule, except for very limited circumstances, is not a prerequisite to the finding of an ethics breach. In other words, ignorance of the RPCs is not a defense to an ethics violation.

Client Communication Under RPC 1.4

Of particular importance in the handling of client communications is RPC 1.4, which requires all attorneys to: (a) fully inform a prospective client of how, when and where the client may communicate with the lawyer; (b) keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (c) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; and (d) when a lawyer knows a client expects assistance not permitted by the Rules of Professional Conduct or other law, advise the client of the relevant limitations on the lawyer's conduct.

Compliance with RPC 1.4 by the solo practitioner is not just an ethics requirement; it can be an excellent tool in creating a rewarding relationship with clients. As contemplated by RPC 1.4, setting reasonable goals and expectations with the client from the outset will pay dividends in the long haul.

At the initial client conference, after assessing the facts of the case and determining whether a valid cause of action exists, the attorney should clearly and openly "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[1] The attorney should then educate the client about the 'reasonable expectations' of the case.

The following are some tips to keep the assessment and objectives of the representation on point and within the understanding of the client:

- Educate the client generally about the law as it applies to the facts of his or her case, even if the client is savvy and

appears to already understand the process.

- Explain the attorney's role in the client matter, so the client's expectations of the attorney's representation in the matter are reasonable, including the billing structure, and the manner and expected frequency of communications between attorney and client.
- Explain the process, including the likely timeframe, legal procedures, motions expected, and anticipated limitations on what the attorney can achieve in the case. Do not sugar-coat the matter or over-promise what can be gained by virtue of the lawsuit.

Overall, good communications will serve the solo practitioner well in running a successful law practice. Clients expect their attorneys to be very responsive to telephone calls and emails, and otherwise require constant communication and updates about their legal matters. As long as the client's requests for information are reasonable, the lawyer is obligated to keep the lines of communication open and respond to the client's requests according to RPC 1.4.

Getting it in Writing

For clients new to the firm, a written legal services agreement must be made, as required under RPC 1.5(b). The solo practitioner should explain to the client in the legal services agreement, exactly what services the attorney will perform, terms of payment, treatment of retainer funds, and the client's responsibilities to the attorney during the representation period. If the matter is a contingency fee case, compliance with Rule 1:21-7 is also mandatory. All retainers in matrimonial matters must be in writing, as required by Rule 5:3-5(a).

In any event, the fee agreement must be fair and, "may not provide for an unreasonable fee or any other unreasonable waiver of the client's rights."[2] Handling of client retainer funds must be treated in accordance with the terms of the legal services agreement.[3] The retainer funds must be earned before they are paid over to the attorney,[4] and RPC 1.16(d) requires that upon termination of representation the lawyer must refund any advance payment of fees that have not been earned.

Within the legal services agreement, the solo practitioner should advise the client when he or she will receive updates on their billing status. In certain matters, it would be appropriate for the attorney to provide monthly statements of account, keeping the client constantly aware of their financial status with the attorney. If a client is regularly updated on their account, the element of surprise and dissatisfaction with progress on their case can be averted. A client who regularly receives detailed legal invoices from his or her attorney will not only be aware of the costs associated with the representation, but will have (by virtue of the detailed invoice) a written report of everything the attorney has done.

In the event a client makes excessive and unreasonable demands for information about their file, the attorney should confront the client about the problem without delay. Attorneys will rarely have to address this issue (*e.g.,* excessive or daily calls about a case that is not at the trial level, for example) if they initially explain the frequency with which clients should expect to be updated. If the client is regularly updated, the instances of client unhappiness will likely be minimal.

The client's overall satisfaction with the attorney is often not based on the outcome of the matter, but on whether he or she believes the attorney has worked hard on the case and kept the client's best interests as the focal point of the representation. Typically, the client will be satisfied if he or she believes in the attorney's commitment to the case and if the attorney has been updating the client on a regular basis, thereby alleviating any surprises or problems the client was not expecting. This all leads back to great communications between attorney and client.

Conclusion

Year after year, the majority of ethics complaints are based on attorneys' failing to adequately communicate with clients. A majority of these ethics grievances are filed against solo practitioners or small law firms, possibly because solo practitioners and small firms often engage in the type of practice areas ripe for complaints, such as divorce, real estate and general practice work.

Fortunately, there is a ready solution for the newly solo practitioner and small firm lawyer: Complying with RPC 1.4, educating the client about their legal position, managing the client's expectations about legal proceedings and potential outcomes, and providing the client with a sufficiently detailed legal services agreement whereby the client is updated regularly, will serve both the attorney and the client well. ⚖

Endnotes

1. RPC 1.4(c).
2. *Cohen v. Radio-Electronics Officers*, 146 N.J. 140,156 (1996).
3. *In re Stern*, 92 N.J. 611, 619 (1983); *In re Youmans*, 118 N.J. 622, 636 (1990).
4. *In re Spagnoli*, 115 N.J. 504, 516 (1989).

Brian J. Fruehling *is a solo practitioner in Madison, former chair of the District X Ethics Committee, and handles employment, commercial and personal injury litigation. He also represents attorneys in ethics cases.*

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Conflicts of Interest

Do I Have One? If So, Can I Cure It?

by David H. Dugan III

Conflicts of interest abound in the practice of law. They may be present before representation begins, or may arise during representation. They may involve simultaneous representation or representation that is successive. They may extend from one lawyer to include, by imputation, an entire firm. They may be the subject of disciplinary charges or malpractice liability or motions to disqualify. Some are curable by client consent. Some are curable by screening. Some are not curable by any means.

Conflicts of interest law is complex and diverse. Although the relevant Rules of Professional Conduct (RPC 1.7 through 1.14) provide a helpful framework, they are difficult to apply because they are loaded with terms requiring attorney judgment and discretion, such as "reasonably believes," "full disclosure," "reasonable opportunity," "substantial risk," "substantially related matter," and so forth. The law's diversity results from court decisions and advisory committee opinions going back many years, which have not been always anchored in code rules and vary in their focus. Many of the court decisions are in response to disqualification motions, and many conclude by prohibiting representation where the conflicts are not actual but only potential in character.[1]

The advisory committee opinions raise problems for other reasons. First, many, particularly older ones, do not constitute carefully written expressions of what the rules prohibit, but instead are expressions of what, on a somewhat higher plane, a lawyer would be wise to refrain from doing. Second, many reference the appearance of impropriety standard, which the Supreme Court discarded in its 2004 revisions to the Rules of Professional Conduct. Without the appearance of impropriety standard, New Jersey's conflict of interest code law is considerably less vague. Not only that, but it can be said that the New Jersey code now prohibits only actual conflicts of interest. The code continues to prohibit imputed conflicts under RPC 1.10. But, the conflicts that are imputed are the actual ones prohibited under other rules, chiefly RPC 1.7 and RPC 1.9.

In considering conflicts, some confusion can arise from the word "risk:" RPC 1.7(a)(2) speaks of "significant risk;" RPC 1.8(k) speaks of "substantial risk." A risk of conflict is not a potential future conflict. Rather, the risk is a present fact. What remains potential is any actual harm to the relationship between lawyer and client and the effectiveness of the lawyer's representation.[2] This interpretation is consistent with the New Jersey Supreme Court's decision to abolish RPC 1.7(c), which spoke of "situations creating an appearance of impropriety rather than an actual conflict." The intention is to narrow the rules to prohibit only actual conflicts, with significant risk or substantial risk referencing a present situation, not a potential one.

In general, three categories of conflicts are proscribed: concurrent conflicts (RPC 1.7 and 1.8); conflicts involving former clients (RPC 1.9); and imputed conflicts (RPC 1.10). In each of these categories, provision is made for curing most conflicts with client consent. Imputed conflicts involving former clients may also be cured in some situations by screening, even without client consent. This article is limited to the topic of concurrent and *per se* conflicts under RPC 1.7.

Identifying Concurrent Conflicts

RPC 1.7(a) refers to "concurrent" (*i.e.*, contemporaneous) conflicts of two sorts, derived from former RPC 1.7(a) and (b): conflicts involving "directly adverse" client interests and conflicts involving representation that is "materially limited" by the lawyer's responsibilities to others or by the lawyer's own interests.[3]

Directly Adverse Interests

Typically, directly adverse situations are obvious. Opposing parties in litigation—a buyer and seller, or an employer and employee—are examples. Some adverse situations are not as obvious, such as where a lawyer represents one client against a party the lawyer simultaneously represents in another matter, even though the two matters may be completely unrelated.[4] And, some directly adverse situations develop later in the course of what may have been a conflict-free representation, such as where a lawyer represents the maker and guarantor of a note when a loan is negotiated, but later is asked to defend both in collection proceedings brought by the payee.[5]

Materially Limited Representation

By comparison, "materially limited" situations tend to be more difficult to identify, for three reasons. First, the terminology is less precise. "Significant risk" and "materially limited" are terms requiring considerable sensitivity and discretion in their application. Second, the scope is broader. Interests to be evaluated include not only other contemporaneous clients but also former clients, third persons and the lawyer's own interests. Third, the elimination of the appearance of impropriety from the code calls into question many, if not most, of the existing New Jersey court and advisory committee conflict of interest rulings that would otherwise provide guidance in materially limited situations, since these rulings so often cite the appearance of impropriety standard in support of their holdings.

Despite such analytical difficulties, some of the more widely recognized materially limited situations include representing co-plaintiffs or co-defendants in litigation; representing multiple parties to a negotiation (such as formation of a joint venture); representing several family members (or even simply a husband and wife) in estate planning; representing a lawyer in one matter while both lawyers also represent adverse parties in other litigation and the old standby, representing both an insurance company and the insured. Identification of materially limited conflicts can be especially difficult in non-litigation matters.[6]

Critical Recordkeeping

Identification of conflicts requires that law firms maintain detailed records of conflict data, including the names of all clients and prospective clients, former clients and former prospective clients, organizations with which the lawyers in the firm are affiliated, law firms with which firm lawyers were formerly associated, lawyers in other firms or organizations who have family ties to lawyers in the firm, and so forth. When prospective clients are first interviewed, forms should be completed containing the names of the prospective clients, adversaries and adverse law firms, and that data should be compared with the firm's conflict data records before the firm agrees to any new representation.

When a conflict search produces a match, a conflict determination must be made, preferably by a lawyer or lawyer-committee in the firm having some expertise in ethics law. The determination process should include not only whether an actual conflict exists but also, if there is a conflict, whether and how to resolve it by client consent (or, in former client conflicts under RPC 1.9, by screening). Note that this same process should be invoked again any time a new party or adversary counsel becomes part of the case, or when a new lawyer joins the firm.

Curing Concurrent Conflicts

RPC 1.7(b) allows for the curing of concurrent conflicts. The curing process involves two elements: 1) client consent to the conflict, and 2) the lawyer's belief that the representation will not be impaired by the conflict.[7]

Client Consent

Regarding the consent element, each affected client must consent. This includes former clients as well as current clients, but not third parties. The consents must be informed. "Informed consent" is defined in RPC 1.0(e) as follows:

> the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RPC 1.7(b) requires that the consents be "confirmed in writing, after full disclosure and consultation," and if the conflict involves multiple clients in a single matter, the consultation "shall include an explanation of the common representation and the advantages and risks involved." The rule does not specify what is to be included in each client's written confirmation. Presumably, at a minimum, the writing must contain a simple statement of the facts constituting the conflict, a reference to there having been a consultation with the lawyer, and a confirmation of consent by the client. The written document also should be signed by the client. The rule does not state when such consent must be obtained, but consent should be obtained before the conflicting representation commences.

In practice, counsel may wish to set forth in the consent document a fuller statement of what disclosures were made and what explanations were given in terms of the common representation, the advantages, the risks and the available alternatives. Counsel also might provide the client with the basis for the lawyer's belief that he or she will be able to provide competent and diligent rep-

resentation to each affected client. If there is a possibility that future events might render the lawyer unable to continue the multiple representation, counsel's disclosure should indicate that in such circumstances he or she would have to withdraw completely from the representation.

The Supreme Court also has recommended a further step: When representing co-clients, counsel should obtain from the clients an agreement on the sharing of confidential information that may come to the lawyer's attention during the representation.[8] The Court left it to counsel and their clients to decide whether such information should be shared or kept confidential, but as a practical matter, the lawyer's preference should be for such information to be shared.

RPC 1.7(b) does not state whether a consent, once given, may later be revoked. Comment 21 to the American Bar Association Model Rules of Professional Conduct opines that a client should be able to revoke the consent, since clients generally may terminate representation at any time for any reason. The difficult issue, however, is whether the lawyer may continue with the representation of the other client or clients. Here, Comment 21 hedges, indicating that it would depend upon the circumstances.

The Lawyer's Belief

Turning to the second curing element, the lawyer also must believe that he or she will be able to provide competent and diligent representation to each affected client. Competence and diligence are duties imposed by RPC 1.1 and 1.3. Although the New Jersey rule and the model rule of RPC 1.3 are identical, the two versions of RPC 1.1, both new and former, are very different. The model rule speaks of competence as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The New Jersey rule simply prohibits gross negligence or a pattern of negligence. New Jersey's version of RPC 1.1 does not coincide with competence, as that word is used in RPC 1.7 (b)(2); the model rule's four-part standard is likely what was intended.

Critical to this second curing element is that the lawyer's belief be reasonable. This is an objective issue, subject to independent review by the court.[9] Logically, the lawyer's approach on reasonableness would follow the same pattern as the lawyer's subsequent approach with respect to client disclosure and consultation; namely, to assemble facts, identify all relevant persons in interest, and evaluate the risks in terms of undivided loyalty and preservation of confidences. In view of these rigorous requirements for the curing of conflicts, the reader may conclude that curing is not worth the effort. A conservative approach is prudent, particularly where the risks associated with the conflict are high. Directly adverse conflicts are particularly risky. Increasingly, courts have created *per se* prohibitions in directly adverse situations.

Per Se Conflicts

Not all RPC 1.7 conflicts are curable. Three exceptions are listed in RPC 1.7(b). The most notable is in matters involving public entity clients who are specifically not permitted to give consent. The rule also prohibits simultaneous representation of clients having opposing claims in litigation. This *per se* rule excludes only clients in the same litigation with claims against each other. It does not cover cases involving representation of parties who are on the same side, such as co-plaintiffs or co-defendants, where any conflicts are, at least theoretically, curable. Finally, the rule excludes consent to cure in any other matters prohibited by law—obviously a reference to court rulings and advisory committee opinions in which the extreme nature of a particular conflict requires a *per se* prohibition. Not surprisingly, most of the *per se* rulings involve directly adverse conflicts, where the risk of harm is greatest. A commonly cited example is *Baldasarre v. Butler*,[10] where the New Jersey Supreme Court ruled that even with consents from the parties, one attorney may not represent both the buyer and the seller in a complex commercial real estate transaction.[11]

A nearly *per se* rule exists in the matter of representing co-defendants in criminal proceedings. In that context, joint representation is presumed to be prejudicial, resulting in ineffective assistance of counsel under the Sixth Amendment.[12] However, valid joint representation may exist with informed waivers in cases where there is no actual conflict, provided the waivers are put on the record and explored by questioning each defendant.[13] Thereafter, pursuant to Rule 3:8-2, the court determines whether the joint representation will be permitted.[14] Where, however, actual adverse conflicts exist, the conflict is not waivable."[15]

Public Entity Conflicts

Representation of public entity clients is governed by both the general conflict of interest rules such as RPC 1.7 and by RPC 1.8(k), a special rule added in 2004 as a replacement for RPC 1.7(c) in public entity situations. Unlike the Model Rules, the New Jersey rules expressly prohibit public entities from giving consent to cure conflicts.[16] Because of this limitation, in order to proceed with public entity representation the New Jersey lawyer must be very confident that no conflict exists.

The threshold issue in public entity representation is identifying the public "client." The general conflict rules (1.7, 1.8 and 1.9) refer simply to a "public entity." However, RPC 1.11, the former government employee rule, refers repeatedly to "the appropriate govern-

ment agency," and RPC 1.13, the organizational client rule, defines organization in 1.13(f) to include "state or local government or political subdivision thereof." These provisions suggest that a public "client" is the specific department or agency for which the lawyer is providing representation.

That notion is inconsistent, however, at least at the county and local levels, with the "official family doctrine" which, historically, lumped all county or municipal agencies into a single county or municipal government client for conflicts purposes. (At the municipal level the principle was usually referred to as the "municipal family doctrine"). This doctrine had a long history in New Jersey, extending back to *ACPE Opinion 4* (1963).[17]

In 2006 the New Jersey Supreme Court overturned prior case law and eliminated the official family doctrine as traditionally expressed. In *ACPE Opinion 697* the committee had been asked whether an attorney whose partner represented a township zoning board or housing authority might simultaneously appear on behalf of private clients in that township's municipal court.[18] The committee ruled against the inquirer, relying upon the municipal family doctrine and insisting that such private representation would create a directly adverse conflict under RPC 1.7(a).

The Supreme Court chose to review *ACPE Opinion 697*, combining in its review consideration of another situation which the committee had condemned based upon *ACPE Opinion 697*. In that second matter the inquiring firm had asked whether it would be precluded *per se* from serving as bond counsel or as special litigation counsel for a municipal governing body while simultaneously representing private clients before boards, agencies or the municipal court in that municipality. The Supreme Court reversed the committee. In doing so, the Court provided much needed clarification of the law on several points:

1. The Court acknowledged that the official family doctrine (designated the municipal family doctrine in the Court's opinion since that was the factual context) was rooted in the appearance of impropriety standard and, as traditionally formulated, the doctrine had been effectively nullified when the appearance standard was eliminated in 2004.
2. Although the doctrine as traditionally formulated had been nullified, the Court chose to retain the title but give it a new meaning, one which fit into the "contours" of RPC 1.8(k). The new "municipal family doctrine" is in reality simply a *per se* rule created by case law opinion to the effect that if the lawyer represents a municipal governing body in a "plenary" role the lawyer is prohibited from concurrently representing private clients before any subsidiary boards or agencies of that municipality including courts.
3. This new *per se* prohibition only applies where the lawyer represents the governing body itself in a "plenary" role. It does not apply if representation of the governing body is pursuant to a "limited scope engagement" (such as serving as bond counsel or special litigation counsel, for example). Nor does the *per se* prohibition apply if the representation only involves subsidiary boards, agencies or courts. Situations not covered by the per se rule are governed by RPC 1.7(a) and RPC 1.8(k).
4. The Court emphasized the overriding importance of RPC 1.8(k) in non *per se* situations. The Court did not explain what role, if any, RPC 1.7(a) should play in the conflict analysis. The Court did, however, declare that if a lawyer represents an agency subordinate to the governing body, the lawyer is barred from representing private clients before that agency.[19]

To summarize, in public entity-private client situations, the Supreme Court's revised official family doctrine, working in combination with RPC 1.8(k) and 1.7(a), provides that if the lawyer's public entity role is plenary, representation of a private client anywhere in that public entity system is prohibited *per se*. If the lawyer's public entity role involves a subordinate entity, representation of a private client before the same subordinate entity is also prohibited *per se*. All other public entity-private client situations as well as all public-public situations, except for specific *per se* rulings such as in *ACPE Opinion 722* (2011), are subject to the lawyer's own assessment of risk per RPC 1.8(k) and 1.7(a)(2). Note that these two rules speak generally of conflicts involving "another client." Although that other client was a private one in the *Opinion 697* analysis, "another client" may also include another public entity, as in *ACPE Opinion 706* (2006), *Opinion 707* (2006) and *Opinion 722*. Note also that recusal is available as a temporary solution in appropriate situations.[20]

ACPE Opinion 707 stands for the proposition that the committee's prior opinions based upon the appearance of impropriety standard are no longer binding on attorneys. This represents an enormous shift in the law with respect to public entity clients. Instead of having recourse to a vast collection of rulings addressed to dozens of different public entity client situations, New Jersey lawyers now have for their guidance only the RPCs (primarily 1.7(a) and 1.8(k)) and the precious few opinions that have been rendered by the Supreme Court and the committee since the abo-

lition of the appearance standard in 2004. Until we have more case-made law to work with, lawyers should take a conservative approach, consistent with a recognition that representation of a public entity is a position of public trust, requiring the lawyer to be especially circumspect.[21] ⚖

Endnotes

1. *See, e.g., Hill v. N.J. Dept. of Corrections*, 342 N.J. Super. 273 (App. Div. 2001), *certif denied*, 171 N.J. 338 (2002).
2. Hazard and Hodes, *The Law of Lawyering*, Third Edition (Aspen Law and Business, 2002), Sec. 10.4; Restatement of the Law, the Law Governing Lawyers, Third (ALI 2000), Sec. 121, Comment c(iii).
3. The 2004 version of RPC 1.7(a) reads: "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, or a third person or by a personal interest of the lawyer."
4. *See, e.g., Gray v. Commercial Union Ins. Co.*, 191 N.J. Super. 590 (App. Div. 1983); ABA Model Rules of Professional Conduct 1.7, Comment (6).
5. Advisory Committee on Professional Ethics Opinion 556 (1985).
6. Rotunda and Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA Center for Professional Responsibility, 2005), Sec. 1.7-2(d).
7. Under RPC 1.7(b):

   > Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved; the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

8. *A. v. B.*, 158 N.J. 51 (1999).
9. *Whitman v. Estate of Whitman*, 259 N.J. Super. 256, 263 (App. Div. 1992).
10. 132 N.J. 278 (1993).
11. *Id. See also In re Opinion 682 of the Advisory Committee on Professional Ethics*, 147 N.J. 360 (1997).
12. *State v. Bellucci*, 81 N.J. 531 (1980); *State v. Land*, 73 N.J. 24 (1977).
13. *Id.*
14. *See also* Restatement of the Law, the Law Governing Lawyers, Third (ALI 2000), sec. 129, Comment c.
15. *State ex rel. S.G.*, 175 N.J. 132 (2003).
16. RPC 1.7(b)(1). *See also* RPC 1.8(1) and 1.9(d).
17. *See, for example, Perillo v. ACPE*, 83 N.J. 366, 378-379 (1980); *In re Opinion 452*, 87 N.J. 45, 48 (1981); *ACPE Opinions 104* (1967) and *423* (1979); and *Matter of ACPE Opinion 621*, 128 N.J. 577-594 (1992).
18. *In re ACPE Opinion 697*, 188 N.J.549 (2006).
19. *Supra* at 569.
20. *ACPE Opinion 706* (2006).
21. *In re Opinion 415*, 81 N.J. 318, 324 (1979).

David H. Dugan III *is a sole practitioner in Marlton. His practice is limited to consulting, providing expert testimony, and defending lawyers in ethics and disciplinary matters. He edits* Professional Responsibility in New Jersey, *a three-volume work published by the New Jersey Institute of Continuing Legal Education, which includes his annually updated* Manual on Legal Ethics.

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Confidentiality

The (Perhaps Surprising) Breadth and Scope of RPC 1.6

by Carol Johnston

Rule of Professional Conduct (RPC) 1.6 broadly requires lawyers to maintain confidentiality of "information relating to representation of a client." In contrast, the lawyer-client privilege protects only "communications" made in confidence between a lawyer and his or her client. This article explores the breadth and scope of RPC 1.6 and hopefully, will help practicing lawyers avoid unintended ethical violations.

There is no published case or advisory committee opinion in New Jersey to date analyzing the breadth and scope of RPC 1.6. The rule was adopted in New Jersey as part of the comprehensive 1984 rule amendments, and is drawn from the American Bar Association Model Rules of Professional Conduct. The comments to the Model Rule provide some guidance to practitioners.

> The confidentiality rule...applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.[1]

Hence, information imparted to the lawyer by the client, as well as information imparted by a third person such as a relative, coworker, or neighbor of the client, is confidential. The lawyer's own observations of the client can be "information relating to the representation." Further, there is not even an exception in the RPC permitting a lawyer to disclose information relating to representation of a client that is generally known, part of a public record, publicly available, or known to other persons.

Other jurisdictions with similar versions of RPC 1.6 have upheld discipline for lawyers who disclosed 'confidential' information that, arguably, was generally known or publicly available.[2] Scholarly commentary, however, supports a construction of RPC 1.6 that sets information in the public domain outside the definition of confidential information.[3] However counterintuitive it may seem, unless and until New Jersey issues a decision or opinion setting generally known or publicly available information outside the definition of confidential information, lawyers who reveal publicly available details of their cases without client consent may face disciplinary charges.

Confidential information cannot be disclosed unless the client has consented to disclosure after consultation with the lawyer, or disclosure is impliedly authorized in order for the lawyer to carry out the representation. Many statements lawyers make about a case in the course of representation are impliedly authorized.

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.[4]

Hence, statements made by lawyers in the course of negotiating a settlement, and discussions about the case with colleagues in the lawyer's firm, can be considered necessary to further the lawyer's representation of the client in the matter, and impliedly authorized by the client.

A client may expressly consent to disclosure of confidential information, but only after having consulted with the lawyer about the proposed disclosure. In the absence of express consent from the client, or implied authorization to carry out the representation, there are limited safe harbors authorizing lawyers to disclose confidential information.

RPC 1.6(b)(1) requires a lawyer to disclose confidential information to "the proper authorities" to the extent the lawyer believes it is necessary to prevent the client or another person "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." The RPC does not require a lawyer to report a criminal, illegal or fraudulent act that has already occurred; it requires the reporting of information necessary to prevent harm that has not yet occurred.

RPC 1.6 should be read in conjunction with RPC 1.14, which authorizes a lawyer to disclose information and take protective action when a client has diminished capacity; is at risk of substantial physical, financial or other harm unless action is taken; and cannot adequately act in the client's own interest. Hence, a lawyer who represents a frail and confused elderly client who appears to be abused by a family member may reveal confidential observations about the client in order to obtain adult protective services.

RPC 1.6(d)(3) permits a lawyer to reveal confidential information "to comply with other law." If a lawyer receives a subpoena seeking turnover of a file that contains information relating to representation, and the client does not consent to the turnover, the lawyer can seek a court order to quash the subpoena. A court order arguably is "other law" that allows the information to be disclosed.[5]

RPC 1.6(d)(2) permits a lawyer to disclose confidential information to the extent the lawyer believes it necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved." Hence, the lawyer may disclose certain confidential information to the extent necessary to defend a legal malpractice action brought by the client, or to pursue an action seeking fees from the client if the information is relevant to the defense or the claim.

According to the Model Rules comment, if a person "alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense....The lawyer's right to respond arises when an assertion of such complicity has been made."[6] The comment further notes that when a claim of complicity has been made, the lawyer need not "await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."

A lawyer's obligation to maintain confidentiality of client information can complicate withdrawal from representation. The RPC has no exception, no safe harbor, permitting disclosure of information relating to representation to support a motion to withdraw. A withdrawal motion is not a "controversy between the lawyer and the client."[7] Other jurisdictions have disciplined lawyers for disclosing confidential information in support of a motion to withdraw from a case.[8]

Moreover, if the client has written to the court making misrepresentations about the lawyer's services to thwart withdrawal, the RPC does not provide a safe harbor for the lawyer who seeks to set the record straight by revealing otherwise confidential information in defense of his or her reputation. The client, by making statements about the lawyer's conduct to the court, has not expressly consented to disclosure of other confidential information relating to representation. There can be no implied authorization permitting the lawyer to disclose details about the client and the lawyer's handling of the case. Implied authorization permits the lawyer to disclose confidential information to carry out the representation, not to fire back at a disruptive client in a withdrawal motion.

Nor may a criminal defense lawyer defend his or her legal reputation by voluntarily speaking with a prosecutor after a former client claims ineffective assistance of counsel. A recent American Bar Association formal opinion[9] notes that a claim of ineffective assistance ordinarily waives the lawyer-client privilege, but it does not obviate RPC 1.6 confidentiality obligations.

> [T]he lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

The ABA opinion initially discusses the safe harbor permitting a lawyer to establish a claim or defense in a controversy between the lawyer and the client.

> The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as

> necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.

But, the opinion concludes, a claim of ineffective representation is not a legal controversy between the lawyer and the client, and the criminal defendant's motion or appeal is not a charge or claim against the lawyer that the lawyer must defend. The opinion recognizes that a finding of ineffective assistance "may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer." But a lawyer may only provide his or her side of the story if the court has compelled the lawyer to testify—"subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim."

If a lawyer learns, after the fact, that his or her client lied in a document filed in court, the lawyer may, in accordance with RPC 1.6(d)(1), disclose the confidential information to "rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used." If the lawyer learns the client intends to lie in a document to be filed in court, the lawyer is required, in accordance with RPC 1.6(b)(2), to prevent the client from committing the "criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud on the tribunal."

This obligation of the lawyer to disclose confidential information to avoid prejudice to the administration of justice is buttressed by other Rules of Professional Conduct. RPC 3.3(a)(4) provides that if a lawyer presents evidence and later learns it is false, the lawyer has the obligation to "take reasonable remedial measures." Similarly, RPC 3.4(b) provides that a lawyer cannot assist a witness to testify falsely; RPC 4.1(a) provides that a lawyer may not make a false statement of material fact or law to a third person, or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client; and RPC 1.2(d) prohibits a lawyer from assisting a client in conduct that is illegal, criminal, or fraudulent.

The obligation to maintain confidentiality applies not only to information imparted by clients, but also information from prospective clients. Even if a lawyer is not retained by a client and no lawyer-client relationship is formed, RPC 1.18 requires the lawyer to maintain confidentiality of all information learned from the prospective client in the course of the consultation.[10]

Protected consultations need not take place at a lawyer's office. If a prospective client talks with a lawyer in a setting other than the law office—a bookstore, for example—and the prospective client reasonably believes he or she is consulting a lawyer and seeking professional guidance, the information must be kept confidential.[11]

The breadth and scope of information rendered confidential by RPC 1.6 is perhaps surprising to some practitioners. In the absence of New Jersey published cases or advisory committee opinions limiting the broad language of the rule, lawyers must take great care before disclosing any information relating to representation of a client without the client's express or implied consent. ⚖

Endnotes

1. Model Rules of Prof'l Conduct R. 1.6, cmt. 3.
2. *See Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W.Va. 1995); *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *In re Bryan*, 61 P.3d 641 (Kan. 2003); *State ex rel. Oklahoma Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004); *In re Harman*, 628 N.W.2d 351 (Wis. 2001); Arizona Ethics Op. 00-11 (2000).
3. Restatement (Third) of the Law Governing Lawyers §59 (2000)(removing information that is generally known from the definition of confidential information); 1 G. Hazard and W. Hodes, *The Law of Lawyering* §9.5 (3d ed. Supp. 2003)(approving the restatement definition of confidential information).
4. Model Rules of Prof'l Conduct R. 1.6, cmt. 5.
5. *See Fellerman v. Bradley*, 99 N.J. 493 (1985); *Horon Holding Corp. v. McKenzie,* 341 N.J. Super. 117 (App. Div. 2001).
6. Model Rules of Prof'l Conduct R. 1.6, cmt. 10.
7. RPC 1.6(d)(2).
8. *See In re Gonzalez*, 773 A.2d 1026 (D.C. 2001)(submission of affidavit in support of motion to withdraw stating that client lied to lawyer violated duty of confidentiality); *Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460 (W.Va. 1997)(motion to withdraw revealed confidential information); Rhode Island Ethics Op. 2003-04 (2003) (reasons for withdrawing from representation is "information relating to representation" and may not be disclosed by the lawyer).
9. ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 10-456, "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim," (July 14, 2010).
10. *See generally, O Builders & Associates, Inc. v. Yuna Corp. of New Jersey*, 206 N.J. 109 (2011).
11. The State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Ethics Op. 2003-161 (2003).

Carol Johnston *works in the Administrative Office of the Courts in Trenton. She serves as secretary and counsel to the Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and Committee on the Unauthorized Practice of Law, and answers the attorney ethics research assistance hotline. This article reflects the personal view of the author only and does not reflect the official position of the Supreme Court of New Jersey, the Administrative Office of the Courts, or the Supreme Court Advisory Committee on Professional Ethics.*

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Mandatory Professionalism

RPC 3.2 and the Lawyer's Duty to be Courteous and Considerate

by David H. Dugan III

Lawyers have a responsibility to treat others with courtesy and consideration. This goes along with being a professional. In New Jersey, however, being courteous and considerate is not just professionally desirable, it is mandatory under the Rules of Professional Conduct (RPC).

The New Jersey version of RPC 3.2 states:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration, all persons involved in the legal process.

The American Bar Association (ABA) Model Rule version of RPC 3.2 contains only the first half of the above text, stopping with "client." The second half was added to RPC 3.2 by the New Jersey Supreme Court when it adopted the RPCs in 1984. The Court took its "courtesy and consideration" language from DR 7-101(A)(1) of the Disciplinary Rules, New Jersey's ethical code between 1971 and 1984. The verbiage has a long history; however, the context in which the words appear is not the same under the two rules.

The relevant part of DR 7-101(A)(1) stated:

> A lawyer shall not knowingly...fail to seek the lawful objectives of his client.... A lawyer does not violate this Disciplinary Rule...by treating with courtesy and consideration all persons involved in the legal process.

Technically, DR 7-101(A)(1) did not mandate courtesy and consideration. Rather, the rule simply declared that courtesy and consideration are not incompatible with appropriate advocacy on behalf of the client. When the Supreme Court shifted the courtesy and consideration language over into RPC 3.2, the nature of the rule changed, becoming both mandatory and open-ended.

An Ethical Mandate

At a minimum, RPC 3.2 is violated whenever a lawyer is discourteous or inconsiderate toward anyone who is part of the legal process. Thus, lawyers have been sanctioned under the rule for making rude and degrading statements about an opposing party during argument of a motion; for making sarcastic and degrading remarks to a municipal court judge; for addressing loud and obnoxious statements to a judge's secretary; for declaring during court proceedings that the adverse party should be "cut up in little pieces and sent back to India;" for making personal attacks against almost everyone involved in the lawyer's own child custody case, including two judges; for sending an insulting letter to the complaining witness in a criminal matter, charging her with giving false information about his client; for repeatedly shouting at the judge; and for calling the prosecutor an idiot and pushing the police officer, who was a witness.[1]

Historically, disciplinary prosecutions under the second half of RPC 3.2 have been limited to situations involving these types of discourteous or inconsiderate behavior. However, it would be a mistake to view RPC 3.2 so narrowly. Phrased in positive terms, on its face at least, the rule requires lawyers to be courteous and considerate, seemingly without limit.

A Principle of Professionalism

The open-endedness of RPC 3.2 serves to associate this rule of discipline with standards relating to courtesy and consideration in the wider world of lawyer professionalism. DR 7-101(A)(1) was superseded in 1984, when New Jersey adopted the RPCs. However, the principles it articulated were revived in 1997, when the New Jersey Commission on Professional-

ism in the Law adopted a collection of 16 principles of professionalism for lawyers and judges.[2]

Among these principles are:

1. Clients should be advised that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation.
2. To opposing counsel, a lawyer owes a duty of respect, courtesy and fair dealing, candor in the pursuit of truth, cooperation in all respects not inconsistent with the client's interests, and scrupulous observance of all agreements and mutual understandings.
3. As an officer of the court, a lawyer should act with complete honesty; show respect for the court by proper demeanor; and act and speak civilly to the judge, court staff and adversaries, with an awareness that all involved are integral parts of the justice system.

Unlike RPC 3.2, these three principles are not binding on lawyers. They are only admonitions. However, they are useful reminders of what courtesy and consideration should look like in the everyday practice of law. They also contain two important propositions that may be of interpretive benefit when applying RPC 3.2. The first proposition, also found in DR 7-101(A)(1), is that showing courtesy and consideration to others is not incompatible with proper and effective advocacy.

The second proposition contained in the principles of professionalism is that the lawyer's responsibility to extend courtesy and consideration should be subordinated to the client's interests. Similar language actually appears in RPC 3.2 as "...consistent with the interests of the client." However, these words come at the end of the first half of the rule, and were probably intended to relate only to the matter of expediting litigation. Nevertheless, in the absence of contrary precedent, the notion that client interests should take priority over courtesy and consideration seems reasonable.

Hypothetical Situation

Attempting to extend courtesy and consideration to one's adversary without sacrificing client interests can be extremely awkward. Consider, for example, the following hypothetical: Time for completion of discovery in the case has expired, and a trial date has been established. Under Rule 4:24-1(c), no extension of the discovery period will be granted unless "exceptional circumstances" are shown. The adversary attorney calls wanting to schedule your client's deposition before trial. Asked why she waited so long, she admits it was simply an oversight on her part. What do you do?

For two reasons, the matter should not be decided either way without first conferring with the client. First, although the deposition request concerns the 'means' of the representation, over which the lawyer has final authority, RPC 1.2(a) and RPC 1.4(c) require the lawyer to consult with the client before making a decision on means (unless the issue is one for which the lawyer has implied authority). In the context of this hypothetical, authentic consultation should include explaining to the client that, because the request was made out-of-time, by law the deposition cannot be compelled.

Second, since courtesy and consideration should yield to client interest, the lawyer needs to confer with the client in order to determine what interests may be relevant. It was observed earlier that the Model Rule version of RPC 3.2, which is identical to the first half of New Jersey's version, ends with the phrase "consistent with the interests of the client." Referring to this phrase, Geoffrey Hazard Jr., W. William Hodes and Peter Jarvis argue in their work *The Law of Lawyering* that only legitimate client interests should be given preference.[3] Once again, in the absence of New Jersey precedent, that modifier seems reasonable.

Returning to the hypothetical, assume that personally you would like to grant the adversary's request, but the client resists, wanting to take advantage of the adversary lawyer's failure. Are you ethically obligated to go along with the client and refuse the adversary's request? The answer would depend upon whether taking advantage of the failure reflects a legitimate interest on the part of the client. It is certainly an arguable issue, but the answer is probably no. However, if you were to demand that the client submit to being deposed after he or she has been told the deposition cannot be compelled, you would surely find yourself with an unhappy client. As a practical matter, if the client is not willing to be deposed you would be likely to support the client's position regardless of whether a legitimate interest were at stake.

Assuming the client does not have a legitimate interest to support a refusal to be deposed but nonetheless refuses, where does that leave you in terms of your RPC 3.2 duty? Presumably, your duty under the rule would not extend to requiring cooperation in the deposition. However, the rule's open-endedness has not really been tested in litigation. Presently, any limits on the lawyer's ethical duty to display courtesy and consideration are a matter of conjecture.

Mandatory Professionalism

The second half of RPC 3.2 is a clear example of a disciplinary provision that was constructed around a professionalism concept. Other examples of such hybrid rules are: 1) RPC 1.2(b), which encourages lawyers to represent unpop-

ular clients; 2) RPC 2.1, which encourages lawyers to represent clients holistically; 3) RPC 3.1, which encourages lawyers to reform the law and improve the legal system; 4) RPC 4.4(a), which prohibits lawyers from using means designed to embarrass, delay or burden others; and 5) RPC 6.1, which declares that lawyers have a professional responsibility to render public interest legal service.

These five rules of professionalism serve to demonstrate that the Rules of Professional Conduct are not simply a collection of negative standards useful only for disciplinary proceedings. Some of the RPCs have this limited function; however, many others, and particularly the five cited here, have an aspirational dimension and help to define lawyer function at the highest professional level.

Conclusion

RPC 3.2 is a hybrid, and intended to serve a disciplinary function—holding lawyers accountable if they fail to treat others with courtesy and consideration. At the same time, the rule's open-endedness gives it the sort of aspirational character more typical of professionalism. Vagueness is not a fatal defect for disciplinary standards.[4] Nonetheless, the rule lacks clarity in terms of its disciplinary function. Without adequate definition, the rule tends to blur into the wider world of professionalism. ⚖

Endnotes

1. *See Matter of Rifai*, DRB 10-221 (Oct. 26, 2010) and cases cited at pages 9-12.
2. *See generally*, New Jersey Commission on Professionalism in the Law, Principles of Professionalism for Lawyers and Judges (1997), available at njsba.com/commission on prof/index.cfm?fuseaction=principles.
3. Geoffrey C. Hazard Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering*, Third Edition, Section 28.3 (Walters Kluwer, 2011).
4. *In re Hinds*, 90 N.J. 604, 631 (1982).

David H. Dugan III *is a sole practitioner in Medford. His practice is limited to consulting, providing expert testimony and defending lawyers in ethics and disciplinary matters. He is the author of* Manual on Legal Ethics, *an annually updated publication of the New Jersey Institute for Continuing Legal Education.*

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Writing Persuasively at the Trial Court Level

Practical Tips on Style and Substance

by Helen E. Hoens

The report that accompanied the recommendations now known as "best practices" in the Civil Division observed that "the civil division is awash in motions."[1] Whether that concept is expressed in terms of the number of motions assigned to each trial-level judge on an average motion day, or in terms of pounds of paper or linear feet in the stacks of briefs and certifications piled on the bench, the sheer volume of paper confronting each of us is breathtaking.

If you consider that each of those briefs must be read and analyzed, and often re-read in the course of preparing for an oral argument or as part of the more complex process of preparing a statement of reasons or writing an opinion, and if you consider that hearing and deciding motions is but a small part of the work of a trial judge, you can begin to appreciate just how overwhelming this part of our work has become. Keeping this in mind, however, can help you become a more effective brief writer. While the material in this article is by no means everything that you need to know to become an effective writer, the following suggestions, at least in the view of this trial-level judge, should help you get your point across more effectively.[2]

Rule Number One—Less Really Is More.[3] One of the easiest tasks for any lawyer is expressing an argument at great length and in complete detail. One of the hardest tasks, in comparison, is writing clearly and concisely, expressing arguments with precision and without wasted words or thoughts. If you learned in high school, as I did, to write lengthy complicated sentences, then referred to as compound-complex sentences, which were filled with twists and turns of thought that I, for one, was certain were a sign of great wisdom, then what you actually learned was to make your writing so complicated that it lost its effectiveness. Heavy, dense, intricate writing may be acceptable in a novel, but it is not effective or persuasive when foisted on a trial judge.

Consider, if you will, the very different style of writing used in two classic novels, *Moby Dick* by Herman Melville and *The Old Man and the Sea* by Ernest Hemingway. Each is widely regarded as great literature; each is a timeless tale of a man and his great battle with a fish. One, however, is heavy, weighty, dense with detail and rich with complexity, while the other is direct, declarative, compelling. The point is not that one book is better or even better written than the other, but rather that one style requires more focus and attention from the reader than the other, and will likely be read with less comprehension than the other in light of the volume of other materials to be read. Effective brief writing uses a style that is direct, declarative and compelling, rather than one that is rich in detail and complex in structure. Put another way...

Rule Number Two—It's Not the Law Review. If you were fortunate enough to have been selected to serve on a law review or law journal,[4] you undoubtedly mastered a writing style which is neither persuasive nor compelling. Rather, the formula used requires density and weight of phrase, with overwhelming supporting references to primary and secondary sources. That style of writing, while well suited to scholarly discourse, is not one that is calculated to get the point across to a judge.

Compare the analysis you would undertake of the standard for summary judgment in a law review with the explanation of that doctrine which you should include in a brief. The former would examine all published precedents, discuss historical antecedents and explain in detail the evolution of the doctrine up to *Brill v. Guardian Life Ins. Co.*[5] and beyond, with each concept amply supported by footnotes and references. The latter need only demonstrate to the trial judge that the

motion is seeking summary judgment and set forth the standard, referring to the *Brill* decision, in a concise fashion that demonstrates familiarity with the concept and identifies its application to the matter at hand. Which reminds me of...

Rule Number Three—Edit, Edit, Edit. There is no substitute for learning to edit your own work. Even if you have the luxury of having others who can and will do so, at some point all of us need to learn to look at our own writing with an editor's eye. If you are very lucky, you may have a colleague or, better still, a mentor who writes clearly and concisely and is willing to edit a piece of your writing that you think is already well written. This process can help you identify weaknesses in your style and learn how to edit your own work. Editing can help you avoid common pitfalls, such as redundant arguments, disjointed thoughts and run-on sentences. Editing can also help you learn useful and persuasive writing techniques, such as parallel construction and the use of transition sentences to link thoughts and themes effectively.

Even if you have no one to help you learn to edit, you can apply a few rules that will automatically make your writing better and more persuasive to a trial judge. Work from an outline to help you create an organized brief. This is particularly important if you dictate briefs, in order to help you avoid the stream of consciousness brief. I once received such a brief consisting of 50 pages of text on the history of an industry with no legal points at all. It was interesting and entertaining, but not as persuasive as the opponent's brief, which discussed a relevant statute that gave rise to a summary judgment argument. Had the writer taken the time to edit the brief, one can only hope that he would have noticed that he had not included any legal arguments.

Another common editing trick is to put your brief aside for a day or two after you think it is finished, and then read it with fresh eyes to detect weaknesses and errors. Look at your brief as well from a purely visual appearance perspective, bearing in mind the volume of material that the reader is wading through, to avoid a product that is visually dense. Consider how much effort it takes to read pages of text without paragraph breaks or pages of single-spaced text representing block quotes. Consider how much less effort it takes to read short, direct sentences and paragraphs and text punctuated by shorter quoted materials. This applies even more so, by the way, to point headings. Your point headings are just that—headings. They are not the entire point. Every day I read briefs with point headings that fill half of the page and attempt to capture the entire point, subpoint and nuances of the point. Visual density aside, it is not necessary and it is distracting to a reader to encounter lengthy point headings.

Proofread your work, particularly if you dictate. I have actually received a brief that asked me to dismiss a complaint because it was "raised due to cotta" in place of "*res judicata*," and have seen a reference to a "baloney amputation" in place of a "below-knee amputation."[6]

Proofread your work to correct errors in spelling and grammar. Poor spelling and poor grammar detract from the brief and distract the reader. Notice I did not suggest that you run the brief through the computer's program for checking spelling or (if there is such a thing) grammar. The computer cannot substitute for the human mind, and relying on it as if it does can lead to some interesting spelling substitutions. If you don't believe me, run your own name, whatever it may be, through such a device. Unless you have a name such as "Brown" or "Miller," you will get some interesting results that will illustrate the danger of relying on such a program.

As for grammar, if you do nothing else, get a copy of the classic writer's aid, *The Elements of Style*,[7] and read it. Then, read it again. While not strictly a guide to good grammar, it will help you learn how to be a better and more persuasive writer. Now, lest you think this is all about style and not about substance, here are a couple of rules to help with the substance of your brief.

Rule Number Four—Define the Field of Battle. A trial lawyer for whom I worked a long time ago insisted that creating the field of battle was a critical substantive guideline. He was convinced that if he could define the terms of the debate effectively, he could materially increase the likelihood of success on any issue. He worked long and hard to create the terms of every debate so as to always fight on his own terms. If his adversary moved for summary judgment, he might re-frame the debate in terms of rights to be heard or depriving his clients of their day in court. If the adversary took that approach, he would re-frame the argument in terms of the rule of law, the need for finality, judicial economy or equal protection. He was a master of this skill, but only because he recognized the concept and worked to perfect it. His principal weapon in this endeavor was the use of an introductory statement at the outset of every brief. No matter that the rules at the time did not permit one, he just wrote it anyway, and inserted it at the start of his brief—a page or two of pithy, persuasive prose that set the stage for the points that would follow. Few of us are able to master that skill, but you can effectively define the terms of the dispute without trying to do so by following...

Rule Number Five—Make It Your Argument, Not Your Adversary's. The legendary samurai Miyamoto Musashi expressed the idea as follows: "In contests of strategy it is bad to

be led about by the enemy. You must always be able to lead the enemy about."[8] This advice applies as much to your brief writing today as it did to warfare in the 17th century. It is, however, difficult advice to follow.

Consider as you begin to write how best to organize your points. Determine which argument is your strongest and lead with it, following that with your less persuasive arguments. Abandon weak arguments entirely because they may undercut your overall position.

Do not make the very common mistake of over-anticipating your adversary. By that, I mean that while you should generally be aware of the arguments your adversary will raise in response to your motion, remember that your brief is your opportunity to make your points, not to rebut in advance your opponent's points. For example, write: "The plaintiff is entitled to summary judgment because...," and avoid writing "The plaintiff is entitled to summary judgment in spite of the fact that the defendant will argue..." While it is rare that anyone presents an argument phrased precisely in the latter fashion, it is common for brief writers to over-anticipate their adversary's points, and as a result they make the mistake of worrying so much about rebutting the expected arguments that their own points are lost. In fact, it is quite common for brief writers who are trying to meet their adversary's expected arguments to state those points more persuasively than their adversary would have.

An equally common mistake, however, is based on the notion that some arguments should be "saved for the reply," as if holding the best argument back will in some way lull one's adversary into filing a weaker brief, or perhaps give the moving party the opportunity to have the last, and apparently, best word. Apart from the fact that dispositive motions, as to which oral argument is ordinarily entertained, will afford the adversary the chance to respond orally to the point made in the reply, having the last word in the briefing process pales in comparison to simply presenting one's strongest arguments first and being able to set the terms of the debate from the outset. All of which brings me what to me is one of the most important substantive rules...

Rule Number Six—Give Me a Place to Hang My Hat. Whatever it is you want the trial judge to do in a case, you cannot anticipate getting it unless you give the judge a reason. Perhaps that sounds self-evident, but actually it is not. The issue in this regard is not simply one of presenting case law or statutory references, although a surprising number of briefs lack both. It is more a matter of providing for the judge a basis, a ground, a reason for reaching the result you desire in spite of whatever your opponent is arguing.

The simplest illustration of this concept, of course, arises in the context of relief you seek which would require an extension of existing law to a new situation. Some lawyers ignore the fact that the law has not yet been interpreted the way they hope it will be, and imply that precedent (whether cited or not) supports their position. Some lawyers concede that the law has not yet been applied as they hope, but simply assert that it should be. Some lawyers even boldly declare that the existing precedents are squarely against their position, and challenge the trial judge to cast all precedent aside and strike a blow for whatever cause they are pressing. None of these is likely to be a winning strategy, because it simply is insufficient in this circumstance to assume that the judge will go where you ask unless you can come up with a reason.

If you want a judge to extend the law to a new situation, check to see if the law in that field has been evolving in the direction you hope it will, or argue by analogy to a similar field of law that is helpful to your cause. Simply put, give the judge a reason, preferably a good one, to decide in your favor.

Giving the judge a good reason to do what you want is a vitally important concept. The easier you make the task of finding for you, the greater the likelihood that you will prevail. The harder the judge has to work to understand your point or ferret out some basis to find for you, the less likely it is that you will get the result you are hoping for.

I recently received a brief on a motion to vacate an arbitration award that did not once acknowledge that there is a statute that governs such an application.[9] Perhaps this oversight was due to the fact that the statute was not particularly helpful to the moving party, and the lawyer thought I might not be aware of the existence of the statute, but the application would have had a better chance of succeeding if the lawyer had come up with a reason why the statute did not or should not apply. As it was, I was left to wonder whether the lawyer was even aware of the statutory problem with his application.

Another, perhaps more stark, example of this concept comes from a brief-reading experience I had recently. The brief in question was devoid of any point headings, and completely lacking in any reference to any published decision or statute. I quite literally had no idea what the moving party wanted. The adversary, apparently in an effort to respond but obviously having a clue what the issue was all about, filed an equally incomprehensible brief. Reading the two briefs together was a little like walking into a movie theater partially through the film—the other people knew what the plot was, but I certainly did not. I could not even determine what the movant wanted from reading his proposed form of order, which simply stated that the motion was granted. I eventually learned, by requiring the lawyers to appear for oral argument, which they

had waived, what the dispute was about. It would have been far more efficient for everyone involved, and certainly more cost effective for their clients, if the briefs had been well written.

Which brings me to my final thought. Effective brief writing is not easy to learn. Concise and persuasive writing is a pursuit, and a challenging one at that. If you compare the effort you put into a brief that you file with the Appellate Division[10] with the effort you put, or more likely do not put, into the many briefs you file with trial judges, you may begin to appreciate the kind of dedication excellence in writing demands. While the press of your caseload and the realities of the relative costs of that excellence may lead you to conclude that not every brief is worth the effort required to turn a mediocre product into a great one, with practice you can become a more effective and more persuasive writer. If you have read this far, at least you are interested enough in the subject of effective brief writing that this trial judge's views and suggestions may in some way help you toward that goal. ⚖

Endnotes

1. Summary of best practices, reprinted in "Surviving Civil Best Practices," compiled by Jane F. Castner, assistant director, Civil Practice Division AOC (ICLE 2000).
2. The views expressed in this article are solely the views of the author. They are based upon the author's experiences both as a litigator and as a judge, and upon the author's training, both formal and informal, and education, before and after law school.
3. The author first learned this rule from the Honorable John J. Gibbons, then serving on the United States Court of Appeals for the Third Circuit. Fresh from law school, and armed with law journal training (*see* Rule Number Two, *infra*), the author had no idea what the judge meant when, after reading her first bench memo, he stated that "less is more." To the extent that the author has managed to master this rule, she owes Judge Gibbons a great debt of gratitude because he took the time to explain it and cared enough to explain it more than once.
4. Eighth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1977-1978, 67 *Geo. L.J.* 317 (1978).
5. 142 N.J. 520 (1995).
6. The first example given in this section came from a brief filed with the court several years ago. The second example actually came from a transcript provided to the court, but it illustrates effectively the pitfalls of dictation.
7. William Strunk Jr. and E.B. White, *The Elements of Style* (1972).
8. Miyamoto Musashi, *A Book of Five Rings* 72 (Victor Harris trans., Overlook Press, Woodstock, N.Y. 1974).
9. N.J.S.A. 2A:24-1 *et seq*. The particular statutory reference concerning vacating, altering or modifying an arbitration award is found at N.J.S.A. 2A:24-8.
10. Rule 2:6-2. The author would be truly remiss if she did not pay homage to the late Robert E. Guterl, assignment judge for Vicinage 13, who longed for the day when the trial bench would enjoy the benefit of a page limitation on briefs similar to the one which governs briefs filed with the Appellate Division.

Hon. Helen E. Hoens *has recently concluded her service as a justice of the New Jersey Supreme Court. This article was written when she was a superior court judge and was serving as the presiding judge of the Civil Division for Vicinage 13, comprising Somerset, Hunterdon and Warren counties.*

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Brief Thoughts on Effective Brief Writing

by Christine D. Petruzzell

Despite the image of a successful lawyer as one who handles high-profile cases or presents gripping closing arguments, much of the significant work attorneys do is accomplished methodically and in less dramatic fashion through their writing; for example, in preparing correspondence, memos, briefs and agreements. This essential fact underscores the necessity for skill and clarity in legal writing, and with respect to briefs, writing as an advocate.

The technical requirements of a brief are readily ascertainable by reviewing the relevant Rules of Court of the jurisdiction where the brief will be filed, and are not addressed here. The following thoughts move beyond these technical requirements to the next level of effective brief writing.

Planning is Essential

Preparing a brief affords an opportunity to present the facts and legal arguments of a matter on your own terms and in a light most favorable to your client, without the pressure and time constraints of oral argument on a motion or an appeal. One of the ironies of effective brief writing is that careful planning must precede the process of writing. The effective advocate plans the presentation, the points to be raised, and how each argument will be developed and supported with the relevant law and facts before beginning to write. Such planning will bring focus and clarity to the brief, making it more understandable and persuasive.

Preparing a short outline of the points to be raised and how each will be developed, even if jotted down as brief notes on a legal pad, assists this process. Additionally, it is a useful way to break the ice for attorneys who find it hard to begin writing, since this starts the process. The outline provides the framework that can then be developed into a workable first draft of the brief.

However, there is no need to be irrevocably wedded to the outline as you develop and refine your arguments, add to them, or decide that late night flash of genius now actually makes no sense. Writing and evaluating the arguments being made are fluid processes. One can see what works effectively only after a draft of the brief is prepared. This fact also points to the need to continually revise and edit a brief before it is finalized.

Repeated revisions are not signs of a deficient work product, but rather demonstrate careful thought and consideration of the matter, highlighting the writer's professionalism and dedication to the task. Only after an argument is written can it be read with a critical eye to see if it is sound, well-organized and logical. Invariably, changes will be necessary to make the arguments clear, concise and more persuasive. In the course of editing, it is useful to let a day or so pass before reading the brief again, so it can be approached with a fresh eye to spot typographical and other technical errors, and with a fresh mind to examine and refine arguments that are not well articulated or supported.

The Skill and Strategy of a Preliminary Statement

One of the most powerful, but often overlooked, sections of a brief is the preliminary statement. A preliminary statement allows the attorney to set forth a concise overview of the client's position on the issues being raised, providing a framework for the more detailed arguments that follow. As such, it provides a useful frame of reference for the determinations you seek from the court. This concise overview is particularly important to our Judiciary, given the fact that many briefs are far from brief (for example, a party's initial brief can contain up to 65 pages),[1] and in light of the volume of matters addressed by the courts.

A preliminary statement also provides the opportunity to go beyond merely summarizing the arguments being made, allowing the advocate to get to the essence of the case. As an advocate, you are able to explain in a preliminary statement

what the case is really about, beyond the purely legal arguments being raised, or to elaborate upon the consequences that will follow from granting seemingly innocuous relief sought by the adverse party. It is your chance to speak from the heart. While the Court Rules reference a preliminary statement as an optional section in an appellate brief,[2] it should be viewed by the writer as an essential part of the argument in all briefs.

While the preliminary statement appears as the first section of a brief, preceding the procedural history and statement of facts, it is best written after the brief is completed. It is only at this point that the writer will have a true appreciation of the arguments ultimately made and their nuances, allowing for a powerful preliminary statement.

As a cautionary note, it is important to follow the requirements of Rule 2:6-2(a)(6) for appellate briefs, limiting a preliminary statement to three pages, precluding footnotes, and to the extent practicable, citations as well. This will avoid the possibility that the brief will be rejected by the court as non-conforming, thereby requiring revision and re-submission.

Lead With Your Strongest Argument

A brief is your forum to present the strongest possible argument for your client. Therefore, particularly when representing the movant on a motion or the appellant on an appeal, the attorney should avoid the natural tendency to present arguments in logical or chronological order if that presentation causes your best argument to be made toward the end.

Take, for example, a case in which a defendant's arguments in support of summary judgment on the issue of liability under the Consumer Fraud Act are the assertions that the action is barred by the statute of limitations; the plaintiff lacks standing to assert the claim; and the plaintiff cannot establish one of the necessary elements of the claim asserted as a matter of law. The order stated above is the logical way of conceptualizing the arguments being made. However, if the strongest point supporting summary judgment is the last—the plaintiff cannot establish one of the elements necessary to the claim—that argument should be presented first in the brief.

Frame the Brief in the Context of the Relief Sought

All parts of a brief should work toward the relief sought. This means more than simply stating the nature of the relief sought and asking the court to grant it. The relief sought should guide the brief in its entirety. For example, on a motion for summary judgment, entitlement to that relief exists only if the material facts are not in dispute, and the movant is entitled to judgment under the law.[3] The brief of the moving party should present, cleanly and precisely, the key facts, whether based upon oral testimony or documentary evidence, on which there is no dispute.

The proper approach would not be to state and discuss at length additional facts that are not relevant to the issues presented on the motion. Such an approach runs the risk of detracting from the issues on which the motion is based, creating the impression that the case is a fact-intensive one that warrants determination only after a plenary hearing, and provides the opportunity for your adversary to raise fact disputes that may exist regarding these additional facts. Conversely, in opposing summary judgment, the focus should be upon the fact-intensive nature of the matter and the legitimate factual disputes in the record, warranting determination of credibility and other issues at trial.

Similarly, if a temporary restraining order is sought, the brief should consistently highlight the urgency of the matter and the immediate and irreparable harm that will occur in the absence of the requested restraint. The standards for the grant of such relief are established and well known to our courts, and need not be discussed at length.[4] What is important to the motion is the application of those standards to the facts of the matter at hand, particularly on the issue of immediate and irreparable injury.

State Explicitly the Relief Sought

While this sounds like an obvious point, it can be lost in the complexities of the facts or the law being argued. The brief should end with a separate conclusion section that explicitly states the relief being sought. For example, on a pre-trial motion, the conclusion should go beyond stating simply that the relief sought "should be granted."

The writer should elaborate to specify the particular relief being sought (*i.e.*, on a motion to dismiss, "the complaint should be dismissed;" on a discovery motion, "the deponent should be ordered to appear for deposition within 10 days and to produce the documents identified in the notice to produce served by the defendant;" on a motion for a preliminary injunction, "the defendant should be preliminarily enjoined during the course of this case from performing the following specified activities [which should then be specifically set forth])."

Without such specificity, the risk exists that not all of the relief needed will be granted, particularly when so many pre-trial motions are decided on the motion papers submitted, and without oral argument offering the opportunity to elaborate on the relief being sought.

Be an Advocate at All Times

Every first-year associate in a law firm litigation department hears the same lecture: You are writing a brief as an

advocate for your client, not a law review article providing a neutral assessment of the law and an intellectual discussion of legal principles. This is advice that must be taken to heart, applied, and refined with each brief that is written.

Advocacy means more than simply referencing cases that support the position being advanced. It is not accomplished by simply string-citing cases, or blandly reciting the facts and holdings of a series of cases as was done in briefing cases for law school classes. It means addressing the key aspects of a cited case, explaining how it is exactly on point (or dissimilar, if one is the opponent of the motion or appeal), and constitutes controlling or persuasive authority (or not, if one is opposing the relief sought).

Similarly, if the case contains specific language worthy of note, advocacy is not accomplished by quoting wholesale from the case at length. Quote only the pertinent and most powerful language and integrate it into your argument, demonstrating that the language is particularly relevant to your case. Lengthy, rambling quotes lose the reader.

The fact that contrary authority may exist and should be disclosed to the court does not impair the mandate to be an advocate. While the adverse authority, at first blush, may contradict your client's position, it often can be distinguished in order to demonstrate that the authority is not pertinent to the issue at hand. If this is not possible, you may be able to respectfully argue that the authority is wrongly decided and should not be followed.

In the event you are sure an argument against your position will be made by your adversary, it may be appropriate to address and rebut the argument or case in advance, rather than waiting for it to be stated in opposition to your position. Doing so has the benefit of defusing the argument when it is raised by your opponent.

On a more subtle basis, advocacy should also be used in presenting the statement of facts in a brief. An effective factual statement is one that is presented in narrative form, as a story, with a central focus supporting the theme of your client's position.

For example, in a matter involving misappropriation of a company's trade secrets, the facts should tell the story of why the information at issue is proprietary, the steps taken by the company to maintain its confidentiality, and the facts that lead to the belief the information was wrongfully acquired by the defendant.

The telling of such a story engages the reader, and advocates the plaintiff's position more effectively than a disjointed witness-by-witness account of the facts summarizing the testimony of each witness.[5] As stated by Justice Oliver Wendell Holmes: "Make the facts live." As a respondent on a motion or an appeal, it may be useful to include a counter-statement of facts, setting forth your client's version of the facts rather than simply stating that you adopt and rely upon the acts stated by your adversary.

Effective advocacy is accomplished with a clear and well-organized brief. Each paragraph should make a point, and the sentences should not be lengthy or complex. If the arguments are sound and easy to comprehend, the brief has inherent strength.

Each legal argument made should contain a point heading that identifies the argument. The argument itself should start with a brief introduction. This can be as simple as stating: "It is well recognized that the discovery rule tolls the running of the statute of limitations under N.J.S.A. 2A:14-1. As demonstrated below, the discovery rule is applicable here and demonstrates that the plaintiff's claim is timely brought."

Each separately stated legal argument should then end with a brief concluding sentence or two, summarizing the position just argued.

Retain Your Credibility

As an advocate, your credibility is a key element of your professionalism and the service you provide to a client. Once compromised, credibility is not easily regained, and unfortunately may not be restored to a viable level during the case in which it was lost. Your credibility should, therefore, permeate your brief.

Arguments should not be overstated, and the facts and holdings of cited cases should never be misstated. The same is true of references to documents in the record, or to deposition or trial testimony. On appeal, references to facts outside of the record are inappropriate and may result in the imposition of sanctions.[6] Such misstatements will likely be caught by your adversary, and addressed to your embarrassment, or worse, will be noticed disapprovingly by the court.

Credibility is also inherent in the particular arguments made in a brief. In arguing a point, the writer should not misstate the law or take a position that is without reasonable basis in fact or law, or based upon a reasonable argument for an extension of the law.

Lastly, your written product reflects upon your credibility. It should be free of typographical errors and improper grammatical usage. The use of a spell check program does not ensure a brief free from errors, since the word used may be spelled correctly but is an inappropriate usage.

The technical rules that govern preparation of a brief or a motion should be satisfied.[7] Errors in following these rules suggest the writer is not a careful attorney, raising the question whether such carelessness extends to the attorney's analysis and argument of the law. This slippery slope can easily be avoided by careful attention to the writ-

ten form of the brief, and is well worth the effort.

An Effective Brief Takes Time, Skill and Effort

An effective brief does not just happen. As the observations above demonstrate, it takes time, skill and effort. Additionally, it is much harder to prepare a pointed, concise and powerful brief than it is to write a lengthy brief that meanders endlessly through the facts and law, telling it all in a case without theme or focus. Leaving sufficient time to prepare, think about and edit a brief before it is filed is also essential. The good news is that with each brief prepared, additional skill is acquired, and the task becomes a more enjoyable challenge. ⚖

Endnotes

1. *See* Rule 2:6-7, setting page limits for briefs submitted on an appeal and on a cross-appeal to the Appellate Division, including a limit of up to 65 pages for the parties' initial briefs on appeal, and up to 90 pages for briefs where a cross-appeal has been filed.
2. *See* Rule 2:6-2(a)(6).
3. *See Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).
4. *See Crowe v. DeGioia*, 90 N.J. 126 (1982).
5. For example, Rule 2:6-2(a)(4), governing briefs submitted to the Appellate Division, cautions against presenting a statement of facts as a summary of all of the evidence adduced at trial, witness by witness.
6. *See, e.g., Cherry Hill Dodge, Inc. v. Chrysler Credit Corp.*, 194 N.J. Super. 282, 283 (App. Div. 1984)(dismissing appeal for numerous violations and observing that it was "completely improper" to include in appendix numerous documents that were not in evidence before the trial court); *Drake v. Human Services Dept.*, 186 N.J. Super. 532, 537 (App. Div. 1982)(reliance on appeal upon material not before the lower tribunal can trigger censure for violation of the appellate practice rules).
7. *See, e.g.,* with respect to briefs to the Appellate Division: Rule 2:6-2; Rule 2:6-4; Rule 2:6-5; Rule 2:6-6; Rule 2:6-7; Rule 2:6-8; with respect to a motion for summary judgment before the trial court: Rule 4:46-1 and Rule 4:46-2; and with respect to discovery motions before the trial court: Rule 1:6-2(c).

Christine D. Petruzzell *is a shareholder of Wilentz, Goldman & Spitzer, P.A., where she concentrates her practice in commercial litigation and general equity matters in state and federal courts. She is a member of the firm's appellate practice group and a member of the* New Jersey Lawyer Magazine *Editorial Board.*

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How Lawyers Can Make Better Motions

by Sahbra Smook Jacobs

While motions and supporting briefs filed with the court are probably the most common and significant pieces of persuasive legal writing, careful thought is infrequently given to the work product. Some attorneys seem to believe that haste in submitting a reply excuses incomprehensible prose and poorly edited pleadings. This primer on persuasive motion practice will address some common mistakes to avoid and some general principles of legal writing to further guide you.

Read the Court Rules

What should be the most obvious of rules is often breached by attorneys: Read the court rules. Decide what relief you want to obtain and read the court rules for that type of motion. Given the periodic amendments to the court rules, a gentle reminder of the applicable elements may be needed. Since we cannot afford mistakes affecting our client's rights, we must review the court rules before any motion is prepared.

Motion for Summary Judgment[1]

A motion for summary judgment may be filed at least 35 days after the pleading requesting that particular affirmative relief is filed. It must be served upon opposing parties and the court at least 28 days before the return date of the motion.[2]

Opposition to the motion and cross motions must be filed no later than 10 days before the return date. Answers or responses to the opposition papers or to the cross motion must be filed at least four days before the return date. No other papers may be filed without leave of court.[3]

The requirements for a summary judgment motion include filing a brief which may incorporate support affidavits along with a statement of material facts. The statement of material facts, the element most commonly omitted by attorneys, should state "...in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record..." supporting this fact.[4]

The opposing party must address the issues raised in the movant's statement of material facts, admitting or disputing each numbered paragraph. The opposing party may also submit a separate statement with citation to the motion record.[5] Affidavits and certifications submitted shall be in accordance with Rule 1:4-4, in the first person and in numbered paragraphs.[6]

If the affiant is not available to sign the affidavit or certification, it may be filed with a facsimile of the original signature.[7] A certification in compliance with the rule, as set forth below, should be attached:

> This Certification is being submitted pursuant to R. 1:4-4(c). I hereby certify that the affiant acknowledged the genuineness of his/her signature and that the original or a copy of the original signature affixed will be filed if requested by the court or a party.[8]
>
> I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

A motion for summary judgment will be granted "...if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* challenged and that the moving party is entitled to a judgment or order as a matter of law."[9]The rule specifies that

> ...an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate interferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.[10]

The court is required to find the facts and state its conclusions in accordance with Rule 1:7-4, "...by an opinion or memorandum decision, either written or oral..." and enter or direct the entry of appropriate judgment.[11]

Motion for Relief from Judgment or Order[12]

A motion for relief from a judgment or an order "...shall be made within a reasonable time..." and "...not more than one year after the judgment, order or proceeding was entered or taken."[13] The reasons elucidated for bringing such a motion are as follows:

1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;
3. fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
4. the judgment or order is void;
5. the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or
6. any other reason justifying relief from the operation of the judgment or order."[14]

The filing of this motion does not "...suspend the operation of any judgment, order or proceeding..." or "affect the finality of a final judgment..." and does not affect the ability of the court to set aside a judgment or order for fraud.[15] These motions are sparingly granted and "...are addressed to the sound discretion of the trial court, whose determination will be left undisturbed unless it results from a clear abuse of discretion."[16] In the filing of this motion, the affidavits and certifications are critical in showing the court that the stated reasons in the rule are satisfied.

Motion to Alter or Amend a Judgment or Order[17]

A commonly used device in the event of judicial error is a motion for reconsideration seeking to alter or amend a judgment or order pursuant to Rule 4:49-2. This motion must be filed within 20 days after *service* of the judgment or order seeking amendment. This rule has been modified from the previous requirement of filing the motion within 20 days after the *entry* of the judgment or order. The motion shall "...state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred."[18]

General Rules for Writing Persuasive Motions

When drafting motion papers and briefs, strive to provide the reader with the answers to the questions you have raised. Try to anticipate their questions and address them. Explain from your point of view why a counter-argument should not prevail.

The best tip for writing is to think before you write. Analyze the issues and understand the applicable law; outline your thoughts in writing. Now, review your plan, and write. If you fail to follow a plan, you are likely to become sidetracked from your original thesis, and may actually miss a significant issue or point. Moreover, a disjointed piece of writing is less likely to be persuasive. After all, the power of persuasion is the reason for your writing in the first place.

Use the most precise and persuasive words possible, starting with the most important and significant issues followed by the less important or less persuasive arguments. Try not to get too wrapped up in legal wording and so-called "legalese;" instead, write so a layperson can understand it.

While use of legal terminology is important, keep it simple when drafting certifications for your clients. Sometimes, the client's own words, stated in an earlier meeting, can get right to the heart of the issue, unlike the lawyer's objective stance.

Although we are often married to our words and cannot bear to eliminate a single syllable, every piece of writing can benefit from careful editing. A reading with "fresh eyes" may reveal prior mistakes and incomplete thoughts as well as typographical and other errors. As lawyers, we are under constant deadlines, and time is at a premium. However, if you follow these rules, you are well on your way to making better motions. ⚖

Endnotes

1. R. 4:46-1 *et seq*.
2. R. 4:46-1.
3. *Id.*
4. R. 4:46-2 (a).
5. R. 4:46-2 (b).
6. R. 1:4-4 (a).
7. R. 1:4-4 (c).
8. R. 1:7-4 (a).
9. R. 1:7-4 (a).
10. R. 1:4-4 (c).
11. R. 1:7-4 (a).
12. R. 4:50-1 *et. seq*.
13. R. 4:50-2.
14. R. 4:50-1.
15. R. 4:50-3.
16. R. 4:50-1[1] n. *US Bank Nat. Ass'n* v. *Guillaume*, 209 N.J. 449, 467 (2012); *Morristown Housing Authority* v. *Little*, 135 N.J. 274, 283-84 (1994); *Hodgson* v. *Applegate*, 31 N.J. 29 (1959) (other case citations omitted).
17. R. 4:49-2.
18. *Id.*

Sahbra Smook Jacobs *was in private practice for many years, but is currently counsel to the Committee on Character of the New Jersey Supreme Court.*

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Common Errors to Avoid in Writing Opinions and Memoranda

(Editor's Note: The guidelines that follow appeared in the printed materials distributed as part of the Institute for Continuing Legal Education seminar titled "Writing Killer Briefs: Adding Power and Persuasion to Your Legal Documents," and is reprinted here with permission. In Feb. 1996, the material was originally released from the chambers of then Associate Supreme Court Justice Gary Stein, who retired from the court in 2002.)

This document lists common errors in opinion and memorandum writing and contains suggestions that will make any writing clearer and more precise. It is divided into two sections: 1) a system of citations, and 2) rules of grammar, punctuation, and style. This checklist should serve as a supplement to The Bluebook, and to the New Jersey Manual on Style for Judicial Opinions.[1] It is not meant as an exhaustive list of all the possible mistakes that can be made in legal writing. Nor is this the only source to consult in drafting an opinion or memorandum. Rather, it is an organic document designed to alert the writer to common flaws; to encourage the writer to improve the conveyance of ideas; and, most important, to maintain the level of excellence in the court's opinions.

System of Citations

N.J. Court Rules

When citing to a New Jersey Court Rule in a textual sentence, spell out the rule as Rule. When used as a citation, abbreviate Rule as R. A comment in the Rules should be cited as Pressler, Current N.J. Court Rules, comment __ on R. ____(year). [Manual on Style, p. 13-14]

Statutes

New Jersey statutes are cited as N.J.S.A., followed by the applicable sections. [Manual on Style, p. 13]

When citing to an entire act or to consecutive sections within an act, the proper form is N.J.S.A. 17:10-1 to -26. Do not use *et. seq*. Cite to nonconsecutive sections within an act by separating the sections with commas, as N.J.S.A. 34:13A-26, -29, not as N.J.S.A. 34:13A-26 and -29. [Bluebook Rule 3.3(b) and Manual on Style, p. 13].

When citing multiple subsections within a single section, use only one section symbol: 28 U.S.C.A. § 105(a)(3), (b)(1). Multiple subsections within different sections are cited: 19 U.S.C.A. §§ 1485(a), 1486(b) (1988). Note: In a textual sentence in a memorandum or opinion, spell out the words "section" and "paragraph," except when referring to a provision in the U.S. Code or to a federal regulation. [Bluebook Rules 6.2(c), 12.10, 14.4]

Constitutions

The U.S. Constitution appears in text as follows: Article I, Section 8, Clause 17 of the Constitution. [Bluebook Rule 8].

In a citation, however, the U.S. Constitution appears as follows: U.S. Const. art. I, § 8, cl. 17. [Bluebook Rule 8].

The New Jersey Constitution should appear as: N.J. Const. art. IV, § 7, ¶2. [Manual on Style, p. 13].

U.S. Constitution Amendments should be cited as U.S. Const. amend. XIV, § 2. [Bluebook Rules 8, 11, and Manual on Style, p. 13]

Cases

Decisions of state courts outside New Jersey should be cited solely to a regional reporter, if the decision is reported in a regional reporter. [Manual on Style, pp. 7-8].

The name of the state or of the court should be omitted if unambiguously conveyed by the reporter title or in the text immediately preceding or following the citation. [Manual on Style, p. 8].

Explanatory phrases of prior or subsequent history followed by a case citation as their direct object are not followed by commas: Nesmith v. Walsh Trucking Co., 123 N.J. 547 (1991), rev'g on dissent 247 N.J. Super. 360, 371-73 (App. Div. 1989). [Manual on Style, p. 12, and Bluebook T. 8].

Omit the case history on remand and any denial of a rehearing unless relevant to the point for which the case is cited. [Manual on Style, p. 11].

Never trust a running head to identify a case name correctly. It will invariably lead you astray. Follow Bluebook Rule 10

instead. For example, case names in textual sentences follow Bluebook Rule 10.2.1, and should not be abbreviated pursuant to T.6 (Bluebook Table 6), except for "&," "Ass'n," "Bros.," "Co.," "Corp.," "Inc.," and "Ltd." [Bluebook Rule 10.2.1(c)].

Always change "and" to "&." [Bluebook Rule 10.2.1(c)].

Omit "Inc.," "Ltd." and similar terms if the case name also contains words such as "R.R.," "Ass'n," "Bros.," "Co.," and "Corp.," that clearly indicate that the party is a business. [Bluebook Rule 10.2.1(h)].

In citations, never abbreviate the first word in a party's name unless the full name of the party can be abbreviated to widely recognized initials. [Bluebook Rule 10.2.1(c)].

Always use "In re" in place of "In the matter of." [Bluebook Rule 10.2.1(b)].

Omit all prepositional phrases of location not following "City," or like expressions, unless the omission would leave only one word in the name of a party: North Plainfield Educ. Ass'n v. Board of Educ., *not* North Plainfield Educ. Ass'n v. Board of Educ. of N. Plainfield. [Bluebook Rule 10.2.1(f)]

Signals

Know and understand Bluebook Rules 1.2, 1.3, and 1.4. Legal writing uses four basic types of signals: supportive (Rule 1.2(a)), comparative (Rule 1.2(b)), contradictory (Rule 1.2(c)), and background (Rule 1.2(d)). In footnotes, signals may be used as verbs. (Rule 1.2(e)). The supportive signals are: "e.g.," "accord," "see," "see, e.g.," "see also," and "cf." The comparative signal is: "Compare... [and]...with... [and]... Contradictory signals include: "Contra," "But see," "But cf." The background signal is: "See generally." When using verb signals, include the material that would otherwise be included in a parenthetical explanation as part of the sentence itself. [Bluebook Rule 1.2].

When using more than one signal, consult Bluebook Rules 1.2 and 1.3 to determine the order of signals. For the order of authorities within each signal, see Bluebook Rule 1.4.

Signals of the same basic type must be strung together within a single citation sentence. All signals following the first cited authority are written in lower case: See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); cf. Palmer v. Ticcione, 433 F. Supp. 653 (E.D.N.Y. 1977)(upholding mandatory retirement age).

Signals of different types must be grouped in different citation sentences, each of which begins with a capital letter: Smith v. Farley, 100 N.J. 1, 7 (1990); see Johnson, supra, 99 N.J. at 150; see also Owens, supra, 110 N.J. at 100 [parenthetical explanation encouraged]). But see Farley v. Montross, 139 N.J. 1, 5 (1995); cf. Kressel v. Boxer, 999 N.J. 1, 99 (1999) ([parenthetical explanation strongly recommended]). [Bluebook Rule 1.3 and 1.2(c) (for omission of "but" before "cf." in the example)].

When using a citation clause, however, citation strings may contain signals of more than one type: States have required defendants to prove both insanity, e.g., State v. Caryl, 543 P.2d 389, 397 (Mont. 1975); State v. Hinson, 172 S.E.2d 548, 554 (S.C. 1970), and self-defense, see, e.g., Ouillen v. State, 110 A.2d 445, 449 (Del. 1955); see generally Wayne R. LaFave & Austin W. Scott Jr., Handbook on Criminal Law § 8, at 46-51 (1972) ([parenthetical explanation encouraged]). [Bluebook Rule 1.3].

When using a signal to introduce additional supportive authorities following a citation without a signal, or following "Ibid." or "Id." do not capitalize the signal: Ibid.; see also Smith v. Jones, 555 F.2d 555 (1st Cir. 1955) ([parenthetical explanation encouraged]). [Bluebook Rule 4.1].

Note that "see," "but see," and similar phrases are also used as verbs in ordinary sentences, in which case they are not underlined. For the order of authorities within each signal, see Bluebook Rule 1.4. See Rule 1.3 for the order of signals. For an alternative conception of property, see Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," 1 Yale I.L. & Feminism 7, 15-26 (1989). [Bluebook Rules 1.2(e), 2.2(a)(iv)].

Underline the first comma in "See e.g." [Bluebook Rule 2.2.(c)].

Parenthetical Phrases

Parenthetical information is generally recommended if the relevance of a cited authority might not otherwise be clear to the reader (see Rule 1.2). Explanatory parenthetical phrases ordinarily should begin with a present participle and should not begin with a capital letter. The exception is the use of a full-sentence quotation as the explanatory material. [Bluebook Rule 1.5].

Generally, omit articles such as "a" and "the" from parenthetical phrases. If a complete participle phrase is unnecessary in context, a shorter parenthetical may be substituted. [Bluebook Rule 1.5].

For certain signals, the use of a parenthetical explanation of the source material's relevance is strongly recommended. These signals include: "cf," "Compare… with...," and "But cf." The use of a parenthetical explanation is encouraged for "see also" and "See generally." [Bluebook Rule 1.2].

Citing an Unreported Opinion

If an opinion is unreported and available only in separately printed slip-opinion form, the citation must include the full docket number, the court, and the full date: Wohlforth v. Boxer, No. A-1234-98T2 (App. Div. Jan. 1, 1995).

To cite to a specific page of the opinion, use the form: Wohlforth v. Boxer, No. A-1234-98T2, slip op at 6 (App. Div. Jan. 1, 1995). [Bluebook Rule 10.8.1(b)].

Cases that are unreported but avail-

able on Westlaw or Lexis may be cited to an electronic database. Gibbs v. Frank, No. 02-3924, 2004 U.S. App. LEXIS 21357, at *18-19 (3d Cir. Oct. 14, 2004). [Bluebook Rule 10.8.1(a)].

Citing a Footnote

To cite to a footnote in another authority, give the page on which the footnote appears, "n.," and the footnote number, with no space between "n." and the number and no comma between the page and "n" or between "n" and the footnote number: 138 U. Pa. L. Rev. 1499, 1560 n.222 (1990). [Bluebook Rule 3.2(b)].

Some Commonly Cited Authorities

Listed below are some commonly cited authorities:

Senate Judiciary Committee, Statement to Senate Bill No. 3741, at 1 (Dec. 12, 1991).

Senate Revenue, Finance, and Appropriations Committee, Statement to Senate Bill No. 1103, at 2 (Sept. 18, 1978).

Model Jury Charges (Criminal), § 2C:2-1 Possession (Oct. 17, 1988).

Model Jury Charges (Criminal), Flight (Nov. 18, 1991).

2 Model Report of the New Jersey Criminal Law Revision Commission, commentary to § 2C:2-6, at 56 (1971) (hereinafter Final Report).

Walter Lucas, Throwing After-Acquired Evidence Into The Fire, 138 N.J.L.J., 34, 54 (Jan. 3, 1994).

David C. Baldus, Death Penalty Proportionality Review Project Final Report To The New Jersey Supreme Court, 24-25 (Sept. 24, 1991) (hereinafter Final Report).

Note: A helpful way to determine how to cite an authority that is not contained in the Bluebook and Manual on Style is to run a Westlaw search through Justice Clifford's opinions of 1990 to 1994 to see how he cited that authority or a similar type of authority. (He asks that you not embarrass him by referring to some of his earlier efforts before he gained the skill that comes only with maturity and experience.)

Rules of Grammar, Punctuation and Style

Active Voice Preferred

The active voice is generally preferred to the passive voice. The passive voice, however, does have its proper uses. You may use it when the thing done is important, and the one who did it is not: The subpoena was served on January 19, 1988.

You may use the passive voice when the actor is unknown. You may also use it to place a strong element at the end of the sentence for emphasis: When he walked through the door, he was shot.

You may use it on those rare occasions when detached abstraction is appropriate: All humans are created equal in the eyes of the law.

Some Preferred Word Choices

Delete "so as" and "in order" when appropriate: People work to make money. Not: People work so as to make money or people work in order to make money.

Avoid the phrases "there is," "there are," and "it is." A court's deference to an arbitrator's decision has limitations. Note: There are limitations to the deference that courts will provide to an arbitrator's decision.

In general, use: "that" instead of "this," "those" instead of "these," "although" instead of "even though" or "while," "because" instead of "since," "on" instead of "upon," "use" instead of "utilize," "specific" instead of "particular," and "person" instead of "individual." To elaborate further on the person instead of individual preference and related terms, "individual" should refer to a single human being in contrast to a group or should stress uniqueness: The U.S. Constitution places strong emphasis on the rights of the individual. For other meanings, "person" is preferable.

Avoid the use of "as to" (use "about" "on," or "concerning"); "meaningful" (a word without meaning); "viable" (except in its literal or technical sense); and never use "verbed" nouns such as "to access," "to reference," and "to conference." Learn the difference between "alternate" and "alternative." Avoid using "this point in time," "in terms of" and "this particular case."

"Party" means "group" and should not be used to refer to a person except in legal documents when referring to a litigant. In formal usage, "people" refers to a general group. "Persons" refers to a collection of individuals: "We the people of the United States, or will the persons who saw the accident please notify the police?" Except when emphasizing the individuality of members of a group, prefer "people" to "persons."

"May" and "Can"

Another important distinction is the difference between "may" and "can." "Can" is used in reference to ability and physical possibility, "may" in reference to permission: He can swim, so he won't drown. He may swim after he has finished his chores.

"Only"

The location of the word "only" in a sentence can change the sentence's meaning. Place it as close as possible to the phrase or word that it modifies: I eat only clams. (I don't eat mussels or oysters.) Only I eat clams. (Nobody else gets any clams.)

"That" and "Which"

Familiarize yourself with the distinction between "that" and "which." "Which" is confined to introducing a descriptive or refining construction; therefore, use it only when a comma is appropriate preceding the construction, as in "I'm returning this book, which I enjoyed." "That" is confined to intro-

ducing a defining construction; therefore, use it only when a comma is not appropriate preceding the construction, as in "I'm returning a book that you lent me." See William Strunk & E.B. White, The Elements of Style 59 (3d ed. 1979).

"Trial Court," Not "Trial Judge"

Generally, do not refer to a judge; rather, refer to the court. Use the trial court, not the trial judge.

"Plaintiff" and "Defendant"

Use "plaintiff" and "defendant" for the parties in the case under consideration, and use "the plaintiff" and "the defendant" when referring to parties in another case.

Proper Names Following Titles or Adjectives

The following examples illustrate instances in which a proper name following a title should be set off by commas:

- Special Master John Smith (No commas are necessary because "Special Master" is being used as an adjective.)
- A Special Master, John Smith
- The Special Master, John Smith
- Plaintiff, John Smith, was driving the car. (Here, John Smith is the only plaintiff in the case.)
- Plaintiff John Smith was driving the car. (Here, John Smith is one of two or more plaintiffs.)
- The plaintiff, John Smith, was driving the car. (Here, we use "the" and the commas because this plaintiff is the sole plaintiff in the case.)

Possessives

Form the possessive singular of nouns by adding "s": Charles's friend or Burns's poems

Form the possessive plural by adding an apostrophe: Plaintiff's house

Dates

If the day is not indicated, do not separate the month from the year with a comma: "March 1955." If the day is indicated, insert commas both after the day and after the year: "The court cites to its March 5, 1991, order in its opinion." [Manual on Style, p. 22].

Numbers

In general, spell out numbers zero through ninety-nine in text and zero to nine in footnotes; in text, use figures for any number over ninety-nine. However, if a series of numbers appears in the same sentence, some under and some over ninety-nine, use figures for all of them. Write sum of money as "$50," not "$50."or "$50.00." [Bluebook Rule 6.2(a); Manual on Style, p. 22].

Note: Nothing in the foregoing should be interpreted to encourage the use of or the desirability of footnotes, which generally should be avoided.

Moreover, spell out numbers that begin a sentence, except for years. However, beginning a sentence with "12 U.S.C.A. § 1835," or "N.J.S.A. 2C:13-1" is permissible. [Bluebook Rule 6.2(c)].

In general, spell out the first word of any sentence. Thus, spell out the words "section" or "paragraph" if they begin a sentence, rather than using the section or paragraph symbol.

Selected Rules of Punctuation

Use two spaces after a colon, and one space after a semicolon.

In a series of three or more terms with a single conjunction, use a comma after each term, except the last: red, white, and blue

Always place periods and commas inside the quotation marks. Place a colon, semicolon, question mark, or exclamation point inside the quotation marks only if it is part of the quoted material; otherwise, place it outside the ending quotation mark. [Manual on Style, p. 22].

Hyphenation of Compound Words

Most compound words formed with prefixes are not hyphenated; rather, the prefixes are connected to the base word. Thus, antilabor and noninterest

There are exceptions to the foregoing rule, however. Compound words made up of a base word beginning with a vowel and a prefix ending with a vowel are often hyphenated: de-emphasize

Compound words made up of a prefix and a hyphenated compound base word usually require a hyphen after the prefix: non-interest-bearing account

Hyphenate almost all compounds that begin with "all" and "self." Hyphenate most compounds beginning with "ex" when "ex" means "former." Hyphenate most compounds that begin with "vice," "wide," and "half." Hyphenate all that begin with the kinship term "great." Thus, all-important, self-confident, ex-wife, vice-chancellor, wide-ranging, half-truth, great-grandfather; but, selfsame, widespread, halftone.

Note: A glance at the dictionary will confirm the above-mentioned general rules and will show when hyphenation is required. See Edward D. Johnson, The Handbook of Good English 182-216 (2d ed. 1991) for a clear and thorough explanation of the rules on hyphenation.

Capitalization After a Colon

Capitalize the first word after a colon if what follows the colon is a grammatically complete sentence and you are using the colon primarily to introduce material that naturally follows, rather than to link an independent thought: The chairman offered the following choice: We could jail the treasurer or fine the security officer. (The word "following" in the first sentence indicates that this colon is being used to introduce rather than to link.)

Do not capitalize the first word after a colon if what follows is a list or sentence fragment: Three people stood by us: the chairman, the treasurer, and the

security officer.

If the words following the colon form a grammatically complete sentence and you are using the colon primarily to link the two sentences, do not capitalize the second sentence: Not one of the men showed up: they all claim to be sick. *Note*: See Edward D. Johnson, The Handbook of Good English 182-216 (2d ed. 1991) for the rules on use of colons.

Capitalization of Words Commonly Found in Legal Writing

Bluebook Rule 8 deals with capitalization in legal writing. The general rule is to capitalize nouns referring to people or groups only when identifying specific persons, officials, groups, government offices, or government bodies: the President, the Congress, the Legislature, the Governor, Judge Jones; but: the presidential veto, the congressional hearings, the legislative hearings, the gubernatorial veto, the judge, plaintiff, administrative agencies. *Note*: Rule 8 contains a table of capitalization for words commonly used in legal writing.

Capitalize "Court" only if naming a court in full or when referring to the Supreme Court of the United States or the Supreme Court of New Jersey. "State" should be capitalized if it is part of the full title of a state, if the word it modifies is capitalized, or if referring to a state as a governmental actor or party to litigation: the State of New Jersey, the State Commissioner of Environmental Protection, the State relitigated the issue.

Likewise, capitalize "federal" only if the word it modifies is capitalized: the Federal Reserve, federal spending.

Capitalize parts of the U.S. Constitution and constitutional amendments in narrative text: defendant relies on his Fifth Amendments rights, Bill of Rights, Ex Post Facto Clause; but: Ex post facto laws are prohibited. [Manual on Style, pp. 23-24]

Quotations, Alternations, Omissions

For rules governing quotations, alterations, and omissions, see Bluebook Rules 5.1 to 5.3 and Manual on Style, pp. 20-22.

When citing quoted material, never indicate "(emphasis in original)." Note only a change in emphasis. [Manual on Style, p. 21].

When using quoted language as a phrase or clause (rather than as a full sentence), do not indicate the omission of matter before or after the quotation. Never use "(citations omitted)" for citations that come after the passage you have quoted. [Bluebook Rule 5.3(a)].

If quoted language is used as a full sentence and language is omitted at the end of the quoted sentence, indicate that omission by ellipses between the last word quoted and the final punctuation of the sentence quoted. [Bluebook Rule 5.3(b)(iii)].

If you omit language at the beginning of an original sentence, do not use ellipses; rather, capitalize the first letter, placing it in brackets if it is not already capitalized. [Manual on Style pp. 20-21].

In the case of omissions in quotes, use three periods. Ellipses are always set off by a space before the first and the last period. Ellipses are never correct at the beginning of a quotation (because in that case the first letter is capitalized and bracketed) or at the end of a quotation if the quotation ends with a complete sentence. If one or more entire paragraphs are eliminated, indent and insert four periods on a new line.

Italicizing

Italicize words or phrases sparingly for emphasis as a matter of style. Italicize foreign words or phrases that have not been incorporated into common English usage. Latin words and phrases commonly used in legal writing have been incorporated into common usage and thus should not be italicized.

Avoid use of Latin expressions such as "inter alia" and "sub judice" because English equivalents are readily available (for example, "among other things," "the present case"). [Bluebook Rule 7, and Manual on Style, pp. 23-24].

To Split or Not to Split—Infinitives

Do not split an infinitive unless doing so will avoid an ambiguity or a clumsy expression: to litigate effectively, not: to effectively litigate. According to experts, fewer and fewer writers and grammarians adhere to the rule prohibiting split infinitives. *Note*: See Edward D. Johnson, The Handbook of Good English 71 (2d ed. 1991); H.W. Fowler, Modern English Usage 579-82 (2d ed. 1965). Nevertheless, the rule remains implanted in many readers' minds. Because those readers will be distracted if they see an infinitive split unnecessarily, following the rule is recommended.

Using Footnotes

As a matter of style avoid using footnotes in opinions and memoranda. If something is important enough to be said at all, it should be said in text. ⚖

Endnote

1. The most recent version was revised and approved by the Supreme Court of New Jersey on April 22, 2004.

Original Publisher's Note: Common Errors is the result of two terms' hard work by the law clerks of Associate Justice Gary S. Stein. Law Clerk Clement Farley spearheaded the first year's effort. Dorit Kressel has led the editorial work conducted during the current term. They were ably assisted by Louis Smith (1994–1995), William Montross (1994–1995), Matthew Boxer (1995–1996), and Evan Wohlforth (1995–1996). Additional editorial assistance was provided by Retired Associate Justice Robert L. Clifford.

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Dealing With Problems at Depositions

by Gianfranco A. Pietrafesa

This article presents various situations that occur frequently at depositions and addresses how to deal with them. Each scenario sets forth an excerpt from a deposition, which includes a question by the examining attorney and an objection by the defending attorney.[1] A discussion of the law governing the issue follows each scenario, including whether the question and the objection are proper. The objective of the article is to identify possible problems that may arise at depositions, and to set forth the governing law to facilitate the resolution of the issues between counsel.

Scenario 1

The first scenario involves questions seeking information about meetings or discussions with counsel in preparation for a witness giving testimony at a deposition.

> Question: Before your testimony today, you spent a number of hours with your attorney preparing your testimony, didn't you?
> Defending Attorney: Objection—attorney-client privilege.

Does the question seek attorney-client privileged information? Is it an improper question? This scenario was excerpted from the Appellate Division's decision in *Daisey v. Keene Corp.*,[2] where the court stated that there is "nothing improper in inquiring as to whether plaintiff met with his attorney prior to trial or during a break."[3] The court, noting the attorney-client privilege objection, explained that "[t]he specific question objected to did not...seek the contents of the meeting or do anything more than ask if plaintiff has met with counsel prior to testifying."[4] The Appellate Division held that the objection was properly overruled by the trial court.[5]

Therefore, questions on whether the witness has met with counsel to prepare for a deposition are not improper because they do not seek privileged communications.

Scenario 2

This scenario involves questions seeking details concerning the witness's meeting or discussion with counsel to prepare for the deposition.

> Question: Did you meet with anyone to discuss or prepare for this deposition?
> Answer: I met with my attorney.
> Question: When did that meeting take place?
> Answer: Yesterday.
> Question: Where did the meeting take place?
> Answer: At his office.
> Question: How long did that meeting last?
> Defending Attorney: Objection. This is getting absurd. Don't answer; the question calls for attorney-client privileged information.

Are the questions improper? In other words, do they seek privileged information? Is the defending attorney correct? Or is he simply uninformed about the scope of the attorney-client privilege?

The attorney-client privilege is set forth in New Jersey Rule of Evidence 504.[6] It provides in pertinent part that "*communications* between lawyer and his client in the course of that relationship and in professional confidence, are privileged,..."[7] Based on the language of the rule alone, it should be clear that "[t]he privilege only proscribes disclosure of 'communications' between attorney and client."[8] Therefore, questions seeking details or facts surrounding the attorney-client relationship, including questions about meetings to prepare for a deposition, are not improper. Only communications are entitled to protection under the privilege. This was explained in *LTV Securities Litigation*[9] as follows:

> Last, and at the risk of confusing by stating the obvious, information concerning the factual circumstances surrounding the

> attorney-client relationship has no privilege, at least so long as disclosure does not threaten to reveal the substance of any confidential communications. The attorney-client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney's employment, the purpose for which an attorney has been engaged, the steps which an attorney took or intended to take in discharging his obligation, or any of the other external trappings of the relationship between the parties.[10]

Based on the foregoing, it should be clear that the information requested in the questions in Scenario 2 are not privileged and, therefore, the questions are not objectionable. Indeed, they are relatively harmless when compared to the factual information that may be obtained pursuant to the decision in *LTV*. The subject questions do not seek the disclosure of privileged communications; they seek only the facts or details surrounding the communication—where the meeting took place, when, how long the meeting lasted, etc.

Scenario 3

The third scenario also involves a question about a meeting between witness and counsel to prepare for deposition.

> Question: Was anyone else present when you met with your attorney to prepare for your deposition?
> Defending Attorney: Objection. The question seeks attorney-client privilege information.

Is the defending attorney correct? Similar questions were the subject of the court's decision in *Arthur Treacher's Franchise Litigation*.[11] There, the defending attorney objected to, among other things, questions seeking the identity of persons present at certain meetings.[12] The court noted that the "questions generally pertaining to the meetings held…were apparently asked in an attempt to ascertain whether or not the privilege was being invoked properly.[13] "The court held that "[t]hese questions did not seek to elicit any confidential information but rather were aimed at establishing the applicability, or lack thereof, of the privilege.[14]

The question in Scenario 3 was aimed at determining the identity of other persons present at the meeting between the witness and counsel to determine whether the attorney-client privilege protects the communications, or whether the presence of a third party renders the privilege inapplicable or results in a waiver of the privilege.[15] Therefore, the question in Scenario 3 is permissible because it does not seek privileged information. Instead, the question is aimed at determining whether the privilege even applies.

Scenario 4

This scenario also involves the attorney-client privilege.

> Question: What did you tell your attorney about the accident?
> Defending Attorney: Objection. The question seeks the disclosure of attorney-client privileged information.

Is the defending attorney correct? The New Jersey Court Rules provide that "[n]o objection shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege …"[16] It is obvious that this question, at least on its face, is improper because it seeks the disclosure of a confidential communication between client and lawyer. OK, so this was an easy scenario to deal with. However, consider the next scenario.

Scenario 5

The fifth scenario involves a defending attorney's objections to various questions. It concerns the propriety of speaking objections.

> Question: Were you present at the July 1996 meeting where Mrs. Smith and Miss Jones discussed the subject contract?
> Answer: I was there for part of the meeting, but I think I left early.
> Question: What did she say about the contract at that meeting?
> Defending Attorney: Objection as to form; the question is ambiguous. Whom do you mean by "she"? Mrs. Smith or Miss Jones?
> Question: What did Mrs. Smith say?
> Defending Attorney: Objection. What did Mrs. Smith say about what? The witness cannot possibly remember everything that was said at a meeting that took place over five years ago. Can you be more specific?
> Question: What did Mrs. Smith say about the contract?
> Answer: I don't recall; the meeting took place some time ago.

Are the defending attorney's objections proper? The first objection is proper because the question is ambiguous. The attorney made his objection as to the form of the question and stated the grounds for the objection. In this case, he also clarified his objection to assist the examining attorney. It was permissible to do so because it did not suggest an answer to the witness.

The second objection, however, is improper because it is a speaking objection; that is, an objection that suggests the answer or the manner of answering, or provides a warning to the witness. In the excerpted deposition, the defending attorney's speaking objection warned the witness about the question and suggested how to answer the question, which is improper and impermissible. The New Jersey Court Rules provide that

> [a]n objection to the form of a ques-

> tion shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question. No objection shall be expressed in language that suggests an answer to the deponent.[17]

This language was added to the New Jersey Court Rules in 1996 to combat the problem of speaking objections.[18]

Therefore, it should be clear that speaking objections are not tolerated by the court. If the defending attorney continues to utter speaking objections, the questioning attorney may seek appropriate relief from the court, even through a telephone application during a deposition, to combat such abuse.[19]

Scenario 6

This scenario concerns the propriety of discussions between the witness and counsel during a deposition.

> Question: What did you do immediately after the July 1996 meeting?
> Examining Attorney: Let the record reflect that the witness and counsel are whispering with one another.

Is it proper for the witness and his attorney to begin whispering with one another after the examining attorney asks a question? At first blush, the obvious answer is that it is improper for them to do so. However, it may depend on the situation.

The New Jersey Court Rules provide:

> Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.[20]

If the witness asserts a valid privilege, then there is probably no harm resulting from the conference. However, if the witness answers the question rather than asserting a privilege after consulting with counsel, then there is an implication that the defending attorney provided the answer or otherwise coached the witness. In cases where the witness answers the question, the witness or his attorney should state on the record the nature of their discussion; meaning, for example, that the discussion concerned whether the witness should assert a claim of privilege.

Although the potential for abuse is present, the nature of the question, the explanation of the conference and the answer to the question will likely determine whether there has been a violation of the court rules. In any event, the examining attorney should make a statement of the record when the witness and counsel confer with one another, especially when the conferences are beyond the hearing of the stenographer. If such conduct continues, without any assertion of privilege, etc., the examining attorney should seek appropriate relief from the court.[21]

Scenario 7

This scenario also involves a conference between the witness and counsel. However, this conference takes place during a break in the deposition.

> Question: Did you and your attorney discuss your deposition during the lunch break? Answer: Yes.
> Question: What did you discuss?
> Defending Attorney: Objection. Attorney-client privilege.
> Examining Attorney: The court rules prohibit communications during a deposition; therefore, I am entitled to know about the nature of the discussion.
> Defending Attorney: The rules do not prohibit conversations during breaks. Next question please.

Who is right? As noted, the New Jersey Court Rules provide that "there shall be no communication between deponent and counsel during the course of the deposition *while testimony is being taken*..."[22] Therefore, the language of the rule clearly supports the position of the defending attorney. The leading text on the court rules states that there is nothing improper about discussing a deposition during a break.[23]

Moreover, in the *PSE&G* case, the court noted that "[a]lthough it may be appropriate to question the witness as to whether or not he had discussions with counsel in preparation of the witness's testimony, the nature of those conversations is protected by the privilege."[24] Therefore, it is improper to ask about what was discussed between the witness and counsel. In such situations, the questioning attorney need only ask the witness whether he or she wants to change or modify any answers given to questions prior to the break.[25]

It is possible, however, to convince the court to prohibit conversations between deponent and counsel during breaks in depositions. For example, in *PSE&G,* the court held:

> In the present cases, the court believes that the following restrictions should apply to the depositions of the defendant directors: once the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition.[26]

An application for such a restriction is decided on a case-by-case basis, based on the specific facts presented to the

court. Without special circumstances, however, it will be the rare case for the court to justify a prohibition on conferences during breaks.

Scenario 8

The last scenario involves a witness's review of documents to prepare for a deposition and the examining attorney's demand to inspect the documents.

> Question: Did you review any documents to prepare for this deposition?
> Answer: Yes.
> Question: Which documents did you review?
> Defending Attorney: Objection. The specific documents selected for this witness's review are protected by the attorney work-product doctrine. In addition, all of the documents reviewed were produced to you in discovery.

Is the questioning attorney entitled to inspect the specific documents reviewed by the witness? The answer is not entirely clear in New Jersey.

The basis for the request to review the documents appears to be found in New Jersey Rule of Evidence 612, which provides in pertinent part that

> [i]f the witness has used a writing to refresh the witness' memory before testifying, the court in its discretion and in the interest of justice may accord the adverse party the same right to the writing as that party would have if the writing had been used by the witness while testifying.[27]

The "same right" includes the right to inspect and use the writing to examine the witness.[28] Rule 612 apparently applies to depositions through the court rule that provides that "[e]xamination and cross-examination of deponents may proceed as permitted in the trial of actions in open court,...[29] Therefore, if a witness reviewed a document to refresh his or her memory before testifying, then the examining attorney may be entitled to a copy of the document.

Until 1998, the New Jersey state court did not address this particular issue in a reported decision. Then, in *PSE&G*, the court held that documents used to refresh a witness's recollection must be produced:

> Any documents that the witness uses to refresh the witness' recollection, either in preparation for the deposition or during the deposition, must be produced. The fact that the document may have been turned over to plaintiffs' counsel in discovery is immaterial. The actual document that the witness used to refresh the witness's recollection is the document that counsel is entitled to see.[30]

The *PSE&G* court did not, however, cite any legal authority to support its decision. Nor did it perform any analysis of the issue. We do not know why or how the court reached its decision. This is unfortunate because an analysis of the issue would have greatly benefited the bar, especially in light of the Third Circuit's 1985 decision in *Sporck v. Peil*,[31] which holds to the contrary.

The Third Circuit's decision in *Sporck* holds that if the documents reviewed by the witness in preparation for testifying are selected by the attorney, then the identity of the specific documents is protected by the attorney work-product doctrine.[32] The court held that "the selection process itself represents...counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation."[33]

Therefore, based on *Sporck*, the examining attorney would not be entitled to the identity of the specific documents selected by the defending attorney because it would infringe on the attorney work-product doctrine. However, *PSE&G* entitles the examining attorney to the identity of the documents reviewed by the witness. The decisions obviously conflict.

Even under *Sporck*, however, there is a way to obtain the identity of documents. If the witness testifies that a document refreshed his or her memory, and that it influenced or supports his or her testimony, then the specific document must be identified because it is no longer entitled to protection under the work-product doctrine.[34] The *Sporck* court explained that the questioning attorney should first question the witness about a subject and then ask whether any document was used to refresh the witness's memory on the subject, or whether any document influenced or supports his or her testimony.[35] Under this approach, the defending attorney's work-product—the selection of particular documents—is not implicated, and the examining attorney is entitled to inspect the documents.[36] In other words, the documents selected by the defending attorney are not disclosed; instead, the witness identifies the documents that refreshed his or her memory or that influenced or support his or her testimony.

Based on the *PSE&G* decision, it would appear that the examining attorney is entitled to inspect the specific documents reviewed by the witness to refresh his or her recollection. However, *PSE&G* is only a trial court decision and the decision on the issue borders on being *dictum*. The better approach may well be found in *Sporck* because it does not implicate the attorney work-product doctrine. However, this federal court case is not binding in state court cases. As a result of the foregoing conflict, it is certainly an issue that should be addressed and clarified by the Appellate Division or by the Supreme Court's Civil Practice Rules Committee.

Conclusion

Counsel should be prepared to confront these problems at depositions. This article presents New Jersey law on the issues. Counsel should also consult other publications on depositions to learn how to deal with these and other problems that may arise.[37] ⚖

Endnotes

1. Some of the deposition excerpts are fictional; others are based on actual depositions, or on trial testimony in reported decisions, which have been edited for clarity.
2. 268 N.J. Super. 325 (App. Div. 1993).
3. *Id*. at 333-34.
4. *Id*.
5. *Id*. at 335. *See also PSE&G Shareholder Litigation*, 320 N.J. Super. 112, 118 (Ch. Div. 1998) ("it may be appropriate to question the witness as to whether or not he had discussions with counsel in preparation of the witness's testimony,...").
6. N.J.R.E. 504; N.J.S.A. 2A:84A-20.
7. N.J.R.E. 504(1) (emphasis added).
8. Richard J. Biunno, Harvey Weissbard and Alan L. Zegas, *New Jersey Rules of Evidence* (Gann 2013), Comment 3 to NJ.R.E. 504 [hereinafter Biunno].
9. 89 F.R.D. 595 (N.D. Tx. 1981).
10. *Id*. at 603 (citations omitted).
11. 92 F.R.D. 429 (E.D. Pa. 1981).
12. *Id*. at 432.
13. *Id*. at 435.
14. *Id*.
15. *See, e.g*., Biunno, Comment 5 to NJ.R.E. 504.
16. Rule 4:14-3(c).
17. *Id*. *See Wolfe v. Malberg*, 334 N.J. Super. 630, 634 (App. Div. 2000).
18. *See PSE&G*, 320 N.J. Super. at 116-17.
19. *See* Rule 4:14-4. A discussion of the procedure to seek relief from the court and the types of relief available are beyond the scope of this article.
20. Rule 4:14-3(f). *See Ngai v. Old Navy*, 2009 U.S. Dist. Lexis 67117 (D.N.J. July 31, 2009) (text messages during deposition are prohibited communications).
21. *See* Rule 4:14-4.
22. Rule 4:14-3(f) (emphasis added).
23. *See* Sylvia B. Pressler and Peter G. Veniero, New Jersey Court Rules (Gann 2014), Comment 6 to Rule 4:14-3 ("Since the rule speaks only to 'while the deposition is being taken,' it clearly does not address consultation during overnight, lunch and other breaks.") [hereinafter Pressler & Veniero]. *See also* Gianfranco A. Pietrafesa, Voice of the Bar, "Rule Doesn't Bar Conferences with Deponent During Breaks," 146 N.J.LJ. 911 (Dec. 9, 1996).
24. *PSE&G*, 320 N.J. Super. at 118.
25. *See id*. ("If a witness changes his deposition testimony after consultation with counsel, then a different question may be presented.").
26. *Id*. at 117-18. *See* Pressler & Veniero, Comment 6 to Rule 4:14-3.
27. N.J.R.E. 612 (emphasis added).
28. *See id*.
29. Rule 4:14-3(a).
30. *PSE&G*, 320 N.J. Super. at 118.
31. 759 F. 2d 312 (3d Cir. 1985).
32. *Id*. at 315.
33. *Id*.
34. *Id*. at 317-18.
35. *Id*. at 318.
36. *Id*.
37. There are several very good books on deposition procedures, including Dennis R. Suplee, Nicole Reimann and H. Justin Park, *The Deposition Handbook 5th* (Wolters Kluwer); David M. Malone, Peter T. Hoffman and Anthony J. Bocchino, *The Effective Deposition: Techniques and Strategies That Work 4th* (NITA); Henry L. Hecht, *Effective Depositions 2d* (ABA).

Gianfranco A. Pietrafesa *is a partner in the firm of Archer & Greiner, P.C., in Hackensack.*

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Why? Because I Said So, That's Why!

Opening and Closing Arguments

by Joseph P. Rem Jr.

Having been raised watching the gentle sincerity of Gregory Peck in "To Kill a Mockingbird," the aw shucks approach of Jimmy Stewart in "Anatomy of a Murder," the fiery rhetoric of Spencer Tracy in "Inherit the Wind," the mania of Al Pacino in "...And Justice for All," and the blue-eyed charm of Paul Newman in "The Verdict," some lawyers, notably newer lawyers, feel intimidated by the prospect of matching such performances. What most lawyers fail to realize is that, sadly, the average address to the jury is closer to the wooden mannequin approach of Keanu Reeves in "The Devil's Advocate"—hardly a standard that should produce nightmares.

Strategies differ; styles widely diverge; but every lawyer can create an opening or deliver a summation that can be not just effective, but winning. Sure, you suffer the normal anxieties about not being a Hollywood type. That kind of charisma is helpful, but not critical to being effective. It may not even be important. Content is king. You can win your case without winning an Academy Award.

Winning begins with preparation. It is a cliché, but there is no substitute for preparation. It is disturbing the number of attorneys who wing it. Merely reciting facts and their favorable inferences is not an opening or closing argument. Children on a playground can do that because it is easy. What is difficult, what requires preparation, is *persuasion*. This article will suggest ways to help you prepare to persuade.

Persuasion requires a plan, organization, structure, boldness and long stretches of quiet time for creative thinking. If you are not willing to put in the time—if you do not feel a burning desire and need to put in the time—the trial game is not for you. It is great fun only if you put in the hard work it demands.

One theme common to good trial attorneys is a genuine belief in what they are advocating. No matter how much of a stretch the argument may be, the good trial attorneys will exercise a willing suspension of their own disbelief so they believe, genuinely believe, at least for the duration of the trial, what they are selling. If you do not believe it, you will not be able to sell it. The jury will read your tone of voice, inflection and body language, and just know, one way or the other. It is said that the key to persuading a jury is sincerity—if you can fake that, you have it made. Be sincere, and be a true believer.

With all the media attention and movie treatments summations get, you would think they are the most important part of a trial. The most dramatic, maybe. But the most important part of a trial is the opening. It is here that you develop a rapport with the jury, inducing the jurors ever so subtly to like and trust you, or feel for your client. This will make them want to find in your favor if they can. Jury studies show that the majority of jurors vote the same verdict as they would have after the openings. Once jurors have a rooting interest, they tend to view the participants and the evidence through their own biased prism, skewing the ultimate outcome.

Most of us try our case, and then, following the close of testimony, prepare our summation. But before trial you should daydream the strongest and most persuasive summation you could possibly give, replete with all the facts that mandate a verdict in your client's favor. Having done so, you then know exactly what facts you must elicit and scenarios you must create during the trial to enable you to ultimately deliver that killer closing. And you begin to deliver that killer closing in your opening. Your opening and summation are but a single continuing monologue, separated by a few days.

Openings

Strategies for opening differ depending on which side of the aisle you sit. Having been on both sides, this author can tell you that the prosecution, be it the state or the federal government, has three things going for it that make its job much easier: It has an indictment, it usually has the facts, and it frequently has police witnesses.

Prosecutors should:

- not underestimate the power of an indictment. The jury will be told that it is not evidence, that it is merely a pleading that brings this matter to trial. But what the jury members hear, if the prosecutor resolutely and with firm conviction reads the indictment to them, is that whatever act the defendant did, he or she did against the "peace of this state, the government, and the dignity of the same." These are powerful, condemning words.
- pound home the facts. Good facts are a great marketing tool for the product the prosecutor is pushing: guilt beyond a reasonable doubt.
- drape themselves in the flag. The third arrow in the prosecutorial quiver is the reality that often governmental agents, dressed in blue or displaying badges, will appear from on high as the anointed of the people, to testify for the government. In their *voir dire*, the jurors have agreed that they will judge the credibility of a police officer the same as that of any other citizen, but this is simply not so. The 12 people in that box are not a jury of the defendant's peers, for they are not alleged murderers, drug dealers, embezzlers or pedophiles. Blue is a winning color—wear it; wave it.

What does the defense have to oppose this formidable governmental troika? Defense counsel occasionally has some scraps or shards of evidence, but always has both the law and their own boundless creativity. Of these three, the law may be your most powerful ally. The jury should be reminded of the following in opening:

- The defendant is presumed to be innocent. Do not be afraid to tell the jurors that it is human nature to believe that because someone has been accused of something they are in fact guilty. Drive home that the presumption of innocence is a mental discipline and not a visceral response. Tell the jurors to sit back, fold their arms, and skeptically listen to see if the prosecutor can dissuade them from their firmly held opinion that the accused is indeed innocent.
- The burden of proof is always on the government. The jury will be told this by the judge, so adopt it; reinforce it; embrace it. Remind the jurors that our criminal justice system is premised on the truism that in a trial, as in life, it is impossible to prove a negative, that is, to prove that something did not occur.
- You should not call your client "the defendant." Explain to the jury that others may do so, but that the term is inappropriate, as a defendant has no obligation to defend against anything. The state has the burden of proving guilt beyond a reasonable doubt, and that burden continues not only through the trial, the summations and the charge by the court, but even into and through their jury deliberations; and, that burden never shifts.
- An indictment is not evidence of guilt. Drive home the point by discussing with the jury how an indictment is obtained; how the prosecutor alone appears before the grand jury; how only the state's witnesses are presented; how there is no defense attorney to cross-examine the witnesses, or to present witnesses who will tell the whole story. Jurors are sometimes horrified at the one-sided nature of a grand jury proceeding, and may even believe the accused was brought to trial unfairly.
- All trials follow a specific structure. Despite all the televised dramas regarding the practice of law, many jurors are still uncertain exactly how a trial unfolds. Tell the jurors that the state will present its evidence first, just as the state opened first to the jury. Remind the jurors that they have sworn an oath to keep an open mind until all the evidence is in. Ask the jurors how they would feel if one of their loved ones was on trial—their son, their husband, their brother, their father—and after only the state's opening, or the state's case, they saw those jurors walking out commenting that they had already made up their minds.

Trial

Openings and summations are interrupted in our system of justice by what we call the trial. It is a filler proceeding whose sole function is to allow you to gather fodder for your summation. In the trial, defend your case on the pure and simple theory you intended from the outset, shunning the distracting clutter of the shotgun approach, being ever mindful to catch whatever nuggets of good fortune may fall into your lap.

Summation

What many experienced criminal trial attorneys have in common is a pattern, a patter, a script of sorts, a pre-formatted framework and strategy to communicate those elements that are common to all their summations, allowing them to get across to the jury important ideas that are not case specific while they focus on the facts and defenses unique to the current case. Consider the following when preparing

your summation: Most legal commentators will tell you to pound home the theory of your defense from the outset, using the rule of threes. Under the rule, tell them what you are going to say; tell them what you are saying; and then tell them what you just said.

While true for the government, this author preaches a heretical view. It is rare to try a case that unfolds exactly as expected. Weak witnesses suddenly turn strong; strong witnesses crumble. Bedrock facts become ambiguous, and information unknown to either side oozes from each witness in cross-examination. In short, often the case you prepared to try is far different than the case you actually try. As a result, in most cases the best approach is to remain flexible in your opening.

Do not address the facts in your opening, because facts lock you in and narrow your options.[1] Leave your defense open to the possibility of taking advantage of unforeseen circumstances. Furthermore, an opening that pounds home the legal principles enunciated above becomes diluted, and the jury becomes distracted, when you also address the facts. In advertising lingo, you take the jurors off message.

Key points to keep in mind are:

- The prosecution has to prove each and every element of the offense. Let the prosecutor prove five out of six, and the accused wins. Do not be afraid to admit the elements that cannot be credibly disputed. Attack only the element(s) the state has trouble proving. A laser-like approach that narrows and focuses your efforts brings clarity to your defense, enhances your credibility and keeps the jury attentive.
- Do not use notes when speaking to a jury. There is no thicker or more imposing wall between an attorney and a jury than the psychological wall of just a few sheets of legal paper. Yes, you do run the risk of forgetting one or two thoughts you jotted down in constructing your jury address, but the credibility you will create with the jury by making direct eye contact, and not hiding behind the bullet-proof glass of your legal pad, will advance your cause much further than those one or two omitted points ever would have.
- Structure your opening and closing arguments so each argument logically flows into the next, and inexorably walks the jury up the ladder of persuasion step by step to the ultimate conclusion. Plan and create segues, eloquent connective phrases you will seemingly pluck from the air as needed. Being spontaneous requires much forethought and planning.
- Remind the jurors that the prosecutor was not present when the offense was committed, and he or she does not know what occurred that night. What he or she will tell the jury after you sit down is merely comment on the evidence the jurors have heard for themselves.
- Drive home the advantage the prosecutor has by being allowed to speak last. The prosecutor has had the opportunity to listen to and comment upon everything you as a defense attorney say, but you will not be allowed the same opportunity. Request that during deliberations the jurors make you the *13th juror*: What summation response would you have made if you were given the opportunity?
- It is one thing to be given a solution to a puzzle, and quite another to solve it yourself. When you solve it yourself, you are invested in the answer; you own it. Phrase many of your stronger points not as statements, but as rhetorical questions. Do not tell the jurors that no one bothered to look for fingerprints on the gun to prove the accused possessed it. Ask instead what evidence there was that could have proven, unequivocally, that the accused held the gun in his or her own hand. Then pause (silence is such a powerful tool), while they themselves solve the puzzle. On more than one occasion this author has had jurors respond to that rhetorical question with a shout of "Fingerprints!" While those Perry Mason moments are rare, the point is rarely lost on a jury.
- Beyond a reasonable doubt really is an extraordinarily high standard, with good reason to a noble purpose. It is the shield we wield to protect against that which our system of justice most despises—an innocent man being wrongfully convicted. It expresses our belief—no, our dogma—that it is better 100 guilty men go free lest one innocent man be convicted. It is not to be taken lightly. Tell the jurors that if they go into that jury room and decide the accused is probably guilty, then that is an acquittal; if they think the accused is almost certainly guilty, that mandates a verdict of not guilty, for neither is proof beyond a reasonable doubt.
- Your client and the state of New Jersey request nothing more than fairness. If the jurors can go home that night, lay their heads on a pillow and feel comfortable with their verdict, then justice has been done. It is discomforting to convict someone of a crime. The jurors will understand an improvident conviction will affect not only the accused, but them as well.
- If there is a particularly helpful phrase in the jury charge, memorize it and use it, verbatim. When the judge, who is seen as a paragon of justice and neutrality by the jurors, charges the jury using those exact words, he or she may be seen as having allied with you, as having given

you his or her imprimatur. You will share the judge's mantle of credibility.

- Consider, lastly, not using the phrase "not guilty." It comes back to the rhetorical question and puzzle-solving strategy. Tell the jurors that if the state has proven every element of the offense to their satisfaction beyond a reasonable doubt, then they may convict; but if they still have a doubt, a reasonable uncertainty about the guilt of the accused, then they know what the verdict must be. The answer will come from their own inner voice, louder and more credibly than if spoken by you.

Conclusion

Take comfort in the words of Justice (and former solicitor general) Robert Jackson:

> I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.[2]

Whether you toil in the fields of the state, or the pastures of the defense, if you conduct yourself in a professional and collegial manner, if you do not take unfair advantages or liberties with your ethical obligations, you will impress your client and earn the respect of the court and your colleagues. You will be confident that you have done the job the framers of our Constitution envisioned, that so many soldiers have fought and died to protect. You will be a worthy heir to our legal tradition. And no matter how insecure you may be about your performance—and yes, as was Justice Jackson, we all are—you will take comfort in knowing you demonstrated greater emotional range than Keanu Reeves. ⚖

Endnotes

1. An admission of any fact in opening becomes an admission that obviates the need for the adversary to prove it by other means. *State v. Wright*, 155 N.J. Super. 549 (App. Div. 1978).
2. Advocacy Before the Supreme Court, 37 ABA 1.801, 803 (1951).

Joseph P. Rem Jr. *is the senior partner in Rem Zeller Law Group, P.C., in Hackensack. A former Passaic County assistant prosecutor and president of the Bergen County Bar Association, he is certified by the New Jersey Supreme Court as a criminal trial attorney.*

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Requests for Admissions—An Underutilized Litigation Tool

by Alan S. Naar

Requests for admissions are an effective way to build a pretrial record that establishes the strengths of your case and the weaknesses of your adversary's case. By requiring parties to admit uncontested facts and the authenticity of documents, requests for admissions are a useful tool to expedite and streamline litigation by eliminating issues that are not in dispute, "but which are difficult and expensive to establish by competent evidence, and thereby expedite the trial, diminish the cost, and focus the attention of the parties upon the matters in genuine controversy." Requests for admissions can also reduce litigation costs by eliminating the need to establish certain facts through more costly discovery procedures, and to obviate the need to prove those facts at trial. Thus, requests allow both parties to narrow and define the claims and defenses that need to be resolved at trial.

Although requests for admissions are a time saving and effective device, they are often underutilized in favor of traditional discovery methods. If understood and used properly, they can greatly assist the practitioner in preparing a case for summary judgment or trial.

The Rules

Federal Rule 36 and New Jersey Rule 4:22-1 establish the procedure for a party to request and obtain admissions from another party in the litigation. The Federal Advisory Committee notes explain that the goal of Federal Rule 36 is to help expedite trials by limiting litigation to facts and circumstances that remain in dispute. "Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." Both the federal and state rules encourage parties to admit requests by specifically providing that the admissions are limited to the pending action only, thereby eliminating the concern that the admission can be used against them in the future.

To use requests for admissions effectively, and to avoid common mistakes and possible penalties, practitioners should fully understand both the substance and procedure of requests for admissions.

Distinction Between Discovery and Requests for Admissions

By definition, requests for admissions are not discovery because they were not designed to seek discovery of unknown information; rather, they were designed to confirm the accuracy of information already available. "Strictly speaking[,] Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document[,] and merely wishes its opponent to concede their genuineness."

New Jersey courts have similarly held that Rule 4:22-1 is not the equivalent of discovery. "Requests for admissions are not discovery devices to ascertain relevant facts. They were designed to ascertain an adversary's position with respect to these facts." Clearly, basic discovery methods, such as interrogatories and depositions, are designed for exploring and uncovering facts about the case. Courts are careful, however, not to let parties circumvent restrictions on discovery methods, such as limits on interrogatories, by employing requests for admissions improperly. Generally, parties should not use requests to seek unknown additional information, but to settle questions relating to undisputed relevant facts. Thus, requests for admissions permit parties to "focus [their] attention...upon the matters in genuine controversy."

The Distinctions Between the Federal and State Rules

New Jersey Rule 4:22-1 is patterned after Federal Rule 36, as amended in 1970. However, there are certain distinctions.

Distinction: Opinion and Fact

A major distinction between Federal Rule 36 and New Jersey Rule 4:22-1 is that Federal Rule 36 permits requests for

admissions as to opinions.

Federal Rule 36(a)(1) states, in pertinent part, with emphasis added:

> A party may serve on any other party a written request to admit, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) relating to:
> - *facts, the application of law to fact, or opinions about either*; and
> - the genuineness of any described documents.

By contrast, New Jersey Rule 4:22-1 states, in pertinent part, with emphasis added:

> A party may serve upon any other party a written request for the admission for purposes of the pending action only, of the truth *of any matters of fact* within the scope of Rule 4:10-2 set forth in the request, including the genuineness of any documents described in the request.

This distinction was added to the federal rules in the 1970 amendment to resolve a conflict that had developed in the courts. The 1970 amendment to Federal Rule 36 eliminated the requirement that the admission requested be "of fact." Rule 36 permits a party to obtain an admission of the truth of a matter that relates to "facts, the application of law to fact, or opinions about either." Thus, "Requests which seek opinions of fact, or of mixed fact and law, are appropriate, since contention requests were encompassed within Rule 36, by amendment, in 1970." However, requests that are inappropriate include requests for: 1) opinions of law; 2) legal conclusions; and 3) admissions of law that are unrelated to the facts of the case.

New Jersey did not adopt this change made in the 1970 amendment to Federal Rule 36. Rather, New Jersey Rule 4:22-1 limits requests for admissions to matters of fact.

Distinction: Time for Service of Requests for Admissions

Another distinction between Federal Rule 36 and New Jersey Rule 4:22-1 is the time for service of a request for admissions.

Before the 2007 amendment to Federal Rule 36, it referenced the discovery moratorium provisions of Federal Rule 26(d). It is now assumed that the timing of requests for admission is governed by Federal Rule 26(d)(1), which makes clear that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."

New Jersey permits a party to serve a request for admissions "with or after service of the summons and complaint." New Jersey Rule 4:22-1 states, in pertinent part: "The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party." Requests for admissions are specifically excepted from the time within which discovery shall be completed. New Jersey Rule 4:24-1 states, in relevant part: "Except for proceedings under...R. 4:22 (request for admissions) ... all proceedings referred to in R. 4:10-1...shall be completed within the time for each Track." Thus, unless precluded by a pre-trial order, a party may serve a request for admissions even after its time to complete discovery has expired.

Distinction: Timing of Motion to Determine the Sufficiency of a Response

The federal and state rules permit a party to move to determine the sufficiency of responses, or the validity of objections to a request. An improper response may result in an order that the matter is admitted or that amended answers be served. Moreover, both rules provide that the court may award the expenses incurred in bringing the motion.

New Jersey Rule 4:22-1 states, in relevant part:

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

Federal Rule 36(a)(6) is substantially the same and adds that: "[t]he court may defer its final decision until a pre-trial conference or a specified time before trial."

Both New Jersey Rule 4:22-1 and Federal Rule 36 specifically place the burden on the party requesting the admissions to move for a determination by the court prior to trial concerning the sufficiency of a response or the validity of an objection. Federal Rule 36 "now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served." A responding party may, therefore, be presented with the contention that he or she has made a binding admission for the first time at trial. *Some* courts have entertained motions to rule on the defective answers to avoid unfair surprise.

Form

The federal and state rules require that each matter must be separately stated. Federal Local Civil Rule 36.1(a) provides further that: "Requests for admission shall be so arranged that after each separate request, there shall appear a blank space reasonably calculated to enable the answering party to have the answer to the request for admission typed in." In addition, requests are required to be simple and direct in form and limited to a single, relevant state-

ment.

> The questions should be so submitted that they are direct, material, relevant and concise, and, in general, capable of answer by a yes or no. A request for an admission, except in a most unusual circumstance, should be such that it could be answered yes, no, the answerer does not know, or a very simple direct explanation given as to why he cannot answer, such as in the case of privilege. To hold otherwise we are convinced would lead to long and interminable hearings on requests for admissions which would serve no real purpose.

Neither the federal nor state rules limit the number of requests, or the number of separate sets of requests for admissions, that may be served. Unless restricted by pre-trial order, a party may serve separate sets of requests for admissions as discovery advances and trial preparation commences.

Relevancy

Federal Rule 36 and New Jersey Rule 4:22-1 both require that the party serving the request for admissions adhere to a relevancy standard.

Federal Rule 36 states, in relevant part: "[a] party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1)..." Similarly, New Jersey Rule 4:22-1 states, in relevant part: "[a] party may serve upon any other party a written request for the admission for purposes of the pending action only, of the truth of any matters of fact within the scope of R. 4:10-2." Federal Rule 26(b) and New Jersey Rule 4:10-2 require simply that the information sought be "reasonably calculated to lead to the discovery of admissible evidence."

The relevancy requirement is not a very narrowing limitation. "Relevance is given a very broad reading in the context of Rule 26(b) and this [broad interpretation] is now clearly the test to be applied to Rule 36." The purpose of Federal Rule 36 is to expedite litigation and "[t]his purpose is best served by adhering to the rule's requirement that the requested admissions be relevant to the issues in the case."

Response Due Within 30 Days after Service

Federal Rule 36 and New Jersey Rule 4:22-1 both require that a party *shall* respond to a request for admissions within 30 days of service, unless otherwise agreed to by the parties or ordered by the court. Courts may allow responses to requests after the 30-day period if justice would be furthered by doing so. Significantly, a party's "failure to respond, either to an entire request or to a particular request, is deemed to be an admission of the matter set forth in that request or requests."

While it may be possible to amend or withdraw a response to a request, *see* discussion, *infra*, any matter "admitted" under both the federal and state rules, whether explicitly admitted or admitted by default, is deemed "conclusively established" and not rebuttable. A matter deemed admitted does not require further proof. Of course, the admission is applied to the pending action only. Because an admission cannot be used in any other proceeding, it has no collateral estoppel effect. While some courts have treated an admission the same as sworn testimony, they are not equivalent because an admission is not made under oath. "In form and substance, a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party."

Responding to a Request for Admissions

A response to a request for admissions may consist of an admission, a denial, an objection, a qualification, a statement of lack of information or knowledge, a motion for a protective order, or a combination of any of these responses. Federal Rule 36(a)(4) and New Jersey Rule 4:22-1 clarify that the reasons for an objection or inability to respond must be set forth.

"Good Faith" and "Reasonable Inquiry"

The federal and state rules are substantially similar in prohibiting a party responding to a request from answering "lack of information or knowledge" as a reason for failing to admit or deny a request. Rather, both rules require that the parties make a "reasonable inquiry" prior to admitting or denying a request. Moreover, both rules require that a party exercise "good faith" in responding to a request, and qualify a denial if part of the request can be admitted.

Federal Rule 36(a)(4) states, with emphasis:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when *good faith* requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made *reasonable inquiry* and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

New Jersey Rule 4:22-1 is virtually identical to Federal Rule 36 in this respect, although the 2007 amendment to the federal rules included a restyling of language.

While a line of cases exists that permits a party to answer a request based on lack

of knowledge, Federal Rule 36 and New Jersey Rule 4:22-1 adopt the majority view "that if the responding party lacks knowledge, he must inform himself in reasonable fashion." Thus, a claim of insufficient information alone is inadequate under Federal Rule 36(a) because "it fails to allege and specify any reasonable inquiry undertaken to obtain information which would enable [a party] to admit or deny the admissions requested."

The Federal Advisory Committee Notes on Federal Rule 36(a) state that the sanction for a party that fails to inform itself before it responds to a request for admissions is an award of costs after trial, as provided in Federal Rule 37(c)(2). The comments to New Jersey Rule 4:22-1 not only provide for the similar award of fees under New Jersey Rule 4:23-3, but also cite the Federal Advisory Committee Notes on Federal Rule 36(a) with approval.

Federal Rule 37(c)(2) states:

> If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: (A) the request was held objectionable under Rule 36(a); (B) the admission sought was of no substantial importance; (C) the party failing to admit had reasonable ground to believe that it might prevail on the matter; or (D) there was other good reason for the failure to admit.

New Jersey Rule 4:23-3 is similar although not identical to Federal Rule 37(c)(2) with respect to the reasons why a court would not order the payment of reasonable expenses and attorney's fees. Thus, practitioners should attempt to resolve issues relating to unclear requests and responses to guard against the potential of costs being awarded.

Objections

The federal and state rules require that a party making an objection set forth a specific, written objection within 30 days of service of the request. If a party responds to a request without objecting to it, possible objections are deemed waived. If the objection goes only to part of the request, "good faith requires" that the party "shall specify so much of [the request] as is true and qualify or deny the remainder." Rather than making blanket objections, parties must admit those facts and documents that are uncontroverted, and give reasons for their refusal or inability to answer those that call for conclusions or are vague and indefinite, or about which they have no information.

The federal and state rules require parties to set forth their objections to the specific portion of the objectionable request, and respond to the portion of the request to which the objection does not apply. Valid objections include objections based on: 1) form or number; 2) ambiguity; 3) relevance; 4) privilege; 5) compound requests; and 6) in New Jersey, requests that go to opinions. If a party cannot admit or deny a request, the federal and state rules require that party to provide a specific, written response that explains why the request cannot be admitted or denied, and that the responding party has made a reasonable inquiry in responding to the request. An unjustified objection is sanctionable under Federal Rules 36(a) and 37 and under New Jersey Rules 4:23(1)(c) and 4:23-3.

A party can object to a request if a response would impinge on the attorney-client privilege. The cross reference in Federal Rule 36 and New Jersey Rule 4:22-1 to the requirements set forth in Federal Rule 26(b)(1) and New Jersey Rule 4:10-2, respectively, confirms that parties are entitled to assert the attorney-client privilege or the work product doctrine as permissible objections to requests for admissions. Both Federal Rule 26(b)(1) and New Jersey Rule 4:10-2 state in substance that parties may obtain discovery regarding any *nonprivileged* matter. Those rules also provide that a party may seek discovery of work product only upon a showing of substantial need and the inability to obtain the substantial equivalent without undue hardship. Of course, a party objecting to a request based on privilege or work product must do so with specificity. "Bare assertions of attorney work product are insufficient. Therefore, it is not sufficient to say 'not an issue at trial' or 'work product' without more; answers must be more specific." An adequate claim of privilege should detail the nature of the privileged material, and precisely how it is protected from disclosure.

Motion for a Protective Order

If a party believes that the request for admissions contains improper requests or is overly burdensome, it may move for a protective order pursuant to Federal Rule 26(c) or New Jersey Rule 4:10-3. Protective orders are typically granted to protect a party from annoyance, embarrassment, oppression, or undue expense. Of course, the moving party bears the burden of establishing "good cause" to obtain the desired protective order. General claims of harm are not specific enough to warrant a protective order.

There is no limit on the number of requests for admissions a party may serve; however, requests that are overly burdensome, repetitive or irrelevant will not be permitted. While the New Jersey Rule is silent on the issue, Federal Rule 26(b)(2) states that the court may, by order or local rule limit the number of requests under Federal Rule 36.

Withdrawal or Amendment of Responses to Requests for Admissions

If facts or circumstances change, both Federal Rule 36 and New Jersey Rule 4:22-2 permit a party to withdraw

or amend its response to a request for admissions, subject to the provisions of Federal Rule 16 and New Jersey Rule 4:25-1, respectively. Both rules also incorporate a two-part test for withdrawal requiring first, that it would promote the presentation of the merits of the action, and second, that the court is persuaded that the requesting party will not be prejudiced in maintaining or defending the action on the merits. The court must exercise its discretion in considering this two-part inquiry.

The first element of the inquiry permits withdrawal "if it will facilitate the development of the case in reaching the truth, as in those cases where a party's admissions were inadvertently made." The second part of the inquiry speaks to the prejudice derived from "the difficulty the party opposing the motion to withdraw will face as a result of the sudden need to obtain evidence to prove the matter it had previously relied upon as answered." Amending an admission is carefully scrutinized by the court because the intent behind requests for admission is to allow the parties to rely on admissions in preparation for trial. Courts are willing to allow amendments or withdrawal of an amendment if it would further justice, and not prejudice the opposition.

Under Federal Rule 36(b), the withdrawal provision is "[s]ubject to Rule 16(e)" governing amendment of a pre-trial order. The court can enter a pre-trial order in connection with a Rule 16 conference to give effect to matters resolved at the conferences, which includes admissions and stipulations made by the parties. Modification of the pre-trial order will occur only to avoid "manifest injustice."

Use of Admissions

Admissions may be an effective litigation tool to practitioners considering whether to bring a motion for summary judgment. Because admissions, whether explicitly admitted or admitted by default, are deemed "conclusively established" and not rebuttable, they may provide the basis for summary judgment.

The following hypothetical and suggested requests for admissions are an example of how litigation costs can be reduced by eliminating the need to establish facts through more costly discovery procedures, and to eliminate the need to prove those facts at trial.

A unit owner in a condominium brings suit against the condominium association for the cost of certain repairs that the unit owner claims the condominium association agreed to satisfy by reimbursement to the unit owner. The condominium association failed to reimburse the unit owner for the repairs. The unit owner wants to establish that the association duly authorized the reimbursement at a board meeting. The following are examples of requests for admissions that might be utilized in order to avoid taking depositions of board members.

1. On Jan. 15, 2001, the board of directors of the ABC Condominium Association held a board meeting.
2. Annexed hereto as Exhibit A is a true and correct copy of the minutes from the Jan. 15, 2001, meeting of the board of directors of the ABC Condominium Association.
3. Exhibit A annexed hereto accurately sets forth the actions taken by the board of directors of the ABC Condominium Association at its Jan. 15, 2001, meeting.

Conclusion

Federal Rule 36 and New Jersey Rule 4:22-1 provide a similar framework for the use of requests for admissions. When used properly, requests can highlight the strengths and weaknesses of the case, eliminate issues that are not in dispute, and reduce the time and expense of trial. ⚖

Endnotes

1. *Hungerford v. Greate Bay Casino Corp.*, 213 N.J. Super. 398, 404 (App. Div. 1986) (quotations omitted).
2. *See* 8B Charles Alan Wright, et al., *Federal Practice & Procedure* § 2251, (_____ 2010).
3. Federal Advisory Committee Notes on Fed. R. Civ. P. 36, 1970 Amendment.
4. *See United States v. Lewis*, 10 F.R.D. 56, 57 (D.N.J. 1950).
5. Wright, et al., *supra* note 2, § 2253.
6. *Van Langen v. Chadwick*, 173 N.J. Super. 517, 522 (Law Div. 1980).
7. Unlike Requests for Admissions, Federal Rule 33 limits the number of interrogatories that a party may serve without seeking leave to serve additional interrogatories. However, a party can also request that requests for admissions be limited in number. Fed. R. Civ. P. 26(b)(2)(A).
8. *See Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445-46 (C.D.Cal. 1998).
9. *Klimowich v. Klimowich*, 86 N.J. Super. 449, 452 (App. Div. 1965) (*quoting Hunter v. Erie R.R. Co.*, 43 N.J. Super. 226, 231 (Law Div. 1956)).
10. *See Van Langen*, 173 N.J. Super. at 522.
11. *See* Federal Advisory Committee Notes on Fed. R. Civ. P. 36, 1970 Amendment.
12. Fed. R. Civ. P. 36.
13. *Lakehead Pipe Line Co. v. American Home Assur. Co.*, 177 F.R.D. 454, 457 (D.Minn. 1997).
14. *See Currie v. United States*, 111 F.R.D. 56, 59 (M.D.N.C., 1986) (legal conclusions are not admissions).
15. *See Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 130 F.R.D. 92, 95-96 (N.D. Ind. 1990) (Request for legal conclusion improper).
16. Federal Advisory Committee Notes on Fed. R. Civ. P. 36, 2007 Amend-

ment; Fed. R. Civ. P. 26(d)(1).
17. New Jersey Rule 4:22-1.
18. *Id.*
19. New Jersey Rule 4:24-1(a).
20. *Id.*
21. *See* Fed. R. Civ. P. 37(a)(5); New Jersey Rule 4:23-1(c).
22. *See* New Jersey Rule 4:22-1; Fed. R. Civ. P. 36(a)(6).
23. Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a) (*citing Southern Ry. Co. v. Crosby*, 201 F.2d 878 (4th Cir. 1953) and *United States v. Laney*, 96 F. Supp. 482 (D.C.S.C.1951)).
24. *See* Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a), 1970 Amendment.
25. *Johnstone v. Cronlund*, 25 F.R.D. 42, 46 (E.D.Pa. 1960).
26. Fed. R. Civ. P. 26(b)(1); New Jersey Rule 4:10-2.
27. Wright, et al., *supra* note 2, § 2254.
28. *Burns v. Phillips*, 50 F.R.D. 187, 188 (N.D.Ga. 1970).
29. *See* Fed. R. Civ. P. 36(a); New Jersey Rule 4:22-1.
30. *See Ark-Tenn Distrib. Corp. v. Breidt*, 110 F.Supp. 644, 646 (D.N.J. 1953), *aff'd* 209 F.2d 359 (3d Cir. 1954). The Court in *Ark-Tenn* noted that "[s]imple justice demands that a person who has no knowledge of a request for admission should not be held liable for his failure to deny."
31. Wright, et al., *supra* note 2, § 2259.
32. *See* Fed. R. Civ. P. 36(b); New Jersey Rule 4:22-2.
33. *See* Fed. R. Civ. P. 36(a)(1) and (b); New Jersey Rule 4:22-1; New Jersey Rule 4:22-2.
34. *See In re Pizante*, 186 B.R. 484, 489-490 (B.A.P. 9th Cir. 1995), *aff'd without opinion*, 107 F.3d 878 (9th Cir. 1997) (prior fraudulent transfer proceeding did not have collateral estoppel effect so as to bar relitigation of debtor's intent in creditor's subsequent proceeding when judgment in avoidance proceeding was entered against wife based on wife's deemed admissions, which admissions could only be deemed admitted in that proceeding).
35. *See McSparran v. Hanigan*, 225 F. Supp. 628, 637-38 (E.D.Pa. 1963), *aff'd* 356 F.2d 983 (3d Cir. 1966); *see also* Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a), 1970 amendment (recognizing the deletion of the requirement that answer to a request for admissions be sworn).
36. Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a), 1970 Amendment; *American Auto. Ass'n. v. AAA Legal Clinic of Jefferson Crooke*, 930 F.2d 1117, 1120 (5th Cir. 1991).
37. Fed. R. Civ. P. 36(a)(4); New Jersey Rule 4:22-1.
38. Federal Advisory Committee Notes on Fed. R. Civ. P. 36, 2007 Amendment.
39. *See Jackson Buff Corp. v. Marcelle*, 20 F.R.D. 139, 140-41 (E.D.N.Y. 1957); *Sladek v. General Motors Corp.*, 16 F.R.D. 104, 105 (S.D. Iowa 1954).
40. Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a), 1970 Amendment (citations omitted); Comments, New Jersey Rule 4:22-1 (*citing* Federal Advisory Committee Notes with approval).
41. *Han v. Food and Nutrition Serv. of U.S. Dep't of Agric.*, 580 F. Supp. 1564, 1566 (D.N.J. 1984).
42 Federal Advisory Committee Notes on Fed. R. Civ. P. 36(a), 1970 Amendment.
43. *See Pleasant Hill Bank v. United States*, 60 F.R.D. 1, 4 (W.D. Mo. 1973).
44. New Jersey Rule 4:22-1; *see* Fed. R. Civ. P. 36(a).
45. *See Jackson Buff*, 20 F.R.D. at 140.
46. *See Minnesota Mining & Mfg. Co. v. Norton Co.*, 36 F.R.D. 1, 3 (N.D. Ohio 1964).
47. *See Dubin v. E.F. Hutton Group, Inc.*, 125 F.R.D. 372, 376 (S.D.N.Y. 1989).
48. *See* discussion, *supra*; *see also* cross reference in Federal Rule 36 and New Jersey Rule 4:22-1 to Federal Rule 26(b) and New Jersey Rule 4:10-2, respectively.
49. *See* discussion, *supra*.
50. Both Federal Rule 36(a)(2) and New Jersey Rule 4:22-1 require that each matter be stated separately.
51. *See* discussion, *infra*, explaining that a major distinction between Federal Rule 36 and New Jersey Rule 4:22-1 is that Federal Rule 36 permits requests for admissions as to opinions.
52. *See* discussion, *supra*.
53. *See* Federal Local Civil Rule 36.1(b); *Schneck v. IBM, Corp.*, No. 92-4370, 1993 WL 765638, *7-8 (D.N.J. July 26, 1993) (citations omitted).
54. *Id.* at *8.
55. *See id.*
56. *See Frank v. County of Hudson*, 924 F. Supp. 620, 623 (D.N.J. 1996) (quotation omitted).
57. *See id.*
58. *See* Federal Rule 26(b)(2); *Minnesota Mining & Mfg*, 36 F.R.D. at 3.
59. Fed. R. Civ. P. 36(b); New Jersey Rule 4:22-2.
60. James WM. Moore, 4A *Moore's Federal Practice*, ¶36.08 (1992-1993).
61. *Id.*
62. *See Gardner v. Southern Ry. Sys.*, 675 F.2d 949, 953-54 (7th Cir. 1982).
63. *See* Wright, et al., *supra* note 2, § 2264, note 20.
64. Fed. R. Civ. P. 16(e).
65. *See Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc.*, 656 F. Supp. 826, 827 (M.D. Fla. 1987).

Alan S. Naar *is a partner in the firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, where he specializes in commercial litigation. He was assisted in the preparation of this article by Gina M. Pontoriero, a litigation associate in the firm.*

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Why—or Why Not—Federal Court? (Be Careful What You Ask For)

by James J. Ferrelli

When I sat down to write this article, I had initially planned to address pleadings and first filings, with an overview of the basic steps in commencing a civil action in federal court, whether by filing a complaint or removal from state court. I quickly realized, however, that this has already been done, and that such an article would probably be of little value. So if you are looking for an overview of pleadings and first filings, I direct you to other excellent sources.[1]

More useful, I believe, is a discussion of the questions that should precede the how to of federal civil practice. Why (or why not) federal court? Why (or why not) state court? Based upon all the facts and circumstances you know about your case, does federal court or state court provide the most advantageous venue to obtain the relief your client seeks? What's the best fit for this case overall to achieve your client's objectives?

These are questions I suspect many lawyers do not ask. Needless to say, I will not describe any potentially incriminating instances, let alone name names. Most trial lawyers could probably think of their own examples. Suffice it to say that some lawyers seem to believe (at least from what they say) that federal court is always the *better* forum. With all due respect to our distinguished bench and bar, that simply is not always true.

Whether to go to federal court should always precede the question of how and what to do to get there.[2] One should not take a case to any court—federal or state—without thinking through whether that venue is the best fit for your case. The answer to this inquiry depends on a consideration of many pertinent factors in the context of the particular case at bar.

The starting point, of course, is what your case is about. For example, a personal injury case will involve different considerations than a commercial case involving breach of contract, antitrust, unfair competition, or intellectual property. And among personal injury cases, or commercial cases, different kinds will, of course, have different considerations. For example, a catastrophic automobile accident is dramatically different from a pharmaceutical product liability case. The point is that you should consider the legal issues involved, the parties, the third-party witnesses, the likely discovery, and a host of other issues that will be important in your case, and think about how the venue could affect the outcome, given these variables.

"We Could Get Judge X"

In some cases, state court may be preferable, based upon the applicable case law (unfavorable federal vs. favorable state court decisions on the same key issue), the federal court judges who might hear the case in the vicinage (Camden, Trenton or Newark), or the state court judges who could hear the case in the particular county where it might be brought.

For example, as a young associate, I was involved in defending a series of product liability cases in Philadelphia. Although the Philadelphia County Court of Common Pleas was far from what would be considered a defendant's ideal venue, we made a strategic decision not to remove any of those cases to federal court (notwithstanding that diversity jurisdiction existed) because we wanted to avoid the risk of having the cases assigned to a particular judge, because of our view that the cases had strong defenses on the merits which would be of limited use given that judge's typical approach to settlement. Let's call him or her Judge X for purposes of this article. Every time I questioned whether we should remove, the partner I worked for would say: "We could get Judge X." Every time, the comment would put an end to the removal

discussion. And in retrospect, it was the correct decision because we either won the cases outright or resolved them for a nominal nuisance payment.

Think through your case, including the key factual and legal issues involved. Are there any federal court judges to whom your case may be assigned before whom—for whatever reason—your case is likely to fail? There may be, for example, a federal court judge who has written an opinion on your key issue that goes against you, even perhaps where favorable opinions also exist from other judges within this district. If that one opinion would sink your case, guess what? That judge may be, with all due respect, your Judge X. The risk of having your case assigned to Judge X and having his or her unfavorable opinion applied in your case may well outweigh any benefits of federal court, where an alternative state forum exists without a similar unfavorable opinion. Alternatively, *you* may have had past experience with a particular judge in a similar case that suggests he or she is a potential Judge X for that kind of case. There could even be a particular judge who, based upon your past experience, apparently does not like you or your client. There are a multitude of possibilities for your case to be doomed from the start by its being assigned, through pure dumb luck, to Judge X.[3]

Conversely, you may have a favorable opinion written by a state court judge in a county where you might file, with no similar federal case law. Or you may just be more comfortable with the state court judges in a particular county on your issue. In such instances, state court may well be a preferable venue.

Summary Judgment Considerations

In many cases, the potential for summary judgment is a primary consideration in the decision to bring a case to federal court, particularly as a defendant considering removal from state court. Rightly or wrongly, a widely held perception among practitioners is that state court judges are less likely to grant summary judgment than their federal court brethren, notwithstanding similarities in the language of Federal Rule of Civil Procedure 56 and New Jersey Rule 4:46-2(c).

In truth, this conventional wisdom is a generality that merits careful consideration in each instance. There is no question, that as a general matter, federal court judges in New Jersey and elsewhere have taken to heart the Supreme Court trilogy of summary judgment cases from 1986,[4] and regularly apply them to grant summary judgment in appropriate cases. However, there certainly are many state court judges who do not apply the summary judgment procedure reluctantly. And federal court judges, being human, do not necessarily apply the summary judgment standards in precisely the same way in all cases. With all due respect, idiosyncrasies are evident to experienced practitioners.

As with so many other things in law, it all depends. Like the Judge X factor discussed above, whether or not a federal court forum will provide a more favorable venue for summary judgment in a specific case depends on the alternatives as well as the specifics of the case. Most experienced practitioners can think of state court judges before whom they would prefer to present summary judgment motions, as well as federal court judges before whom they would not prefer to present such motions. This is a very subjective judgment, and one influenced as much by individual experience before particular judges as anything else. Nevertheless, the issue is one that should be considered in determining whether to pursue a federal court forum.

Motion Practice Considerations

Related factors to summary judgment considerations are the differences between federal and state court motion practice and the effect those differences may have on the disposition of your case. A serious disincentive to seeking federal court in the eyes of some attorneys is the length of time from filing to disposition inherent in federal motion practice.

In state court, you file a motion, returnable in 16 days (28 days for summary judgment), and argue the motion on the return date. In virtually all cases, the court renders its ruling, followed by an order, at the conclusion of oral argument on the return date. You get your ruling, you move on with your case, all within a few weeks. It's pretty straightforward.

Not so in federal court. Rather than an oral argument date, the return date in federal court is virtually always used as a date from which motion filing deadlines are calculated. The return date rarely, if ever, serves as the oral argument date. Moreover, federal court judges do not always grant oral argument, a striking difference from state court, where (but for routine discovery motions), oral argument is virtually always granted if requested by one of the parties.

Most significantly, from a timing standpoint, a federal court litigant never really knows when its motion will be decided. Motions often remain undecided for weeks or months.

This can be particularly frustrating and unfair for the client that has filed a viable summary judgment motion in a timely manner in advance of trial. In many instances, the court requires the client to proceed with the preparation of the final pretrial order, and with its counsel's trial preparation, notwithstanding that the summary judgment motion could resolve the entire case without a trial and save lots of money. While counsel is free to ask, many judges will not stay the case pending a ruling on the summary judgment

motion. We are invariably told "the case must be ready for trial." Administrative pressure due to the age of the case is typically cited as the reason we must forge on with trial preparation. The result is that the client has little choice but to incur substantial trial preparation expenses, which will prove to have been unnecessary if its motion is granted.

As we all know, litigation is extremely expensive, and the approach taken by many judges in these instances is, quite frankly, insensitive to the cost issue. Many litigants perceive this as a triumph of administrative convenience over the interests of the parties in achieving a cost-effective, just result. Clients are not satisfied with the explanation that the Court Rules and "the system" require their expenditure of such costs in those circumstances. Instead, their confidence in the legal system is undermined, and clients are given the impression that the Court is out of touch with the real world.

Delay in deciding a motion is also problematic where the motion seeks dismissal or relief of less than all claims in the case. While the motion is pending, the discovery period clock continues to tick. Counsel and the parties are often faced with a dilemma. Do they really want to omit discovery on the issues that are the subject of the motion? If the motion is denied, those issues remain in the case, and by then, the discovery period may be over or almost over. In many instances, parties see little alternative but to take the safer course and continue with discovery on the entire case. Delays in adjudication of motions frequently undermine the parties' efforts to conduct the most cost-efficient discovery.

Sometimes this situation can take an even worse turn from the litigant's perspective. Some judges have been known to hold a pending summary judgment motion (or critical *Daubert*[6] or *in limine* motions) over the moving party's head in order to put pressure on the party to settle the case. The message, often presented implicitly rather than explicitly, is "counsel, you may have a valid motion, but your client had better settle the case because I'm not going to rule on it." Trials have even been known to start with pending summary judgment motions.[6]

Your client may have a perfectly legitimate summary judgment motion, may not desire to settle with its opponent, but may have no practical alternative but to bite the bullet and make a deal with the Devil in view of the expense and risk of a trial. It is these situations, among others, that cause corporate attorneys to tell litigators how much they hate litigation.

Discovery Considerations

In some cases, discovery considerations can be of paramount importance. There are a number of factors involving discovery that should be considered when determining whether to seek federal court jurisdiction.

One extremely convenient advantage of federal court is the nationwide subpoena power under Federal Rule of Civil Procedure 45. This is a tremendous benefit in cases where there are documents and/or witnesses located in other states. Under Rule 45, an attorney as officer of the court may issue and sign subpoenas for document production and/or depositions not only in the court in which the attorney is authorized to practice (*e.g.*, New Jersey), but also in any court in which the deposition or document production is to occur, provided the discovery pertains to an action pending in a court in which the attorney is authorized to practice. In other words, as a New Jersey attorney handling an action pending in federal court in New Jersey, one is permitted to prepare and sign subpoenas to obtain documents and/or depositions from third parties in any other states, without the need for any application or permission from the courts of other states. This is a tremendous convenience and time saver, as anyone who has had to obtain commissions for subpoenas in other states will attest.

Another advantage of federal court is the close involvement of our United States magistrate judges in ongoing pretrial case management. Our magistrate judges are actively involved in case management on an ongoing basis from the outset of the case. Their involvement facilitates individualized handling of complicated issues, particularly since cases are typically assigned to a single magistrate judge for all pretrial purposes, and the judge becomes familiar with the case and issues. Because the same magistrate handles the case from commencement to the eve of trial, the issues are generally handled consistently.

This can be a tremendous advantage, particularly in cases where contentious or complicated discovery issues are anticipated, including, for example, privileges, relevance, and extensive document or electronic discovery. Individualized case handling facilitates focused, individualized adjudication of discovery issues, much more so than is typically the case in state court. Further, discovery motion practice is substantially faster and more streamlined in federal court under Local Civil Rule 37.1, which requires discovery disputes to be submitted informally by letter rather than motion in the first instance. Discovery disputes submitted under Local Civil Rule 37.1 are generally resolved promptly and efficiently, in many instances without the need for formal motions.

Besides individualized case management as a useful concept, we are fortunate in New Jersey to have an extremely competent and hard-working group of United States magistrate judges (not to mention district judges) who are not reluctant to tackle thorny discovery issues. It is not unusual, for example, for

our magistrates to hold hearings and consider detailed briefing on complex and important discovery issues. Further, if your case initially does not require active case management, magistrate judges in our federal court are generally willing to adapt their involvement to the specific needs of the case, even if developments occur that change the scope or extent of the issues. Depending upon the issues and specifics of your case, this may be a paramount consideration.

Finally, federal court has a number of limitations on discovery that may or may not be important in a particular case. One limitation of varying importance from case to case is the 10 depositions per side limit set forth in Federal Rule of Civil Procedure 30. You may have a case where substantially more than 10 depositions will be needed. Under Rule 30, a showing of cause is needed to exceed the 10-deposition limitation. What this means as a practical matter, however, is that a party needs to be able to articulate a good reason why more than 10 depositions are needed. One such reason, for example, is that the opposing party has identified or will identify more than 10 persons as having relevant knowledge or as potential trial witnesses. In practice, most magistrate judges afford the parties the discovery they reasonably need, and if this exceeds 10 depositions, there is usually no problem. Judges are not without limits, and your case may well be one where you have concerns about obtaining all of the deposition testimony you need. Federal court may not be the best venue for your case.[7]

More important, however, are the limitations on the scope of discovery under Federal Rule of Civil Procedure 26(b)(1). Discovery practice under this rule was fundamentally changed by the 2000 amendments to Rule 26(b)(1), which narrowed the scope of discovery available without court involvement to focus on the claims or defenses of the parties, rather than the subject matter of the case. The present Rule 26(b)(1) states that "[p]arties may obtain discovery regarding any nonprivileged matter that is *relevant to the claim or defense* of any party...." (emphasis added). Rule 26(b)(1) goes on to say that "[f]or good cause, the court may order discovery of any matter *relevant to the subject matter involved in the action*." (emphasis added). "The good-cause standard warranting broader discovery is meant to be flexible."[8]

Rule 26 now puts the primary emphasis on discovery of issues that are expressly set forth in the parties' pleadings. As explained by the advisory committee:

> [t]he rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.[9]

The two-tier structure of discoverable information under Rule 26(b)(1) may be used advantageously by either the plaintiff or the defendant to expand discovery or attempt to keep a close reign on discovery. By preparing detailed and specific pleadings, a party can put itself in a strong position to argue for expansive discovery of facts relating to the specific allegations in its pleadings, whether in the plaintiff's complaint or the defendant's answer. Rule 26(b)(1) specifically states that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Based upon this language, the party opposing discovery of facts specifically alleged in the pleadings, even where they may be extraordinarily intrusive to its business, has a difficult, if not often impossible, argument to limit its opponent's discovery.

On the other hand, where a plaintiff has filed a boilerplate complaint with little factual detail, the defendant has a far stronger argument to limit discovery in that case in federal court than it would have in state court, simply based upon the text of the applicable rules. In state court, Rule 4:10-2(a) allows for discovery of "any matter...which is relevant to the subject matter involved in the pending action...." Thus, discovery in New Jersey state court is still based on *subject matter* relevancy, rather than *claims or defenses* relevancy as under Federal Rule of Civil Procedure 26(b)(1). Rule 26(b)(1) provides a benefit that is simply not available in state court.

Daubert and its Progeny

In many cases, federal court jurisdiction is sought so that *Daubert v. Merrell Dow Pharmaceuticals, Inc*. and its progeny apply to govern the admissibility of expert testimony. As discussed at length in Anne Patterson's article in this issue, *Daubert* and its progeny established that in admitting expert testimony, federal courts have an obligation to perform a gatekeeping role to ensure only reliable expert testimony is admitted into evidence, and this role applies to scientific and other expert testimony.

In cases where expert testimony is critical, such as pharmaceutical product liability cases, or toxic tort cases, defendants often seek to remove cases to federal court so *Daubert* governs the admissibility of expert testimony, and to restrict the availability of so-called *junk* science. Many attorneys view the application of *Daubert* in particular cases in and of itself as a sufficient basis for seeking a federal court venue.

Time From Filing to Trial

One factor that is in a state of flux is the time from filing of the complaint to trial. In light of the large case backlog

that had existed in many counties around the state, it was generally true that the time from filing to trial was faster in federal court. In the wake of best practices, and recent efforts in many counties to reduce backlog, it is not clear that this general rule holds true in all cases. It may depend on the kind of case, the backlog in the counties where it might be filed, the federal court vicinage and judges where it would be assigned if filed in federal court, and possibly other factors. It is important to know the lay of the land in the potential courts where the case might be filed.

Avoidance of Local Bias and the Available Juror Pool

Historically, one of the reasons for federal court jurisdiction in civil cases was the avoidance of local bias. The concern, for example, was that a citizen of Massachusetts sued in a New Jersey state court would not receive a fair hearing or trial because of local prejudice against citizens of other states. This concern has become less important because over time we have come to regard ourselves as Americans rather than as citizens of our individual states.

Nevertheless, certain cases in certain counties around the state may well present issues of local bias against a litigant. One situation could be where a major local employer is a party. Another situation could be where a foreigner or foreign company is a party. In today's post-9/11 world, it is not a stretch to imagine that a litigant of Middle Eastern ancestry could well be concerned about local prejudice in certain areas of the state. Again, conscientious counsel should know and consider the lay of the land.

Related to the issue of local bias is the pool of potential jurors. In state courts, jurors come from a single county. In federal court, on the other hand, jurors are drawn from the counties comprising the vicinage (Camden, Trenton, or Newark) to which the case is assigned. Depending upon the case, the parties, and the potential witnesses, you may prefer to be before jurors from a single county, or before jurors from a larger geographic area. A Somerset County jury pool is probably going to be different from the federal court jury pool in Newark. Again, it all depends, and counsel should take this into account.

Conclusion

There are other factors that may come into play in determining whether counsel should seek federal court jurisdiction in a particular case. Your instincts will undoubtedly reveal important considerations to you in particular cases, but you have to keep an open mind to the issues. Federal court may be the most advantageous forum, or it may present unnecessary obstacles or expense in your client's case. Hopefully, this article suggests factors that will assist you in providing the most effective advice to your clients. ⚖

Endnotes

1. The author highly recommends the following six essential resources for federal court litigation in New Jersey:

   Federal Civil Judicial Procedure and Rules (West) includes Fed. R. Civ. P., MDL Rules, F.R.E., Fed. R. App. P., S. Ct. Rules, portions of Title 28, and the Advisory Committee Notes.

   New Jersey Federal Practice Rules with comments and annotations by Allyn Z. Lite (Gann) includes local civil and criminal rules, extensively annotated, along with Federal Rules of Civil, Criminal, and Appellate Procedure, Evidence and Third Circuit Rules.

   New Jersey Federal Civil Procedure (Robert E. Bartkus, Ed.) (New Jersey Law Journal Books) includes excellent chapters on various issues of civil litigation, with citations to New Jersey and Third Circuit case law.

   Gibbons on Federal Practice in New Jersey (NJICLE) includes excellent how-to approach on filing, covering all of the nuts and bolts (including points like number of copies required) and extensive forms.

   Wright and Miller, *Federal Practice and Procedure* (West), and *Moore's Federal Courts* (Matthew Bender) both provide extensive scholarly discussion of all issues arising in federal court litigation, with extensive nationwide citations to cases in all circuits, and are very well written. If you can't find an answer in either Wright and Miller or Moore's, you're probably on the cutting edge, and your case may end up being the leading case in their next edition.
2. This article assumes the availability of federal court subject matter jurisdiction, which is beyond the scope of this article and is discussed at length in four of the sources cited in endnote 1 above.
3. Needless to say, this article is not intended to be and should not be interpreted as being critical of any particular judge, lawyer, or client, or anyone else for that matter. The fact of the matter is that as human beings, we all bring our own views and predispositions to our work. It is no secret that on a daily basis, lawyers discuss judges and the way they might rule in specific cases. Indeed, it is a topic frequently raised by clients.
4. *Celotex Corp.v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
6. In light of the purpose of the Rule 56 summary judgment procedure (*e.g.*, eliminate the need for trial, thereby effecting cost and time savings), it is difficult if not impossible

to understand how a court could (or should) ever start a trial without first ruling on any timely filed summary judgment motions. While this may be a powerful tool for the Court to force a settlement, it is a tactic that is perceived as inconsistent with Rule 56 and leads clients to question why the Court does not follow its own rules. The prospect of appellate relief offers little consolation to clients in that situation.

7. Additionally, Fed. R. Civ. P. 33 limits the number of interrogatories each party may serve to 25, including all subparts, but this is not likely to be an issue of concern in determining whether to pursue a federal court forum in light of the relative unimportance of interrogatories as compared to other discovery tools, such as depositions, requests for documents, and third-party subpoenas.

8. Advisory Committee Notes to Rule 26, 2000 Amendment, found in Federal Civil Judicial Procedure and Rules at 167 (West 2003 Rev. Ed.).

9. *Id.*

James J. Ferrelli, *a member of the* New Jersey Lawyer Magazine *Editorial Board, is a partner in the firm of Duane Morris LLP, resident in its Cherry Hill office. Licensed to practice in New Jersey and Pennsylvania, he practices business, commercial, product liability, and intellectual property litigation.*

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A Practical Guide to Appellate Advocacy Before the New Jersey Supreme Court

by Daniel J. O'Hern

The secret to appellate advocacy before the Supreme Court is to get there. Once you get there, I can assure you that you will get a fair shake. The Court will pay careful attention to you. Seven most capable justices will study your appeal; 21 smart law clerks will be involved in the process; and one of those clerks will have read every word in your briefs and in the record.

For purposes of this article, I will assume that the reader actually wants to have a case heard before the New Jersey Supreme Court. After all, if you won in the Appellate Division, you need not go any farther.

Getting Your Case Before the Supreme Court

There are three ways to have the Court review an unfavorable ruling. Although you can file an appeal as of right to the Supreme Court, in certain situations the most common procedure is to file a petition for certification. The petition may be granted on the vote of three members of the Court, so you need not win the case in order to have it heard. You will need four votes to win the appeal.

Appeals as of right to the Supreme Court are allowed in very limited circumstances. Grounds for an appeal as of right include: a sentence of death in a criminal case; a dissent in the Appellate Division (but the appeal will be limited to the issues discussed in the dissent); and the presence of a substantial constitutional question that has not been the subject of a prior appellate decision. But be careful with appeals as of right. Not all allegations of constitutional violations are substantial questions. If the Court decides that the questions are not substantial within the meaning of the rules and case law, your appeal can be dismissed on the Court's own motion. In order to protect yourself, file a protective petition for certification along with the notice of appeal.

A third way to get before the Court is on motion for leave to appeal. If you are seeking Supreme Court review of an interlocutory ruling of the Appellate Division, you must file a motion for leave to appeal. In certain circumstances, you might also be filing a motion for a stay pending appeal, or a motion for bail pending appeal. Although interlocutory relief is greatly discouraged,[1] the truth is that the biggest cases often get to the Court on motion for leave to appeal, or on direct certification. A quick search of opinions found at least 23 matters in which the Court had granted leave to appeal[2] A lazy lawyer's guide to the paperwork for such matters may be found on the Supreme Court's website, which provides advice to parties who represent themselves, at judiciary.state.nj.us/.

Some Advice About Writing Style

Once you are before the Supreme Court, do not lose the opportunity to put your best foot forward. Although the Court permits attorneys to rely on their Appellate Division briefs, Rule 2:12-11 allows a party to seek leave to file additional briefs. Although the clerk of the court will wince, I recommend that you do this. First, you will have a better view of the case after the Appellate Division has digested it. Second, the issues will probably be refined to one or two key points. Why force the Court to go through a 65-page brief when there are only two issues remaining? Focus on what you must, and concentrate the Court's attention on your strongest points.

Now to address the briefs themselves. First, remember that the petition for certification is the most important document you will write. It and a motion for leave to appeal are the only documents that can get you before the Supreme Court. If your appeal is granted, oral argument is always allowed. But in the petition, the form of which is prescribed by Rule 2:12-7, you must rely on the written word alone.

The statement of the matter involved and the reasons why certification should be allowed are critical parts of the petition. You must frame them in a manner that captures the

attention of busy justices. Do not use generalities such as "certification should be granted because the decision below is manifestly unjust." Relate the question to the facts and the law. Try something like this: "Whether, after indictment, the initiation of conversation by prosecutors or their representatives with an uncounseled defendant violates the right to counsel guaranteed by article 1, paragraph 10 of the New Jersey Constitution."

Concerning legal writing, a law school professor of mine, Benjamin Kaplan, taught "Know what you want to say, and say it." I know you (and perhaps your client) will want to put every conceivable argument in your papers but resist the temptation. Judge Warren Brody of the Appellate Division gave this advice in an article in *New Jersey Lawyer, the Magazine*[3] some time ago:

> Most appeals have only one or t issues despite the many legal points that are commonly raised. A plethora of argument headings usually means a paucity of thought. The best argument is one that comes close to what I would write in the opinion. A judge is not likely to come down with a holding that is full of holes. Of course, an argument must have a subtle tone of advocacy, but I am more likely to accept an argument if it recognizes and deals with its own weaknesses. I like to be convinced by a good argument. It whets my appetite for the respondent's brief. But a high-flying argument for reversal will nose-dive if the answering brief demonstrates that the fact or the law are not as represented.

Avoid outrageous misprints or spellings. I know this is not your fault. You are very busy—but try to read your briefs carefully. Spellcheck misses a lot. One example that caught my eye is "Despite the inconsistencies of [Smith's] testimony and the medical records and [Smith's] failure to *illicit* any medical testimony concerning his injuries and treatment, the company was ordered to provide personal injury protection." Another brief, dealing with the loss of goods at a supermarket, described one of the witnesses as the "Director of *Lost* Prevention" for the supermarket.

Try not to be a last-minute person. Although one of the lawyers here asks me, "What good is the last minute O'Hern, if you don't use it?," I would try to a have a brief ready days in advance of a filing date, so it may be read carefully by all involved. No matter how many times I read an opinion of mine, I always found something to change.

Write in plain English. Skip the papers, legalese and Latinisms. If one were to write about the "instant case," Justice Clifford Warren would always ask, "What other case are we talking about?"

Compress your arguments into as few sentences as will convey what you want to say. Write in strong English. Avoid the passive voice (it is submitted). Follow the customary progression of the mind. A subject *does* something to an object. The Workers Compensation Act provides a fault-free remedy to injured workers.

One Justice's Views on Oral Argument

Concerning oral argument, I must confess that judging an oral argument is like judging Olympic figure skating. When we left the bench, we went down an inclined passage to our conference room. On the walk, I would often say, "Wasn't that a great oral argument?" Other justices reacted as though I were a fool, saying, "Are you kidding, that was terrible." So, there is no sure way know whether you are reaching a court, unless the members start folding up their case files. Then it is time to sit down. One thing I do know, oral argument does influence the New Jersey Supreme Court. Every member of the Court will acknowledge that oral argument can change his or her mind about a case.

These are my tips on oral advocacy. No warranties accompany them.

You are entitled to five minutes of uninterrupted time in the Supreme Court. Do not take it. Your mouth may become dry and the Court may start reading the next file. The best method of oral argument is conversational method. Have a talk with the Court. Try to imagine that you are explaining your case to one of your friends. Use analogies, similes and metaphors. Judges are drawn to a turn of phrase. The most complex legal concepts may be captured in brief expressions such as one person-one vote. Do not overestimate the Court. You will have been living with your case for months, perhaps years, and you are deeply immersed in the nuances of law and facts. Not everyone else will be. The Court will have read your briefs, but it cannot be expected to recall the subheadings of statutes. I like visual aids to see dependent clauses in statutes.

Adrian Burke, judge of the New York Court of Appeals, advised lawyers, "Keep it simple so even a judge could understand it." Here are the top 10 rules for keeping my attention.

1. Of course, master all the facts of your case and have a thorough understanding of the fundamental principles and rules of law, not only with respect to your case, but to related propositions of law. The Court will undoubtedly ask you, "Where will your proposition take us?"
2. Make a good approach. The late Chief Justice Arthur T. Vanderbilt gave this advice. In his advice, he used the male pronoun because most lawyers were men in Chief Justice Vanderbilt's day. But many of our most effective appellate lawyers today are women. Please excuse the

dated reference. The chief justice said that:

> in the few moments that it takes after his case is called for the advocate to rise from the counsel table, gather his papers, approach the lectern, and utter the magic words 'May it please the Court,' he will be giving the Court a preview of his entire argument. If he stumbles over a chair as he leaves it, if he bundles his books and papers, his glasses and his pencil in his arms like a schoolgirl, if he waddles to the scene of action, if he puts on his glasses and takes them off before he talks, the Court will know just about what it is in for. On the other hand, if he walks promptly but unostentatiously to the lectern, places the appellant's briefs on the right, the respondent's on the left, and the single-page outline in the middle of the table before him, the Court will know before the utterance of a single word that he has an orderly mind and that he knows what he wants to do with it.

3. I agree with Vanderbilt. Do not use a prepared text for oral argument. It does not offend me, but it does not move me. A one-page summary of the oral argument should suffice. Make sure you cover the points you wish to cover in due proportion. You should write down page references for any items in the record concerning which you anticipate questions. If you cannot recall the reference readily, do not fumble through the file or the record while you are at the lectern. Ask if you may submit the reference at the close of the argument, or even after the argument. One of the best oral arguments that I heard was by Douglas Eakeley, the assistant attorney general, arguing in support of the Fair Automobile Insurance Reform Act of 1990, Governor James Florio's plan to reduce the high cost of mandatory passenger automobile insurance. In a case of extraordinary complexity with a wide range of statutory and constitutional issues, he approached the lectern without a single note and fielded every question from the Court. He won.
4. Start with your strongest point. "Chief Justice and members of the Court, it is simply impossible to reverse the judgment of the Appellate Division because...." Do not throw cases at the Court. It is all well and good to tell judges that *Miranda v. Arizona* requires that warnings be given to a suspect prior to eliciting an oral confession, but to toss out references to obscure cases without mention of the facts or the holdings is not a useful or effective way to address the Court. Also, we will often have to go back and read your authorities to check them, but if—and this applies to the brief as well as the oral argument—you really want to hold our attention, you must make sure that you have given us a case that really stands for the proposition cited. There is nothing worse than disillusionment.
5. Answering questions from the Court is the most important part of appellate advocacy. Do not become argumentative. Be respectful, but not docile. Know the opinions of the members of the Court on the subject, and be prepared to deal with them. (We remember all of our own opinions.) Do not be suspicious of the justices. Justice Handler often threw out what I called life preservers to lawyers who never failed to reject them. They thought there was some trick in the question. I watched lawyers reject the help and drown.
6. Admit when you are wrong. Insistence on the untenable may undermine other valid arguments in your case. But, when you are convinced that you are right, hang on even when you feel overwhelmed. Do not abandon your point. Just say, "I appreciate your viewpoint your honor, but I believe that after you have reflected further on this case, you will agree that I am correct on this point." And admit that you are stumped when you have to. Although such admissions may appear to sully an image of omniscience, lawyers should remember that it is worse to say something that is wrong.
7. With respect to the introduction of matters outside of the record, I don't know what to tell you. All the rules say that you cannot do it, and some judges are bears about enforcing the rules. But lawyers frequently bring up matters outside of the record. Frankly, we rarely pounced on the lawyer when the references gave us the full flavor of the case. In one tax appeal involving dual jurisdiction in the tax court and the county tax board, we entertained a recital of excruciating detail, even to the point of learning the attorney had paid a parking ticket in New York while trying to gather the data necessary to file a timely tax appeal.
8. Do not patronize the Court. An example is that of a lawyer who said to us several times in a case in which we had granted certification, "I have no idea why I'm here your honors." The comment is either a reflection on the lawyer's intelligence or our intelligence. Do not say "Your honors, I was thinking about this on the way down this morning." What were you thinking of in the days and weeks before the argument?
9. Never make excuses such as, "I didn't try the case below," or "I didn't prepare the brief." It is your case.

Take responsibility for it. Try to avoid cliches like "To be perfectly honest." Chief Justice Wilentz used to ask lawyers who said that, "Will you tell us when you are not being perfectly honest?" And do not let anyone, client or colleague, pass you notes. We want to think that you are in charge. Suggestions can usually wait for a break.

10. Above all, enjoy your visit to the Court. I always loved it when lawyers would say, "It is an honor to appear in this Court." We all tend to become blase, but the New Jersey Supreme Court is an extraordinary place. Many lawyers, especially those from out of state, have told me, after retirement, what a pleasure it was to appear before the Court. We have the luxury of entertaining what I called the endless oral argument. It goes on until the lawyers and the Court have exhausted either the issues or themselves. But at the end of the process, the orange is usually peeled, and we can see what is at the core. ⚖

Endnotes

1. *See generally*, Robert L. Clifford, Civil Interlocutory Appellate Review in New Jersey, 47 *Law & Contemp. Probs*. 87, 93-97 (1984).
2. Among them were *American Employers' Ins. Co. v. Elf Atochem North America, Inc.*, 157 N.J. 580 (1999) (environmental insurance law); *Pfizer, Inc. v. Employers Ins. of Wausau*, 154 N.J. 187 (1997); (multi-site, multi-state environmental insurance coverage); *State v. P.Z.*, 152 N.J. 86 (1997) (must Division of Youth and Family Services caseworker advise of Miranda rights); *F.G. v. MacDonell*, 150 N.J. 550 (1997) (clergy malpractice); *Apgar v. Lederle Laboratories*, 123 N.J. 450 (1991) (duty to warn in pharmaceutical case); and *Shackil v. Lederle Laboratories*, 116 N.J. 155 (1989) (duty to warn in DPT vaccine manufacturing context).
3. Nov./Dec. 1992 at p. 47.

Justice Daniel J. O'Hern *was with Gibbons, Del Deo, Dolan, Griffinger & Vecchione when this article was published. He served the New Jersey Supreme Court from 1981 to 2000. He died at age 78 in 2009.*

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Cognitive Barriers to Valuing Your Case for Settlement or Mediation

Improving Your Risk Assessment

by Laura A. Kaster

Over 95 percent of litigated cases are settled. Indeed, the American Bar Association's landmark study on the vanishing trial established that between 1962 and 2002, the percentage of federal trials dropped from 11.5 percent to a scant 1.8 percent of cases filed.[1] Some members of the bar have, therefore, bemoaned the lost art of trying a case. But there is less discussion, less focus in law school, and even less preparation in practice for settlement, the primary method of actually resolving litigated disputes. Few corporations, insurers, law firms, or individual practitioners invest the needed energy in preparing for settlement or in evaluating and calibrating their own settlement performance and the accuracy of their case valuation.

How can we actually improve the accurate assessment of the value of a case in order to assure that the settlement, whether reached through negotiation or mediation, represents a better alternative for the client than actually trying the case?

In 1981, Roger Fischer and William L. Ury, in *Getting To Yes*,[2] measured negotiation success against the best alternative to a negotiated settlement. In a typical legal dispute, this means the present risk-assessed value of the judgment in a case if taken to trial. This has become the holy grail of negotiation lore. Nevertheless, few lawyers actually engage in a rigorous process to reach or improve their judgments about risk, or to track information that could help them assess whether they are accurately predicting the net present value of their cases at the time they enter into settlement discussions.

We do not engage in rigorous risk assessment or work on improving or calibrating our judgments to improve outcomes because in many cases lawyers do not believe there is a way to improve; they believe that case valuation is simply guesswork.[3]

Even large insurers do not track the information on rejected settlement offers and law firms that have excellent data in their files do not mine it to determine whether their predictions of net present value, and even of fees and costs as a component of that calculation, approximate reality at the end of the day. As discussed below, we know from several important recent studies that lawyers who fail to settle are not accurately valuing their cases.

In 2008, a large-scale analysis of attorney-litigant decision making was published by Randall Kiser of Decision-Set, and Martin Asher and Blakely McShane of the Wharton School. Supported by both earlier and later studies, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*[4] analyzed over 2,000 cases in which one party rejected the other's final demand or offer and proceeded to arbitration or trial. The study addressed whether the party refusing to settle obtained as good a result after trial as the result they would have achieved had they accepted the demand or offer that was rejected—even without factoring in the cost and fees associated with trial.

The study compared the proposed settlement number with the eventual verdict.[5] What they found was startling.

The results demonstrate that plaintiffs committed decision error in 61.2 percent of their cases. That is, in over 60 percent of the cases where settlement was refused, the plaintiffs received an award at trial that was equal to or less than the defendant's settlement offer.[6] Defendants made a decision error in 24.3 percent of the cases, paying more at trial than the last settlement offer made by the plaintiff.[7]

But the magnitude of error was very different. While on average, verdicts for plaintiffs were $43,100 less than the average offer, defendants paid on average $1,140,000 more than they could have to settle the case.

Randall Kiser recently studied New York cases and confirmed these results by demonstrating that the defendants' mean cost of error is roughly 19 times the plaintiffs' decision error.[8] Adding in the costs and attorneys fees, most of the

cases examined should have arrived at a zone of possible agreement had the attorneys involved been able to accurately assess the value of their cases.

Why Are We Making These Errors?

The underlying reason for poor risk assessment is that our brains get in our way. Our unconscious biases, heuristics, and reactions so color our assessment that we literally become blind to visible and knowable risk. This information is no secret. Business schools offer courses in improving judgment. Nobel laureates have been publishing on the subject for at least 30 years.[9] In addition, a great deal of popular literature explains these cognitive barriers in the context of economic and policy decisions.[10]

But despite the fact that the subject matter of law schools is judgment, lawyers are behind the curve in exploring the science that has developed on the formation of judgment and how to use it to improve client outcomes.

It is critical to understand that these are unconscious influences; by definition we are not aware of their impact on our thinking. But the results are evident and powerful, and they have a direct bearing on a lawyer's ability to accurately assess the risks of trial and even to conduct settlement negotiation and participate productively in mediation.

One potent example that influences both the formation of a judgment about the value of a case and the approach to negotiation is anchoring. Many studies have confirmed the effect of anchoring on decision making. You can do this little experiment yourself. Take the last three digits of your phone number—write them down. Now answer the following question: When do you think Attila the Hun sacked Europe? Was it before or after the year that those three digits represent? Write down before or after. Now write down your best guess at a date.

The actual year is 451 CE. Typically in exercises like this one, the disparity in the guesses (because this doesn't work if you know the answer) is approximately 300 years between people who had phone numbers beginning with six or higher and those with low phone numbers beginning with four or less.[11] In anchoring and adjustment, you typically start with a number you know and then adjust in the direction you think is appropriate. But the bias is that you do not adjust enough; you are tied to the anchor. Thus, people from Chicago consistently overestimate the population of Milwaukee while people from Green Bay underestimate it.

Although you know your phone number has nothing to do with the year in which an historic event occurred, the unconscious impact of a number you have focused on recently is enormous. So too, a recent event, a number the client or the client's spouse arbitrarily mentions, or some number a team member simply states he or she aspires to, may have a tremendous and unwarranted impact on how lawyers value their case.

The same phenomenon counsels against the typical belief that it is always better to have your opponent suggest the first number in a negotiation or mediation. Because that first number may anchor the discussion, you may want to consider being the one to do the anchoring.

Other unconscious cognitive barriers together cause attention blindness or selective attention. The author calls the confluence of the circumstances that impair litigators' judgment 'client think'. It is a version of the phenomenon Irving Janus defined as group think.[12] But for litigators, a large group is not needed. Janus based his study of group think on the Bay of Pigs fiasco during the Kennedy administration. He determined that the poor judgments arrived at were a product of the process of group decision making.

He identified the following symptoms of group think:

1. The group feels it cannot fail.
2. The group rationalizes away disconfirming data and discounts warnings.
3. The people in the group believe they are inherently better than their rivals; the opposition is stereotyped.
4. Dissent is discouraged, overtly or covertly.
5. The group comes to the belief that it unanimously supports a particular proposal without necessarily asking what each individual believes.
6. Individuals self-censor. Few or no alternatives are discussed and people do not surface risks or seek outside expertise that has no vested interest.

This description fits many client/lawyer teams faced with bringing or defending suit. After all, even the solo lawyer becomes a team with the client and knows the desired outcome. The natural consequence of attorney/client relationships is magnified by the change in the general view of the profession—from counselors to hired guns. If the client communicates the expectation of hearing only positive views, and the ability to go elsewhere if unsatisfied, client think is even more likely. Other cognitive impacts include the product of overconfidence (the mistaken belief in the accuracy of our predictions),[13] and sunk cost biases.[14] These are all worthy of further examination and understanding, and have significant impact on decision making.

Together, all of these and other cognitive barriers coalesce to actually impair our ability to fully see and therefore evaluate the evidence before us. If you have any doubt that you can miss information because you are concentrating on (or biased by) something else, look at a YouTube presentation called the "Monkey Business Illusion," by the authors of the Invisible Gorilla. It can be found at theinvisiblegorilla.com/videos. html.

How Can We Improve?

We are all subject to these unconscious impediments. We don't realize it,

obviously, because they are unconscious.

So what can we do to improve our judgment in valuing our cases? How can we improve our chances of seeing and weighing risks?

First, we need to improve our chances that we will actually perceive damaging information. We need to see things from the opposing perspective to avoid attention blindness. If you have a team of attorneys working on discovery, one member of the team should be assigned to be the devil's advocate, to truly adopt the role of the other side and to review documents, depositions and legal developments with that perspective, alerting the client and lead lawyer directly and actually providing the damaging or dangerous document or testimony, without gloss or explanation. This requires giving that person real authority and an understanding by the entire team that the assignment is really forwarding the team goals.

Use of the devil's advocate should not await a mock jury at the end of the case; it needs to be ongoing. Ask the client to role play as the opponent, and give what he or she thinks will be the opponent's reaction or testimony. Try to get intelligence on the other side's views. These methods, or having an independent expert or a person who does not know what side you want supported evaluate the evidence, are ways to stymie attention blindness.

To calibrate your ability to predict the cost of litigation and the accuracy of your risk assessment, start systematically recording offers by yourself and your opponents and then keep a record of the final result at trial or settlement. Keep tabs on your estimates of fees and costs and then compare them to the actual results dating from the time of the settlement offer forward. (Don't count sunk costs.) Encourage your colleagues to do the same. Examine the reasons for discrepancies and try to calibrate your predictive accuracy.

Make it a firm policy to give and get feedback on settlement positions. In other words, become as methodical in preparing for settlement as you are in preparing for trial. Establish and follow a method for collecting and evaluating information and countering cognitive biases. Remember that the biases will sabotage these efforts, so make them routine, get early client buy-in, and develop a system that confirms that the procedures you establish are followed.

You can have better information—less blurred by attention blindness—even early in the case. Once you have better information, you will be in a better position to assess risk going forward and to use that risk assessment to calculate the net present value of a potential award less the costs of going to trial. Accordingly, you will position yourself for obtaining greater negotiation and mediation information, and improving strategy and client results. ⚖

Endnotes

1. Patricia Lee Refo, The Vanishing Trial, 30 *ABA Litigation* 2 (2004).
2. Roger Fisher and William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Group 1981).
3. In an excellent piece on using decision trees and other methods to assist in valuing patent cases, the authors nevertheless refer to the critical component, the risk assessment, as guesswork. Christopher J. Renk and Erik S. Maurer, *Setting Goals, Managing Expectation and Estimating Cost in Patent Litigation*, bannerwitcoff.com/_docs/library/articles/assessingrisks.pdf.
4. 5 *Journal of Empirical Legal Studies* 551 (2008).
5. *Id.* at 563.
6. *Id.* at 566.
7. *Id.*
8. Randall Kiser, *Beyond Right and Wrong* (Springer 2010).
9. *E.g.*, Amos Tversky and Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, *Science* (1981).
10. Such as Richard H. Sunstein and Case R. Thaler, *Nudge* (Yale 2008), and Christopher Chabris and Daniel Simons, *The Invisible Gorilla and Other Ways Our Brains Deceive Us* (Random House 2010).
11. *E.g.*, Thomas Gilovich, Dale W. Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgement*, 122-126, 136-137 (Cambridge U. Press 2002).
12. Irving Janus, *Victims of Group Think* (2d Ed. Houghton Mifflin 1982).
13. Jane Goodman-Delahunt, Par Anders Granhag, Maria Hartwig and Elizabeth Loftus, Insightful or Wishful: Lawyer Ability to Predict Case Outcomes, *Psychology, Public Policy & Law* (May 2010) (finding that litigators (particularly male litigators) are overly optimistic in the predictions of trial outcomes and the higher the level of confidence in their predictive capacities, the more likely they were to fall short of their goals.) *See also Nudge* at 31-33.
14. Sunk costs are retrospective (past) costs that have already been incurred and cannot be recovered.

Laura A. Kaster *is a mediator and arbitrator in Princeton. She is an adjunct professor teaching alternative dispute resolution at Seton Hall Law School and has presented seminars for the ABA, NJSBA, PLI and in-house for corporations and law firms. Before working full-time as a neutral, she was chief litigation counsel for AT&T and a partner in the law firm Jenner & Block.*

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Using Public Wi-Fi Hotspots Can Land You in Hot Water by Risking Disclosure of Confidential Information

by Richard L. Ravin

The ability to access the Internet at hotels, airports, cafes, libraries and other public places with wireless devices is enormously convenient, but it comes at a price—a loss of privacy. It is indeed tempting to connect to the Internet via a hotspot to quickly check your email, send a document, or make an online transaction. However, as these Wi-Fi hotspots become ubiquitous, they also are becoming fertile ground for electronic eavesdroppers and spoofers to capture confidential information. Significantly, the interception of such unencrypted transmissions may be perfectly legal, even if such communications include user names, passwords, account numbers, credit card numbers, Social Security numbers, trade secrets and attorney-client privileged communications.

Interception of Wi-Fi Transmissions

Because unencrypted public hotspots use the public airwaves instead of wires for the transmission of communications, they are easily susceptible to being intercepted. Use of unencrypted Wi-Fi networks to send or receive confidential information could result in the unauthorized disclosure of attorney-client privileged communications, trade secrets, or other confidential information that could have serious malpractice and ethical ramifications for attorneys. Moreover, the mere use of such networks could call into question the status of such information as being confidential, privileged or trade secret.

Wi-Fi[1] hotspots are places where local area networks (LANs) are set up using high-frequency radio waves to transmit and receive signals traveling short distances of up to 300 feet (unobstructed, outside), which communicate with notebook computers, smartphones and other wireless devices, enabling users to access the Internet. Wi-Fi, which stands for wireless fidelity, uses a part of the radio frequency spectrum that is not licensed by the Federal Communications Commission.[2]

There are principally two types of activities that make users of public Wi-Fi networks vulnerable—interception (*i.e.*, eavesdropping or receiving) and spoofing. The federal Electronic Communications Privacy Act (ECPA), Title I, amended the Federal Wiretap Act (FWA) to make it unlawful for any person to intentionally intercept or endeavor to intercept any electronic communication.[3] The New Jersey Wiretapping and Electronic Surveillance Act (WESA) proscribes similar conduct.[4] However, both acts expressly exclude interception of radio communications that are "readily accessible to the general public."[5] ECPA provides that a radio communication is readily accessible to the general public if it is not:

> (A) scrambled or encrypted;
> (B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;
> (C) carried on a subcarrier or other signal subsidiary to a radio transmission;
> (D) transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or
> (E) transmitted on frequencies allocated under part 25 [for satellites], subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.[6]

New Jersey's WESA uses the same definition of "readily accessible to the general public."[7]

Under this definition, intercepting an unencrypted transmission from a Wi-Fi network provided at hotels, airports, cafes, libraries, or other public places, would not be a violation under ECPA or WESA (unless the signal were transmitted using a subcarrier, or transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication). Once the unencrypted radio signals are received by the eavesdropper's computer, its user could perceive any unencrypted or unscrambled information that is contained within the transmission, including confidential emails, attachments and other records. It is important to note that if the Wi-Fi network were provided by a common carrier, such as a telephone company, then the system would not be deemed readily accessible to the general public, and intentional eavesdropping or attempted eavesdropping of such signals would violate the ECPA and WESA.[8]

In 2001, the U.S. Supreme Court[9] implicitly recognized that ECPA prohibits the intentional interception of cell phone conversations.[10] Moreover, ECPA outlaws the manufacture, possession, sale, or sending through the mail of any "device" that is "primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications."[11] Unlike the monitoring of cell phone conversations, the devices used for receiving Wi-Fi communications are not "primarily useful for the surreptitious interception of...electronic communications,"[12] but are computers that are used for numerous other legitimate purposes.

When an employee uses a public Wi-Fi hotspot to transmit company trade secrets or confidential business information without access controls or encryption, he or she risks disclosing such secrets during the transmission, and jeopardizes the status of such information as secret or confidential.

With respect to operating a Wi-Fi network at home or the office, using encryption not only provides a measure of security, it also may make the intentional interception of such communications unlawful. Implementing encryption would give the user of that network a reasonable expectation of privacy, which could require a warrant under the Fourth Amendment before such communications could be intercepted by law enforcement personnel.[13]

Spoofing Wi-Fi Network Users

Another concern for Wi-Fi users is when sham wireless networks are set up to fool or spoof a user into thinking that he or she has logged onto a legitimate public network operated by a nearby establishment. Experts warn, and common sense dictates, that spoofers may be present at public facilities, actively luring unwitting users of Wi-Fi networks into connecting to their counterfeit network, as a way to capture private information.

While sitting at a library, cafe or hotel, for instance, one or more available wireless network connections may appear on your computer screen and seem to be legitimate because the names match or describe your location, perhaps even using the trademark, or a variation thereof, of the facility you think is offering the service (*e.g.*, Rick's Cafe). When the name of the counterfeit Wi-Fi network mimics the name of real network, it is called an evil twin network. In fact, all of the networks at a given location could be fake. Once you log on, the spoofer can monitor all your communications. Spoofing a wireless network can be done with a notebook computer, software that is readily available, and a small USB device to act as the access point. When unsuspecting victims connect with the spoofed access point to make supposedly secure transactions, the spoofer could capture passwords, bank account information and other valuable personal information. Under this scenario, it is unclear whether such conduct would be in violation of the FWA, 18 U.S.C. Section 2511, for the reasons discussed above. However, if the conduct of the spoofer involved unauthorized *access* to the victim's computer, a spoofer could be in violation of Title II of ECPA, which created the federal Stored Wire and Electronic Communications Act (SWEC). Section 2701 of SWEC prohibits intentionally accessing stored communications without authorization.[14]

The conduct of spoofers is distinguished from that of electronic eavesdroppers who receive radio signals without accessing the sender's computer, and thus, do not run afoul of the SWEC.

If a spoofer has accessed the victim's computer without authority, the spoofer may be subject to civil liability for economic damages under the Computer Fraud and Abuse Act (CFAA), providing the loss requirement is satisfied.[15] Under the civil action portion of the CFAA, the loss to the victim's computer'[16] must be $5,000 or more within one year. The term "loss" is broadly defined by statute to mean "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." Of course, such a recovery presupposes the spoofer can be found or identified.

It is noted that with respect to the interception of transitory electronic communications (*e.g.*, emails in route from the sending email server to the destination email server via the Internet), ECPA, Title I,[17] provides that

depending on the defendant's conduct, a plaintiff has the right to recover either actual damages plus any profits of the defendant, or statutory damages that are the greater of $100 per day or $10,000.[18] As discussed above, however, the part of an email's journey that travels via an unencrypted public Wi-Fi network would not be protected under ECPA because that part of the transmission would be "readily accessible to the general public."[19]

One of the problems with being spoofed or being the victim of eavesdropping is that when the Wi-Fi user communicates with another computer system, such as his or her employer's network, a spoofer or eavesdropper can capture user names and passwords, and thereby compromise the security of the employer's network. While the snoop may not have been in violation of law when the data was intercepted from the airwaves, clearly if he or she were to later log in to the company's network using the user names and passwords obtained while lawfully eavesdropping, he or she would arguably be committing an unauthorized access of the company's computers, in violation of Section 2701 of SWEC. Further, such conduct could also be contrary to the CFAA.

Wardrivers and Peering Neighbors

While the scenarios discussed above involved Wi-Fi networks intended for use by the public, there are numerous—probably hundreds of thousands—of non-encrypted Wi-Fi networks across the country, operated by private citizens out of their homes and business, but nonetheless available to the public. The laws discussed above do not expressly outlaw accessing of such networks by third parties.

A worrisome problem for unencrypted Wi-Fi networks open to the public is a practice known as wardriving,[20] whereby one drives around in a car with a laptop computer to detect unencrypted Wi-Fi networks. While Internet access is the primary reason why people access Wi-Fi networks in public places, the target of wardrivers, or even unscrupulous neighbors of homes and businesses operating Wi-Fi networks, could be the data residing on unprotected computers attached to the network. Wi-Fi networks in public places, the target of wardrivers, or even unscrupulous neighbors of homes and businesses operating Wi-Fi networks, could be the data residing on unprotected computers attached to the network.

These *open* Wi-Fi networks also could be used by the wardriver or neighbor to send and receive unlawful material such as child pornography, or to conduct other criminal activity. Not only can data be downloaded, uploaded, altered or destroyed, but programs, and even extra computers, can be added to the unsecure network without the knowledge of the Wi-Fi operator. This risk is highest in densely populated neighborhoods and office building complexes. It is noted that the Internet service provider has an interest in minimizing unauthorized access to the Wi-Fi networks, since these users take up bandwidth without paying any fees.

Securing Wi-Fi Networks

Wireless networks lack the inherent security feature of wired networks, which require a physical connection to the network in order to log-on and are usually located within a secure facility, such as a locked building, office or room. Wi-Fi networks do not give the user the ability to unilaterally implement encryption—that must be done by the operator of the network. Choosing the right protection method is important when operating a Wi-Fi network to obtain a proper level of security for the network and the data being exchanged over the network.

Wi-Fi-protected access (WPA) encryption is the preferred method for securing a Wi-Fi network, although the most common form of security is wired equivalent privacy (WEP). Note that the "E" does not stand for encryption. Many within the information technology industry view WEP as less-than-optimal security, because a WEP key can be deciphered without much effort, depending on the bit size, and by utilizing generally available programs. These decoding programs monitor the keys generated by the wireless network that accompany each transmitted packet of information in an attempt to deduce the central key that will allow access to the network. WEP keys are either 5, 13, 16, or 29 characters long, depending on the encryption bit size of 64, 128, 152, or 256, respectively. The longer the key, the more powerful the encryption, and the longer it takes to crack.

Changing the key periodically helps prevent cracking by requiring the would-be hacker to start over. It is generally thought that merely by implementing WEP, at any level, many hackers would be deterred and move on to a non-secure network.

Michel Cukier, assistant professor of mechanical engineering and affiliate of the Clark School's Center for Risk and Reliability and Institute for Systems Research at the University of Maryland, recommends limiting the signal coverage so the signal for the network will not reach outside your home or office, turning off service set identifier (SSID) so your network won't be identified by unwanted users, employing WEP, or even better, WPA, so confidential information is not shared with unwanted readers, frequently changing your network key, or setting your wireless access point so it only accepts known media access control (MAC) addresses, which means that only known computers will have access to the network since a MAC address is essentially a serial number unique to each manufactured, network adaptor.[21]

Alternatives: Using Mobile Broadband and Encrypting Individual Communications

As an alternative to using unencrypted public Wi-Fi networks, many wireless telephone carriers provide broadband access, which is also known as mobile broadband. This system allows users with wireless broadband network adapter cards (either internal or PCMCIA) to access the Internet via cell phone networks. The speeds of access vary depending on the location and whether the particular cell tower being accessed is set up for broadband or slower connection speeds. Because such signals are "transmitted over a communication system provided by a common carrier," interception or attempted interception of such transmissions would be in violation of ECPA.[22] Additionally, assuming the common carrier employs encryption," then use of the encryption itself would be a separate basis for making access of such communications unlawful. More importantly, such communications would be secure and protected from disclosure or interception.

Finally, if open Wi-Fi networks are used to transmit confidential information, then users are advised to send and receive only emails and documents which have themselves been encrypted by the sender, so that even if the communications are intercepted, the information contained within such communications will remain secure. ⚖

Endnotes

1. Wi-Fi is also the registered trademark of Wi-Fi Alliance Corporation, which is a trade organization that sets Wi-Fi standards.
2. Kevin Werbach, Radio Revolution: The Coming Age of Unlicensed Wireless (2003) at 22, 25-28, http://www.werbach.com/docs/RadioRevolution.pdf, accessed on March 6, 2008. The Institute for Electrical and Electronic Engineers (IEEE) standard 802.11a (Wireless-a) uses the 5 GHz band of the public radio frequency spectrum, and standards IEEE802.llb/g (Wireless b/g) use the 2.4 GHz band.
3. 18 U.S.C. §2511.
4. N.J.S.A. 2A:156A-3.
5. 18 U.S.C. §2511(2)(g)(i).
6. 18 U.S.C. §2510(16).
7. N.J.S.A. 2A:156A-2.r.
8. 18 U.S.C. §2510(16)(D); N.J.S.A. 2A:156A-2.r(4).
9. *Bartnicki v. Vopper*, 532 U.S. 514 at 521, fn 4 (2001), *citing* 18 U.S.C. §2511(1)(a).
10. 18 U.S.C. §2511(1).
11. 18 U.S.C. §2512(1)(b).
12. *Id.*
13. *See United States v. Slanina*, 283 F.3d 670, 676-77 (5th Cir. 2002)(employee had a reasonable expectation of privacy in his computer and files where the computer was maintained in a closed, locked office, the employee had installed passwords to limit access, and the employer "did not disseminate any policy that prevented the storage of personal information on city computers and also did not inform its employees that computer usage and Internet access would be monitored"), vacated on other grounds, 537 U.S. 802 (2002); *see Lown v. State*, 172 S.W.3d 753, 761 (Tex. App. 2005); *State v. Moller*, WL 628634 at *6 (Ohio App. 2002), not reported in N.E.2d.
14. 18 U.S.C. §2701 *et seq.*
15. 18 U.S.C. §1030(a)(4), (a)(5)(B)(i) and (g).
16. The affected computer must be a "protected computer," defined by 18 U.S.C. §1030(e)(2), to include one which is used in interstate or foreign commerce or communication (*e.g.*, one connected to the Internet).
17. 18 U.S.C. §2511(1)(a).
18. 18 U.S.C. §2520(c)(2)(A) and (B).
19. 18 U.S.C. §2510(16).
20. wikipedia.org/wiki/Wardriving.
21. Benjamin Fryson, Study: Passwords Alone Not Enough to Keep Wireless Networks Secure, Aug. 23, 2007, www.associatedcontent.com/article/355815/study_passwords_alone_not_enough_to.htm, accessed on Sept. 15, 2007. See also, University of Maryland Study: Password Protecting Your Wireless Network Is Not Enough prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-22-2007/0004649513&EDATE, accessed on Sept. 15, 2007.
22. 18 U.S.C. §2510(16)(D).
23. *See, e.g.*, b2b.vzw.com/govt/security.html, accessed on March 7, 2008: "Verizon Wireless employs Code Division Multiple Access (CDMA) technology that scrambles voice and data information, encrypts signaling messages, and authenticates devices to the Verizon Wireless network to hinder unauthorized users from capturing and deciphering wireless messages."

Richard L. Ravin *is a member of Hartman & Winnicki, P.C., and heads the firm's Internet, intellectual property law, and debtor-creditor rights practice areas, with offices in Paramus and New York City. He is immediate past chair of the New York State Bar Association's Intellectual Property Section, and past (founding) co-chair of the section's Internet and Technology Law Committee.* *The author gratefully acknowledges the contributions of Shifra Apter, an associate with the firm, and Quentin W. Wiest, a law clerk for the firm, when this article was originally written.*

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Ethical Considerations for Attorney Marketing

by Asaad K. Siddiqi

Today's social media provides myriad opportunities for consumers to find services in the marketplace. Conversely, businesses have engaged in clever ways to follow and forecast consumer trends, to gain the consumer's attention, and to earn the consumer's hard-earned money.

Social media outlets like Facebook and Google+ have brought friends, family, and strangers closer together than ever before.

Twitter and YouTube are constant sources of breaking news, whether worthy of public distribution or not.

LinkedIn offers a global networking environment for businesses and professionals.

Without question, the Internet is the first choice of many consumers for information sharing/gathering, and it is always open for business and easily accessible through a widening array of digital devices.

Not surprisingly, attorneys have sought to leverage social media to advertise their practices and solicit clients. Attorneys are now able to self-publish at little cost, and generate clients by advertising on websites visited by potential clients and responding to inquiries on Twitter, LinkedIn, and Facebook. Many social media sites, as well as some attorney advertising sites, allow others to post comments and recommendations about listed attorneys. For better or worse, attorneys have also adapted to the contemporary consumer and how a potential client will be drawn to terms like "Super Lawyer" and "Best Lawyer," as opposed to the staid belief that self praise is no recommendation. Indeed, law firms, large and small, have developed marketing strategies and departments to meet the demands of today's clients.

The Rules of Professional Conduct (RPCs) govern both traditional and online advertising. The rules, however, were formulated when attorney advertising was deemed a form of commercial speech, and sought to address advertisements in the Yellow Pages and billboards, and on the radio and television. The proliferation of social media as a marketing tool has triggered a renewed emphasis on an attorney's knowledge of the Rules of Professional Conduct in order to avoid glaring ethical missteps.

This article endeavors to highlight some of the ethical considerations for attorney marketing in New Jersey. It begins with a short history of the advent of modem attorney advertising in 1977, and includes a discussion of the current rules and recent ethics opinions. It concludes with a sampling of ethical considerations raised by the prevailing social media. While this article does not comprehensively address every nuance of each potential attorney communication, it is intended to serve as a launching point for the ethical considerations for attorney marketing in New Jersey.

General Background and History of Attorney Marketing

Attorney advertising has had a varied existence in the United States. Attorney marketing was commonplace before the adoption of the Constitution, and proliferated in an unregulated manner for over a century.[1] That came to a halt when the American Bar Association, acting in response to growing ethical concerns, adopted Canon 27 in 1908, and ushered in a blanket proscription on attorney advertising.[2] The New Jersey Supreme Court punctuated the sentiment that attorney advertising was unprofessional, stating "If competitive advertising among lawyers were permitted, the conscientious ethical practitioner would be inescapably at the mercy of the braggart."[3]

The blanket limitations on attorney advertising lasted until 1977, when the United States Supreme Court held that truthful attorney advertising constituted commercial speech protected by the First Amendment.[4] Attorney advertising that was false, deceptive or misleading, however, remained subject to restraint.[5] In a subsequent decision, the United States Supreme Court held that even truthful commercial speech may be regulated by the states upon a showing that: first, the

restriction is sought in order to serve a substantial state interest; second, in fact the restriction does directly serve that interest; and third, there is no less restrictive alternative available to accomplish the same effect.[6]

Guiding Principles for Attorney Marketing in New Jersey

The requirements of RPC 7.1 govern all attorney communications, including attorney advertising, and provide:

> A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; (3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or ...

RPC 7.2 specifically addresses attorney advertising:

> Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, Internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence. (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as per- mitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for- profit lawyer referral service or other legal service organization.

RPC 7.3 governs attorney solicitation of prospective clients, and provides, in relevant part:

> A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b). (b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if: (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or (3) the communication involves coercion, duress or harassment; or (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter: (i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; and (ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and (iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625....

Although RPC 7.3(b)(4) forbids attorney solicitation of potential clients for 30 days after a mass disaster, and RPC 7.3(b)(5) imposes other requirements for contacting potential clients not covered by (b)(4), the New Jersey Legislature passed A-4430/S-2316 on Jan. 5,

2012, criminalizing an attorney's attempt to contact a person involved in a motor vehicle accident before 30 days have passed.[7] Governor Chris Christie pocket-vetoed the legislation on Jan. 17, 2012. Nonetheless, a fair question remains as to whether the Legislature can criminalize attorney advertising conduct the Supreme Court has not deemed violative of the RPCs.[8] In addition, A-4430/S-2316 may offend the still-emerging law of commercial speech by criminalizing truthful statements that may otherwise be protected by the First Amendment.[9]

RPC 7.4 governs an attorney's ability to market that he or she practices in particular fields of law, and an attorney's ability to state whether he or she has been recognized or certified as a specialist in a particular field of practice, for example patent law, admiralty law, civil trials, criminal defense, matrimonial law, and municipal practice.[10]

RPC 7.5 governs attorney and firm communications relating to firm names and attorneys not admitted in New Jersey.

Subsection (a) states that firm names must conform with RPC 7.1 and Rule 1:21-1(e).[11]

Subsection (b) sets forth the required information that must be included in advertisements and letterheads when the firm name includes, or if the firm employs, attorneys not admitted to practice in New Jersey.[12]

Subsection (c) states that the firm name "shall not contain the name of any person not actively associated with the firm…other than…a person or persons who have ceased to be associated with the firm through death or retirement."[13]

Subsection (d) states that lawyers may assert that "they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.[14]

Subsection (e) states that a firm name cannot include "legal aid" in its name or any additional identifying language; may include "& Associates" only when such language is accurate and descriptive of the firm; and may include "Legal Services" only if the client is advised that the firm is not affiliated with a public, quasi-public or charitable organization.[15]

Subsection (f) states that a law firm that uses a trade name permitted by subsection (a) shall display the name or names of its principally responsible attorneys on all letterheads, signs, advertisements, cards, and wherever else the trade name is used.[16]

The New Jersey Supreme Court's Consideration of the Recent Amendments to the ABA's Model Rules 7.2 and 7.3

In 2014, the New Jersey Supreme Court established the Special Committee on Attorney Ethics and Admissions with the purpose of reviewing the American Bar Association (ABA) amendments to the Model Rules of Professional Conduct.[17] Among the proposed changes, the ABA's amendments include the addition of a comment to Model Rule 7.2 explaining that a communication "contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."[18] Additional language is recommended to clarify that as long as a lead generator does not recommend the lawyer, there is no unreasonable or improper division of fees, and no influence on the professional judgment of the lawyer, a lawyer may pay for lead generation.[19]

The ABA also recommends that the title for Rule 7.3 be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients," and that any reference to "prospective clients" be substituted with "target of solicitation."[20] The ABA recommends that "solicitation" be defined "as a targeted communication initiated by the lawyer directed to a specific person that offers to provide legal services," and that "a communication generated in response to Internet searches is not a solicitation.[21] Lastly, it is recommended that a comment be added that would permit blasted emails to solicit prospective clients, "noting that such communications do not have a potential for abuse, juxtaposed with 'real time' electronic communication."[22]

Committee on Attorney Advertising

The New Jersey Supreme Court has also created the Committee on Attorney Advertising (CAA), consisting "of seven members, five of whom shall be members of the bar and two of whom shall be public members."[23] The CAA "shall have the exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications with [RPC's 7.1, 7.2, 7.3, 7.4, and 7.5] and with any duly approved advertising guidelines promulgated by the [CAA] with the approval of the Supreme Court."[24] The CAA may adopt advertising guidelines,[25] conduct pre-publication review of certain types of proposed advertisements,[26] and provide education to the public regarding the process of selecting counsel and determining whether counsel is needed, and to the bar regarding the ethical limitations of attorney advertising.[27]

The CAA has issued several opinions that are informative in wading through the myriad issues presented by attorney advertising through social media. A brief overview of some of those opinions follows.

Opinion 15 addresses client testimonials and endorsements, and concludes that, subject to certain conditions, lawyers may use such statements in

their advertising.[28] Specifically, Opinion 15 requires that testimonials be first-hand expressions of satisfaction by actual clients of the attorney's services, and must include the following disclaimer: "Results may vary depending on your particular facts and legal circumstances."[29] Opinion 15 further states that "the attorney should include this disclaimer in any general or targeted direct-mail solicitation letter and/or make certain that it is included and prominently displayed in the body of the testimonial letter itself."[30]

The CAA sought to supersede Opinion 15 with Opinion 33, which concluded that attorneys may not advertise using client testimonials.[31] The New Jersey Supreme Court, however, stayed Opinion 33 on Sept. 14, 2005, and there have been no further pronouncements from the Court. Thus, Opinion 15 remains in effect.

In Opinion 36, the CAA held permissible an attorney's payment of a flat fee for listing the attorney's website on a website run by a private commercial advertising and marketing enterprise, and the attorney's receipt of an exclusive listing for a particular county in a specific practice area.[32] Such an arrangement was acceptable provided that "the listing or advertisement contains a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that 'all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.' With such disclosure, the proposed activity is permissible, as long as it otherwise complies with RPC 7.1 and 7.2..."[33]

In Opinion 38, the CAA reiterated the longstanding prohibition against participation in private for-profit referral services, including 1-800-U.S. Lawyers and l800USLawyer.com:

> Private for-profit referral services are barred by RPC 7.3(d). This Rule prohibits attorneys from "compensat[ing] or giv[ing] anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client...." Further, RPC 7.2(c) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services," with limited exceptions for not-for-profit legal referral services or organizations listed in RPC 7.3(e), such as certain legal aid offices. Accordingly, assuming New Jersey lawyers have paid or given something of value to be included in the roster of attorneys of 1-800-U.S.Lawyer and/or 1800US Lawyer.com, attorney participation with services offered by this entity is strictly prohibited.[34]

In the much-publicized Opinion 39, the CAA concluded that "advertisements describing attorneys as 'Super Lawyers,' 'Best Lawyers in America,' or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2)."[35] Less than a month after it was released, the Supreme Court stayed Opinion 39 and appointed a special master, the Hon. Robert Fall, J.A.D. (retired), to conduct hearings and issue a report.[36] Following the lead of Judge Fall's comprehensive June 2008 report, the Court vacated Opinion 39 and concluded that the RPCs required review, and that RPC 7.1(a)(3), at a minimum, must be modified, "because of the constitutional concerns identified in the Report and in light of the emerging trends in attorney advertising."[37] Subsequent to that remand, amendments to RPC 7.1(a)(3) were proposed, and ultimately, on Nov. 2, 2009, the Supreme Court adopted the version reproduced in this article, together with the Court's official comment.

Opinion 42 best summarizes the impact of the Super Lawyers litigation and the Supreme Court's subsequent rulemaking on attorney advertising.[38] In Opinion 42, the CAA reaffirms that "attorneys may communicate that they are included in ranking lists only if the factual basis for the comparison of attorneys' services can be substantiated or verified, and the comparing organization has made appropriate inquiry into the attorney's fitness."[39] Next, "the attorney must include in the communication the name of the comparing organization and a description of the standard or methodology on which the honor or accolade is based."[40] The advertisement must state that it "has not been approved by the Supreme Court."[41]

The attorney is further directed to include "the year the honor or accolade was conferred and the specialty, if any, for which the attorney was listed."[42]

Opinion 42 further provides that if the list contains a superlative in its title, such as "super," "best," "leading," "top," or "elite," the attorney must state and emphasize only his or her inclusion in the list, and must not state that he or she is "super," "best," "leading," "top," or "elite."[43] Similarly, an attorney may not state that the list in which he or she is included reflects "the best" attorneys or a "top percentage" of attorneys, or that he or she belongs to an organization comprising an "elite percentage" of attorneys, because "[s]uch statements cannot be substantiated and are inherently misleading."[44]

Opinion 42 also notes that popularity contests such as those conducted by newspapers to anoint 'top' attorneys do not reflect a process that can substantiate or verify the quality of a winning attorney's services, and as such, "attorneys may not refer to such honors or accolades in any communications about

the attorney's services."[45]

Opinion 40 provides guidance on advertising to out-of-state attorneys eligible to practice before a federal agency in New Jersey, and to law firms employing such attorneys.[46] Opinion 40 provides, in material part:

> An attorney not licensed in New Jersey may not advertise his or her availability to provide legal services to New Jersey residents.... [However], an attorney licensed in another United States jurisdiction is permitted to represent persons in the federal immigration agency in New Jersey. If the out-of-state attorney is associated with New Jersey attorneys in a New Jersey law firm and solely engages in immigration law, then the attorney may practice from that law firm's offices in New Jersey....Any advertising by the out-of-state attorney or the law firm, however, must be accurate and not misleading. Hence, all communications (including the firm's letterhead, business cards, website, and advertising materials) must specifically state that the attorney is not licensed in New Jersey and that the attorney's practice is limited to immigration matters....[47]

Opinion 43 addresses several overlapping topics, namely Internet advertising, misleading content, and impermissible referral services in the context of attorneys seeking to purchase exclusive rights to geographical locations from which client contacts may emerge.[48] Consistent with RPC 7.1, Opinion 43 reiterates that "the content and operation of Internet advertising websites must not be misleading."[49] Internet websites that offer exclusivity for client contacts "must make the methodology for the selection of the attorney's name clear, especially if the website limits participation of attorneys by geographical area or practice area."[50] If participation is limited to a certain number of attorneys, "all requirements for attorneys to participate in the website must be specified."[51]

Websites may state that the participating attorneys meet these requirements, but "must refrain from making statements vouching for the quality of the participating attorneys or comparing participating attorneys to other attorneys. Internet websites must make a full list of participating attorneys readily accessible."[52] Websites must provide this information to consumers in plain language, not convoluted "legalese," and the information cannot be countermanded or undermined by contrary statements or suggestions.[53] The language "attorney advertisement" and "not an attorney referral service" must still be prominently displayed on the website.[54]

Opinion 43 also obliquely discusses whether websites that use a fee scheme that requires participating attorneys to "pay-per-lead," "pay-per-click," or "pay-per-contact" constitute an impermissible referral service. Answering in the negative, Opinion 43 focuses on whether "[t]he payment is based only on the contact, not on the retention of the attorney by the client or the establishment of an attorney-client relationship."[55] The CAA then concludes with a somewhat cryptic message: "Attorneys are responsible for the language and methods of websites on which they advertise. A New Jersey attorney who participates in a website that is misleading violates Rule of Professional Conduct 7.1(a)."[56]

In addition to the opinions, the CAA has also adopted three advertising guidelines. Guideline 1, as amended in 2013, provides that, "In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm." The deletion of the requirement that a *bona fide* address be included with an advertisement is a nod to the fact that the use of a "virtual office" is now permitted. Guideline 2, as amended in 2013, sets forth specific requirements for attorney solicitations governed by RPC 7.3(b)(5):

> The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) must be at least two font sizes larger than the largest size used in the advertising text. (b) The font size of notices required by RPC 7.3(b)(5)(ii and iii) must be no smaller than the font size generally used in the advertisement. (c) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) on the face of the outside of the envelope must be at least one font size larger than the largest font size used on the envelope. If any words on the outside of the envelope are in bold, the word "ADVERTISEMENT" must also be in bold. Pursuant to Committee Opinion 20, if the envelope contains a message relating to subject matter of the correspondence to be found inside, the attorney must ensure that the face of the envelope also includes the notices required by RPC 7.3(b)(5)(ii) and (iii).
>
> Guideline 3, adopted in 2012, provides that "An attorney or law firm may not include, on a website or other advertisement, a quotation or excerpt from a court opinion (oral or written) about the attorney's abilities or legal services. An attorney may, however, present the full text of opinion, including those that discuss the attorney's legal abilities, on a website or other advertisement."

Illustrative Ethical Concerns Raised by Attorney Use of Social Media

It is beyond dispute that a New Jersey-licensed attorney may be disciplined in New Jersey for violations of the state's Rules of Professional Conduct.[57] The Internet, however, provides unprecedented ability for attorneys to market across a broad geographic audience.

That ease of access presents a double-edged sword, in that clients outside of New Jersey can have access to the attorney. As a result, a New Jersey-licensed attorney is subject to discipline in New Jersey "regardless of where the lawyer's conduct occurs."[58] Should an ethics infraction occur outside of New Jersey, the choice of law in any subsequent ethics proceeding may be "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction."[59] Accordingly, marketing through social media greatly expands the jurisdictions whose rules may apply to an attorney's marketing efforts, even though he or she only practices in New Jersey and sought to abide by its attorney advertising rules.

In 2011, the Supreme Court did not punish an attorney whose website designer inadvertently used a seal reserved for attorneys authorized by Rule 1:39. However, the Court made clear that, going forward, "Whether a website is created by an outside consultant or developed and maintained by an attorney or his or her staff, all language and design that appears on it should be reviewed frequently for compliance with Rule 1:39 and all Rules of Professional Conduct," and that an offending website would subject the attorney to discipline.[60]

A question has recently arisen regarding whether an attorney's use of GroupOn (group coupon) is permissible under the rules of professional conduct. GroupOn is among a growing trend of deal-of-the-day websites that rely on the user's location to offer discounts on goods and services in the area. GroupOn negotiates the discounts with businesses on a case-by-case basis; however, GroupOn's fee is a percentage of each 'daily deal' or coupon sold. In the past year, ethics authorities in New York,[61] North Carolina,[62] and South Carolina[63] have condoned an attorney's use of GroupOn and like websites, as long as there is a true discount being provided to the consumer, and cautions the subscribing attorney to ensure compliance with RPC 7.1 and RPC 7.2.

The respective authorities in North Carolina and South Carolina have also concluded that GroupOn's collection of fees is not a violation of RPC 5.4(a), which prohibits the sharing of legal fees with non-lawyers.[64]

The New York decision summarized the ethical considerations for an attorney pursuing a GroupOn deal as follows:

> A lawyer may properly market legal services on a "deal of the day" or "group coupon" website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the Rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.[65]

The use of websites like GroupOn is also addressed in the American Bar Association Formal Opinion 465, "Lawyers' Use of Deal-of-the-Day Marketing Programs."[66] The opinion draws a distinction between a "coupon deal" and a "prepaid deal."[67] In a coupon deal, for example, a lawyer may sell a $25 coupon for a discount of 50 percent on up to five hours of legal services.[68] In a prepaid deal, a lawyer may charge $500 for up to five hours of legal services with a value of up to $1,000. In the first option, the coupon purchaser must "make additional payment to the lawyer commensurate with the number of hours actually used."[69] In the second option, "all of the money would be collected by the marketing organization, with no additional payment collected by the lawyer no matter how many of the five hours of legal services were actually used."[70]

Preliminarily, ABA Formal Opinion 465 advises that "a coupon deal can meet the requirements of the Model Rules," but "[l]ess clear is whether a prepaid deal can be structured to be consistent with the Model Rules."[71] According to the opinion, in a coupon deal no legal fees are paid until an attorney-client relationship is formed.[72] In other words, the lawyer will render legal services and discounted fees will then be paid.[73] However, in a prepaid deal "the money that a lawyer receives from the marketing organization constitutes advance legal fees, because the marketing organization collects all of the money to which the lawyer will be entitled."[74] The opinion advises that "[t]hose advance legal fees need to be identified by purchaser's name and deposited into a trust account."[75] More problematic for the lawyer, the opinion advises that the lawyer must "obtain sufficient information about deal buyers in order" to comply.[76]

ABA Formal Opinion 465 also clarifies "that marketing organizations that retain a percentage of payments are obtaining nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services."[77] However, "[t]he one caveat is that the percentage retained by the marketing organization must be reasonable."[78]

Interestingly, the opinion suggests that where a coupon deal is purchased but then is never used, the lawyer may retain the proceeds.[79] The opinion

rejects the analysis from certain jurisdictions that retaining those proceeds from an unredeemed deal amounts to an excessive fee under Rule 1.5.[80] However, "monies paid as part of a prepaid deal likely need to be refunded in order to avoid the Model Rules prohibition of unreasonable fees."[81]

The opinion also reinforces that all marketing statements are accurate and clear, including the scope of services offered, the circumstances for obtaining a refund, and that no attorney-client relationship is formed until a consultation.[82]

As noted before, Twitter and Facebook effectively constitute an open conversation on the Internet. Potential clients will often share intimate details, such as a family member's filing for divorce, getting pulled over for speeding, or having to probate a loved one's will. An attorney that responds to such a Twitter tweet or Facebook posting may run afoul of the advertising rules. For example, RPC 7.3(b)(1) prohibits contacting a person for the purposes of obtaining professional employment when that person's physical, emotional or mental state compromises the reasonable judgment necessary to employ a lawyer, while RPC 7.3(b)(5)(i) imposes specific advertising requirements unless the attorney has a family, close personal, or prior professional relationship with the intended contact.

Real-time methods of communication can also land the attorney in hot water. For example, an attorney in an effort to brandish his or her criminal defense practice may inadvertently reveal client secrets or work product by posting that he or she had a client meeting in a certain location to discuss a particular defense strategy.

Websites like LinkedIn and Avvo permit attorneys and clients to write testimonials about an attorney's services. If the testimonial states that an attorney is "the best trial lawyer in town," the attorney receiving the testimonial would be wise to consult RPC 7.1(a)(3), which proscribes comparative statements unless certain criteria are met. For websites that permit the attorney to determine whether to accept or reject a testimonial, the CAA's Opinion 15 provides specific guidance as it relates to testimonials and the requisite disclaimers. LinkedIn, however, does not appear to provide an attorney the opportunity to include the disclaimer language required by Opinion 15.

Conclusion

In the past, print or television advertisements reached an audience within certain boundaries, and were restricted by the money spent and the form of advertisement. Social media, by contrast, provides access to an audience in any state, and even in other countries, often at a fraction of the cost. Just as the technology is constantly changing to bring people closer, so are the attitudes and the rules governing attorney advertising, as reflected by the Super Lawyers litigation and the blessing of virtual offices. Social media is about building real and virtual connections and relationships easily and quickly. If New Jersey attorneys continue to avoid impermissible client solicitations and false and misleading attorney advertising, they should continue enjoying the benefits of today's technology without running afoul of the rules governing attorney advertising. ⚖

Endnotes

1. *See* Jean Edward Smith, John Marshall 101 (Henry Holt &. Co., 1996) (footnotes omitted), *citing Virginia Gazette and General Advertiser*, Nov. 6, 1784. *See also Petition of Felmeister & Isaacs*, 104 N.J. 515, 518-519 (1986).
2. *Felmeister, supra*, 104 N.J. at 518-519.
3. *In re Rothman*, 12 N.J. 528, 542 (1953).
4. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).
5. *Bates, supra*, 433 U.S. at 383-384.
6. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).
7. A-4430/S-2316 provides that "no person shall solicit professional employment from, or contact, a person whose name, address or other personal information was obtained from a public record of a motor vehicle accident for a period of 30 days after the date on which the accident occurred."
8. *See* N.J. State Const. Art. VI, sec. 2, para. 3. *See also Winberry v. Salisbury*, 5 N.J. 240, 255 (1950).
9. *But see Chambers v. Stengel*, 256 F.3d 397 (6th Cir. 2001) (state satisfied its burden of demonstrating statute criminalizing attorney solicitation of accident victims before passage of thirty-day period was sufficiently narrowly tailored to avoid offending the First Amendment, notwithstanding the statute's criminalization of such conduct).
10. RPC 7.4.
11. RPC 7.5(a).
12. RPC 7.5(b).
13. RPC 7.5(c).
14. RPC 7.5(d).
15. RPC 7.5(e).
16. RPC 7.5(f).
17. Special Committee on Attorney Ethics and Admissions Seeks Comments on Proposed RPC Amendments, N.J.L.J., April 18, 2014, at 1.
18. *Id*. at 6.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. R. 1:19A-1(a).
24. R. 1:19A-2(a).
25. R. 1:19A-2(c).
26. R. 1:19A-2(d).
27. R. 1:19A-2(e).

28. Opinion 15 of the CAA, 133 NJ.LJ. 1370 (April 5, 1993).
29. *Id*.
30. *Id*.
31. Opinion 33 of the CAA, 180 N.J.L.J. 655 (May 23, 2005).
32. Opinion 36 of the CAA, 182 N.J.L.J. 1206 (Dec. 26, 2005).
33. *Id*.
34. Opinion 38 of the CAA, 185 N.J.L.J.360 (July 24, 2006).
35. Opinion 39 of the CAA, 185 N.J.L.J. 360 (July 23, 2006).
36. In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66, 67 (2008).
37. *Id*. at 70.
38. Opinion 42 of the CAA, 202 N.J.LJ. 1112 (Dec. 27, 2010).
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. Opinion 40 of the CAA, 194 NJ.LJ. 450 (Oct. 27, 2008).
47. *Id*.
48. Opinion 43 of the CAA, 205 N.J.L.J. 155 (July 4, 2011).
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. RPC 8.5(a).
58. *Id*.
59. RPC 8.5(b) (2).
60. *Matter of Ty Hyderally*, D-134-10 (Dec. 20, 2011).
61. New York State Bar Association Committee on Professional Ethics, Opinion 897 (Dec. 13, 2011).
62. North Carolina State Bar Ethics Committee, Formal Ethics Opinion 10 (Oct. 21, 2011).
63. South Carolina Bar Ethics Advisory Committee, Ethics Advisory Opinion 11-05 (July 22, 2011).
64. *Id*.
65. Opinion 897, *supra*, at pp.3-4, 124.
66. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 465 (Oct. 21, 2013).
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.

Asaad K. Siddiqi *is of counsel at Walder, Hayden & Brogan, P.A., in Roseland. A member of the* New Jersey Lawyer Magazine *Editorial Board, he practices in the areas of business counseling and litigation, attorney ethics, and white-collar criminal defense, and also serves as counsel to nonprofit organizations.*

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