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Journal

PRENUPTIAL AGREEMENTS FOR LOVE, MONEY AND SECURITY

Inside

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President's Message

STEVEN C. KRANE

Now We Are 125

You can find it in the Laws of 1877, Chapter 210. It's called "An Act to incorporate the New York State Bar Association," passed on May 2, 1877. In § 1, the law recites that the Association "is formed to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, and to cherish the spirit of brotherhood among the members thereof."

We have accomplished much in the past 125 years, and much of the story of justice and social change in New York State is the story of its lawyers and judges and their dedication to the rule of law. This year, we have taken the opportunity to celebrate the first eighth of a millennium of the New York State Bar Association by celebrating its history. In fact, a committee chaired by John Hanna of Albany is in the process of supervising the preparation of a book that will recount the highlights of those 125 years in words and pictures. The history of the Association, which will be produced by the publishers of *American Heritage* magazine, is expected to be ready for public consumption in time for our 2003 Annual Meeting. You will be receiving further information on the history project as it progresses.

In the meantime, you will have to be satisfied with some vignettes from our distinguished past. Our roots can be traced back to the organizational meeting that took place in Albany on November 21, 1876. A group of lawyers determined "that it is expedient that a State Bar Association be now formed," and as noted above they received their legislative charter a few months later. The first annual meeting of the Association was held in November 1877. John K. Porter, our first president, addressed the annual meeting and set the tone for the foreseeable future: "Let us trust that this association may endure, and that it may exercise a collective and permanent influence. We are strengthened by association with each other."

The reference to "brotherhood" in the charter shortly became an anachronism, when in 1887 Governor David Hill—himself a president of this Association—signed legislation removing restrictions on the admission of women to the practice of law in New York State. In so doing, he declared that "hereafter no female otherwise properly qualified can be rejected solely on account of her sex. If the influence of woman, usually so potent for good, shall be conducive towards arraying the whole profession more thoroughly on the right side of every public question, the sphere of woman in all occupations may well be more generally extended."

In 1890, the NYSBA took a major step toward being an organization of national importance when it sponsored a centennial celebration of the organization of the Judicial Department of the federal government and the first meeting of the U.S. Supreme Court. Widely reported in the press, this gala event at the Metropolitan Opera House attracted hundreds of guests, including all nine sitting Supreme Court Justices and former President Grover Cleveland. A few years later, our voice was heard internationally as a NYSBA proposal grew into what is now the Permanent Court of Arbitration in The Hague, then the first global means for settling disputes among countries.

We have always been deeply concerned with maintaining effective self-regulation of the profession. In 1894, we spearheaded a successful effort to obtain legislation establishing a board of bar examiners and a uniform statewide bar examination process. Four years later, a NYSBA proposal for a statewide register of attorneys and counselors at law was enacted by the Legislature. Eleven years later, our first code of ethics, the venerated and veneered "Canons," was adopted by the NYSBA.

We have also always been concerned with access to justice for all. Our 1920 study of the availability of legal services for the indigent, which built upon work in prior years, concluded that "[a]ny state of society or any system of government which does not look to the enforcement of law and the protection of rights for the poor and weak and friendless, is wanting in that keystone of the arch upon which a stable society rests. Where this essential is lacking you shake the faith of the people in government and bring in the question of fundamental fairness of our institutions."

By the time we celebrated our 50th anniversary, our membership had reached 4,000 and our first Section—the Judicial Section—had been created. During the next 20 years, members of the Association created the Young

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Lawyers Section, the Food, Drug and Cosmetic Law Section, the Municipal Law Section and the Insurance Law Section (now the Tort, Insurance and Compensation Law Section). Our first monthly bulletin was published in 1928.

Ever seeking to improve and reform law and legal institutions, the NYSBA pressed forward with a number of key initiatives as we approached the midpoint of the 20th Century. Based on an NYSBA proposal, in 1939 the Governor of New York undertook a survey of the operation and procedures of state administrative agencies. Since then, we have continued our work for effective administrative adjudication procedures, as evidenced by the extensive studies presented to the House of Delegates in the past few years. In 1941, our lobbying efforts to promote automobile safety resulted in the Motor Vehicle Safety-Responsibility Act.

NYSBA members mobilized during World War II. Lawyers served as government appeal agents for Selective Service boards. And beginning a tradition of *pro bono* service for members of our armed forces that continues to this day, the NYSBA coordinated the efforts of lawyers throughout the state who provided legal services to our fighting men and women. In 1945, Secretary of War Henry Stimson issued a certificate of appreciation to the Association, which stated: "The contribution of time and professional services made by patriotic civilian lawyers under this plan has materially enhanced the morale of the Army and contributed to the success of the war effort."

As our 75th anniversary neared, we formed the New York Bar Foundation, which works to facilitate the availability of legal services, increase the public's understanding of the law, promote initiatives to improve the justice system and the law, and enhance professional competence and ethics. We celebrated our anniversary in 1952 with the hiring of our first executive director (50 years later, we're only on our third occupant of that position), and by moving out of the space we had occupied in the State Capitol Building for 60 years into offices at 99 Washington Avenue in Albany. In the ensuing years, we established a continuing legal education program, inaugurated the New York State Bar Association *Journal*, and formed several new substantive law Sections for our more than 7,500 members to join.

Our 100th anniversary saw us in our current headquarters, the award-winning facility at One Elk Street that we occupied in 1971. I encourage each of you to pay a visit to the Bar Center. You will find that, hidden behind the facades of several early 1800s town houses, is space (after a 1990 expansion) for more than 100 staff members, as well as meeting rooms, the Great Hall, and in the front of what was once Two Elk Street, the President's Office in which I now sit.

Our governance structure was changed dramatically in 1972 with the creation of the House of Delegates, a stellar example of pure democracy. Each member of the House is free to stand up and say whatever comes to his or her mind; House members often do just that.

Membership topped 25,000 as we approached our centennial year, and we continued to look for more ways to serve our members and the public. We created the Law, Youth & Citizenship Program in cooperation with the State Education Department, formed the New York State Conference of Bar Leaders, and in 1981 established a statewide Lawyer Referral Service.

Our second century has begun with a series of initiatives designed to achieve the goals set forth in our charter. Years of hard work by members of the Association resulted in the Court Modernization Act in 1987. That law provided financing means and provisions to improve or replace inadequate and deteriorating court facilities. In 1989 we commissioned a landmark study of the legal needs of the indigent in New York State and presented a plan to enhance volunteer legal services. Two years later, the Association created a Department of *Pro Bono* Affairs to oversee these efforts.

In 1997, the NYSBA broke new ground by filing a federal lawsuit challenging the constitutionality of the now infamous—and invalidated—"Granny's Counsel Goes to Jail" law. And in 2001, the four departments of the Appellate Division joined together to adopt new disciplinary rules, developed and proposed by the NYSBA, to delineate clear boundaries between permissible and impermissible forms of multidisciplinary practice. Our Association's extensive disaster relief work in the wake of the World Trade Center attack on September 11 is a tribute to the volunteer efforts of our members in serving those in need.

We are now an organization of 70,000 members, 23 Sections, 70 Association-wide committees, and other numbers as well. We have considerable reason to be proud of what our Association has accomplished over its first 125 years. Next year at this time, you will be able to read all about it. In the meantime, hold on to this thought: The goals set out for our organization in our charter 125 years ago remain the fundamental underpinnings for our efforts. We still seek "to cultivate the science of jurisprudence." We make every effort "to promote reform in the law." We strive "to facilitate the administration of justice." Much of our work seeks "to elevate the standard of integrity, honor and courtesy in the legal profession." And to paraphrase, we do still, now and forever, cherish the spirit of collegiality among our members.

Happy anniversary to all!

Changing Population Trends Spur New Interest in Prenup Agreements For Love, Money and Security

By Willard H. DaSilva

As recently as 15 or 20 years ago, the experienced matrimonial practitioner typically wrote one or two prenuptial agreements per year, and sometimes even fewer. Now, with the advent of equitable distribution of marital property, multiple marriages and an increase in the aging population, it has become commonplace for clients to request prenuptial agreements to preserve the separate character of currently held property, to protect rights relating to future acquired assets (in addition to the preservation or waiver of estate rights) and sometimes to provide effective Medicaid planning.

In the past, prenuptial agreements were designed primarily to protect estate rights. In recent years, the purpose has expanded to cover broad estate planning which may encompass many obligations and rights arising from a marital relationship. Provisions now include predetermination of rights with regard to marital and separate property during the lifetime of the spouses, maintenance, pension rights, life insurance provisions, distribution of acquired property and other marital benefits. The prenuptial agreement, which once rarely was more than three or four pages in length, is now commonly eight, ten or more pages and sometimes as long and involved as an entire post-marriage settlement agreement.

Historically, prenuptial agreements were useful tools in protecting decedents' estate rights. Commonly, one or both parties to a contemplated marriage waived his or her rights to the other party's estate in the event of the death of that party. Before 1980, equitable distribution of marital property was not a consideration under New York law. Consequently, the prenuptial agreements commonly focused on the waiver of estate rights and, possibly, the waiver of alimony or a provision for alimony in a specific amount and for a specific time.

However, with the advent of equitable distribution of marital property, the prenuptial agreement expanded in scope to encompass not only the protection of decedents' estates but also waivers or provisions relating to the acquisition and distribution of marital property.

As second and third marriages began to abound, prospective spouses often desired to protect property rights for children of prior marriages. They also wanted, in appropriate cases, to limit liability for maintenance in the event of a divorce. Among the older population, serious considerations have arisen with regard to protecting Medicaid benefits. Younger people marrying for the first time, whose parents were wealthy, were influenced by their parents to protect the parents' property, which would evolve to the children by way of estate planning and estate distributions.

In short, the proliferation of prenuptial agreements in recent years is a byproduct of sociological and economic changes affecting a large portion of our population.

Requisites for a Valid Prenuptial Agreement

One of the most obvious ways of minimizing possible foreseeable problems after a marriage is a prenuptial agreement. Agreements of this type have become fairly common among persons of all ages who marry or remarry. Many precautions should be taken because the agreements are usually strictly construed, being in derogation of common law and of statute law. There are five indispensable requirements to a valid prenuptial agreement.

First, there must be complete financial disclosure by each of the parties to the other, in writing. Although it was formerly held that prior to the marriage, parties en-

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tering into a prenuptial agreement are not in a confidential relationship with each other, the Court of Appeals, in *In re Greiff*,[1] indicated otherwise. It is not uncommon during a challenge to the prenuptial agreement for one party to claim ignorance of the extent of the financial resources of the other party. In the absence of that knowledge, the claim is frequently made that had such financial information been revealed, the prenuptial agreement might not have been entered into or, if it were, the terms would have been significantly different. If there is a concealment of assets and income, then there exists a basis to presume that there has been overreaching, concealment of facts, misrepresentation or other forms of deception.[2]

Consequently, the suggestion is that a net worth statement be prepared by each of the parties, using the form prescribed by 22 N.Y. Comp. Codes R. & Regs. § 202.16(b) and Appendix A of that Rule. If the parties desire not to provide financial information in the detail required by the form, then at a very minimum, a general statement should be included in the agreement regarding the assets, income and net worth of each of the parties.

A *second* indispensable requisite to the preservation of the integrity of the agreement is that each party *must* be separately represented by counsel of that person's own choosing and without any suggestions by the other party about that choice. It has been held that the failure of one party to be separately represented was not *per se* fatal to a matrimonial agreement—the leading case is *Levine v. Levine*.[3] However, before the parties could determine whether the agreement was valid, it was necessary to litigate the case from the trial court, through the intermediate appellate court and to the Court of Appeals—with enormous expense involved—to learn whether the agreement would be upheld. It would have been far less expensive, and far more expedient and reassuring for each of the parties to have been separately represented. The cost of a second attorney, who is consulted regarding an agreement prepared by the first attorney, will certainly be far less than even the initial stages of any process of litigation. To avoid the appearance of impropriety, the client should be cautioned not to suggest the name of an attorney to be used by the other party. Rather, the other party should have a free and independent choice of attorney, thereby eliminating any claim that the attorney might have been biased.

If the other party is reluctant to retain an attorney, then the suggested practice is to prepare an agreement based upon information supplied by the client. Under no circumstances should the attorney for the client discuss the matter, see or have any contact with the other party (again, to avoid any possible claim of influence by the attorney on the other party). A copy of the agreement may then be given to the client for delivery to the other party with instructions that the other party take the agreement to an independently chosen attorney for a consultation. The copy provided to the other party should be clearly stamped "DRAFT" on each page in order to avoid the impulse on the part of the parties to sign a draft without a second attorney having been consulted. After the consultation, the name and address of the other attorney should then be inserted in the agreement, which is then placed in final form for its execution.

The *third* prerequisite is a proper acknowledgment of each signature. To be valid, the agreement must be signed by each of the parties and acknowledged before a notary public, using the same language necessary when a deed is being recorded. That requirement applies for the agreement to constitute an "opting out" agreement under Domestic Relations Law § 236 Part B (3), whereby the parties by agreement may alter the plan of equitable distribution of marital property that would otherwise be applicable.

In *Matisoff v. Dobi*,[4] the parties had signed a prenuptial agreement in 1981. However, their signatures were not acknowledged. During the trial, both parties testified that the agreement was duly signed and that the signatures were, indeed, authentic. However, what was lacking was the acknowledgment before a notary public or other person authorized to take the acknowledgment. The Court of Appeals held that, even though the signatures were genuine and the parties admitted that they had in fact signed the agreement, nevertheless the parties should have complied with the statute,[5] which specifies that a certificate of acknowledgment be provided in the same form as necessary for a deed to be recorded. Because that certificate of acknowledgment was lacking, the agreement was invalid.

It should be noted, however, that in the case of *Bloomfield v. Bloomfield*,[6] decided on November 27, 2001, the Court of Appeals found that a 1969 premarital agreement (which predated the 1980 Equitable Distribution Law) was not required to have such an acknowledgment. The case is also significant in holding that in a pre-Equitable Distribution Law agreement (in this case 1969) a party could waive rights to the equitable distribution of marital property even before those rights were created or even contemplated.

A *fourth* indispensable ingredient in protecting the integrity of the prenuptial agreement is time. To expect a party to sign an agreement affecting substantial rights and obligations minutes, hours or even a few days before a marriage can very easily give rise to a claim that the prenuptial agreement should be set aside for the reason, among others, that it was signed without sufficient time to contemplate its full import. The claim may also

be made that it was signed under duress—that is, under the pressure of time and the emotional anxiety of a party immediately or shortly prior to a marriage, to the extent that full consideration was not given to the agreement. Here again, this fourth ingredient for a valid agreement is essential to minimize an attack upon the instrument and to protect its validity. It has been said that the agreement should be signed well in advance of the anticipated nuptials and before any commitments are entered into which may influence or induce a party to sign the agreement, such as an obligation for a wedding reception made to a catering hall. Weeks or months are appropriate as the advance time for signing the agreement before the wedding ceremony.

The *fifth* requisite to a valid prenuptial agreement is that it have an essential fairness. If there was any doubt about whether the parties to a prenuptial agreement were in a confidential, or special, relationship before their marriage, that issue was resolved by *In re Greiff*,[7] in which the Court of Appeals held that the parties were in "a relationship of trust and confidence" at the time of entering into an agreement, which could, under the proper circumstances, result in the burden shifting to the party seeking to sustain the agreement to disprove fraud or overreaching. Therefore, freedom from fraud, deception, undue influence and overreaching required a scrutiny of the agreement beyond that of ordinary commercial transactions. Consequently, the agreement must be free from "undue and unfair advantage."

Care should be taken to modify the recitals in any form agreement to conform strictly to the facts of the case.

Content of the Prenuptial Agreement

Historically and prior to the advent of the Equitable Distribution Law in New York in 1980,[8] prenuptial agreements dealt primarily with the regulation of estate rights or the waiver or partial waiver of them. Sometimes they contained provisions regarding the support of one of the parties to the agreement in the event of the death of a party or a dissolution of the marriage. They rarely contemplated a division of what is now known as "marital property" for the reason that the concept of marital property had not yet become the law of New York.

Although community property and marital property existed elsewhere in the United States, most prenuptial agreements in New York overlooked the fact that the parties could subsequently live in a community property or marital property jurisdiction or that the law then extant in New York would change. However, with the increasingly transient nature of society, it is now necessary to consider in a prenuptial agreement not only marital property, as that expression is interpreted in New York, but community property and other types of property as may exist in other jurisdictions as well.

The structure of the prenuptial agreement commonly begins with recitals. Although recitals in an agreement are not considered a part of the actual agreement of the parties, nevertheless they are included to indicate the parties' intent and to aid in the interpretation of the instrument. Recitals in a prenuptial agreement commonly indicate the fact that each of the parties has known the other for a sufficiently long period of time in order to make a determination that a prenuptial agreement is appropriate. Recitals also usually reflect that disclosure has been made and that each of the parties may have earnings, liabilities, assets and obligations for which the agreement will seek to protect or insulate them against the other to the extent indicated by the agreement itself.

In a typical prenuptial agreement, there is the expressed intent that each party own and dispose of property in the future without being restricted by provisions of law that may limit the exercise of those property and income rights. The recitals should be based on the factual circumstances of the parties and should not, under any circumstances, be simply a copy from a form prenuptial agreement such as the one that follows this article. The illustrations in it presume that each party has independent income and has no need for financial support from the other. It also indicates in the recitals that although each of the parties may be financially independent, one may have significantly greater income than the other. Care should be taken to modify the recitals in any form agreement to conform strictly to the facts of the case. Failure to do so may provide a handle for one of the parties to grasp in seeking to attack the agreement at a subsequent time. The recitals are critical in that they set the tone for the entire agreement, in addition to the possibility that they may be referred to if the agreement should require interpretation at a subsequent date.

The recitals shown in the form agreement reflect an intent that each party may acquire property in the future, may dispose of it and may deal with it in any manner that the party chooses, irrespective of requirements of law that may otherwise apply. Before inserting such a recital in a prenuptial agreement, the attorney should be aware that such an intent is actual in the case at hand.

The agreement should be written in as simple terms as possible. Prenuptial agreements that often extend for 15 or 20 or more pages may become a burden for parties

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to read and to understand. To the extent possible, plain language should be employed with precision and conciseness.

The form agreement is structured so that the parties may readily identify the content of each paragraph by paragraph headings. Separately treated are rights with respect to presently held property and property to be acquired in the future. There is also a provision for property in which the parties wish to share an ownership interest, which may be held in their joint names. For example, the parties may wish to retain their separate, premarital property and also after-acquired property. However, they may purchase a residence in which they wish to share title jointly. Under New York State Banking Law § 675, there is a rebuttable presumption that a bank account held in the joint names of parties is owned by each of the two parties in undivided equal shares. The parties may wish to alter that percentage either by a designation when opening the account or by a separate document. If a residence is subsequently purchased in the joint names of the parties as husband and wife, they are treated as owning the property as tenants by the entirety, which gives survivorship rights in the event of the death of either of them and partition rights on a 50-50 basis if the marriage should be terminated by divorce or annulment. Here again, the parties may choose to take title as tenants-in-common in whatever percentage ownership they may choose, or they may eliminate survivorship rights or deal with the property in any other manner. The form prenuptial agreement affords the parties those options.

A prenuptial agreement may also constitute the waiver of maintenance in the event of a dissolution of the marriage.

Historically and typically, a prenuptial agreement contains a waiver on the part of at least one party (commonly both parties) to share in the estate of the other as a beneficiary and a fiduciary. The agreement should be explicit regarding the waiver of rights. The form agreement specifically makes reference to selected portions of the Estates, Powers and Trusts Law to eliminate any question regarding the nature and the extent of the waiver. An Alabama case, *Steele v. Steele*,[9] held that a waiver of estate rights in general terms did not constitute a waiver on the part of a surviving spouse in asserting a claim for the wrongful death of the decedent. That waiver was not specifically set forth in the prenuptial agreement in that case and, therefore, was held not applicable.

Because prenuptial agreements are strictly construed, any waiver of rights is similarly viewed narrowly, and no waiver will be presumed unless it is specifically set forth. A further illustration occurs when a woman has waived her right to serve as administratrix or executrix "as the surviving spouse of the decedent." However, she may be the mother and custodial parent of a child of the parties, and the child may be the primary beneficiary of the estate. If the decedent died intestate, the surviving wife may make a claim that although she waived her right as administratrix "as the surviving wife of the decedent," she did not waive her right to serve in that capacity by virtue of her being the custodial parent of the principal beneficiary of the estate. Probably, she would prevail in her argument and would achieve the status of administratrix of the estate, not by virtue of any spousal right (which had been waived), but rather because of her right as the custodial parent of the prime beneficiary of the estate. The waiver of fiduciary rights should be sufficiently broad to eliminate any theory by which a surviving spouse may seek to obtain the status as a fiduciary.

Nevertheless, it is quite frequent that subsequent to the marriage, one or both of the parties may wish to provide in a last will and testament for the other party and/or to designate the other party as a fiduciary. In order to eliminate any claim that the future right to participate in estates has been waived by the prenuptial agreement despite a subsequently executed will, that argument may be eliminated by a provision in the prenuptial agreement that a subsequently executed testamentary writing will prevail.

A prenuptial agreement may also constitute the waiver of maintenance in the event of a dissolution of the marriage. This is a particularly vexatious clause among older persons, particularly where one of them may seek Medicaid benefits. General Obligations Law § 5-311 specifically provides that an agreement may not eliminate the obligation of a spouse to support the other if the other spouse is or is likely to become a public charge. A Medicaid recipient constitutes a party receiving public assistance funds. In a sense, therefore, the recipient becomes a public charge. Social Services Law § 101 requires a spouse of a recipient of public assistance to be responsible for the support of such a person, if the obligor (called the "community spouse") is of sufficient financial means.[10] Under Social Services Law § 366.4(h), the recipient of public assistance, as a condition for eligibility, must assign to the public authority any claim for support from the community spouse to reimburse the public authority for the cost of care of the institu-

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tionalized or needy spouse. The refusal on the part of the community spouse to support the needy person is called "spousal refusal." Not all counties will pursue rights of reimbursement under Social Services Law § 366.4(h), on the basis of political considerations. Consequently, the absolute waiver of any obligation for support in a prenuptial agreement (as well as a postnuptial agreement) may not be valid. In that case, it is particularly important that the agreement contain a separability clause to protect other provisions of the agreement.

Another common provision in a prenuptial agreement is the predetermination of who will be responsible for debts and obligations which may be incurred by either or both of the parties after the marriage. The form agreement contains an indemnity provision so that if there is a violation of the obligation with respect to debts, the aggrieved party may recover not only the amount paid to a creditor but also any legal and other costs which might have resulted from a breach on the part of the other party.

Treasury Regulations . . . bar waiver in a prenuptial agreement of pension rights acquired by a spouse after the marriage.

Some prenuptial agreements contain a provision that one or both of the parties waive pension and other forms of deferred compensation rights in plans of the other party. Where any of those plans have been qualified under ERISA, it has been held that such a waiver is invalid.[11] This decision conforms to Treasury Regulations, which similarly bar waiver in a prenuptial agreement of pension rights acquired by a spouse after the marriage. The rationale is that only a "spouse" may waive rights in an ERISA deferred compensation plan, and a person signing a prenuptial agreement is not yet a "spouse." If the plan is not qualified under ERISA, such as an IRA, then the rule does not apply. One solution to the problem, if applicable, is to "roll over" ERISA pension benefits into an IRA before the marriage. The prenuptial waiver will then apply to the IRA, whereas it would not to the ERISA pension plan.

In an effort to overcome the foregoing impediment, the form agreement sets forth language to carry out the intention of the parties with respect to the waiver of pension rights. It imposes upon each of the parties an obligation, after the marriage has taken place, to effectuate a proper waiver of spousal pension rights. The possible ability of a party to enforce that provision of the prenuptial agreement was indicated in *dictum* in *Richards v. Richards*.[12]

The form prenuptial agreement also contains clauses commonly referred to as "boiler plate." One should not be deceived by relying upon the language in those clauses. Instead, each must be specifically tailored to the requirements and facts of each case. There is a recitation of disclosure as well as a provision for indicating the attorneys representing each of the parties. The general provisions should also be examined to determine whether changes should be made.

Sample provisions relating to disclosure are contained in the form agreement. Immediately following the form are additional alternative paragraphs in the event that maintenance payments are to be included in the agreement upon a dissolution of the marriage. Life insurance benefits and a limitation of the waiver of estate rights may also be the basis for alternate provisions in the agreement.

It is not uncommon, especially among elderly persons, for parties to be concerned about the continued residence of the survivor in the event of the death of the other party. Consequently, a provision may be included in the prenuptial agreement to assure continued occupancy by a surviving spouse. The clause in the form is skeletal in nature and should be expanded or changed as appropriate.

A further provision common to prenuptial agreements among older persons relates to a consideration for long-term care in the event of a disability of one or both of the spouses. Here again, the paragraph suggested in the form is only a beginning and a simple illustration, which will require embellishment in an appropriate manner.

Good draftsmanship of any agreement mandates that any expressions used be clearly defined. The form prenuptial agreement is no exception. Because the word "remarriage" and the period of time when parties are "married" have highly significant consequences, it is absolutely essential that those expressions be defined in a manner in which the parties intend. The definitions shown in the paragraph in the form are only suggested and are not designed to be anything more than samples of what may be considered. They should be changed in appropriate circumstances to carry out the actual intent of the parties for whom the agreement is being drafted.

Despite the many cautions to tailor any form agreement to the specific requirements of a case, there persists a continuing inclination simply to copy suggested provisions. In a prenuptial agreement, in particular, the practice is extremely dangerous. The form should be considered as merely an illustration of some of the types of concerns which should be given consideration, and the provisions should be changed, expanded or eliminated in order to carry out the specific desires of the parties involved.

Clearly, prenuptial agreements should not be drafted by copying forms. Changes in the law mandate specialized provisions. The facts of each case must be carefully analyzed so that the agreement will truly carry out the intent of the parties. The negotiation of the terms against a backdrop of the attitudes and reactions of the parties will often bring to the surface underlying fears, concerns and desires. In an appropriate case, it may be wise to collaborate with a skilled matrimonial attorney experienced in prenuptial agreements, particularly when substantial assets are involved or complex legal issues exist.

Query

At some point, a party may be presented with the difficult determination of the true basis for the contemplated marriage: Is it love? Is it money? Is it security? Or is there a different agenda? The elements of trust, confidence in the relationship, and even greed, often become a part of the scenario.

It is then that the relationship between the parties is really challenged, underlying motives and concerns are revealed and the agreement becomes the true test of trust, confidence—and love.

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1. 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998).
2. See *In re Phillips's Estate*, 293 N.Y. 483 (1944), which held that parties to a prenuptial agreement, although not in a confidential relationship with each other, nevertheless stand in a relation of mutual confidence which calls for "good faith of a high standard in disclosing those circumstances which are relevant to the contemplated arrangement."
3. 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982).
4. 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).
5. Domestic Relations Law § 236 Part B (3) (DRL).
6. No. 140, 2001 N.Y. LEXIS 3470 (N.Y. Nov. 27, 2001).
7. 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998).
8. DRL § 236 Part B.
9. 623 So. 2d 1140 (Sup. Ct., Ala. 1993).
10. *See* Family Court Act § 415.
11. *See Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y. 1992).
12. 167 Misc. 2d 392, 640 N.Y.S.2d 709 (Sup. Ct., N.Y. Co. 1995), *aff'd*, 232 A.D.2d 303, 648 N.Y.S.2d 589 (1st Dep't 1996).

Simple Premuptial Agreement
Both Parties Financially Independent

AGREEMENT made as of this ___ day of _____ between Mary Jones, residing at _____ (referred to herein for the purposes of this agreement as "Wife") and John Smith, (referred to herein for the purposes of this agreement as "Husband"), residing at _____,

WITNESSETH:

Whereas, each of the parties has known the other for a period of time, is fully satisfied with the disclosure of the financial circumstances of the other and desires to make an agreement regarding his and her property rights in consideration of the marriage to each other, and

Whereas, each of the parties has assets and earnings, or earnings potential, sufficient to provide for his or her own maintenance and support in a proper and acceptable standard of living without the necessity of financial contributions by the other, and each of the parties is aware of the hazards and risks of the continuance of earnings and of the changes in assets and liabilities of the other and of the possibility of substantially changed financial circumstances of the other with the result that the earnings and/or net worth of one party is or may be substantially different from those of the other party, and

Whereas, each of the parties desires to own, hold, acquire and dispose of property now and in the future and subsequent to their marriage to each other with the same freedom as though unmarried and to dispose of said property during their respective lifetimes or upon death or upon any other termination of the marriage without restriction or limitation in accordance with his or her own desires, and

Whereas, it is the intention of each of the parties by entering into this agreement to determine unilaterally what property, now and in the future, shall be his or her own separate property and that all of the property of each, however acquired or held, shall be free from any consideration as marital property, community property, quasi-community property or any other form of marital or community property, as those terms are used and understood in any jurisdiction, including but not limited to the State of New York,

NOW, THEREFORE, in consideration of the marriage of each party to the other and the mutual promises and covenants herein, the parties have mutually agreed as follows:

1. **Present Property.** Except as otherwise herein set forth, all of the property, real, personal and mixed, which each party has previously acquired and now holds in his or her name or possession shall be and continue to remain the sole and separate property of that person, together with all future appreciation, increases and other changes in value of that property and irrespective of the contributions (if any) which either party might have made or may hereafter make to said property or to the marriage, directly or indirectly.

2. **Future Property.** Except as otherwise set forth, all of the property, real, personal and mixed, which each party may hereafter acquire in his or her own name or possession shall be and remain the sole and separate property of that person, together with all future appreciation, increases and other changes in value of that property and irrespective of the contributions (if any) which either party may make to said property or to the marriage, directly or indirectly.

3. **Joint Property.** Any property, real, personal or mixed, which shall now or hereafter be held in the joint names of the parties shall be owned in accordance with the kind of joint ownership as title is held, and if there is no other designation, shall be presumed to be held equally by the parties with such survivorship rights (if any) as may be specifically designated by the title ownership or as may be implied or be derived by operation of law other than the operation of the so-called equitable distribution law or community property or any similar law of any jurisdiction involving marital property, community property, quasi-community property or any other form of marital or community property.

4. **Estate Rights.** Each party hereby releases, waives and relinquishes any right or claim of any nature whatsoever in the property of the other or otherwise, now or hereafter acquired, and, without limitation, expressly forever waives any right or claim which he or she may have or hereafter acquire, whether as the spouse of the other or otherwise, under the present or future laws of any jurisdiction: (a) to share in the estate of the other party upon the death of the other party; (b) to act as executor or administrator of the estate of the other or as trustee, personal representative or in any fiduciary capacity with respect to the estate of the other; and (c) to make any claim for the wrongful death of the other party. All rights which either party may acquire in the other's estate by virtue of the marriage, including but not limited to rights of set-off in Section 5-3.1, all distributive shares in Section 4-1.1 and all rights of election in Section 5-1.1A of the Estates, Powers and Trusts Law of New York, as such laws may now exist or hereafter be changed, and any similar or other provision of law in this or any other jurisdiction are hereby waived by each party.

5. **Wills.** Nothing in this agreement shall prevent or limit either party from hereafter making provisions for the other by Last Will and Testament or other testamentary writing or substitute, in which event the provisions thus made shall control.

6. **Waiver of Maintenance.** Each party represents to the other and agrees that each has sufficient income, income potential and financial resources to be financially self-sustaining now and in the future, that neither seeks or desires any support or maintenance from the other now or in the future and, insofar as may be permitted by law, irrevocably waives all right or claim for support or maintenance from the other now and hereafter.

7. **Debts.** Neither party will at any time contract any debt, charge or liability whatsoever for which the other party may be or become liable, except as they may hereafter otherwise agree in a writing signed by both of them. Each party shall indemnify the other of all loss, expenses (including but not limited to attorneys' fees) and damages of the other party in the event of a breach of this paragraph by the defaulting party.

8. **Pensions.** The parties acknowledge and agree that each may be a participant in one or more individual retirement accounts and/or pension and/or other types of deferred income plans, including but not limited to [name plans] (collectively called the "plans"); that each shall hold all rights in their respective plans without any claim, in fact or in law, which the other party may have therein; that each expressly waives all rights which may now or hereafter exist in the plans of the other, including but not limited to preretirement and joint survivor annuities or to be a participant or beneficiary in the plans of the other or to require the consent of the other with respect to any right, option, distribution or benefit which a party may now or hereafter have or choose to exercise. It is the essence of this agreement that after the marriage of the parties and upon the request of either party, the other party, without charge, shall reaffirm the foregoing and provide such papers and documents properly executed and acknowledged to carry out and implement the foregoing. Notwithstanding the foregoing, in the event that either party shall hereafter expressly designate the other party as a participant or beneficiary in any of the plans under the provisions of the plans, said designation shall control.

9. **Disclosure.** Each party has been apprised of the right to obtain full disclosure of the financial circumstances of the other party and is satisfied with the disclosure made. Each party expressly waives the right to any further financial disclosure and acknowledges that said waiver is made with the full benefit of legal counsel and knowledge of the legal consequences thereof and that neither party properly cannot, and shall not, subsequently assert that this agreement should be impaired or invalidated by reason of any lack of financial disclosure or lack of understanding or any fraud, duress or coercion. The Husband represents that his present net worth is in excess of $2,000,000 and that his annual income is in excess of $300,000; and the Wife represents that her present net worth is in excess of $500,000; and that her annual income is in excess of $75,000; which representations by both parties admittedly are not all-inclusive and which are not intended to be relied upon by either party.

10. **Legal Representation.** Each party has been separately represented by an attorney of his or her own choice. The Husband has been represented by _____; and the Wife has been represented by _____, in connection with the negotiation, making and execution of this agreement.

11. **General Provisions.** This agreement shall be construed as an agreement made and to be performed in the State of New York and cannot be changed, or any of its terms waived, except by a writing signed and acknowledged by both parties. If any provision of this agreement should be invalid or unenforceable, no other provision shall be affected thereby. Each party hereby consents to the personal jurisdiction of the State of New York in the event of any dispute or question regarding the interpretation, validity and making of this agreement, regardless of their then residence or domicile. Each party acknowledges receipt of a fully executed copy of this agreement, has had an opportunity to read it and understands the same after consultation with independent counsel and is fully satisfied with the disclosure made of the financial circumstances of the other party. Each party shall provide such papers and documents and perform such acts as may be necessary or desirable to carry out and effectuate the provisions of this agreement and the intent of the parties. The paragraph captions in this agreement are for the purpose of convenience only and are not part of this agreement.

IN WITNESS WHEREOF, the parties, for themselves, their heirs, next of kin, representatives and assigns have executed these presents prior to their marriage to each other as of the day and year first above written.

_____ L.S.
Mary Jones

_____ L.S.
John Smith

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

On the _____ day of _____, before me, the undersigned, a Notary Public in and for said State, personally appeared MARY SMITH personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her individual capacity, and that by her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

_____
Notary Public

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

On the _____ day of _____, before me, the undersigned, a Notary Public in and for said State, personally appeared JOHN JONES personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his individual capacity, and that by his signature on the instrument, the individual, or the
person upon behalf of whom the individual acted, executed the instrument.

_____
Notary Public

(Substitute Provision for Paragraph 6 "Waiver of Maintenance" to Provide for Maintenance)

6. **Maintenance (Alimony) Payments on Dissolution of Marriage.** In the event that the parties cease to be married to each other (as "marriage" is hereinafter defined) for any reason other than the death of a party, then the Husband shall pay to the Wife maintenance (alimony) at the rate of $50,000 per year for a period of time based upon the duration of their marriage. For each full year of marriage up to and including five (5) full years, there shall be maintenance payments for one full year. Payments shall be made in equal monthly installments at the rate of $4,167 per month, in advance, commencing on the first day of the month immediately following the date when the parties cease to be married and continuing on the first day of each successive month thereafter until the earliest happening of any of the following events: (a) the death of either party; or (b) the remarriage of the Wife; or (c) the date for termination of payments based upon the duration of the marriage. For example, if the parties are married to each other for four years and three months, then the Wife shall be entitled to forty-eight (48) monthly payments of maintenance at the rate of $4,167 per month, subject however to earlier termination in the event of the death of either party or the remarriage of the Wife (as "remarriage" is hereinafter defined). If the parties cease to be married as aforesaid after five full years of marriage, then the obligation, if any, for the payment of maintenance shall be made in accordance with then existing law without regard to any of the foregoing provisions of this paragraph and as though this paragraph never existed.
[NOTE: The above provision must be coupled with definitions as set forth below]

(Provision for Life Insurance)

12. **Death Benefits.** From and after the marriage of the parties, the Husband shall maintain at his own expense a policy or policies of life insurance on his life having death benefits payable in the sum of not less than $500,000 for the benefit of the Wife until the earlier occurrence of the death of either party or the remarriage of the Wife, and he will not encumber said insurance whereby the death benefits shall be less than $500,000. In addition, within a reasonable time after the marriage of the parties, the Husband shall make provision in an appropriate instrument for the Wife to be entitled to receive an additional $500,000 in the event of the Husband's death.
[NOTE: The above provision must be coupled with definitions as set forth below]

(Substitute Provision for Limited Participation in Estate Rights)

13. **Limitation of Estate Rights.** Notwithstanding anything in this agreement to the contrary, in the event of the death of the Husband during the marriage of the parties (as "marriage" is hereinafter defined), the Wife shall be entitled to receive by way of inheritance a distribution from the net estate of the Husband, as legatee or distributee out of the distributable assets, a percentage of said estate, which percentage shall depend upon the duration of the marriage of the parties. If said duration is up to one year, the percentage shall be 5%, up to two years, 9%; up to three years, 13%; up to four years, 17%; up to five years, 21%; and five years or longer 25%. In no event shall said percentage exceed 25%. For example, if the duration of the marriage is 3 years 9 months, the percentage will be 17% of the net estate. Said percentage share shall not be considered in computing the estate available for distribution to legatees or distributees. The term "net estate of the Husband" as used herein shall mean his estate as it would be calculated for the purposes of determining the elective share of the Wife if she were entitled to make such an election under section 5-1.1A of the Estates, Powers & Trusts Law of the State of New York in effect at the time of the Husband's death, less all federal, state and local taxes of every nature allocable to said elective share. However, nothing herein shall be construed to give the Wife a right of election under said law or any similar law of New York or of any jurisdiction.
[NOTE: The above provision must be coupled with definitions as set forth below]

(Provision for Use of Marital Residence in the Event of Death)

14. **Primary Residence.** In the event that the Husband should predecease the Wife during the time that they are married (as "married" is hereinafter defined), the Wife shall have the right to continue to reside in their primary residence until the occurrence of the remarriage of the Wife (as "remarriage is hereinafter defined), provided however that the Wife shall pay all expenses of every kind and nature in connection with said residence (including but not limited to all repairs, whether ordinary, extraordinary, structural or otherwise), except only for the payment of real estate taxes and, if the primary residence is a condominium or cooperative apartment, the maintenance or common charges, as the case may be, which real estate taxes and maintenance charges or common charges, as applicable, shall be paid for by the Husband's estate as an obligation of the estate. If the primary residence is rented and occupied by the parties under a lease (not a proprietary lease of a cooperative apartment), the Wife shall have the right to cause said lease to be transferred to her sole name, including any rent security deposited under said lease, without payment to the Husband's estate, provided that said request is made in writing to the Husband's estate representatives within ninety (90) days after his death. This paragraph shall apply only to the primary residence of the parties and not to any other residence which they or either of them may own at the time of the Husband's death.
[NOTE: The above provision must be coupled with definitions as set forth below]

(Provision for Medical and Long Term Health Care Insurance)

15. **Medical and Health Insurance.** The Husband at his sole expense shall provide to the Wife and also for himself for as long as they are married (as "married" is hereinafter defined) Medicare Part B insurance plus AARP-sponsored Medigap insurance and also AARP-sponsored long term health care insurance with the broadest coverage and minimal deductible available, said obligation to continue for as long as and to the extent necessary for either or both of them, as the case may be, shall qualify and be eligible for Medicaid entitlements. At the reasonable request of the Wife, the Husband shall provide documentation to her of his compliance with the foregoing obligation, and the Wife, in addition, is hereby authorized to obtain direct confirmation from any insurer.
[NOTE: The above provision must be coupled with definitions as set forth below]

(Provision for Definition of "Remarriage" and "Married" – Ties in with Other Applicable Provisions)

16. **Definitions.** The following definitions shall apply to the respective expressions whenever used in this agreement:

(a) "Remarriage" as used everywhere in this agreement shall be deemed a remarriage of the Wife, regardless of whether said remarriage shall be void or voidable or terminated by divorce or annulment or otherwise and shall also be deemed to include circumstances whereby the Wife shall live with an unrelated person in a husband-wife relationship (irrespective of whether or not they hold themselves out as such) for a continuous period of 60 days or for a period or periods of time aggregating 120 days or more on a non-continuous, or interrupted, basis in any 18 month period.

(b) The time during which the parties are "married," or the period of the "marriage" of the parties, as used everywhere in this agreement shall be deemed for the purposes of this agreement to constitute the period of time commencing with the ceremonial marriage of the parties to each other and continuing until the earliest happening of any of the following events: (i) the commencement of a matrimonial action; (ii) the divorce or legal separation (by decree or judgment or by agreement) of the parties; or (iii) the physical separation of the parties wherein either or both of the parties have commenced to live separate and apart from the other with the intent not thereafter to live together, regardless of whether that intent is expressed in writing, orally or otherwise; or (iv) the death of either party. "Matrimonial action" as used everywhere in this agreement shall be as it is presently or may be hereafter defined by the Civil Practice Law and Rules of the State of New York, section 105(p).

Complex Laws and Procedures Govern Civil Contempt Penalties For Violating Orders of Protection

By Marjory D. Fields

Civil and criminal contempt proceedings pursuant to Article 19 of the Judiciary Law are complex and formulaic. This article explores the different purposes and remedies available in Judiciary Law, Domestic Relations Law, and Family Court Act contempt proceedings to enforce civil orders of protection.

The standard of proof, the burden of proof, procedures, pleadings, defenses, hearings, findings of fact and conclusions of law, and judgments for civil contempt under each statute are described here. The latest Court of Appeals and Appellate Division cases on civil orders of protection and analogous civil contempt cases are discussed.[1]

Standard of Proof

The leading discussion of civil and criminal contempt pursuant to Judiciary Law §§ 753(A)(3) and 750(A)(3) is in *Department of Environmental Protection v. Department of Environmental Conservation*.[2] The Court of Appeals stated that, to sustain a finding of civil or criminal contempt for violating a court order, it is necessary to establish that a lawful order clearly expressing an unequivocal mandate was in effect, that the party charged had knowledge of the order, and that there was reasonable certainty the order has been disobeyed. (See the excerpt from the opinion in the box on page 23.)

In a subsequent decision, however, the Court of Appeals stated that the standard of proof for civil contempt is "an issue this Court has yet to determine."[3] The Court did not reach the issue of the standard of proof because it was "undisputed" that the respondent had not paid the court-ordered child support.[4] The respondent in *Powers* was sentenced to imprisonment.[5] The appellate courts make no distinction in the standard of proof when incarceration is or is not ordered in Judiciary Law contempt proceedings.[6]

In an appeal from a sentence of imprisonment for civil contempt for violation of a Family Court order of protection, after *Powers*, the Appellate Division, Second Department, held that the standard of proof is "clear and convincing" evidence.[7] The Appellate Division reasoned that a proceeding for violation of an order of protection in Family Court is "civil in nature."[8]

The standard of proof is the same in the Family Court and Supreme Court because the order of protection provisions in the DRL are derived from the FCA and cite it. It was the intent of the Legislature to clarify that in matrimonial actions the Supreme Court has the power to provide the same protections and remedies as the Family Court.[9]

In addition, civil contempt proceedings for violation of orders of protection in both courts must follow the procedures in Judiciary Law §§ 753(A)(3), 754, 756, 760, 761 and 770. The Judiciary Law makes no distinction between Family Court and Supreme Court.[10]

Procedure

In a proceeding alleging violation of an Order of Protection or Temporary Order of Protection made pursuant to DRL § 240(3) or 252, the provisions of FCA § 846 and Judiciary Law §§ 753(A)(3), 754, 756, 760 and 761, should be applied because the DRL lacks procedures for violation proceedings. (Both order of protection sections of the DRL refer to the FCA.)

Right to Counsel Both parties have a right to counsel in all proceedings for orders of protection and in all contempt and enforcement[11] proceedings for violations of orders of protection and temporary orders of protection.[12] The court must inform both parties to contempt and enforcement proceedings that they have a statutory right to court-appointed counsel if they are indigent, or to an adjournment to retain counsel. A party may waive

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counsel after being informed of this right in open court.[13] A protected party who prevails in a contempt proceeding may recover counsel fees from the restrained party.[14]

Notice of Petition or Motion Family Court Act § 846 and Judiciary Law § 756 provide that an application to punish for civil contempt may be made by notice of motion or order to show cause in accordance with the procedure for a motion on notice in any action. The application must contain the notice that the purpose is to punish the accused for contempt of court by fine and imprisonment. It must contain the statutory language set forth in FCA § 846 and Judiciary Law § 756 "in a size equal to at least eight point bold type."

The petition or affidavit alleging violations must state that the restrained party violated an explicit, lawful mandate.

Service Moving papers are to be served no less than 10 days nor more than 30 days before the return date, except by order of the court.[15] Service must be upon the restrained party personally, unless service on the attorney for the accused is ordered.[16] The FCA, however, requires reasonable effort to effect personal delivery as a condition for obtaining an order for another method of service.[17] Family Court Act § 846(c) also provides that when service is by other than personal delivery "no order of commitment may be entered upon default in appearance" by the accused. The court, however, may issue a warrant for the arrest and production in court of the defaulting, restrained party.

Warrant Family Court Act §§ 846(d) and 827(a) provide that the court may issue a warrant for the arrest of the accused when the summons cannot be served; the accused failed to obey the summons; the accused is likely to leave the jurisdiction; the summons would be ineffectual based upon the history of the case; the safety of the party and children are endangered; or there are aggravating circumstances as defined in FCA § 827(a)(vii). The Supreme Court has all the powers of the Family Court and may issue a warrant under the same circumstances.

Pleadings

The petition or affidavit alleging violations must state that the restrained party violated an explicit, lawful mandate of the court. It must specify the order or judgment by date, that it was in effect on the dates when the violations occurred, that the court had jurisdiction over the restrained party and the provision alleged to have been violated. The act or course of conduct which violated the order, the dates or period of time, and the places of the alleged violations must be stated.[18]

The pleading must state that the restrained party had actual knowledge of the order, having been present in court when the order was made, or the date, place, and manner of service on the restrained party, making reference to the attached copy of the affidavit of service of the order.

If the restrained party was present in court when the order was made, that party has sufficient "notice" for "knowledge," even if the restrained party left the court before receiving a copy of the order.[19]

If personal jurisdiction over the restrained party was obtained initially by personal service, but the restrained party defaulted in the underlying proceeding, state how, when, and where the restrained party was served with the Order of Protection or Temporary Order of Protection granted on default.

Hearing A hearing is required when the restrained party disputes facts or raises legal defenses, only.[20]

The protected party has the burden of proving a prima facie case.[21]

Defenses

Justification The restrained party has the burden of going forward to establish a defense.[22]

The respondent in *Powers* admitted that he failed to pay the court-ordered child support, but denied that his failure to pay child support was a willful violation of the court order. He asserted a defense of inability to pay.[23] The court rejected this defense on two grounds: the respondent's acknowledged income; and the respondent's agreement to pay the arrears on a prior enforcement application.[24]

The *Powers* analysis of the defense to "willfulness" parallels the ingredients in many Order of Protection contempt proceedings. Often, restrained parties admit going to a location from which they are excluded. They deny, however, a willful violation, asserting a defense of "justification": "I was just delivering the child support payment." "I was bringing the children presents." "The protected party invited me to the child's birthday party." In many instances, the proceedings will have been commenced by the arrest of the restrained party in or at the door to the home (workplace, or school) of the protected party, providing proof beyond a reasonable doubt that the restrained party violated the order.

None of the "usual" defenses are sufficient to rebut "willfulness" as a matter of law, when the underlying order is precise regarding the prohibited conduct.[25] Justification is not a defense to contempt under the Judi-

ciary Law, except in the limited circumstances of "inability, arising from imminent peril, to comply with the order."[26]

A cognizable legal defense to the claim of willfulness must be decided by the court after a hearing.[27]

Defect in the Petition or Motion The Court of Appeals has held that in a criminal prosecution for contempt pursuant to the Penal Law based on a charge of violation of an order of protection, any challenge to the legal sufficiency of the accusatory instrument,

> including whether the order was in effect on the date of the contumacious conduct, was a matter to be raised as an *evidentiary defense* to the contempt charge, not by insistence that this information was jurisdictionally defective without annexation of the order to that accusatory instrument. Defendant's failure to raise an issue before the District Court as to whether the order was in effect when the offense allegedly occurred thus precludes its consideration here.[28]

Thus, by analogy, any defense based on the legal sufficiency of an affidavit, petition, or pleading in a civil contempt proceeding must be raised in the trial court, Supreme Court, or Family Court, or it is waived.

Jurisdictional Defenses Lack of personal service is a defense to be raised and decided by the trial court. Service of the contempt motion or petition alleging a violation of an order of protection or temporary order of protection must be by personal delivery.[29] Any other method of service must be approved by the court after a showing of reasonable efforts at personal delivery.[30]

Another defense that may be raised is lack of service or notice of the underlying order. The restrained party must have been served with the order to be enforced, or have been present in court when the order was made.[31]

These issues of service and notice must be presented to the trial court, or they will be deemed waived.[32]

Unclear Underlying Order The trial court must determine whether the underlying order prohibited the conduct alleged as a violation explicitly. "A contempt finding should only be made when '. . . the order violated is clear and explicit and . . . the act complained of is clearly proscribed.'"[33]

Arguments and Evidence

Factual Evidence Assuming there will be an appeal after a finding of contempt and a disposition of a fine or imprisonment, counsel should paint a picture of each party for the appellate courts. Questions regarding the respective parties' height and weight, martial arts or military training, physical fitness, ages, and health may be relevant to the issue of violation of an order of protection.

Elicit a clear, concise description of the acts or course of conduct alleged: where they occurred, and when. The

Court of Appeals on Punishment for Contempt

Excerpt from *Department of Environmental Protection v. Department of Environmental Conservation*[1]

This court's power to punish for civil and criminal contempt is found respectively in Judiciary Law § 753(A)(3) and § 750(A)(3). Although the same act may be punishable as both a civil and a criminal contempt, the two types of contempt serve separate and distinct purposes. A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both. A criminal contempt, on the other hand, involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates. Unlike civil contempt, the aim in a criminal contempt proceeding is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory.

In keeping with a civil contempt's distinct purpose, it must be established that the rights of a party to the litigation have been prejudiced. In a criminal contempt proceeding, no such showing is needed since the right of the private parties to the litigation is not the controlling factor. A key distinguishing element between civil and criminal contempt is the degree of willfulness of the subject conduct. To be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding.

Despite these distinctions, the two categories of contempt share some common elements. To sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect. It must also appear with *reasonable certainty* that the order has been disobeyed. Of course, the party charged must have had knowledge of the court's order.

1. 70 N.Y.2d 233, 239–40, 519 N.Y.S.2d 539 (1987) (emphasis added) (citations omitted).

reactions of the protected party and the children are significant elements which should be presented through testimony.

Credibility Argument When the facts are disputed, the trial court has the burden of assessing credibility, and placing that assessment on the record. In a bench trial, the trier of fact may ask questions the court deems necessary to complete the record.[34]

The trial court has the "unique opportunity" to observe the witnesses and assess their credibility.[35] Thus, in addition to marshaling the facts, a summation should include descriptions of the witnesses' affect and demeanor during the proceeding.

The parties' demeanor during their testimony and while listening to other witnesses can be part of the basis for the court's decision:

- Did the witness include appropriate emotional and sensory details in his or her testimony? Were the witness's tears or pained expression consistent with the content of the testimony?
- Did the witness demonstrate selective memory: remember insignificant events, but forget major or extraordinary events? Remember remote events but not recent events [absent indication of illness or brain damage]? Did the witness contradict himself or herself? Did the witness change his or her answers concerning salient details?
- Did the witness respond to questions by asking questions? Was the witness responsive to questions? Did the witness volunteer irrelevant information? Pause before answering simple questions? Embellish answers? Present long monologues when there was no question before the witness? Rush to present self-serving explanations, or place blame on others before the examination commenced?
- Did a party laugh derisively during the testimony of the other party? Did a party call out during testimony by others, or show lack of self-control in other ways?
- You "know" the witness is fabricating: Can you articulate for the court the basis of this conclusion? Say it on summation, so it goes into the decision and Findings of Fact.

Issues of Law Make sure all the disputed elements essential to a contempt determination are presented in testimony or documentary evidence.[36]

Findings of Fact and Conclusions of Law

The court must make findings of fact, and conclusions of law. This can be done in an oral or written decision. The key issues normally are:

- Was personal jurisdiction obtained over the restrained party in the underlying proceeding?
- Was notice given of the contents of the underlying order?
- Was the mandate in the underlying order explicit? (State what is provided.)
- Was there personal service of the contempt motion?
- Was the statutory contempt notice on the notice of motion or order to show cause?
- Was the order violated by the restrained party in that the restrained party committed specific acts? (If so, recite them.)
- Did the restrained party present a credible factual defense?
- Did the restrained party present a defense as a matter of law?

Counsel or the court may prepare a written judgment to be signed so it can be entered, served, and executed.

When the penalty is incarceration, there must be a provision for the contemnor to purge the contempt, if that is appropriate in the circumstances of the proscribed conduct. When committing a party to the custody of a sheriff or commissioner of corrections, a commitment order must also be signed.

When the penalty is a fine, the judgment must specify when and where the fine is to be paid.

Admonish and Educate

Informing the restrained party of the consequences of violating the Order of Protection may have a deterrent effect. Many judges in matrimonial actions and Family Court family offense proceedings inform the parties at the time a Temporary Order of Protection or Order of Protection is made that "invitations" to the protected party's home or to otherwise ignore the order should be declined, because the police *must* arrest the restrained party when they find the restrained party at the protected party's home.

In addition, the court may tell the restrained party that violation of the order may be the basis of a criminal prosecution for a felony, conviction for which may result in a sentence exceeding five years of imprisonment.[37]

This information regarding compliance and the consequences for violation of a temporary order of protection or an order of protection should be provided by counsel to their respective clients, whether or not the court gives this admonition.

Penalties

Incarceration The Court of Appeals has held that *consecutive* six-month sentences may be imposed for multiple violations of an order of protection pursuant to FCA § 846-a.[38] This decision applies to violations of Supreme Court orders of protection and Temporary Orders of Protection, as well as to Family Court orders.

The court may order forfeiture of bail as provided in Criminal Procedure Law article 540 (CPL).

Firearms Surrender Domestic Relations Law § 240(3)(e) provides that when the Supreme Court determines that a temporary order of protection or an order of protection has been violated, the court may make an order pursuant to FCA § 842-a requiring surrender of firearms, and revoking the restrained party's license to carry or repair firearms as set forth in CPL § 400.00.

When the court finds that the restrained party inflicted "serious physical injury" as defined in Penal Law § 10.00(10), threatened to use a deadly weapon or dangerous instrument as defined in Penal Law § 10.00(12) and (13), or committed any violent felony as defined in Penal Law § 70.02, the court must order the surrender of firearms and revoke the firearms license of the restrained party.[39]

Contempt is formulaic: plead each element explicitly; follow the pleading like a road map at trial; point out every milestone.

In addition to civil contempt proceedings and state criminal contempt prosecution pursuant to Penal Law §§ 215.51 and 215.52, federal prosecution by federal authorities for violation of the federal gun control statutes is possible.[40] The Federal Gun Control Act creates an "official-use exception"[41] to the firearms surrender requirement when the restrained party is in the military or law enforcement personnel for "line of duty" use. This exception does not apply to people convicted of committing a federal or state misdemeanor that involved use or attempted use of physical force or threatened use of a deadly weapon. In addition, the restrained party must have been represented by counsel and tried by a jury, or waived these rights, and been a member of the protected party's family.[42]

Damages, Counsel Fees, Fines, and Restitution The Supreme Court may impose a fine on the restrained party to be paid to the protected party in an amount sufficient to indemnify the aggrieved party for a loss or injury resulting from the misconduct of the restrained party in violation of an order.[43] When actual damages are not proven, a fine may be imposed in an amount equal to the protected party's litigation costs and expenses, plus $250.[44]

In addition, the restrained party may be required to pay the protected party's counsel fees for the enforcement proceeding pursuant to DRL § 240(3)(a)(6).

The Domestic Relations Law and Family Court Act provide for restitution up to $10,000 when the protected party had not been compensated for actual losses in any other manner.[45]

Expanded Orders of Protection The Supreme Court has all the powers of Family Court even though the provisions of FCA § 846-a are not set forth in the DRL. Thus, the Supreme Court may enter a new Order of Protection or Temporary Order of Protection with additional limitations on the restrained party.

The duration of the new order may be the same as any order granting or denying visits to the restrained party, or up to three years.[46] The new order must be served on the restrained party in the same way the prior order was served, unless the restrained party is present and receives the order in court.

The protected party should not leave court without a conformed copy of the new order. The court clerk will transmit the new order to the State Registry of Orders of Protection and Warrants electronically or by fax. When the clerk transmits the order by fax, it will be entered into the Registry the next day.

Criminal Prosecution for Violation Simultaneous criminal prosecution and civil contempt proceedings may be brought for the same violation.[47] In that circumstance, counsel in the civil contempt proceeding are obliged to inform the court of the status of any criminal prosecution. The Court of Appeals held that "parallel court proceedings in different venues" are permitted when the relief is different, in cases addressing the issue of double jeopardy.[48]

Conclusion

Like fraud, contempt is formulaic: plead each element explicitly; follow the pleading like a road map at trial; point out every milestone. Prepare a canned memorandum of law for each element, then update the memorandum every time you use it.

After the court renders its decision, draw findings of fact and conclusions of law (if the court does not do this in an oral or written decision) and a judgment. Again, state the issues that must be determined in the specific case to justify a judgment of contempt. Remember to provide a way for the contemnor to purge the contempt, if possible under the circumstances. Settle the proposed findings of fact and conclusions of law and a judgment on notice promptly after the court renders its decision.

Conform and serve the contemnor personally with a copy of the findings of fact and conclusions of law and a judgment with notice of entry, promptly.

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1. This article does not discuss Penal Law article 215 prosecutions, in which the standard of proof is beyond a reasonable doubt and all procedures are the same as in all other prosecutions under the Penal Law.
2. 70 N.Y.2d 233, 519 N.Y.S.2d 539 (1987).

3. *Powers v. Powers*, 86 N.Y.2d 63, 68, 629 N.Y.S.2d 984 (1995). Most of the standards of proof issues and procedures in contempt proceedings for violations of orders of protection and temporary orders of protection and for child support enforcement proceedings are the same. Child support enforcement proceedings, however, have statutory provisions regarding what is "prima facie" evidence in Family Court Act § 454(3)(a) (FCA), and the definition of willfulness, in FCA § 455(5), which are not contained in FCA article 8 [family offenses proceedings], Domestic Relations Law § 240, 244, 244-a, 244-b, 244-c or 245 (DRL) [support enforcement provisions], or the Judiciary Law contempt provisions.
4. *Powers*, 86 N.Y.2d at 69.
5. *Id*. at 67.
6. *McCain v. Dinkins*, 84 N.Y.2d 216, 225–26, 616 N.Y.S.2d 335 (1994); *In re Waterfront Commission*, 245 A.D.2d 63, 65, 665 N.Y.S.2d 82 (1st Dep't 1997); *Powers*, 86 N.Y.2d 63.
7. *Williams v. Williams*, 230 A.D.2d 916, 646 N.Y.S.2d 861 (2d Dep't 1996).
8. *Id*.
9. *See* 1977 N.Y. Laws ch. 449.
10. This is in contrast to child support proceedings in which the FCA creates a *prima facie* standard when failure to pay child support is established. *Powers v. Powers*, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995) *compare*, FCA §§ 454(3)(a), 455(5) *with* DRL §§ 240, 245.
11. Enforcement may include a new order of protection with expanded conditions and longer duration, in addition to contempt penalties discussed later in this article.
12. *DeMarco v. Raftery*, 242 A.D.2d 625, 626, 662 N.Y.S.2d 138 (2d Dep't 1997). *See* FCA § 262(a)(ii).
13. *People v. Kaltenbach*, 60 N.Y.2d 797, 469 N.Y.S.2d 685 (1983).
14. DRL § 240(3)(a)(6); FCA § 842(f); Judiciary Law § 773 ("Jud. Law").
15. Jud. Law § 756.
16. Jud. Law § 761.
17. FCA § 826(b).
18. Jud. Law § 756; FCA § 846.
19. *People v. Wood*, 95 N.Y.2d 509, 514, 719 N.Y.S.2d 639 (2000); *McCain v. Dinkins*, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335 (1994). DRL § 245 requires a showing that payment cannot be enforced by financial sanctions as a condition precedent to an application for contempt; this does **not** apply to proceedings for violations of orders of protection and temporary orders of protection.
20. *Cashman v. Rosenthal*, 261 A.D.2d 287, 690 N.Y.S.2d 251 (1st Dep't 1999); *Garbitelli v. Broyles*, 257 A.D.2d 621, 684 N.Y.S.2d 292 (2d Dep't 1999); *De Meo v. De Meo*, 281 A.D.2d 662, 721 N.Y.S.2d 420 (3d Dep't 2001).
21. *See Powers v. Powers*, 86 N.Y.2d 63, 68, 629 N.Y.S.2d 984 (1995).
22. *Id*. at 69.
23. *Id*. at 66; *see* FCA § 455(5).
24. *Powers*, 86 N.Y.2d at 69–70.
25. *Hicks v. Russi*, 254 A.D.2d 801, 802, 678 N.Y.S.2d 203 (4th Dep't 1998).
26. *In re Waterfront Comm'n*, 245 A.D.2d 63, 65, 665 N.Y.S.2d 82 (1st Dep't 1997).
27. *De Meo v. De Meo*, 281 A.D.2d 662, 721 N.Y.S.2d 420 (3d Dep't 2001).
28. *People v. Casey*, 95 N.Y.2d 354, 360, 717 N.Y.S.2d 886 (2000) (emphasis added).
29. FCA §§ 826(b), 846(c), (d); Jud. Law § 761.
30. FCA § 826(b).
31. *McCain v. Dinkins*, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335 (1994).
32. *Casey*, 95 N.Y.2d 354.
33. *Kinney v. Simonds*, 276 A.D.2d 882, 884, 714 N.Y.S.2d 151 (3d Dep't 2000) (quoting *Nelson v. Nelson*, 194 A.D.2d 828, 830, 598 N.Y.S.2d 609 (3d Dep't 1993)); *see McCain*, 84 N.Y.2d at 226.
34. *People v. Moreno*, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987).
35. *Gunn v. Gunn*, 240 A.D.2d 704, 705, 660 N.Y.S.2d 134 (2d Dep't 1997).
36. *People v. Casey*, 95 N.Y.2d 354, 717 N.Y.S.2d 88 (2000).
37. Penal Law §§ 215.51, 215.52.
38. *Walker v. Walker*, 86 N.Y.2d 624, 626–30, 635 N.Y.S.2d 152 (1995).
39. FCA § 842-a; DRL § 240(3)(e).
40. 18 U.S.C. §§ 922(g)(8), (9), 2261, 2261A, 2262.
41. 18 U.S.C. § 925.
42. 18 U.S.C. § 922(g)(8), (9).
43. Jud. Law § 773.
44. *Id*.
45. DRL § 240(3)(e); FCA § 841(e).
46. DRL § 240(3); FCA §§ 846-a, 827(a)(vii).
47. FCA § 115(e); CPL § 100.07.
48. *People v. Wood*, 95 N.Y.2d 509, 514–15, 719 N.Y.S.2d 639 (2000).

Westchester Family Court Program

Student Attorneys and Mentors Help Domestic Violence Victims

It is 5:30 in the evening and the staff at the Westchester County Courthouse is thinning quickly. The Family Court waiting room is empty except for an attorney, a law student, and a client who was a recent victim of domestic violence. This trio has been together for the better part of what has turned out to be, for this battered woman, one of the most decision-filled days of her life.

Finally, the student attorney hands the client a copy of an Order of Protection and explains the details of the custody and support proceedings that were initiated that day. The woman extends her hand. As she clasps the future attorney's hand in both of hers and stares into the unexpecting eyes of this young student, the client says, "Thank you so much. I couldn't have done it without you."

BY VICTORIA L. LUTZ AND AMY BARASCH

Since its inception in the fall of 1999, the Family Court Legal Program (FCLP) has assisted more than 1,000 victims of domestic violence and filed more than 1,500 cases on their behalf and that of their children. Although no organization can guarantee safety for battered women, the FCLP has helped its clients become safer by providing carefully tailored orders of protection, referrals to necessary services, and advice regarding the entire legal process. As a result, these traumatized and often conflicted clients know what to expect and how to proceed.

The FCLP is the product of a partnership formed by three organizations: the Pace Women's Justice Center, which conducts the program; Westchester-Putnam Legal Services, which provides continuing representation in some cases; and Westchester County, which funds the program. This externship handles matters ranging from simple disorderly conduct to serious assault and stalking incidents. For clients who choose to proceed in criminal court as well, externship staff explains that option.

The FCLP was established in October of 1999 to serve victims of partner violence who access the White Plains Family Court. Since that time, it has been housed in a specially created office suite in the Westchester County Courthouse. On February 5, 2002, the program expanded, and a second location was established at the Yonkers Family Courthouse. These two sites expect to provide legal redress to more than 1,000 victims of domestic violence and their children annually. As the initiator of these programs, County Executive Andrew Spano, stated at the official opening of the Yonkers site: "The fact that we have gathered here today is proof that this program is working. Women who have been abused need a safe place to go where they know their interests will be given priority, and that's exactly what this program provides." Mr. Spano ended his remarks by reaffirming his ultimate goal of expanding the FCLP so that it is available countywide.

One-Stop Shopping for Petitioners

The FCLP offers immediate legal advice and representation to battered women petitioning the Family Court. A student under the supervision of an on-site attorney interviews each woman who chooses to use the program's free services. The student drafts a petition for an Order of Protection, as well as for custody if neces-

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sary. An on-site representative of the Child Support Enforcement Unit drafts child support petitions. The client then files all three petitions and is represented by the student working under a Student Practice Order (always accompanied by an attorney from the FCLP) in front of the judge on the Order of Protection.

Domestic violence advocates from the Mental Health Association or the Westchester Office for Women conduct safety planning analysis with each client, and shelter referrals are discussed in every case. If the Order is issued, the client is advised regarding service of process and the next court appearance. Generally, the FCLP staff represents clients on their second court date if there is no custody dispute; all other cases are referred during the client's initial FCLP visit to Pace's partner, Westchester-Putnam Legal Services, for ongoing legal representation.

For clients, the child support collection presence in the White Plains site alone has produced more than a $700,000 return for the clients it has seen.

Role of the Law Students

Pace Law School students work at the FCLP as part of an externship during the academic year and simultaneously take a semester-long seminar on domestic violence. Many continue to work with the center on other projects after the semester is over.

The decision of some students to continue working with victims of domestic violence in other legal matters supports our belief that the program is meeting two of its major goals—to train future lawyers about domestic violence, and to encourage some of them to pursue this interest as a field of practice. The center itself has, over its decade of existence, hired four Pace Law School graduates who had started working there as law students.

During the past two and a half years, more than four dozen law students have worked at the FCLP. During the summer, the program takes applications from law students from around the nation who are interested in participating. We hope that by spreading the word about the FCLP, other law schools will be encouraged to set up similar programs in their local courts.

This type of a public-private partnership reaps a variety of long-term benefits. For clients, the child support collection presence in the White Plains site alone has produced more than a $700,000 return for the clients it has seen. For law students, the program has provided a unique opportunity to work directly with many clients. And we expect the community to benefit exponentially when lawyers graduate and practice for decades with a heightened degree of sensitivity to family violence intervention.

The principal beneficiaries, however, are the victims of domestic violence who annually receive legal assistance in Westchester from the program and would otherwise appear in court without legal representation. Equally dramatic is the impact that the FCLP has on its student attorneys. Renée Fischer took advantage of the externship in the spring of her second year and found it an invaluable experience. She reported that she learned practical legal skills as well as a new insight into the complex world of victims of domestic violence. "Dealing with these women instilled in me tremendous respect for their courage, discipline, ingenuity, and humility," she said, adding that the experience helped her to feel much more confident speaking in court. Melissa DeBartolo, a current third-year student, was not sure what her field of practice would be until working at the FCLP convinced her to pursue a career in public interest law. Students, who range from 23-year-old females to 63-year-old males, are always excited to be trained, mentored, and then to be actually interviewing, writing petitions for, and orally arguing on behalf of clients every day that they are at the externship.

Objectives of the FCLP

The FCLP was created for two reasons: (1) so that women who need the personal and less public redress offered by civil courts, such as custody and child support, can obtain that critical relief with the assistance of an attorney; and (2) so that future generations of law students trained and working in this program will provide far better representation to victims of domestic violence than the majority of attorneys have in the past.

Because most orders of protection in the United States are civil, but most of our national intervention funding and initiatives over the past two decades have been around criminal intervention, the FCLP is a direct response to the unmet legal needs of battered women in the civil arena.

Women who come through the program receive significant benefits that have long-term ramifications. One major advantage of the FCLP is the reduced time it takes women to receive child support. Many women feel trapped in abusive relationships because of financial constraints.

Without the assistance of the FCLP, women who file for an Order of Protection and also want to get child support must make an independent appointment with the child support office, usually in no sooner than two weeks, and then wait another six to eight weeks for their

first court appearance. At the court appearance they receive an Order of Support, but it usually takes another three or four weeks before the applicant begins receiving checks.

When an FCLP representative from the Office of Child Support interviews women the day they petition for their orders of protection, these victims can leave the courthouse that same day with an enforceable Temporary Order of Child Support—in addition to a Temporary Order of Protection. Often the court then is able to schedule all three of the client's court cases—Orders of Protection, Child Support, and Custody—for the same return date. This "one-stop shopping" approach saves both the client and the courthouse valuable time, and significantly advances the date on which the client can expect to receive child support.

Client Satisfaction

In early 2001 the FCLP began a series of informal follow-up interviews with women who had been through the program to make sure the program was providing the right combination of resources, and to see if the women felt that they had benefited from its presence. Results to date confirm our belief that the FCLP is providing much-needed representation, information, and reassurance on what is otherwise an overwhelming day. In the words of one client, "Everyone was very helpful when I felt desolate and alone. The process helps the abuser to respect the victim." By and large, women who have been assisted by the program seem to feel empowered by the Order of Protection, and feel that they knew what to expect from the court system.

One dramatic change produced by the FCLP has been the increase in the percentage of victims of domestic violence who come to court on the return date that follows issuance of every Temporary Order of Protection. A battered woman who has been granted a Temporary Order of Protection frequently does not return to court to pursue a Permanent Order of Protection for a myriad of reasons. In some jurisdictions 30 percent to 50 percent of battered women do not return to court, which usually results in the dismissal of their temporary orders. The rate of FCLP returns to our staff and students averages 80 percent to 100 percent. In January of 2002, for example, the rate was 100 percent. Making Family Court legal systems user-friendly and client-focused is a priority of the program that is reaping obvious results.

Conclusion

Creative approaches, dogged persistence, and a coordinated community response are needed to insure that no victim of domestic violence is denied an Order of Protection simply because she did not have professional legal assistance to argue her case. In 1994, representatives of the Pace Women's Justice Center and the law school administration met with local judges. All wanted to create this program, but it took the Westchester County executive and the Board of Legislators to bring it about.

The Chief Justice of the Court of Appeals, Judith Kaye, has expressed our objective most succinctly: "If domestic violence cases don't fit the mold, don't blame the cases, change the mold."

The Wrongly Convicted May Recover Civil Damages, But Must Meet Exacting Standards of Proof

By Terry Jane Ruderman

The advances in the reliability of genetic evidence have brought to the forefront, once again, a dilemma that is at the core of our criminal justice system—the conviction of the innocent. How do we ensure that the true criminal is convicted, yet at the same time prevent the tragedy of sending the innocent person to prison? When the latter does occur, what obligations do we as a society have to the wrongly punished?

Before 1984, "relief for a person, who had been unjustly convicted and imprisoned, was usually 'limited to the common law torts of malicious prosecution and false imprisonment, special legislative action, and a claim for damages following a gubernatorial pardon.'"[1] This article addresses the statute enacted in 1984, which provides a remedy for the unjustly convicted, and the hurdles that face a party seeking to recover under this law.

The Nature of the Action

In 1984, the state assumed a "moral obligation" to innocent persons who had been unjustly convicted.[2] Recognizing that despite the procedural safeguards built into our system, and through no fault of their own, innocent persons had been convicted, the New York State Legislature enacted a means of redress that went beyond existing tort remedies. Incorporating the recommendations of the New York State Law Revision Commission, it passed section 8-b of the Court of Claims Act, creating a claim for unjust conviction and imprisonment against the state.[3] The linchpin of the claim is innocence.[4]

Unlike malicious prosecution, culpability is not an element of an unjust conviction claim. It is not necessary for the person seeking damages to establish that someone's culpable acts resulted in the conviction.[5] The legislature sought to create a balance between the "goals of compensating innocent individuals who had been unjustly convicted and imprisoned, and foreclosing frivolous suits against the State."[6] To recover under this statute, claimants must prove their claims by clear and convincing evidence.[7] The statutory scheme is exacting, the evidentiary burdens demanding.

Claimant's Pleading Burden

The statute provides:

> The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (a) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (b) he did not by his own conduct cause or bring about his conviction. The claim shall be verified by the claimant. If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state.[8]

The requirements of this statute are strictly construed.[9] The statute places the burden on the claimant to provide specific details and the requisite documentary evidence to demonstrate a likelihood of success at trial in proving innocence.[10] The difficulty in making this showing means that many of these claims cannot withstand a motion to dismiss. For example, in *Torres v. State*,[11] the claimant's conviction for criminal possession of a controlled substance in the first degree was reversed and the indictment dismissed because the Appellate Division found that the defense of entrapment had been established by a preponderance of the credible

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evidence. The subsequent unjust conviction claim was dismissed on defendant's motion for summary judgment because entrapment is not a defense that "negates the commission of the crime charged or the existence of any element thereof."[12] In addition, reversals based upon ineffective assistance of counsel or double-jeopardy grounds are similarly excluded from coverage under the statute.[13]

It is not enough for a claimant merely to proclaim innocence, and dismissals are common. The standard for granting a motion to dismiss is "not likely to succeed at trial" and the standard at trial is "clear and convincing evidence." As a result, if the facts alleged indicate that the claimant will not be able to meet this exacting burden at trial, then it follows that such a claimant cannot withstand a motion to dismiss because success at trial is unlikely. To that extent, the trial standard is relevant to the pleading/dismissal standard.[14] As might be expected, where a claimant has admitted his guilt in a criminal trial, the likelihood of proving innocence by clear and convincing evidence is nonexistent and a motion for summary judgment to dismiss the unjust conviction claim will succeed.[15]

Claimants must also establish that they did not, by their own conduct, cause or bring about their own convictions. The purpose of this requirement is to "ensure that one is not rewarded for his own misconduct."[16] The Commission Report lists five examples of conduct that would preclude a claimant from recovering under the statute: (1) giving an uncoerced confession of guilt, (2) removing evidence, (3) attempting to induce a witness to give false testimony, (4) attempting to suppress testimony, and (5) concealing the guilt of another.[17] The list was intended to be illustrative and not exclusive. Therefore, other conduct may form the predicate for denying a claimant recovery as well.[18] While this requirement has also proven to be a stumbling block for a claim's survival at the motion stage,[19] it is not necessarily fatal. A claimant who failed to testify at his own criminal trial was not found to have brought about his conviction within the meaning of the statute.[20]

Claimants also have had limited success in winning their own motions for summary judgment seeking a finding of liability against the state. The exceptions have arisen primarily where a claimant's conviction had been reversed or vacated on the grounds of newly discovered serological[21] or DNA evidence.[22]

Claimant's Burden of Proof at Trial

To prevail on a claim for unjust conviction under Court of Claims Act section 8-b, the claimant must establish by clear and convincing evidence that:

(1) Claimant was convicted of one or more felonies or misdemeanors, was sentenced to a term of imprisonment thereon, and has served all or part of that sentence; and

(2) Claimant's judgment was reversed or vacated pursuant to one of the following statutorily enumerated grounds:

(a) Pursuant to N.Y. Criminal Procedure Law 440.10 (hereinafter "CPL") on the basis that the court lacked jurisdiction; the judgment was procured by duress, misrepresentation or fraud; the material evidence adduced at trial was false; the defendant was incapacitated; or there has been newly discovered evidence;[23]

(b) Pursuant to CPL 470.20 reversing a judgment after trial on one of the grounds referred to above; legal insufficiency; or the verdict was against the weight of the trial evidence;

The standard for granting a motion to dismiss is "not likely to succeed at trial" and the standard at trial is "clear and convincing evidence."

(c) Pursuant to comparative provisions of the former code of criminal procedure or subsequent law or;

(d) That the statute or its application, on which the accusatory instrument was based, violated the Constitution of the United States or the State of New York;

(3) Claimant did not commit any of the acts charged in the accusatory instrument; and

(4) Claimant's own conduct did not cause or bring about the conviction.

A claimant must demonstrate, by clear and convincing evidence, his or her entitlement to the relief requested. As the Court of Appeals stated in *Reed v. State*,[24] the task facing a claimant who brings an unjust conviction claim "is certainly not a simple one. . . . [W]hile the Legislature specified that courts should 'give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons' (Court of Claims Act § 8-b[1]), it also allocated to claimants the heavy burden of proving their innocence by clear and convincing proof."[25]

The clear and convincing evidence standard requires a quantum of proof establishing a high degree of probability.[26] It is thus more demanding than the preponderance of the evidence standard, which ordinarily applies in a civil trial. The proof cannot be "loose, equivocal or contradictory."[27] A claimant's conclusory and self-serv-

ing testimony is insufficient to carry this heavy burden.[28] An acquittal is not the equivalent of innocence[29] and a reversal of a criminal conviction does not establish innocence.[30]

Part of the claimant's burden is to prove, by clear and convincing evidence, that he or she did not cause or bring about the conviction. There are varying interpretations of just what conduct constitutes contributing to one's own conviction. As anticipated by the examples set forth in the Commission Report, a claimant's uncoerced confession, though subsequently shown to be false and illegally obtained,[31] as well as an incriminating statement,[32] have precluded redress under the statute. Additionally, in *Williams v. State*,[33] where a claimant directed his attorney not to call his wife to testify (presumably in order to avoid incriminating her), his actions barred his recovery. The Court of Appeals reasoned that, had the wife taken the stand, the claimant might have been acquitted. Thus, the Court concluded that the claimant's express direction to his attorney may well have contributed to the claimant's conviction.

To prevail, claimants initially must overcome motions to dismiss, and, if they succeed, must then meet an exacting burden of proof at trial.

In contrast, where an attorney had failed to seek an adjournment or to call a witness who had telephoned the attorney the night before summation with additional information, such conduct was not attributable to the claimant.[34] Nor was a claimant found to have brought about his conviction where he exercised his constitutional right and chose not to testify at his criminal trial.[35] A determinative factor in reconciling the holdings in these cases appears to be whether claimant had undertaken some affirmative act rather than having made a strategic trial decision, especially one involving a constitutional right.

Damages

The statute requires the court to award damages that fairly and reasonably compensate the claimant.[36] The Commission Report indicates that no statutory restrictions should be imposed on the amount or type of damages awarded, and that traditional methods of determining damages should be employed.[37]

Both pecuniary and nonpecuniary damages are recoverable. The relevant time period is from conviction to the end of imprisonment,[38] with consideration given to any continuing damages. In most cases, the pecuniary damages sought consist of the loss of past and future earnings that are the direct result of incarceration. In order to establish these amounts, experts are often called to testify.[39]

The primary types of non-pecuniary damages are loss of reputation, humiliation and emotional distress resulting from imprisonment; the last would include discomfort, fear, lack of privacy, and loss of freedom. Courts have considered that this anguish is heightened by the knowledge of one's innocence. It is certainly difficult to place a dollar amount on the loss of liberty, and decisions reflect a range of recoveries depending upon the individual circumstances of each claimant.

There is no fixed dollar amount applicable to any given time period. For example, in *Kotler v. State*, the court determined that claimant should be compensated at a rate of $125,000 per year for his non-pecuniary damages, or $1,335,000 for the ten years and eight months he was unjustly incarcerated.[40] Another claimant, who was found to have been unjustly convicted for rape, recovered $450,000 after having served two years, one month in prison, which included $275,000 for past pain and suffering and $175,000 in damages for the remainder of his life.[41] In contrast, in *Johnson v. State*, a claimant who had served 747 days of his sentence of 30 months to five years was awarded only $40,000 for his loss of reputation, humiliation and pain. The court took into account the fact that this particular claimant had a prior criminal record and numerous incarcerations.[42]

Conclusion

New York's Unjust Conviction Act has given claimants a vehicle for recovery, but it is not without its hurdles. To prevail, claimants initially must overcome motions to dismiss, and, if they succeed, must then meet an exacting burden of proof at trial. Accordingly, there have been a relatively limited number of judgments awarded—but recovery is certainly possible in a proper case.

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1. *Solomon v. State*, 146 A.D.2d 439, 440, 541 N.Y.S.2d 384 (1st Dep't 1989) (citing 1984 Report of N.Y. Law Revision Commission, 1984 N.Y. Laws at 2906 (hereinafter "Commission Report")).
2. *Carter v. State*, 154 A.D.2d 642, 546 N.Y.S.2d 648 (2d Dep't 1989).
3. Commission Report at 2899.
4. *Id.* at 2930.
5. *Id.* at 2932.
6. *Ivey v. State*, 80 N.Y.2d 474, 479, 591 N.Y.S.2d 969, 606 N.E.2d 1360 (1992).

7. N.Y. Court of Claims Act § 8-b(5) (hereinafter "Ct. Cl. Act").
8. Ct. Cl. Act § 8-b(4).
9. *See Groce v. State*, 272 A.D.2d 519, 709 N.Y.S.2d 408 (2d Dep't 2000).
10. *See Nieves v. State*, 186 A.D.2d 240, 588 N.Y.S.2d 329 (2d Dep't 1992); *Stewart v. State*, 133 A.D.2d 112, 518 N.Y.S.2d 648 (2d Dep't 1987).
11. 228 A.D.2d 579, 644 N.Y.S.2d 748 (2d Dep't 1996).
12. *Id*. at 580. *See Britt v. State*, 260 A.D.2d 6, 699 N.Y.S.2d 323 (1st Dep't 1999).
13. *See Barnes v. State*, 153 A.D.2d 968, 545 N.Y.S.2d 614 (3d Dep't 1989); *Fudger v. State*, 131 A.D.2d 136, 520 N.Y.S.2d 950 (3d Dep't 1987).
14. *See Lluveras v. State*, 136 Misc. 2d 171, 518 N.Y.S.2d 548 (Ct. Cl., 1987).
15. *See Diaz v. State*, 222 A.D.2d 549, 636 N.Y.S.2d 625 (2d Dep't 1995); *Paris v. State*, 202 A.D.2d 482, 609 N.Y.S.2d 71 (2d Dep't 1994).
16. Commission Report, at 2899, 2932; *see Moses v. State*, 137 Misc. 2d 1081, 523 N.Y.S.2d 761 (Ct. Cl., 1987).
17. *See* Commission Report, at 2899, 2932.
18. *See Coakley v. State*, 150 Misc. 2d 903, 571 N.Y.S.2d 867 (Ct. Cl., 1991), *aff'd*, 225 A.D.2d 477, 640 N.Y.S.2d 500 (1st Dep't 1996).
19. *See Ausderau v. State*, 130 Misc. 2d 848, 498 N.Y.S.2d 253, *aff'd*, 127 A.D.2d 980, 512 N.Y.S.2d 790 (4th Dep't 1987) (uncoerced confession precludes a claimant from recovery).
20. *See Lanza v. State*, 130 A.D.2d 872, 515 N.Y.S.2d 928 (3d Dep't 1987).
21. *See Coakley v. State*, 225 A.D.2d 477, 640 N.Y.S.2d 500 (1st Dep't 1996).
22. *See Chalmers v. State*, 246 A.D.2d 620, 668 N.Y.S.2d 227 (2d Dep't 1998).
23. CPL § 440.10(a), (b), (c), (e), (g).
24. 78 N.Y.2d 1, 11, 571 N.Y.S.2d 195, 574 N.E.2d 433 (1991).
25. *See id*.
26. *See* Edith L. Fisch, Fisch on N.Y. Evidence § 1090 at 614 (2d ed. 1977); 1A PJI 3d 1:64 (2000).
27. *George Backer Mgmt. Corp. v. Acme Quilting Co., Inc.*, 46 N.Y.2d 211, 220, 413 N.Y.S.2d 135, 385 N.E.2d 1062 (1978) (quoting *Southard v. Curley*, 134 N.Y. 148, 151, 31 N.E. 330 (1892)). *See Alexandre v. State*, 168 A.D.2d 472, 563 N.Y.S.2d 635 (2d Dep't 1990).
28. *See Vasquez v. State*, 263 A.D.2d 539, 693 N.Y.S.2d 220 (2d Dep't 1999).
29. *Id.*
30. *Id.*
31. *See Ausderau v. State*, 127 A.D.2d 980, 512 N.Y.S.2d 790 (4th Dep't 1987).
32. *See Murnane v. State*, ___ A.D.2d ___, 733 N.Y.S.2d 123 (2d Dep't 2001).
33. 87 N.Y.2d 857, 638 N.Y.S.2d 600, 661 N.E.2d 1381 (1995).
34. *See Ivey v. State*, 80 N.Y.2d 474, 591 N.Y.S.2d 969, 606 N.E.2d 1360 (1992).
35. *See Lanza v. State*, 130 A.D.2d 872, 515 N.Y.S.2d 928 (3d Dep't 1987).
36. Ct. Cl. Act § 8-b(6).
37. *See* 1984 Report of NY Law Rev Comm'n, 1984 McKinney's Session Laws of NY at 2932-33; *Carter v. State*, 139 Misc. 2d 423, 528 N.Y.S.2d 292 (Ct. Cl., 1988), *aff'd*, 154 A.D.2d 642, 546 N.Y.S.2d 648 (2d Dep't 1989).
38. *See Carter*, 139 Misc. 2d 423.
39. *See, e.g., Ivey*, Ct. Cl., Feb. 15, 1991, NeMoyer, J., Claim No. 70708, *aff'd* 179 A.D.2d 1069, 580 N.Y.S.2d 908 (4th Dep't 1992), *aff'd* 80 N.Y.2d 474, 591 N.Y.S.2d 969, 606 N.E.2d 1360 (1992).
40. *Kotler v. State*, 255 A.D.2d 429, 680 N.Y.S.2d 586 (2d Dep't 1998).
41. *See Coakley v. State*, 225 A.D.2d 477, 640 N.Y.S.2d 500 (1st Dep't 1996).
42. *See Johnson v. State*, 155 Misc. 2d 537, 588 N.Y.S.2d 722 (Ct. Cl., 1992).

Grounds May Exist to Challenge Orders Suspending Speedy Trials In Aftermath of September Attack

BY PAUL G. FEINMAN AND BROOKS HOLLAND

In the initial weeks after the attack on the World Trade Center, prosecutors announced "not ready" on many criminal matters, citing to the WTC disaster as the cause of the delay. The time now has arrived when defendants may challenge many of these delays in motions to dismiss under Criminal Procedure Law § 30.30 (CPL), New York's speedy prosecution statute.[1] (*See* Box on page 35.)

Normally, CPL § 30.30 would require prosecutors to defend these delays case-by-case, by demonstrating "exceptional circumstances."[2] On September 11, 2001, however, Governor Pataki issued Executive Order 113, declaring a "state disaster emergency."[3] On September 12, 2001, the governor amended that Order with Order 113.7, which "temporarily suspend[ed] and modif[ied]" several statutes imposing time limitations on certain actions, including CPL § 30.30. And, on October 5, 2001, the governor issued Order 113.28, which provided that after October 12, 2001, Order 113.7 would expire, but that the WTC disaster would constitute an "exceptional circumstance" until January 7, 2002.[4]

The governor's executive orders may thus have relieved prosecutors of some or all of their usual burden of justifying delays that followed the WTC disaster. This article identifies arguments that courts may encounter when reviewing § 30.30 motions that implicate these executive orders, including the validity of Order 113.7 in suspending CPL § 30.30. It also addresses the potential applicability and scope of Order 113.7 regarding both § 30.30 release and § 30.30 dismissal, and the question of whether Order 113.28 raises concerns about separation of powers.

Order 113.7

Order 113.7 provides in pertinent part:

> I hereby temporarily suspend, from the date the disaster emergency was declared, pursuant to Executive Order Number 113 . . . until further notice, the following laws:
>
> Section[ ] . . . 30.30 of the [CPL], so far as it bars criminal prosecutions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared . . . on September 11, 2001, until further notice.

Executive Law § 29-a(1) provides:

> Subject to the state constitution, the federal constitution and federal statutes and regulations, and after seeking the advice of the commission, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.

Executive Law § 29-a(2) subjects the governor's suspension authority to further "standards and limits": "no suspension shall be made for a period in excess of thirty days," unless the governor reconsiders "all of the relevant facts and circumstances"; any suspension must prove "reasonably necessary to the disaster effort"; the suspension order must "specify the statute . . . or part

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thereof to be suspended and the terms and conditions of the suspension"; "the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute . . . and may include other terms and conditions"; and "any such suspension order shall provide for the minimum deviation from the requirements of the statute . . . consistent with the disaster action deemed necessary."[5]

Unlike many of the statutory suspensions under Order 113.7, the suspension of CPL § 30.30 affects not just a procedural time limitation, but defendants' substantive interest in a prompt prosecution. Nevertheless, neither the state nor the federal constitution should limit this action, because CPL § 30.30 provides purely a statutory right not implicating constitutional interests.[6] Indeed, Order 113.7 conspicuously fails to suspend CPL § 30.20, New York's true "speedy trial" statute,[7] an action that might involve constitutional limitations.[8]

Executive Law § 29-a(1), however, does limit the governor to suspending laws only "after seeking the advice of the commission."[9] Nothing in Order 113.7 indicates that the governor sought the advice of the Disaster Preparedness Commission.[10] If not, defendants may argue that this failure undermines Order 113.7's validity, for Executive Law § 29-a(1) expressly imposes this "advice" requirement as a condition to the governor suspending or modifying duly enacted laws, a power the constitution otherwise assigns to the legislature.[11] Consistent with separation of powers principles, "'a [legislative] policy [must] be executed in a manner prescribed by' the Legislature."[12]

This "advice" requirement also ensures compliance with the "standards and limits" to suspension orders, particularly that any order prove "reasonably necessary" to the disaster effort and provide for the "minimum deviation" necessary.[13] For example, Order 113.7 does not suspend CPL § 30.30 only in New York City, close to the WTC site. Rather, defendants in upstate and western counties lose their right to a speedy prosecution equally to defendants in New York City. Presumably, Governor Pataki determined that the WTC disaster exceeded the law enforcement resources of New York City, and thus would draw upon law enforcement from the entire state. Indeed, anyone walking through Manhattan below Canal Street has observed state troopers and other law enforcement personnel from outside the city, and even the state, assisting local officials.

While the need for this outside assistance is obvious, the need to suspend CPL § 30.30 to free these personnel without sacrificing criminal prosecutions may not prove so apparent, because CPL § 30.30 already contains its own safety valve under subsections (3)(b) and (4)(g). These provisions excuse delays when an "exceptional circumstance" has rendered material evidence temporarily unavailable to the prosecution. Thus, even without the suspension of CPL § 30.30, many of the delays after the WTC would remain excludable; courts instead would need to evaluate the actual reasons for each delay, a task the courts have demonstrated they can perform competently and efficiently.[14]

If courts do uphold Order 113.7's suspension of CPL § 30.30, defendants nevertheless may argue that the scope of the Order remains quite limited in suspending CPL § 30.30, and thus inapplicable to many cases. These

Criminal Procedure Law § 30.30

CPL § 30.30 creates a statutory right to a speedy prosecution, requiring the prosecution to announce and maintain its readiness for trial within certain prescribed time periods, depending upon the level of offense. The statute provides for both release and dismissal as remedies, depending upon the length of pretrial delay chargeable to the prosecution.

CPL § 30.30(2) requires a defendant's release from custody after 90 days of delay chargeable to the prosecution on a felony, 30 days on a misdemeanor punishable by more than three months, 15 days on a misdemeanor punishable by no more than three months, and five days on a violation. CPL § 30.30(1) requires dismissal of the criminal action after six months of delay chargeable to the prosecution on a felony, 90 days on a misdemeanor punishable by more than three months, 60 days on a misdemeanor punishable by no more than three months, and 30 days on a violation.

CPL § 30.30(4), however, excludes certain delays regardless of the prosecution's trial readiness. CPL § 30.30(4)(g) specifically excuses any delays that occur because an exceptional circumstance has rendered material evidence temporarily unavailable. CPL § 30.30(3)(b) similarly excludes exceptional circumstance delays, but after the prosecution has announced its readiness for trial. The prosecution bears the burden of proving that the exceptional circumstance exception applies.[1]

1. *See People v. Berkowitz*, 50 N.Y.2d 333, 349, 428 N.Y.S.2d 927, 406 N.E.2d 783 (1980) (holding that "once the defendant has shown the existence of a delay greater than six months, the burden of proving that certain periods within that time should be excluded falls upon the People").

arguments extend to both § 30.30 release and § 30.30 dismissal.

30.30 Release

CPL § 30.30(2) provides that if the prosecution is not ready for trial within specified time periods, the defendant "must be released on bail or on his own recognizance."[15] In *People v. Aquino*,[16] the prosecution argued, in response to a § 30.30-release motion, "that the Governor's Order tolls the speedy trial clock and thus they are not chargeable with the time which has elapsed as of September 11, 2001."[17] The Criminal Court disagreed, and released the defendant. The decision focused on the language in Order 113.7 suspending CPL § 30.30 "so far as it *bars* criminal prosecutions."[18] From this language, the court concluded:

> It is clear from the natural and plain meaning of the words in the Order that this provision only applies to those cases where criminal prosecution would be barred, that is dismissed, as a result of the time limitations imposed by subdivision one of section 30.30 . . . because release of the defendant in no way bars criminal prosecution of the case. The prosecution continues. The sole difference is that the defendant is no longer incarcerated pending prosecution.[19]

The court also analogized CPL § 30.30(2) to the CPL's release provisions under §§ 170.70 and 180.80, which the governor did not suspend. The court reasoned that "[t]he fact that these two sections were not suspended clearly suggests that Executive Order 113 was not intended to apply to the release of defendants pursuant to subdivision two of section 30.30."[20]

This view of Order 113.7 as applying piecemeal to CPL § 30.30 finds support in the Executive Law. For, under Executive Law § 29-a, the governor may suspend a statute or "parts thereof,"[21] "may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute . . . and may include other terms and conditions."[22] The governor thus was empowered to suspend only the dismissal provisions of CPL § 30.30. This limitation, moreover, may ensure that the Order "provide[s] for the minimum deviation from the requirements of the statute . . . consistent with the disaster action deemed necessary,"[23] by ensuring solely that criminal prosecutions are not "barred."

Yet, limiting Order 113.7 to § 30.30 dismissals may create an awkward analytical problem, because one adjournment thus may prove both excludable for dismissal purposes, and chargeable for release purposes if the delay did not occur due to an exceptional circumstance. CPL § 30.30 does not appear to contemplate any distinction in the chargeability of time between its dismissal and release provisions. Months after a defendant's release, a court deciding the defendant's dismissal motion may well find that the release provisions do not sever so neatly.

Perhaps the answer lies not in viewing an adjournment as "excludable" under Order 113.7 for dismissal purposes, which presupposes analysis under CPL § 30.30, but rather in viewing CPL § 30.30 as wholly inapplicable for dismissal purposes during the Order's duration. But, Order 113.7 does not "specify," as Executive Law § 29-a(2)(c) requires, that only CPL § 30.30(1) was suspended as the "part thereof to be suspended," leaving section 30.30(2) intact.

These questions of how to interpret Order 113.7 do not end with § 30.30 release motions. The scope of Order 113.7 in suspending § 30.30 dismissals involves equally complex problems of construction.

CPL § 30.30 Dismissal

CPL § 30.30(1) provides for the dismissal of criminal actions if the prosecution is not ready for trial within specified time periods. Order 113.7 suspended CPL § 30.30 "so far as it bars criminal prosecutions," but only those prosecutions "whose limitation period concludes during the period commencing from the date that the disaster emergency was declared . . . on September 11, 2001."

Prosecutors may argue that Order 113.7 suspended CPL § 30.30 across the board during its duration. Defendants will respond, however, that the governor would not have included the Order's final clause absent an intent to limit its scope to certain conditions. The Executive Law authorizes, if not mandates, such limits, to ensure that suspension orders "provide for the minimum deviation from the requirements of the statute . . . consistent with the disaster action deemed necessary."[24]

Defendants consequently may contend that Order 113.7 suspended CPL § 30.30 only insofar as its literal terms: courts may not dismiss cases under CPL § 30.30 whose final date within the applicable 30.30 time period fell on a date between September 11, 2001, and Order 113.7's expiration on October 12, 2001. Thus, for example, if an "A" misdemeanor's ninetieth chargeable day fell on September 20, 2001, Order 113.7 entitled the prosecution to an adjournment past October 12, 2001. But, CPL § 30.30 would continue to apply to cases whose *final* date does not fall within the Order's duration, requiring courts instead to analyze these cases *ad hoc* for exceptional circumstances.

One court appears to have applied this analysis already. In *People v. Rueda*,[25] the court granted the defendant's § 30.30 motion, and included an adjournment from September 6 to September 20, 2001. On September 6, the prosecution had requested the adjournment to September 20. Contrary to the prosecution's contention, the court found that Order 113.7 did not excuse the delay after September 11 during this adjournment. The

court noted that Order 113.7 "temporarily suspended CPL 30.30 between 9/11 and 10/13 only 'so far as it barr[ed] criminal prosecutions whose limitation period conclude[d] during the period.'" Thus, the court held, "[a]s the limitation period of this action did not conclude between 9/11 and 9/20, this provision does not render the adjournment excludable."[26]

This approach, however, may raise as many questions as it answers. It would require courts to calculate § 30.30 time on every case to its final date, without considering the WTC disaster, to determine whether Order 113.7 even applies. Afterward, the court would need to backtrack to September 11, 2001, and recalculate chargeable time from that date, under either Order 113.7 or exceptional-circumstances analysis. And, every case whose final date falls after Order 113.7's expiration would require judicial inquiry into exceptional circumstances, the very burden the governor may have intended to avoid through Order 113.7.

The governor's Orders do not make clear how they should interact with each other, and whether the later Orders supersede the analysis of an adjournment that crosses from one Order's time period into the next.

Courts further would need to resolve how to evaluate adjournments under Order 113.7 that extended beyond the Order's expiration date. For example, if the prosecution requested a one-month adjournment on October 12, 2001, the final date of Order 113.7's duration, Order 113.7 may have suspended § 30.30 solely for that one day, requiring the prosecution to establish some other basis for excluding the balance, or it may have suspended § 30.30 for the entire adjournment. The governor's Orders do not make clear how they should interact with each other, and whether the later Orders supersede the analysis of an adjournment that crosses from one Order's time period into the next.

In the end, courts may find the argument that Order 113.7 simply suspended CPL § 30.30 from September 11 to October 12, 2001, more appealing, due to its clarity. Nevertheless, Order 113.7's final clause makes clear that some limitation applies to the scope of the Order. The courts will continue to determine which approach best comports with the language and intent of Order 113.7.

Separation of Powers

Order 113.7 expired at the end of October 12, 2001, and was replaced by Order 113.28. Order 113.28 provides that as of 11:59 p.m. on October 12, 2001:

> I hereby temporarily suspend . . .
>
> Subdivision 4(g) of section 30.30 of the Criminal Procedure Law, so far as it may be interpreted to limit "exceptional circumstances" in a way that would not include any delay attributable to the disaster emergency.

Order 113.28 thus makes clear that after October 12, 2001, courts should return to exceptional circumstances analysis. However, Order 113.28 also directs courts to interpret CPL § 30.30(4)(g) to include the WTC disaster as an exceptional circumstance, when the prosecution can attribute any delay to the WTC disaster.[27]

Order 113.28 consequently may raise separation of powers concerns. "The doctrine of separation of powers is implied by the separate grants of power to each of the coordinate branches of government,"[28] and "has deep, seminal roots."[29] While "some overlap between the three separate branches does not violate the constitutional principle of separation of powers,"[30] "'[i]t is a fundamental principle of the organic law that each department should be free from interference . . . by either of the others.'" [31]

Defendants may argue that Order 113.28, by effectively amending CPL § 30.30(4)(g), improperly usurped the Legislature's law-making function.[32] But, the Legislature, through Executive Law § 29-a, expressly has authorized the governor to do so, thus placing "his authority . . . at its maximum."[33] Moreover, Executive Law § 29-a sets "intelligible principles"[34] that limit the governor's authority to alter or modify statutes, further strengthening the Legislature's express delegation of power.[35]

Nevertheless, "'powers inherently and exclusively legislative cannot be delegated.'"[36] Indeed, "[a] duly enacted statute, 'once passed, cannot be changed or varied according to the whim or caprice of any officer, board or individual. It remains fixed until repealed or amended by the Legislature.'"[37] Under Order 113.28, defendants thus may contend, the Legislature improperly has delegated its exclusive power to amend CPL § 30.30's exceptional circumstances provision.

The Court of Appeals, however, "has always understood that the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets."[38] And, "the principle that the legislative branch may not delegate all of its lawmaking powers to the executive branch has been applied with the utmost reluctance."[39] So, courts may hesitate to find the governor's action, under an express and limited grant of authority by the Legislature, an improper usurpation of an exclusively legislative function.[40]

Courts also may look to the executive sphere of power under which Governor Pataki acted, in response to a terrorist attack on New York. If an executive has acted *ultra vires*, the wisdom or even emergency nature of the executive's act may not save it from constitutional scrutiny.[41] But, in *United States v. Curtiss-Wright Export Corp.*,[42] the U.S. Supreme Court upheld a not dissimilar executive order because it was issued in the uniquely executive sphere of foreign, rather than internal, affairs.

In *Curtiss-Wright*, Congress had passed a joint resolution in 1934 authorizing the president, under specific conditions, to declare arms sales to countries illegal, for which the resolution set criminal penalties.[43] The defendants were indicted for selling arms to Bolivia, after President Franklin D. Roosevelt declared arms sales to that nation illegal under the resolution.[44]

The Supreme Court upheld the president's order against a separation of powers challenge, noting that the "broad statement" that the government is limited to its enumerated powers "is categorically true only in respect to our internal affairs."[45] In *Curtiss-Wright*, by contrast, the U.S. Supreme Court dealt "not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[46]

Of course, *Curtiss-Wright* implied that it may have found this delegation of legislative power unconstitutional if it did not involve foreign affairs,[47] a fact defendants may turn to their favor concerning Order 113.28. But, if prosecutors fairly can analogize the governor's role in responding to a large-scale terrorist attack on New York to the president's role in foreign affairs—perhaps in the governor's capacity as state commander-in-chief[48]—Order 113.28 may not face the usual constitutional scrutiny. On the contrary, "[t]he delegated duty [becomes] interlinked with duties already assigned to the [executive] by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'"[49]

Defendants alternatively may argue that Order 113.28 does not invade on the legislature's province at all, but upon the judiciary's. Rather than amend CPL § 30.30(4)(g), defendants may assert, Order 113.28 leaves that section intact, and instead directs the judiciary on the findings of fact and conclusions of law that it must make in judging exceptional circumstances claims. Prosecutors may counter that Order 113.28 directs no such thing, but rather simply modifies the statutory definition of exceptional circumstances to include the WTC disaster.

If, however, Order 113.28 does direct the judiciary on how to perform its function in resolving exceptional circumstances claims under CPL § 30.30(4)(g), Order 113.28 may raise genuine separation of powers concerns. "It is emphatically the province of the judicial department to say what the law is. Those who apply the rule to the particular cases, must of necessity expound and interpret the rule."[50] Thus, however often the WTC disaster indeed may constitute an exceptional circumstance, the governor may not expound and interpret that rule for the Judiciary to apply to particular cases.

Conclusion

If the sincerity with which state and local officials have acted since September 11, 2001, alone would test the legality of their actions, no question would exist that they would be upheld. But, even actions undertaken in a good faith belief that they serve the citizenry's best interests must be examined by the courts to ensure that they adhere to the legal foundations that empower, and sometimes limit, those actions. In the coming months, the courts will struggle with these issues when interpreting and applying the governor's orders regarding CPL § 30.30.

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1. *See People v. Anderson*, 66 N.Y.2d 529, 534, 498 N.Y.S.2d 119, 488 N.E.2d 1231 (1985) (explaining that "[a]lthough CPL 30.30, like 30.20, is entitled 'speedy trial' . . . it addresses only the problem of prosecutorial readiness"); Preiser, McKinney Practice Commentary, CPL § 30.30 (1992) (noting that CPL § 30.30, "although labeled 'speedy trial' does not govern the time within which trial must commence: it deals with the subject of when the People must be ready for trial").
2. *See* CPL § 30.30(3)(b), (4)(g).
3. *See* Executive Law § 20(2)(b) ("Exec. Law"); *see also* Exec. Law § 20(2)(a) (defining "disaster").
4. *See* Executive Orders 113.42, 113.43a (extending Order 113.28's original expiration date of November 8, 2001, to December 7, 2001, and January 7, 2002, respectively).
5. *See* Exec. Law § 29-a(2)(a)–(e).
6. *See Anderson*, 66 N.Y.2d at 534 (noting that CPL § 30.30 "is not a speedy trial statute in the constitutional sense").
7. *See* Preiser, McKinney Practice Commentary, CPL § 30.20 (1992) (explaining that CPL § 30.20 "is the only true 'speedy trial' provision in the CPL").
8. *See People v. Anderson*, 66 N.Y.2d 529, 534, 498 N.Y.S.2d 119, 488 N.E.2d 1231 (1985); *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303 (1975).
9. *See* Exec. Law § 20(2)(d) (defining "commission" as "the disaster preparedness commission created pursuant to section twenty-one of this article"); *see also* Exec. Law §§ 21(3) (defining the powers and responsibilities of the commission), 22 (state disaster preparedness plans).
10. Inquiry at the governor's office revealed that the governor did consult with the Attorney General's Office and the Office of Court Administration, but not whether the governor consulted with the Disaster Preparedness Commission.

11. *See* N.Y. Const. art. III, § 1.
12. *County of Oneida v. Berle*, 49 N.Y.2d 515, 523, 427 N.Y.S.2d 407, 404 N.E.2d 133 (1980) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)) (first bracket in original); *see Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165–66 (1991); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 330–31 (1936); *Rapp v. Carey*, 44 N.Y.2d 157, 163, 404 N.Y.S.2d 565, 375 N.E.2d 745 (1978).
13. *See* Exec. Law § 29-a(2)(c), (e).
14. *See* Jane Fritsch, *Criminal Courts in Manhattan Refuse Request to Delay Cases*, N.Y. Times, Sept. 21, 2001, at A 28 (reporting on Manhattan courts' rejection of District Attorney's Office's request to delay all criminal matters for two weeks due to the WTC disaster, with the courts instead addressing each requested delay, after which "the backlog had been all but eliminated").
15. *See People ex rel. Chakwin v. Warden*, 63 N.Y.2d 120, 124, 480 N.Y.S.2d 719, 470 N.E.2d 146 (1984).
16. 189 Misc. 2d 572, 734 N.Y.S.2d 371 (N.Y. City Crim. Ct. 2001).
17. *Id*. at 574.
18. *Id*. (emphasis added).
19. *Id*.
20. *Id*.
21. Exec. Law § 29-a(1); *see* Exec. Law § 29-a(2)(c).
22. Exec. Law § 29-a(2)(d).
23. *See* Exec. Law § 29-a(2)(e).
24. *Id*.
25. Index No. 6684/00 (Sup. Ct., N.Y. Co. Jan. 31, 2002) (unpublished opinion).
26. *Id*. The Court also found no exceptional circumstances for this delay, even though "court was not in session between 9/11 and 9/17 due to the World Trade Center disaster, and . . . between 9/17 and 9/20, [the prosecution] could not have contacted their witnesses." The court looked instead to the initial cause of the delay, and concluded that the prosecution's "request to have the case adjourned to 9/20 was in no way traceable to the World [T]rade Center disaster . . . and while their ability to contact witnesses during this period may have impacted upon their readiness to proceed on 9/20, it did not effect [*sic*] their statement of readiness on 9/6." *Id*.
27. Interestingly, Order 113.28 does not include CPL § 30.30(3)(b), which governs exceptional circumstances in the "post-readiness" context. Presumably, therefore, Order 113.28 applies only to delays that occur in *pre*-readiness settings.
28. *Clark v. Cuomo*, 66 N.Y.2d 185, 189, 495 N.Y.S.2d 936, 486 N.E.2d 794 (1985).
29. *Cohen v. State*, 94 N.Y.2d 1, 11, 698 N.Y.S.2d 574, 720 N.E.2d 850 (1999).
30. *Clark*, 66 N.Y.2d at 189.
31. *County of Oneida v. Berle*, 49 N.Y.2d 515, 522, 427 N.Y.S.2d 407, 404 N.E.2d 133 (1980) (quoting *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282, 49 N.E. 775 (1898)).
32. *Cf. Prospect v. Cohalan*, 65 N.Y.2d 867, 871, 493 N.Y.S.2d 293, 482 N.E.2d 1209 (1985).
33. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 & n. 2 (1952) (Jackson, J., concurring).
34. *Touby v. United States*, 500 U.S. 160, 165 (1991).
35. *Cf. Boreali v. Axelrod*, 71 N.Y.2d 1, 10–11, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987); *Rapp v. Carey*, 44 N.Y.2d 157, 166, 404 N.Y.S.2d 565, 375 N.E.2d 745 (1978).
36. *Boreali*, 71 N.Y.2d at 10; *see Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby*, 500 U.S. at 165; *Wayman v. Southard*, 23 U.S. 1, 42 (1825).
37. *County of Oneida v. Berle*, 49 N.Y.2d 515, 523, 427 N.Y.S.2d 407, 404 N.E.2d 133 (1980) (quoting *Schumer v. Caplin*, 241 N.Y. 346, 351, 150 N.E. 139 (1925)).
38. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995).
39. *Boreali*, 71 N.Y.2d at 9.
40. *Cf. Touby v. United States*, 500 U.S. 160, 163–67 (1991) (upholding federal statute delegating power to Attorney General to reclassify controlled substances from one Schedule to another).
41. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 589 (1952); *cf. also County of Oneida*, 49 N.Y.2d at 523 (noting that "[h]owever laudable its goals, the executive branch may not override enactments which have emerged from the lawmaking process").
42. 299 U.S. 304 (1936).
43. *Id*. at 311–12.
44. *Id*. at 311–15.
45. *Id*. at 315–16.
46. *Id*. at 319–20.
47. *See id*. at 322.
48. *See* N.Y. Const. art. IV, § 3.
49. *Loving v. United States*, 517 U.S. 748, 772 (1996) (quoting *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975)).
50. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Web Research Update

Changes Expand and Contract Research Options in New York

BY WILLIAM H. MANZ

The Internet has brought an element of anarchy into the world of legal research. Instead of just being available in familiar print sources or through well-established commercial services, legal materials may now be available at any number of Internet sites. Adding to this anarchic situation are the constant changes involving Internet resources: new sites appear while others vanish; existing sites may have their content expanded or reduced; a familiar site may be redesigned; or most frequently, a site may be assigned a new Web address.

New York is no exception, with numerous changes during 2001. This article updates and supplements the coverage of one published in the *Journal*'s Nov./Dec. 2000 issue,[1] which surveyed developments during the past year, and reported on the current availability of major New York legal materials on free Web sites.

New York State Courts

The disappearance of Jurisline.com has resulted in a significant reduction in the number of New York appellate opinions available free, online. Jurisline.com had offered Court of Appeals and Appellate Division decisions dating from the early 20th century. In contrast, none of the other free sites currently provide decisions predating 1990. Cornell's Legal Information Institute (LII) still begins Court of Appeals coverage with 1990, and Findlaw.com starts with 1992. Recent opinions from the Court of Appeals and the Appellate Divisions are also available at the Law Reporting Bureau Website as part of the Slip Opinion Service. Cases from the Third and Fourth Departments are also now available at the individual Department Web sites, but again only recent decisions are included.[2]

In addition to these free non-commercial sites, two major commercial services also maintain Web sites offering appellate decisions. Lexis offers LexisONE, where registrants may obtain free New York appellate decisions for the past five years.[3] Unlike most free non-commercial sites, LexisONE offers sophisticated searching, including the usual Lexis terms and connectors, and searches by date, parties, judges, and counsel. Also available is Lexis' "LEXSEE" service, enabling users to locate by citation cases in the free database. The other major Internet-based commercial service, Law.com, limits its free New York case law to the daily "Decision of Interest." Those wishing to access the six-month archive of opinions from all the Appellate Divisions and the supreme courts of the eight downstate counties must register and pay an annual fee of $170.[4]

The New York State Bar Association is also about to become a major source of case law at no cost. Such access, however, is only available to its members. Through its partnership with Loislaw.com, now a division of Aspen Law Publishing, the NYSBA will provide a searchable database, which includes three years' worth of New York appellate and miscellaneous cases, as well as the Second Circuit decisions. Unlike other free services, the links within each case will be live, allowing the user to view all cited authority. The NYSBA will also be providing a link to a co-branded page through LEXIS, which will allow direct access to the resources available through LexisONE.

Historically, lower court opinions have been selectively published with only about 20% of cases submitted to the Reporter of Decisions. Now, however, under a pilot project approved by the Court of Appeals, selected opinions not included in *Miscellaneous Reports 2d* are being released for electronic publication. These decisions are being included in the databases of the commercial databases[5] and are also included in the Reporter's Slip Opinion Service at the Law Reporting Bureau Web site.

An expanding database of New York State Supreme Court opinions is also available at the Unified Court

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System (UCS) Web site. Decisions here are mainly from the Supreme Courts of Broome, Kings, Nassau, New York, Queens, and Suffolk Counties, but a recent check of the database found that opinions also were now posted from a variety of upstate supreme courts, including Chemung, Cortland, Delaware, and Tompkins Counties.

Also available through the UCS site are Nassau County Supreme Court non-matrimonial short form orders and memorandum decisions since June 2000. Supreme court opinions are also located at a variety of other sites. The Queens Supreme Court Library posts decisions as published in the *New York Law Journal* since June 1999. The Buffalo Supreme Court Library provides recent area opinions (largely from Chautauqua County), and the New York Supreme Court, Civil Branch, has separate databases for its recent commercial and non-commercial opinions.[6] Finally, opinions may also be available through the home pages of individual judges.[7]

The Court of Claims site continues to provide full-text decisions, and the New York City Housing Court still posts opinion summaries.

Cases from other state courts are also available. The Court of Claims[8] site continues to provide full-text decisions, and the New York City Housing Court[9] still posts opinion summaries. In addition to these locations, there is a growing number of court home pages accessible through links at the UCS Web site,[10] some of which will likely include judicial opinions.[11]

Federal Courts in New York

As with New York State appellate decisions, the amount of federal court case law available free on the Internet has been markedly reduced by the end of Jurisline.com. Second Circuit opinions since 1995 are now available only through Findlaw.com, Touro Law School, and Pace Law School. Coverage of federal district and bankruptcy court decisions is currently limited to those posted at the sites of the individual courts, which contributes to the lack of uniformity among such sites. The Eastern District provides links to a very limited number of decisions—only five new cases were added between January and November 2001. The Western District allows searches by file name, and also provides a pull-down menu permitting users to search for opinions from specific, individual judges. In contrast, a far wider variety of options are available for Northern and Southern District opinions. Their decisions are available through CourtWeb, a service offering natural language and Boolean searching, as well as searches by case name, date, judge, and year. As in 2000, only the Western and Northern District Bankruptcy Courts make recent decisions available online.

Statutes and Regulations

Free Internet access to both the unannotated Consolidated and Unconsolidated Laws continues to be available at the New York State Assembly Web site and the New York State Legislative Bill Drafting Commission Web site. Access is through a series of links leading from the major laws (*e.g.*, Banking, Business Corporation, the CPLR, *etc.*) to Abandoned Property, leading to links to individual articles, and then to the text of specific code sections.

Unfortunately, unlike LEXIS and Westlaw, no information is provided regarding when the database was last updated. With regard to regulations, there continues to be no comprehensive free Internet access to the N.Y. Comp. Codes, R. & Regs., although links to selected sections, as posted by individual state agencies, now appear at the Web site of the Governor's Office of Regulatory Affairs. Finally, the Department of State site now posts in PDF format (for those with the Adobe Acrobat software, the PDF format enables the page to be printed exactly as it appears in the original) the tables of contents of the weekly *State Register*.

Legislative Materials

The Web sites maintained by the Assembly and Bill Drafting Commission both continue to provide bills, sponsor's memos, bill tracking, and chapter laws for the current session only.[12]

The Bill Drafting Commission site also provides governor's approval memoranda and veto messages. Legislative reports are available at both the Assembly and Senate Web sites. The Assembly back file begins with 1995, while Senate coverage starts with 1998.

Additional legislative materials are now also available through the New York State Library Web site. These include the *Laws of New York*, from 1996 to 1998; Assembly journals, from 1994 to 1998; selected reports and hearings, since the late 1990s; and governor's approval messages, as published in the *State of New York Legislative Digest* (Nov. 1996–Jan. 1998). It should be noted that these materials are not as convenient to use as those at the legislative sites. Retrieval requires consulting an online "Checklist of Official Publications" page, and then entering the relevant library cataloging number. Since the materials are in TIFF format, not Adobe Acrobat PDF, the user cannot scroll through the document, but must instead proceed page by page.

Court Rules

The most comprehensive online source for court rules is the Law.com Web site, which provides rules for the Court of Appeals, the Appellate Division, lower courts of the downstate counties, the Second Circuit, and the Eastern and Southern Districts. However, only the rules for the New York Court of Appeals are provided at no cost; access to the rules of all other courts are limited to subscribers. Recent amendments to state court rules are posted at the UCS site, and additional rules may also be found at many court home pages. At the federal level, local rules for each of the district courts and bankruptcy courts are available at their individual Web sites.

Opinions, Orders, Rulings

There has been no change in Internet coverage of attorney general opinions. Opinions since 1995 remain available at the attorney general's Web site. In contrast, opinions of the comptroller, previously reported as available since 1995, now extend back to 1988. Finally, a limited number of executive orders, previously available only in print, can now be found in the digitized version of the *State of New York Legislative Digest*, now posted at the State Library Web site.

Research using the various Web sites of the state agencies has its own set of problems. These sites have a wide variety in their design and content and, unlike sites of the courts, do not necessarily focus on providing information to the legal community, which sometimes makes them more difficult to use. Despite these problems, however, the increasing number of sites providing rulings, decisions, orders, and opinions allow faster access material once only available from commercial databases, administrative case reporters, or in difficult-to-obtain slip format.

In some instances, Web site administrative databases provide materials previously available online only through Lexis and Westlaw. Currently, in addition to the Department of Taxation and Finance, Public Service Commission, and State Ethics Commission (mentioned in the previous article), materials are now posted by the Banking Department (opinions since 1990) and the Department of Environmental Conservation (department decisions and orders since 1992, and Freshwater Wetlands Appeals Board decisions from 1996–1997). As is most often the case where free Internet sites and commercial services are both available for the same type of material, the material on the Lexis and Westlaw databases predate those of these government-sponsored sites.

Rent Guidelines Board apartment orders (since 1969), and hotel orders (since 1971) are available at the HousingNYC.com Web site.

Sites previously reported as providing material unavailable in the commercial databases have not extended their coverage.[15] However, other Web sites now offer documents not previously available online. These include the Board of Elections (formal opinions since 1974 and informal opinions since 1986); the Commission of Education (decisions since July 1991); the Department of State (legal memoranda and interpretations); and the Temporary State Commission on Lobbying (advisory opinions since 1978).

Municipal Materials

Most New York municipal materials currently available online relate to New York City. The New York City Charter, Administrative Code, and City Rules are available on Lexis and Westlaw, but are not posted at any free Web site. Local laws enacted since 1995 are available on Westlaw, and the City Council Web site has local laws enacted since 1992.

Unlike the City Council Web site, Westlaw also provides the reports relating to individual enactments.[16] Materials not available commercially, but now provided free online at municipal Web sites, include City Council bills (intros, since 1997) at the City Council Web site, the entire Zoning Resolution and City Map at the Department of City Planning Web site, and summaries of Office of Administrative Trials and Hearings (OATH decisions since 1998 at the Office site). Also supplementing the commercial coverage are letter rulings (since 1999); and Division of Tax Appeals decisions (since 1998) are available at the Department of Finance site. However, like many of the state sites, the coverage here is far less than that available commercially.[17]

In addition to materials provided by the city, Rent Guidelines Board apartment orders (since 1969), and hotel orders (since 1971) are available at the HousingNYC.com Web site; and orders from the Office of Collective Bargaining (decisions since 1969) are posted at the Cornell University School of Industrial and Labor Relations site. Notable New York City materials still only available commercially include Commission of Human Rights Decisions and Orders (Westlaw since 1970), the full text of Conflict of Interest Board Advisory Opinions (Lexis and Westlaw since 1990), and Corporation Counsel opinions (Westlaw since 1980).

Legal materials from other New York municipalities receive no Lexis and Westlaw coverage. Although many cities and counties now maintain Web sites, none post the variety of information made available for New York

City. Currently, only the city of Yonkers posts its municipal code at its Web site.

However, codes of a large number of selected localities are available at the site of General Code Publishers, including such major upstate cities as Albany, Buffalo, and Rochester, several counties, and numerous smaller cities, towns, and villages. Another major publisher, Municipal Code Corporation, offers a large number of city codes, but only that of Tonawanda is located in New York.

Professional Responsibility Opinions

In addition to previously available free Web sites, ethics opinions are now provided at the Nassau and Suffolk County Bar Associations. The Nassau site provides comprehensive coverage since opinion 96-1, while the Suffolk site currently has only a small number of opinions—starting with 88-3 and ending with 89-7, This coverage does not match that of the Oceana Publishing subscription service, whose database dates from 1990.[18]

Meanwhile, there has been no increase in coverage of ethics opinions at the Web sites of the New York State Bar Association and those of the major New York City bar associations. Thus, the most comprehensive online source for professional responsibility opinions continues to be the commercial services.[19]

Conclusion

Although the amount and variety of New York legal materials offered on the Internet continues to expand, free online sources will not provide a comprehensive alternative to the commercial services in the foreseeable future. There has been no extension of retrospective coverage, and databases are growing only with the passage of time as new materials become available.

In addition, although it is not difficult to find relevant government sites with such search engines as Google and Altavista, the ability to do research on most free online databases is far more limited than on the commercial services with their multiple search parameters, including Boolean and natural language searching. On most sites, one is most likely to get positive results only when searching for specific, known documents. However, despite these limitations, currently available Web sites do offer a useful body of free law-related materials from reliable providers, many of which are not available electronically commercially, or are difficult and time-consuming to obtain in traditional print format.

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1. *See* William H. Manz, *Internet Web Sites Offer Access to Less Expensive Case Law and Materials Not Offered Commercially*, N.Y. St. B.J. 26 (Nov./Dec. 2000).
2. Third Department coverage starts with Aug. 2001. The Fourth Department provides opinions for 2000 and 2001.
3. LexisONE also offers a variety of fee-based services, including Boolean and LEXSEE searches for opinions more than five years old, Shepardizing, and an electronic advance sheet service.
4. Like LexisONE, Law.com offers subscribers a wide variety of additional features. These include court and judges' rules, judicial biographies, access to CLE seminars, federal district court filings, and e-mail alerts relating to legal news.
5. *See, e.g.*, Westlaw's new NY-CSUNR and NY-ORCSU databases which include unreported opinions released by the Reporter of Decisions since 2001.
6. Commercial Division decisions are also available through the Court System Web site.
7. *See, e.g.*, Justice John P. DiBlasi <http://www.courts.state.ny.us/www/jd9/westchester/Supreme/DiBlasi> (selected decisions from 1999 and 2000); Judge Alexander Hunter <http://members.aol.com/_ht_a/judgehunter/index.html?mtbrand=AOL_US> (listing decisions that will be e-mailed upon request).
8. The court's database back file dates from Mar. 2000. The prototype site with cases from 1995 is also still available at <http://supct.law.cornell.edu/nyctclm>.
9. The site posts summaries of opinions issued since Feb. 1996, as published in the *New York Law Journal*.
10. These sites are accessible through the *New York State Courts on the Web* page, available at the UCS Web site.
11. *See, e.g.*, the Fourth Judicial District Homepage <http://www.courts.state.ny.us/4jd/essex/decisions.html> (including decisions from the Essex County Court from July 1999 to Aug. 2000).
12. The bill information listing at the Senate Web site links to the Bill Drafting Commission site.
13. These include Committee on Open Government Advisory Opinions (since 1993) and Insurance Department Informal Opinions (since 2000). Division of Human Rights Orders (since 1999) are no longer available at the Division Web site.
14. The Council site does provide reports, but these deal with selected topics and do not relate to specific legislation.
15. Lexis offers letter rulings since Apr. 1977. Westlaw coverage begins with 1983. Westlaw also has tax appeals decisions since 1993.
16. This site, available at <http://www.oceana.com/default.asp>, offers subscribers opinions published in Oceana's *New Code of Professional Responsibility*.
17. The New York State Bar Association (NYSBA) site database still begins with September 1991, the Association of the Bar of the City of New York (ABCNY) still provides only an opinion index, and full text coverage of New York County Lawyers' Association (NYCLA) opinions starts with 1996. In contrast, these opinions are available commercially as follows: NYSBA on LEXIS (opinions since 1988), Westlaw (since 1977), and at the Oceana Publications site (since 1990); ABCNY on LEXIS and Westlaw (opinions since 1986) and Oceana (since 1990); NYCLA on Westlaw (since 1979) and Oceana (since 1990).

Addresses of Internet Sites

Materials noted in this article may currently be found at the following Internet addresses:

New York State Courts

Appellate Division, Fourth Department <http://www.courts.state.ny.us/ad4/Court/Decision.htm>

Appellate Division, Third Department <http://www.courts.state.ny.us/ad3/CalendarPages/netcal.htm>

Court of Appeals <http://www.courts.state.ny.us/ctapps/decision.htm>

Court of Claims <http://www.nyscourtofclaims.state.ny.us/decision.htm>

Findlaw.com <http://www.findlaw.com/11stategov/ny/nyca.html>

Housing Court <http://tenant.net/Court/Hcourt>

Legal Information Institute <http://www.law.cornell.edu/ng/ctap>

LexisONE <http://www.lexisone.com>

Nassau County Supreme Court Decisions and Orders <http://www.courts.state.ny.us/10jd/nassau/decisions/search>

New York Law Reporting Bureau <http://www.courts.state.ny.us/reporter>

New York State Courts on the Web <http://www.courts.state.ny.us/ctpages.html>

New York State Supreme Court B Civil Branch B New York County <http://www.courts.state.ny.us/supctmanh/Decisions_Online.htm>

New York Supreme Court Library at Buffalo <http://www.courts.state.ny.us/8jd/NYSSCLawLib/unreported_cases.htm>

New York Unified Court System Online Decisions <http://www.courts.state.ny.us/webdb/wdbcgi.exe/cms/CMS.DECISIONS_NDAWCASE.show_parms>

Queens County Supreme Court Library <http://www.courts.state.ny.us/queenslib/decisions.htm>

Federal Courts

Eastern District Court <http://www.nyed.uscourts.gov/doi/doi.htm>

Findlaw.com <http://www.findlaw.com/casecode/courts/2.html>

LexisONE <http://www.lexisone.com>

Pace Law School <http://www.law.pace.edu/lawlib/legal/us-legal/judiciary/second-circuit.html>

Northern District Bankruptcy Court <http://www.nynb.uscourts.gov/albanydecisions/albdecmenu.html>

Touro Law School <http://www.tourolaw.edu/2ndCir>

Western District Bankruptcy Court <http://www.nywb.uscourts.gov:81/search/decisions.htm>

Western District Court <http:// www.nysd.uscourts.gov/decision/decision.php3>;

<http://www.nynb.uscourts.gov/uticadecision/utidecmenu.html>

Statutes and Regulations

Governor's Office of Regulatory Affairs <http://www.gorr.state.ny.uss/Reg_Guide.html>

New York Department of State <http://www.dos.state.ny.us/info/tocs.html>

New York Legislative Bill Drafting Commission <http://leginfo.state.ny.us:82>

New York State Assembly <http://assembly.state.ny.us/cgi-bin/claws>

Legislative Materials

New York State Assembly <http://www.assembly.state.ny.us> (bills, memoranda, reports, and chapter laws)

New York State Bill Drafting Commission <http://leginfo.state.ny.us:82> (bills, memoranda, veto messages, and chapter laws)

New York State Library <http://www.nysl.nysed/statedoc.htm>

New York State Senate <http://www.senate.state.ny.us> (reports)

Rules of Court

Eastern District <http://www.nysed.uscourts.gov/Local_Documents/local_documents.html>

Eastern District Bankruptcy <http://www.nyed.uscourts.gov/localrules.pdf>

Law.com <http://www4.law.com/ny/rules/index.shtml>

Northern District <http://www.nynd.uscourts.gov/localrul.htm>

Northern District Bankruptcy
<http://www.nynb.uscourts.gov/usbc/lbr/95lbrmenu.html>
Southern District
<http://www.nysd.uscourts.gov/rules/rules.htm>
Southern District Bankruptcy
<http://www.nysb.uscourts.gov/local_rules_html/index.html>
Unified State Court System
<http://www.courts.state.ny.us/ucsrules.html> (recent amendments);
<http://www.courts.state.ny.us/judgerules.htm> (selected judges' rules)
Western District
<http://www.nywd.uscourts.gov/localrules.php>
Western District Bankruptcy
<http://www.nywb.uscourts.gov/localrules/index.htm>

Departments and Agencies

Attorney General <http://www.oag.ny.us>
Banking Department
<http://www.state.ny.us/10.htm>
Board of Elections
<http://www.elections.state.ny.us/law/law.htm>
Commissioner of Education <http://www.counsel.nysed.gov/Decisions/home.html>
Committee on Open Government
<http://www.dos.state.ny.us/coog/coog.html>
Comptroller <http://osc.state.ny.us/legal>
Department of Education
<http://www.counsel.nysed.gov/Decisions/home.html>
Department of Environmental Conservation
<http://www.dec.state.ny.su/website/ohms/decis/index.htm>
Department of State
<http://www.dos.state.ny.us/cnsl/counsel.html>
Department of Tax and Finance
<http://www.tax.state.ny.us/pubs_and_bulls/Advisor_Opinions/AO_tax_types.htm>
Division of Human Rights
<http://www.nysdhr.com/orders.html>
Ethics Commission
<http://www.dos.state.ny.us/ethc/ao.html>
Freshwater Wetlands Appeals Board
<http://www.dec.state.ny.us/website/ohms/decis/indexfwb.htm>
Insurance Department
<http://www.ins.state.ny.us/slcopin.htm>
Office of State Review
<http://seddmznt.nysed.gov/sro/dec.htm>
Public Employees Relations Board
<http://www.perb.state.ny.us/Dec.asp>
Public Service Commission
<http://www.dps.state.ny.us/doc_search_form.htm>
Temporary State Commission on Lobbying
<http://www.nylobby.state.ny.us/opino/adviopin.html>

Municipal Materials

City of Yonkers
<http://www.cityofyonkers.com/code>
Cornell University School of Industrial and Labor Relations
<http://www.ilr.cornell.edu/library/e_archive/nysgov_reports/nyc_ocb/search_decisions>
General Code Publishers <http://www.generalcode.com/webcode.html>
HousingNYC.com
<http://www.housingnyc.com/guidelines/guidelines.html>
Municipal Code Publishers <http://www.municode.com>
New York City Conflicts of Interest Board
<http://www.ci.nyc.ny.us/html/conflicts/html/publications.html>
New York City Council
<http://www.council.nyc.us>
New York City Department of Buildings
<http://www.nyc.gov/html/dob/code.html>
New York City Department of City Planning
<http://www.ci.nyc.ny.us/html/dcp/html/zonetext.html>
New York City Division of Tax Appeals
<http://www.nyc.gov/html/dof/html/tribunal.html>
New York City Department of Administrative Trials and Hearings
<http://www.nyc.gov/html/oath/decisions.html>

Bar Associations

Association of the Bar of the City of New York
<http://www.abcny.org>
Nassau County Bar Association <http://www.nassaubar.org/ethic_opinions_archive.cfm>
New York County Lawyers' Association
<http://www.nycla.org/main.htm>
New York State Bar Association
<http://www.nysba.org/members/publications/ethicsop>
Suffolk County Bar Association
<http://www.scba.org>

World War II Right-to-Counsel Case

Colonel Royall Vigorously Defended Saboteurs Captured on U.S. Shores

BY WILLIAM R. GLENDON AND RICHARD N. WINFIELD

This is the story of the eight Nazi would-be saboteurs who, in 1942, landed on the shores of Long Island and Florida, intent on wreaking death and destruction. Their plot was betrayed by one of their leaders, however, and they were promptly rounded up and put on trial for their lives. It is also the story of our late partner Kenneth C. Royall, then Colonel Royall, who was ordered by his Commander-in-Chief, President Roosevelt, to defend these saboteurs.[1]

The story of their capture and trial by military commission is both timely and fascinating.

As the United States entered the Second World War, the Nazi intelligence service, the Abwehr, under pressure from Hitler, decided to land saboteurs, armed with explosives, on U.S. shores. It planned to attack factories and railroads, disrupt war efforts and spread terror and confusion throughout the land.

A campaign was planned with successive waves of terrorists carrying out the plan. In the first effort in June, 1942, eight men trained in sabotage, all of whom had lived in America, disembarked from German submarines; four on Long Island and four in Florida. That was as far as their plot prospered. Bad luck and treachery took over. An unarmed 22-year-old Coast Guardsman patrolling the lonely fog-ridden Amagansett beach stumbled on the Long Island four as they stood on the beach. The German leader, George Dasch, approached him and explained they were fishermen waiting out the fog. This explanation lost some credibility when one of Dasch's crew called out to him in German. After some colloquy, Dasch offered the frightened sailor a $300 bribe if he would forget the incident. The sailor took the money but did not forget. He left the scene and reported the encounter to his superior and the word was out.

The Germans, apparently confident that the bribe had worked, headed for New York City where they split into two groups. Dasch and one of his band, Burger, went to the Governor Clinton Hotel and discovered that each was considering betraying the plot, allegedly because of their anti-Nazi sympathies. The day after the landing, Sunday, June 14, Dasch called the FBI in New York to report that he had just arrived from Germany and was going to Washington to impart important information to J. Edgar Hoover. The FBI agent receiving the call, unaware of the Coast Guard reception committee at Amagansett, apparently regarded this message as yet another crank call and simply made a memorandum of it.

While Burger assured his other two companions that all was well, all, in fact, was not well. Four days after the call to the FBI, Dasch did, indeed, go to Washington and betray both the plan and his comrades to the FBI. According to Dasch, the FBI agents to whom he talked were initially skeptical but this skepticism vanished when Dasch dumped $80,000 in U.S. dollars on the table.[2] Armed with Dasch's information, all eight of the would-be saboteurs were quickly picked up by the FBI and confessed.

After the last arrest, America learned of the plot in a press conference held by J. Edgar Hoover, announcing yet another FBI coup. He did neglect to mention the assistance they had received from the Coast Guardsman and Dasch.[3]

Hoover's announcement produced a tidal wave of outrage among American politicians and the public against the hapless saboteurs. Demands for their swift trial and execution swept the land. Indeed, it sometimes

WILLIAM R. GLENDON, now retired, was a partner in the firm now known as Clifford Chance Rogers & Wells LLP, and worked for many years with Kenneth Royall. A graduate of the College of the Holy Cross, he went to sea as a lieutenant in the U.S. Navy in World War II. Mr. Glendon received his law degree from Georgetown University Law Center.

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appeared difficult to determine which event should occur first.

President Roosevelt demanded swift and severe punishment. He told Attorney General Francis Biddle, "The death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American government."[4] So the rush to judgment was on.

There were, however, problems. The saboteurs were civilians, not military personnel, and two of them, Burger and Haupt, could claim American citizenship, although the government disputed this in regard to Burger. The eight men had not accomplished any sabotage or even made any attempt to do so. There was concern that trial and punishment in the civil courts would be considered inadequate and too slow, and offenses such as espionage and treason were difficult to prove.

So the solution devised was that the eight saboteurs would be tried before a military commission under the laws of war and the Articles of War. President Roosevelt quickly issued a Proclamation and Order. Under the Proclamation, the defendants would be denied access to any civil court. The Order provided that the defendants would be tried by a military commission to be conducted in secret. Evidence that merely "had probative value to a reasonable man" would be admissible. The President himself would make the final decision after receiving the commission's recommendations, and there would be no appeal.

Royall Named to Represent Defendants

Colonel Royall and Colonel Cassius Dowell, an expert on military law, were appointed to represent seven of the defendants. Dasch was separately represented. Royall, a distinguished North Carolina trial attorney in civil life, took the lead.

The essence of the charge was that the defendants had violated the laws of war by coming through military lines in civilian clothing to commit acts hostile to America. The death penalty would be sought.[5]

Royall obviously had not sought this unpopular assignment. Indeed, to avoid conflicts because of his military status, he proposed that civilian counsel should be appointed instead. When the suggestion was rejected, Royall settled down to battle. His first step was to take on his Commander-in-Chief, the President of the United States. The defense lawyers wrote F.D.R. questioning the validity and constitutionality of the Proclamation and Order. They requested authority to advance this point. They did this because the Order they claimed to be invalid was also the source of their appointment as defense counsel. They were told only to use their own judgment and that was enough for the doughty lawyers.

They then informed the President that they would, indeed, institute *habeas corpus* proceedings to test the constitutionality of the Order. F.D.R. was not amused. Thus, Biddle later recounted that Roosevelt had said to him, "I want one thing clearly understood, Francis, I won't give them up . . . I won't turn them over to any United States marshal armed with a writ of *habeas corpus*. Understand?"[6]

On July 8, 1942, 11 days after the last saboteur was arrested, the commission convened. At its outset, Royall arose to advise the commission, composed of seven generals, that the commission was without jurisdiction and that the proceedings were unlawful and unconstitutional. He pointed out that the civil courts were open and there were civil laws applicable to the offense. Predictably, the motion was denied and the trial commenced. It lasted three weeks. Attorney General Biddle, the prosecutor, presented a meticulous case that went smoothly. As prescribed in the President's Order, the rules of evidence were liberally construed. At one point even Biddle felt constrained to join in Royall's objection, about to be overruled, that a particular item of hearsay evidence should be rejected.

Appeal to Supreme Court

Despite the weakness of his case, the defendants' confessions and the lack of the usual evidentiary and procedural safeguards, Royall was far from through. In the course of the commission trial this indomitable lawyer, convinced that his only hope of avoiding the death penalty lay elsewhere, headed for the U.S. Supreme Court.[7]

Not a shy man, he visited Justice Black, whom he knew slightly, at his Alexandria home to elicit his inter-

Royall in Peace and War

A native North Carolinian, Kenneth C. Royall was a Phi Beta Kappa graduate of the University at Chapel Hill and graduated in 1917 from Harvard Law School, where he was associate editor of the *Harvard Law Review*. He served as a lieutenant with the American Expeditionary Forces from 1917 to 1919. Royall returned to practice law in North Carolina, where he also became a state senator. Royall rejoined the army as a colonel at the outbreak of World War II. He later served overseas as a brigadier general and was awarded the Distinguished Service Medal. After the war, President Truman successively appointed him undersecretary of war, secretary of war and secretary of the Army. In 1949 he re-entered private practice and became head of the New York and Washington firm of Royall Koegel Rogers & Wells, now part of the firm of Clifford Chance Rogers & Wells LLP. Royall continued the active practice of law. He died in 1971 at the age of 77.

This was the scene at the opening of the third trial of eight alleged Nazi saboteurs before a special seven-man military commission in a room of the Department of Justice building in Washington, DC.

World Wide Photo

est, but he received no help. He then turned to Justice Roberts and found help. At Roberts' invitation, he and Biddle, who, to his credit, agreed that a constitutional challenge was warranted, met with Roberts and Black. They, in turn, called Chief Justice Stone. The Court being in recess, Stone agreed to set a special session for July 29, 1942, during the ongoing trial. Some indication of the pressure on the Court may be seen from Justice Roberts' advice to his colleagues that Attorney General Biddle "feared that F.D.R. would execute the petitioners despite any Court action."[8]

In obtaining Supreme Court review, Royall had won a significant victory. He had negated Roosevelt's edict that there could be no access to the civil courts and, at the same time, had breathed some hope into what was, otherwise, a hopeless cause. This victory did not come without some personal cost. Royall was castigated in parts of the media for causing all this trouble. For example, the *Charlotte News*, in Royall's home state, called him a "A Braying Ass" and suggested that some people would want him "thrown in with the accused and made to stand trial himself."[9] An unneighborly North Carolinian wrote, "I would suggest you remain in Washington when the war is over."[10] But he also received substantial praise. The *Montgomery Alabama Journal* called the *Charlotte News* remark, "a great injustice to a man performing a distasteful duty and trying to be loyal to the code of ethics of his profession."[11]

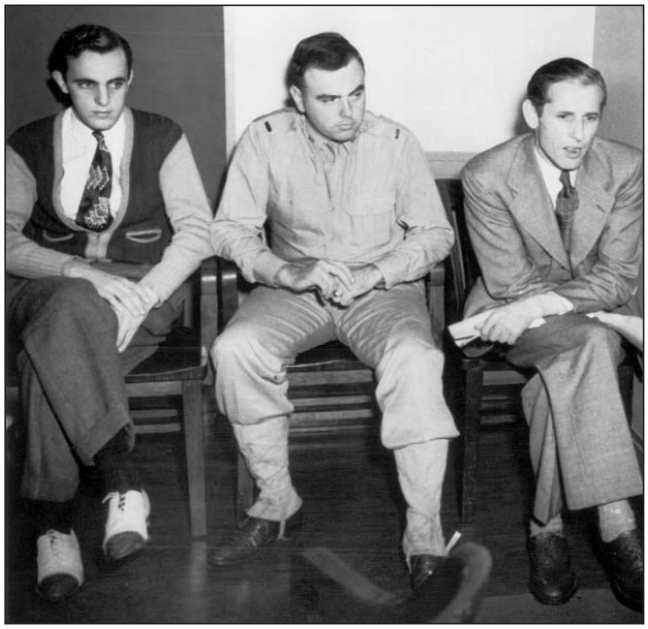
Royall and his team had just three days to prepare for the Supreme Court argument. At the same time they were hard at work at the commission trial.

Despite the fact that they had not accomplished anything, it does not appear that, except possibly for Burger and Dasch, the defendants' testimony at trial was very helpful to their cause. A common theme for most was that they had no real intent to commit sabotage. Dasch and Burger explained their betrayal by citing their anti-Nazi attitudes. Indeed, armed with defendants' confessions, Biddle's cross-examination was both easy and effective. It became increasingly clear that their sole remaining hope lay in the Supreme Court.

On July 29, 1942, with the commission trial in recess, the special session of the Supreme Court convened to hear defendants' petitions for writs of *habeas corpus*. Two days of oral argument ensued. Central to Royall's argument was the famous Supreme Court decision, *ex parte Milligan*.[12]

Milligan, a civilian resident of Indiana, had been convicted by a military tribunal during the Civil War of communicating with the enemy, conspiring to liberate prisoners and resisting the draft, all within military lines, and was sentenced to death. *Milligan* held that civilians could not be tried by a military commission unless the civil courts were closed or martial law imposed. Royall embraced that decision pointing out, "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[13]

The government had trouble with *Milligan*. Biddle at one point said it was bad law and should be overruled in part. Previously he had urged that *Milligan* was totally irrelevant. He did seem to concede some applicability when he stated that the saboteurs' petition for *habeas corpus* "would not have been in this court except for the *Milligan* case."[14]



Guarded by an Army lieutenant, Herbert H. Haupt (left) and George Dasch, two of eight men on trial before a military commission as alleged Nazi saboteurs, sit in the courtroom at the Department of Justice building in Washington awaiting the start of the third day of proceedings.

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Royall argued that a civil court, not a military commission, was required unless the defendants' conduct occurred in an active war zone where the shooting was occurring. Biddle, for his part, beat the drums of war effectively. The writ of *habeas corpus*, he urged, was "never intended to apply in favor of armed invaders sent here by the enemy in time of war."[15] To Royall's argument that defendants had not come through any lines of battle or entered a theatre of war, he argued that the beaches of Long Island and Florida were indeed a theatre of war where enemy submarines could and did land the saboteurs. In his closing argument, Royall returned to *Milligan*, citing its famous statement: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[16]

After nine hours of argument over two days, the special session adjourned. The intense pressure led the Court to promise that the Court's order would be announced the next day with the full decision to follow later.[17] On July 31, 1942, the Supreme Court gave its *per curiam* order, *ex parte Quirin*.[18] The writs of *habeas corpus* were denied. The Court ruled that the charges against the petitioners were triable by military commission, that the military commission was lawfully created and that petitioners were lawfully held.

Conviction and Reaction

The Supreme Court having acted, the trial resumed. Royall continued his oral argument, still desperately combing the record for grounds for leniency for his clients. The trial ended on August 1, 1942, and the commission, after debating for two days, forwarded its secret recommendation to the President.

On Saturday, August 8, less than two months after the first group had landed on Long Island and a week after the commission trial ended, it was announced that six of the eight saboteurs had that day been executed by electrocution in the District of Columbia jail. President Roosevelt had accepted the commission's unanimous recommendation that all be found guilty and that all but Dasch and Burger be executed. They were spared because of their cooperation with the government and were sentenced to long prison terms. After the war they were deported to Germany, where they received less than a hero's welcome.

So Royall's ordeal was over. Reviled in portions of the press for his efforts on the saboteurs' behalf, a decided nuisance to his Commander-in-Chief, and rebuffed in his efforts to seek expert help from the civilian bar, his was a lonely and difficult journey. But his courage and fierce dedication to his unpopular clients drew widespread praise from Supreme Court justices and commentators alike. Thus Justice Jackson wrote to Royall that he had made "an impressive demonstration that the right to counsel in our democracy is neither a fiction nor a formality."[19]

Perhaps the most telling praise came from six of his seven clients. Shortly before their deaths, at a time when most men facing their fate are inclined to attribute their predicament to their lawyers, the six men wrote a letter to their counsel. They said they had received a fair trial and "[b]efore all we want to state that defense counsel . . . has represented our case as American officers unbiased, better than we could expect and probably risking the indignation of public opinion. We thank our defense counsel for giving its legal ability . . . in our behalf."[20] That tribute must have been a poignant reward to Royall. In a desperately unpopular cause, a fine lawyer had discharged his duty with passion and zeal. While he lost six of his seven clients, he gained not only their gratitude and respect, but set a proud example of an American lawyer doing his job. He gave our tradition of the right to counsel new meaning, depth and reality.

Three months after the executions, the Supreme Court's full opinion was issued. It was obviously somewhat anticlimactic. While rejecting F.D.R.'s edict that there could be no access to the civil courts, it otherwise

Colonel Cassius M. Dowell (left) and Colonel Kenneth C. Royall (right) arrive at the Supreme Court in Washington, July 29, 1942, to seek writs of *habeas corpus* on grounds that President Roosevelt's proclamation denying eight alleged Nazi saboteurs access to the civil courts was unconstitutional.

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sustained the government's position. The essence of the decision lay in its finding:

> The spy . . . or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[21]

While not overruling *Milligan*, the Court found factual distinctions differing that case from *Quirin*. The *Quirin* opinion has been criticized, sometimes harshly. Thus, Rachlis quotes "one of the country's outstanding experts on constitutional law" as saying the decision was "'little more than a ceremonious detour to a predetermined goal.'"[22] It could be argued that it was decided, unlike *Milligan*, at a time when "the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."[23]

Whatever its strengths or weaknesses, it would seem clear that *ex parte Quirin* will continue to be cited, criticized and distinguished as we move through current decisions of what to do with the terrorists who, now or in the future, may face our national wrath and American justice.

As for Colonel Royall, his efforts in no way harmed his career. He was later promoted to brigadier general and thereafter became, successively, undersecretary of war, secretary of war and, after unification of the services, the first secretary of the Army.

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1. We are indebted to Eugene Rachlis whose comprehensive work, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (Random House 1961) (hereinafter "Rachlis"), was a prime source for much of the material in this article. We have also drawn from David C. Danelski, *The Saboteurs' Case*, 21 J. Sup. Ct. Hist. 61 (1996) (hereinafter "Danelski"). Gary Cohen, *The Keystone Kommandos*, Atlantic Monthly, vol. 289, No. 2, at 46 (Feb. 2002) was also helpful.
2. Danelski, *supra* note 1, at 64.
3. This omission was designed to keep the Germans guessing as to what caused the failure of their plan. It may also have served to heighten the public perception of FBI diligence.
4. Danelski, *supra* note 1, at 64.
5. To their chagrin, Dasch, who had blown the whistle, and Burger, his aide in the betrayal, were similarly charged and faced the death penalty as well.
6. Danelski, *supra* note 1, at 68.
7. Royall sought help from civilian constitutional experts, but to no avail.
8. Danelski, *supra* note 1, at 68.
9. Rachlis, *supra* note 1, at 250.
10. *Id*.
11. *Id*. at 251.
12. 71 U.S. 2 (1866).
13. *Id*. at 127.
14. Danelski, *supra* note 1, at 71.
15. Rachlis, *supra* note 1, at 261.
16. *Milligan*, 71 U.S. at 120–21.
17. This procedure has been criticized even by the justices themselves. Justice Douglas later said, "it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." Danelski, *supra* note 1, at 80.
18. 317 U.S. 1 (1942).
19. Rachlis, *supra* note 1, at 297.
20. *Id*. at 297–98.
21. *Quirin*, 317 U.S. at 31.
22. Rachlis, *supra* note 1, at 295.
23. *Ex parte Milligan*, 71 U.S. 2, 109 (1866).

Coast Guardsmen and a naval officer point to a stake driven into the sand at Amagansett Beach, Long Island, to mark the spot where submarine-borne Nazi saboteurs buried a cache of explosives June 13, 1942.

World Wide Photo

A Learning Experience

Holiday Program at Bayview Prison

By Sarah L. Krauss

In connection with its ongoing project on Women in Prison, the National Association of Women Judges proposed a holiday program at the Bayview Correctional Facility in Manhattan. The planning began with a visit with the facility's superintendent, Roberta Coward, in January 2001, and culminated in an event on December 19.

We chose Bayview because its location provided easy access for the downstate judges and speakers. Its prisoners had also earned the privilege to be there prior to release, so we knew we would be dealing with a fairly motivated group. And we were attracted by the fact that Bayview is a transitional prison, because we planned to offer classes involving skills and information that would be especially useful after release.

Our planning efforts were delayed by the events of September 11, but by November we had drawn up a program and enlisted speakers for subjects such as foster care and housing, and for classes on stress management and meditation.

We also developed contacts in the community in the hope that, as part of the program, we could provide small gift bags to the participants. We confirmed that the nonprofit group "Suitability" would be able to present a dress and makeup session. A used-book donation effort at the courthouse produced many contributions. In addition, the Brooklyn Women's Bar Association had recently conducted a clothing drive, which generated a good deal of clothing appropriate for job searches.

During a visit to Bayview about ten days before the program date, we spent about two hours with the prison staff to identify the room location and items for each program throughout the day. In addition, we brought sign-up sheets, including the title of each class and the time it would be given. We wanted to get some sense ahead of time about how many women would be attending each session.

The speakers were instructed to fax or send any materials to the assistant deputy superintendent of programs so that the content could be reviewed by the staff before distribution. We were also asked by prison staff to submit a complete list of persons coming to participate in the event, together with a list of anything they might be bringing into the prison.

By Friday, December 14, we had much of the material assembled for 100 gift packages, we had a team of law assistants ready to donate a lunch hour or two to package them, and we had scheduled a delivery of donated clothes, books and gift items to give Bayview Security an opportunity to review what would be distributed to the prisoners. Much to our relief, a Criminal Court clerk arranged for her church choir to come and sing as part of the program.

The program consisted of seven classes offered in different time periods throughout the day, to give the participants an opportunity to attend more than one session if they wished. The best-attended sessions were on housing issues and the makeup/dress tips. The women really enjoyed the little gift bags, as well as the books. We received many books, so after the book distribution the extras were donated to the prison library. The donated clothes were held by the prison staff to be distributed as needed.

In the course of planning the event, we learned, for example, what is considered contraband—gum, candy wrapped in foil, mirrors, anything made of material in the colors orange, brown, black or blue, and all civilian clothes, "how to" books and wire hangers.

In the future the subcommittee has agreed to organize earlier in the year, probably as early as May, in order to encourage better attendance at the program by the inmates and to enlist the assistance of the bar associations.

The subcommittee, consisting of Brooklyn Judges Rachel Adams, Loren Baily-Schiffman, Cheryl Chambers, Laura Jacobson, Margarita Lopez-Torres, Micky Morgenstern and Betty Williams, has expressed the feeling that this was such a rewarding experience that they are willing and able to do this again and again. The satisfaction they experienced in helping others was enhanced by the cooperation and enthusiasm of the prison staff, their availability in working out problems in logistics and information-sharing, as well as their willingness to provide a comfortable, workable physical location for the program within the prison setting.

Judge Carolyn Demarest chairs the Association's Women in Prison Committee, and I had the pleasure of chairing the Subcommittee on the holiday program. Judge Karla Moskowitz is President of the National Association of Women Judges and Judge Phyllis Gangel-Jacob is President of the New York Chapter. For all of us, this was a great venture, which brought festivity, information and hope to the women at Bayview. We would be pleased to share our new-found expertise with anyone interested in setting up a similar program.

Sarah L. Krauss is a judge of the Civil Court of the City of New York.

Language Tips

By Gertrude Block

Question: Notary Alfred Piombino writes, "Controversy repeatedly occurs concerning the meaning of the following language in New York Executive Law § 137. The question that arises is whether the signature and the words beneath the signature must be in black ink, whether only the signature must be in black ink, or whether only the words following the signature must be in black ink. The most common interpretation of § 137 is that both the signature and all the words beneath it must be in black ink. Here is the controversial language:

> In exercising his powers pursuant to this article, a notary public, in addition to the venue of his act and his signature, shall print, typewrite, or stamp beneath his signature in black ink, his name, the words "Notary Public State of New York," the name of the county in which he originally qualified, and the date upon which his commission expires . . .

Answer: The question is interesting, but there is no question about interpretation. As written, § 137 categorically states that all the language after the signature, but not the signature itself, should be printed, typewritten, or stamped in black ink. The controversy about how to interpret the language may arise due to the intent of the drafters of § 137, but not the facial wording of the statute.

To state that the signature also should be in black ink, the phrase "in black ink" should have been moved and a comma added; the statute would then read:

> In exercising his powers pursuant to this article, a notary public, in addition to the venue of his act, shall, in black ink, print, typewrite, or stamp beneath his signature, his name, the words "Notary Public State of New York," the name of the county in which he originally qualified, and the date upon which his commission expires . . .

As drafted, the Notary Public need not use black ink for his signature. What makes this language controversial are the numerous parenthetical insertions. If one concentrates only on the relevant language, "beneath his signature," the language is unequivocal because in this context the word "beneath" means "following."

Question: Fordham Law School professor Michael M. Martin writes: "While reading your October column discussing questions raised by Attorney R.M. Frome about 'Whereas' clauses, I was reminded of my pet peeve about 'hereinafter' parenthetical insertions. Increasingly, I see references like this one, taken from page 8 of the October *Journal*: '. . . an amendment to the N.Y. Estates, Powers and Trusts Law (hereinafter EPTL) last year . . .' Also in this issue are references to (inter alia) the CPLR, which is New York's basic procedure statute, AGI, a basic element of tax law, and IRC or the 'Code' for the basic tax statute. In my view, these and other 'hereinafter' parentheticals are unnecessary."

Answer: Professor Michael M. Martin added that exceptions to his deletion of "hereinafter" parentheticals might be in contracts or in footnotes to articles. In all other cases, he argues that they are not only unnecessary, they fail to give the reader sufficient credit. Many readers, he says, already know what the EPTL is, and those who don't will have no trouble connecting the abbreviation to the full name if it is used two sentences later. If the abbreviation is uncommon and it does not recall the full name, the reader may have to check back to the full name anyway. And if the abbreviation is never used again in the piece, no parenthetical is needed.

Professor Martin says that he believes "those ugly parentheticals" are seldom used except by persons with legal training. Do other readers consider "hereinafter parentheticals" to exemplify the gobbledygook lawyers learn in their legal training?

From the Mailbag

Readers have sent a number of interesting and humorous anecdotes. Rochester Attorney Gregory A. Franklin wrote that he was reminded, after reading the July/August *Language Tips* of the "non-word" *disirregardless*. While a student at the Fordham University School of Law, he was the beneficiary of the teachings of Professor Gerald McLaughlin, who would frequently pepper his lectures with *disirregardless*. In every case, Mr. Franklin said, it took several minutes to figure out whether he meant "regarding" or "not regarding." He added, "While I don't think that was the sole reason for my grade in the class, I cannot say that it was not a factor!"

Another reader asked whether *dilemma* could be spelled *dilemna*; he hoped that his 13-year-old daughter, who had challenged that spelling, was wrong. But everywhere he looked, her spelling was corroborated. He asked, "Have I lost my mind or was this word spelled "dilemna" at one time? If so, how and why did this change? Please respond because my credibility is on the line, and as important as credibility is for a lawyer, it is even more important for a parent helping his children with their homework."

Regretfully, I had to write the reader that his daughter is right. The word *dilemma*, which seems never to have been spelled "dilemna," comes from the Greek word meaning "double." My etymological dictionary adds that the alternatives posed by a dilemma are commonly called "horns," as they "catch on both sides." The source the dictionary lists is Pall Mall Gaz., Sept. 3, 1917. Let's hope the reader's scholarship, if not his spelling, will impress his daughter.

Finally, the following quotation by former Michigan Governor George

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LANGUAGE TIPS
CONTINUED FROM PAGE 54

Romney may indicate the advantages of negative statements to confuse the questioner. Governor Romney is said to have answered a reporter who questioned the governor about a statement he had previously made: "I didn't say that I didn't say it. I said that I didn't say I didn't say it. I want to make that perfectly clear."

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THE LEGAL WRITER
CONTINUED FROM PAGE 64

seem too stuffy for legal writing. The informal *you*, on the other hand, is best not used to tell courts what to do. "You should deny the motion" *becomes* "This Court should deny the motion."

Dab in the double passive. People think in the active voice: who does what to whom. The active voice identifies the subject or actor early in the sentence. The active voice is also more concise than the passive voice. Thus, "The passive voice is avoided by good lawyers" *becomes* "Good lawyers avoid the passive voice." Double, or blank, passives do not identify the subject or actor: "The passive voice is avoided." Passives can be helpful; more about that another time. Double passives can also help. When all else fails, use double passives to remove gender from your legal writing. "The court wrote her decision" is incorrect because a *court* is an *it* (*its* decision), not a *him* or *her*. If you cannot recall that rule, write, "The decision was written."

Be elegant. Inelegance includes the clumsy *s/he*, *(s)he*, *s/he/it* (think about this one), *he or she*, *him or her*; and alternating between *he* and *she*. These options are as distracting as *he* or *she*. To maintain credibility, "write in such a way that no one would ever consider either sexist or awkwardly non-sexist. Then the question of sexism doesn't even occur to the reader, who can concentrate without distraction on the ideas presented."[5]

Do not agree to disagree. The worst inelegance is gender disagreement. "Someone is eating their soup." *Becomes:* "Someone is eating his soup." *Becomes*, by eliminating the pronoun: "Someone is eating soup." "[I]f someone is a good legal writer, they may score better on exams than you do, even if you 'know more law' than they do."[6] *Becomes*, by eliminating the pronoun: "A good legal writer will score better on exams than you will, even if you know more law." *Someone* cannot be *they*. No singular can be *they*.

Womyn is too *je ne sais quoi* for legal writing.

Elegant variation. Repeat the noun to avoid gendered writing. Do not use a different noun. "Find a court officer. He can help you." *Should not become* "Find a court officer. That is the official who can help you." Instead of finding a synonym for "court officer," repeat "court officer," as in, "Find a court officer. A court officer can help you." *Or* "Find a court officer who can help you." Besides, those who know their way around a courthouse know that a court officer is a *who*, not a *that*.[7]

Stunt stereotyping. Wrong: "Real writers write every day, right after they put on their makeup." Wrong: "Real writers write every day, right after they shave." Possibly right: "Real writers write every day, right after they get to work."

English usage being what it is, some stereotyped language is still standard: *fiancé* (man), *fiancée* (woman); *née* (Jane Smith, née Clark) (woman's maiden or birth name); and *blonde* ("a blonde woman," "a blond-headed man").

A practitioner who does not want to offend his or her judge and her henchmen by language he or she will find distracting will use every gender-neutral device they can. S/he will write something that does not look like s/he/it wrote it at the last minute, long after they have put on their makeup or shaved.

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1. N.Y.S. Judicial Committee on Women in the Courts, *Fair Speech: Gender-Neutral Language in the Courts* (2d ed., OCA 1997).
2. *See In re Motion to Admit Miss Lavinia Goodell to the Bar of this Court*, 39 Wis. 232, 236 (1875) (Ryan, C.J.) ("This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.").
3. Judith S. Kaye, Perspective, *A Brief for Gender-Neutral Brief-Writing*, N.Y.L.J., Mar. 21, 1991, at 2, col. 1 (arguing in Point I that gender-neutral writing "is simply the right thing to do").
4. Why the redundant *before* after *gone*? Why the split infinitive "to boldly go"? Stay tuned for future columns on these and other questions. I plan to go boldly where no man has gone before.
5. Bryan A. Garner, *The Winning Brief* 226 (1999).
6. Original from Marion T.D. Lewis, *The Law School Rules* 56 (1999).
7. *Contra*, N.Y.S. Judicial Committee on Women in the Courts, *supra* note 1, at 8 ("Replace the pronoun with a synonym. 'You should find a court officer. That is the *official* who can help you,' may replace 'You should find a court officer. *He* is the one who can help you.'" (emphasis in the original).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, currently assigned to Brooklyn and Staten Island. An adjunct professor and the Moot Court faculty advisor at New York Law School, he has written numerous articles and *Advanced Judicial Opinion Writing*, a handbook for New York State's trial and appellate courts, from which this column is adapted. His e-mail address is Gerald.Lebovits@law.com.

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John Patrick Lennon
Jeffrey E. Marion
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John C. Cuddy
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Yasmin Yanthis
An Yuan Yuan

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Douglas A. Durnin
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Guy W. Germano
Peter Jordan Glantz
Eric D. Goldsmith
Tess Elizabeth Gunther
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Natalie C. Heaslip
Cynthia Jean Hemley
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Beth-Anne Keating
Claudia M. Kiernan
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Michelle Koutrakos
Lisa R. Krieger
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David P. Leno
John J. Leonard
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Anahid M. Ugurlayan
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Yvette M. Villalba
Duane Alexander Watson
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Wayne Antonio Autry
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Sophia Clark
Luis N. Colon
Eric O. Darko
Millicent N. Ele
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Omar Alfredo Gonzalez
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Michael Katz
Gardy Michael Laguerre
Carolyn McNerney
Connie Morales
James Doyle Moran
John Rohan O'Connell
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Caridad Pena
Tracy Pulito
Danielle M. Salese
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Rajen Akaln
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Rita Alexyn
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Preston Young
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In Memoriam

Michael P. Bazell
Edmonton, Alberta

Morris H. Bergreen
New York, NY

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The Legal Writer

He Said—She Said: Gender-Neutral Writing

By Gerald Lebovits

Gender neutrality in judicial-opinion writing is official policy in the New York State Unified Court System. As the court's anti-gender-bias committee has explained, "all of us who work in the courts or work in the court system [must] avoid unintended slights or compromises to the ideal of justice."[1] What of practitioners, for whom internal court policy is not binding? Should they write gender neutrally? Yes. If you do not believe me, ask any successful law man. He, she, he or she, his or her, they, and all their henchpersons will tell you that I am right.

Some believe that gender neutrality is part of an unfortunate, passing phase of political correctness. To each her own, but they are wrong. It is a fortunate phase—and one here to stay. Sexist writing offends readers of both genders. Discriminatory beliefs are reflected in discriminatory writing, and discriminatory writing perpetuates discrimination. Sexism is also often double discrimination. Consider the old-fashioned labels *Jewess* and *Negress*. Have you ever heard of a *Christianess*, a *whitess*, or a *Caucasianess*? And who can forget the expression "woman lawyer"? Perhaps one reason no one used *lawyerette* is that women were excluded from the profession when *ette* suffixes were popular.[2] Opinion writers must be gender neutral so that they can render, and be seen as rendering, fair and equal justice under the law. But no practitioner who wants to persuade can afford to offend or distract readers with gender-biased language.

Others believe that gender-neutral writing sacrifices precision. They are wrong about that, too. Those who accept that gendered writing is discrimination in print will try to write gender-neutrally. It is simple to be both precise and non-sexist. Chief Judge Kaye said it well: "[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize."[3]

Here are some ways to get into the good habit of using precise, non-sexist language.

Use gender-neutral terms. "Brother Justice" (or "fellow Justice" or "brethren") *becomes* "sibling Justice" or "colleague Justice." "King" *becomes* "sovereign." "Madam Justice Ginsburg" *becomes* "Justice Ginsburg." "Mr. Justice Souter" *becomes* "Justice Souter." "Sister state" *becomes* "sibling state." "Statesmanship" *becomes* "diplomacy."

Delete the suffix "-man." "Assemblyman" *becomes* "Assembly Member." Sit down for this one: "Chairman" and the inelegant "chairperson" *become* "chair." "Con man" *becomes* "con artist." "*Fireman*" becomes "firefighter." "Jury foreman" *becomes* "presiding juror" or the peculiar but standard "foreperson." "Foreman" becomes "supervisor." "Mailman" *becomes* "mail carrier." "Policeman" *becomes* "police officer."

Delete the prefix "man-." "Manpower" *becomes* "staff."

Mutilate masculine terms. "Common man" *becomes* "average person." "Mankind" *becomes* "humanity." "Manmade" *becomes* "made by hand."

Change terms once reserved for women. "Mrs." and "Miss" *become* "Ms.," unless the person prefers "Mrs." or "Miss."

Out with suffixes "-ette," "-ess," and "-trix." "Actress" *becomes* "actor." "Poetess" *becomes* "poet." "Stewardess" *becomes* "steward" or "flight attendant." "Waitress" *becomes* "waiter" or "server," not "waitron." "Executrix" and "prosecutrix" *become* "executor" and "prosecutor." Retain only historical usages like "suffragette."

Promote parallel language. "Man and wife" *becomes* "husband and wife" or "man and woman."

Make the antecedent plural. "An infant younger than seven may not be convicted of petit larceny. He is immune from prosecution." *Becomes:* "Infants younger than seven may not be convicted of petit larceny. They are immune from prosecution." Plural antecedents like *judges* instead of *judge* will let you use the personal pronoun *they* instead of *he* or *she*.

> ***Perhaps no one used* lawyerette *because women were excluded from the profession when* ette *suffixes were popular.***

Ply personal pronouns. Substitute personal pronouns (*they*, *them*, *their*) for singular ones (*he*, *she*, *his*, *her*).

Rephrase to eliminate the pronoun. "A gourmet likes her steak rare." *Becomes:* "A gourmet likes rare steak." "To avoid fee disputes, a lawyer should return his phone calls." *Becomes:* "To avoid fee disputes, lawyers should return phone calls."

Is "anyone" out there? Use *anyone*, *human*, *people*, *person*, *someone*, or *you* for nouns like *man* and *woman*. "A man [or *he*] who cannot do the time should not do the crime." *Becomes:* "Anyone who cannot do the time should not do the crime." *Or* "If you cannot do the time, do not do the crime."

"One" more rule. Y2K Star Trek: "To go boldly where no one [or *none*, but not *where no man*] has gone before."[4] Note, however, that *one*, as a synonym for the informal *you*, can

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