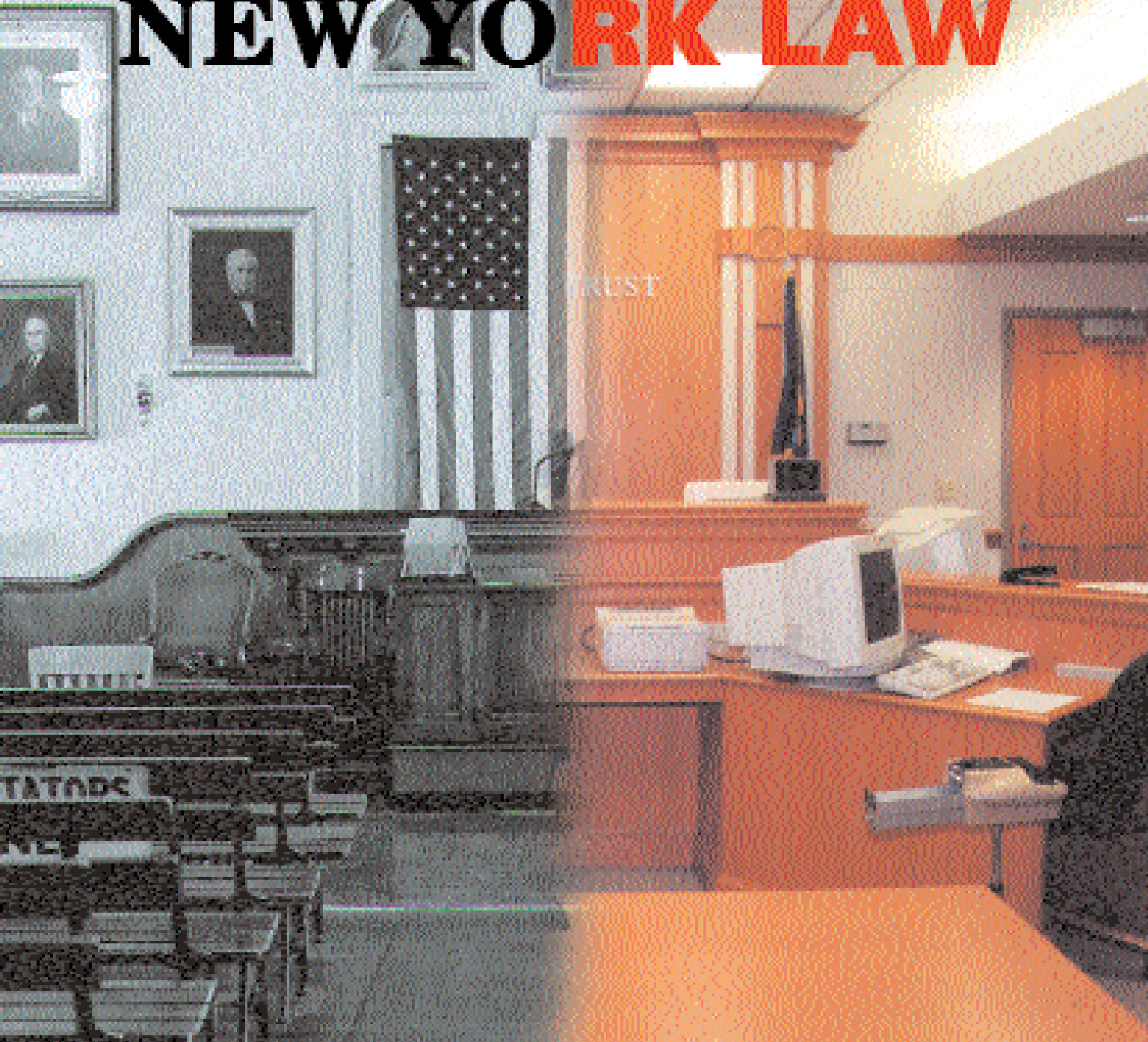




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Journal

**50 YEARS OF
NEW YORK LAW**



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One Elk Street
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(518) 463-3200
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ON THE COVER

The photo on the left is of the Delaware County Courtroom and was taken by Milo Stewart. The photo on the right, by Ted Ermansons, was taken in a Poughkeepsie courtroom.
Cover Design by Lori Herzog

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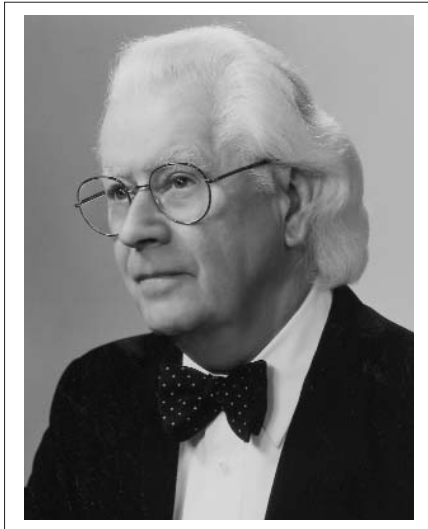
As this is written, Election Day 2000 is well into its second month, and while the end seems to be in sight, it is by no means certain that the saga will not take another twist that would postpone the ultimate resolution yet again. It is probably just as well that I write now so that these observations on the process will be free of influence from the result.

The political jockeying and litigation by both parties, in federal and state courts, have been orchestrated by lawyers. As early as election night, both candidates and their advisors sought the assistance of counsel—first to analyze the vote-counting process and then to persuade the courts to intervene and redirect the process. Indeed, at times the candidates themselves have seemed to take a back seat to their counsel, perhaps intentionally, and attorneys have become the principal spokesmen for the campaign organizations. Not surprisingly, the involvement of the legal profession has become fodder for a large cast of late-night comics and radio talk show hosts who have seized the opportunity to make jokes out of what may be one of the more serious tests our democratic republic has faced. We have been criticized and accused of attempting to resolve the election by “lawyering” instead of at the ballot box.

It is clear to the objective observer, however, that lawyers did not create the issues associated with the vote tabulation in Florida, and the candidates have engaged lawyers in an exercise of their legitimate right to insure that their claims receive a fair and impartial hearing by the judicial system. Lawyers have used their skills to amass the body of facts, to organize the arguments, and to present them in a manner designed to secure a favorable result. When all is said and done, attorneys and courts will have used their powers of analysis and reasoning, influenced by what little precedent exists, to insure that the appropriate constitutional and statutory principles govern the final decision. In other words, the legal profession will use its talents to bring order out of chaos.

Unfortunately, many will criticize the profession and the justice system because they distrust the adversary process, accusing lawyers of arguing from the same set of facts to support directly opposite conclusions. While

PRESIDENT'S MESSAGE



PAUL MICHAEL HASSETT

The Role of Lawyers

we are accustomed to the adversary process, many less familiar with our role in the justice system find much to criticize, and it appears that the journalists covering the various hearings have done little to educate their viewers and listeners about the nature of the process and the fact that a fair resolution will follow from the application of solid legal principles.

The decision of the U.S. Supreme Court to enter the dispute led some to criticize the political philosophies of the individual justices, accusing them of partisanship even before a decision was rendered. At any point in our history, members of the Court have come from varied backgrounds with different educational qualifications, different legal careers and have been appointed by different presidents and confirmed by a Senate composed of members with differing views. It would be surprising for a justice of the Supreme Court to fail to follow his or her jurisprudential philosophy in a case of this magnitude. That philosophy includes a view of the relationship of the federal government to the states and the interrelation of the branches of government at each level, and the current members of the Court obviously have strong differences of opinion on those topics. Those topics do, nonetheless, underlie the current controversy and we can expect that the decision of the Court will flow from the individual philosophies of its members. Those whose candidate is unsuccessful may well accuse the Court of partisanship, but we must hope that the Supreme Court's involvement will ultimately add legitimacy and validation to the process. Accusations of partisanship by the Supreme Court are especially problematic when they come from lawyers, because confidence in the ultimate fairness of the courts is a prerequisite to confidence in the legal profession. We should expect that the general public will look to the legal profession to support the role of the Court which, in the long run, is the only possible forum for resolution of the important questions facing our nation. The rule of law and the indispensable role of lawyers in guaranteeing the primacy of that rule have insured the survival of this republic for more than fifty years. A quick look at our history should leave no doubt as to the significant

Paul Michael Hasset can be reached at 1500 Liberty Building, Buffalo, N.Y. 14202.

PRESIDENT'S MESSAGE

role our profession has played not just in framing the federal and state constitutions but also in pursuing a remedy when whole segments of our population were excluded or denied access to the ballot box.

Since this issue of the *Journal* is a fifty-year retrospective on the legal profession, and lest we think that the events of the past months are unique in the history of our Association, it might be of interest to know that a Committee on Proposed Amendments to the Federal Constitution met in 1949 and considered several proposals, including one to alter the method of electing a president and vice president by changing the Electoral College procedures. In a fairly close vote, the committee voted to recommend rejection of the proposal.

It is also interesting to note that many other matters we have recently considered were on the agenda of the Association fifty years ago.

In February 1950, the retiring president of the Association, Neil G. Harrison, reported that a Special Committee was appointed at the annual meeting to confer with committees of the CPA Societies "for the purpose of defining as may be practicable, the field wherein the accountant may properly function without encroaching on the province of the lawyer." Apparently the MDP debate has been going on a lot longer than we think.

In October 1951, the *New York State Bar Bulletin* reported that the Committee on Civil Rights had undertaken a study of "the constitutionality and advisability of televising and broadcasting court trials and proceedings." Just a few months ago, in Cooperstown, we created a Special Committee on Cameras in the Courtroom to reconsider our longstanding position on the same subject.

In June 1950, then-President Otto T. Bradley reported that a publication had come to his desk reporting that lawyers and newspapermen have a serious problem in common in that both groups need to win greater public confidence. As you may know, our Committee on Pub-

lic Trust and Confidence will present its report for approval by the House of Delegates this month at the Annual Meeting in New York City.

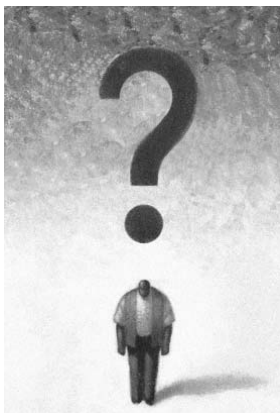
In 1950, the annual meeting was held in New York City as it is today with a summer meeting at Saranac and regional meetings throughout the state. The Association in 1950 had slightly more than 7,000 members with eight specialized sections and more than 40 committees. Our roster of committees may not have grown appreciably but more than half of our 67,000 members belong to one or more of our 23 sections.

In commenting on the role of the profession in 1950, President Bradley expressed his opinion that:

A lawyer by virtue of his professional status assumes certain obligations both to the public and his profession apart from the pursuit of personal gain. It is the effective discharge of such responsibilities which not only maintains but increases the dignity and prestige of the profession.

The same theme was reiterated this past year in the Report of the Special Committee on the Law Governing Firm Structure and Operation and our Association remains as dedicated as it was fifty years ago to service of our membership, to the profession and to the public at large.

As the old saying goes, the more things change, the more they remain the same and when we begin to think that we are engaged in solving new problems, forging new ground, and making a definitive impact on the profession, a look back to just fifty years ago may be helpful in realigning our perspective. Perhaps it would not be so surprising if fifty years hence our nation is faced with another controversy surrounding the election of a president, and, once again, the legal profession is called upon to bring order the process.



Struggling with an

ETHICS ISSUE?

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Introduction To Special Edition



Chief Judge Judith S. Kaye
New York City
*Photo on the left is circa 1970 in a
“debutant” pose.*



How has the legal system changed in the last fifty years? From our millennium perch, we have posed the question. That was the easy part. We have left the more difficult part—the answer—to a panel of veterans who now offer their own unique perspectives.

Intuitively, and in some cases experientially, we know that our field has changed vastly over the last half-century. We are tempted to say that the changes over this past era have been at least as great as in any before it. Too bad there is no accurate yardstick. We do not have written responses from a cross section of practitioners describing the changes in the profession over the period, say, from 1650 to 1700, or, for that matter, from any other fifty-year span.

Now we have our paradigm. Our panelists write from their frontline positions. In addition to being experts in their fields, they are youthful enough to be robust and incisive, yet they have recall that extends over the better part of these past five decades—and in a couple of instances, a few more years for good measure. Some have also helped us mark the passage of time by graciously providing photos of themselves from their younger days.

Many of our readers were around in the 1950s, some in school, some in workpens, some in playpens. For most people, impressions of the '50s are based on political and cultural imagery: Harry Truman, cars with long fins, Marilyn Monroe, Milton Berle, Joseph McCarthy, James Dean, teenagers wearing argyle socks and saddle shoes sipping sodas at ice cream parlors.

But in all likelihood, this imagery looms larger for people who arrived on the scene later. Most people's lives did not revolve around Marilyn Monroe, and the change from poufy petticoats to python pants does not define one's existence. There is no doubt, though, that the practice of law and the work of the courts has changed profoundly, and in the pages to follow the authors tell us how.

When, in eons to come, legal archaeologists pore over the materials of our age, they may encounter this little volume containing the gems offered by its contributors and conclude, “Ah, so *that's* the way it was!”



Judge Albert M. Rosenblatt
Poughkeepsie
*Photo on the left is circa 1960 from
the Harvard Law School Yearbook.*



Chief Judge Judith S. Kaye
Judge Albert M. Rosenblatt

CPLR Provided Escape From Common Law Technicalities

BY DAVID D. SIEGEL

Our task is to survey the major developments in civil procedure between 1950 and 2000, and to do so in the space of only a few pages in the *Journal*. For that mission we will use a flying machine, soar out over the field, seek out each subject in which something significant has happened, alight ever so briefly, make a note, and zoom off to the next subject. In the art world they call this using a broad brush; readers are admonished not to look for any fine strokes.

Those of us alive on August 31, 1963, will remember how difficult it was to control our excitement as midnight approached: the Civil Practice Law and Rules was about to take effect. September 1, 1963, will live in glory: the CPLR replaced the Civil Practice Act, which in the 1920s had replaced the Code of Civil Procedure, which in the 1870s had replaced the Field Code of the 1840s. The Field Code! Look at the CPLR's ancestry!

The CPLR's attainments were many. It was but a fraction of the size of its predecessor, for one thing, choosing to set forth procedure in more general terms and leaving much more to the discretion of the court. Several of the CPLR's more specific attainments need mention.

Special proceedings had been (and continue to be) authorized in various places in and out of the CPLR. The special proceeding is a device designed to produce a judgment with what amounts to nothing more than a motion. The Legislature allows a special proceeding in a variety of contexts in which it feels that expedition is called for. But there were always difficulties about what procedures to follow in a given special proceeding if the particular law supplying it had not furnished enough detail. For that the CPLR offered a new Article 4, supplying the needed detail in just a dozen sections.

In Article 3, the CPLR gave us the long-arm statute, CPLR 302 (on which more below), and through a later amendment gave us Article 9, a detailed procedural framework for the class action.

In Article 30 generally and in CPLR 3013 and 3014 particularly, the CPLR had one of its major achievements: the simplification of pleadings and escape from the lingering technicalities of the common law, which the Field Code tried to dodge but which it took the CPLR to really leave behind.¹

Other of the CPLR's achievements are noted among some of the individual captions below.

Statute of Limitations

The statute of limitations continues to serve as the ultimate bugaboo of civil procedure. It stands by to punish the dilatory plaintiff with a dismissal, sparing the defendant even the burden of drawing an answer. Under the CPLR it has carried on its satanic mission with undiminished enthusiasm, and with not too many changes.

One change worth noting is the adoption of a discovery rule in the so-called "exposure" cases, in which a plaintiff has been injured through the inhalation, ingestion, injection, etc. of a foreign substance, but with the injury not manifesting itself until years later. Under case law, the statute of limitations had started from the exposure,² and never mind that the plaintiff would see and feel no injury until years later. The courts and the Legislature were importuned to adopt a rule that would start the time from the manifestation of the injury—*i.e.*, the discovery—but neither would budge, until half a century later. In 1986 the Legislature took the initiative,



DAVID D. SIEGEL is Distinguished Professor of Law at Albany Law School, editor of the *New York State Law Digest*, the author of *New York Practice*, now in its Third Edition, and *Siegel's Practice Review*, a monthly newsletter on civil practice, and a Commentator on McKinney's CPLR, 28 U.S.C.A., and the Federal Rules of Civil Procedure. A graduate of the City University of New York, Brooklyn College, he received a J.D. from St. John's University School of Law and an LL.M. from New York University School of Law.

with the adoption of CPLR 214-c, adopting a discovery rule with this so-called “exposure” statute.

A parallel development was the adoption of a discovery rule in medical malpractice actions in the “foreign object” (*i.e.*, surgery) category, where something unintended was left inside the patient. There the courts led the way, with the Court of Appeals taking the lead and the Legislature following up with a codification.³

Adoption of a Filing System For Commencing Actions

Service of the summons, not filing, traditionally marked the commencement of the action in New York. While retaining that rule for the lower courts, the state in the early 1990s adopted the filing rule—as used in the federal courts—but only for the Supreme and County courts, retaining the “service” rule for the lower courts.

The rule has worked out okay, but only through an amendment made in the mid 1990s eliminating an ill-considered feature of the original filing rule. The feature required that proof of service be filed within 120 days after the filing of the summons and complaint, and automatically “deemed” the action dismissed if that filing was not made. The rule proved draconian and unworkable, dismissing by the hundreds cases in which service had been timely and properly made but proof of service had not been filed within the allotted time. Repealing this silly requirement and adopting instead the federal rule that refuses to make the filing of proof of service a critical step, the Legislature restored good sense to the filing system, and it has worked well since.

Expansion of Personal Jurisdiction

The celebrated case of *Pennoyer v. Neff*,⁴ a product of the 1870s, which held that the only way for a state court to obtain personal jurisdiction over defendants was to serve process on them while they were physically present in the state, lost its hegemony just before the midway mark of the 20th century. It happened in 1945 with the *International Shoe* case.⁵ But it took a good piece of the next half-century before the case’s jurisdictional invitation was fully understood, and exploited. *International Shoe* adopted, unequivocally, the concept of “long-arm jurisdiction”—until then just hinted at in collateral developments—in which a non-domiciliary defendant could be subjected to the jurisdiction of a court even if served with its process outside the state, as long as the claim arose out of something the defendant did in the state.

Long-arm jurisdiction, which is in essence a constitutional permission—construing the federal due process clause—to send process beyond state borders, requires a statute or rule to implement it. It took well into the 1950s and 1960s for the states to understand and exploit this huge jurisdictional opportunity. Many other states got

started before New York. New York didn’t step in until 1963, with the adoption of the CPLR, which contained CPLR 302, now one of the nation’s most exploited long-arm statutes. It quickly compensated for its tardiness with a spurt of activity that has not abated.

Adopting the federal rule that refuses to make filing of proof of service a critical step, the Legislature restored good sense to the filing system.

CPLR 302 has grounded thousands of cases in which jurisdiction could not previously have been obtained because of the *Pennoyer* stricture. It is among the most important statutes on the procedural books. On its application hinges the key question whether a given case can be brought in New York, or must be farmed out to lawyers elsewhere. It is bread and butter not only to the parties but also to the bar.

It is also—if we may be allowed—one of the most colossal bores ever to afflict the law books. Every long-arm case is a mass of papers by both sides, the plaintiff trying to show adequate activity by the defendant within the state to support the long-arm jurisdiction and the defendant trying to show the opposite. The affidavits rise high, with the judge, hidden behind them, summoning forth all his powers to conceal his distaste for the inquiry—which is in almost every instance a *sui generis* immersion into the background facts of a single case to determine whether there’s enough there to let the case go forward. One federal judge—the federal courts also apply the state long-arm statute under the adoptive provisions of a federal rule⁶—more candid than most, opened a long-arm inquiry with a statement so quotable that we quoted it.⁷ He opened an opinion with the yawn that the case requires yet “another decision in the interminable line of cases applying the New York long-arm statute, CPLR § 302.”⁸

CPLR 302 proves the adage that says that which is terribly important is not always terribly interesting.

Curtailement of Quasi in Rem Jurisdiction

Just as personal jurisdiction was expanded, the category of *rem* jurisdiction was curtailed, a see-saw effect: as personal jurisdiction went up, the need for *rem* jurisdiction went down. One of the *rem* categories is *quasi in rem* jurisdiction. For just about a century it had served as a

possible basis for at least some relief against a non-domiciliary who was beyond personal jurisdiction but had property of some kind in the state. This category was virtually abolished by the U.S. Supreme Court in 1977 in *Shaffer v. Heitner*.⁹ *Pennoyer* had allowed it as a kind of consolation for the rigid restrictions it had placed on personal jurisdiction. With *Pennoyer's* restrictions on personal jurisdiction removed, its alternative concession of *quasi in rem* jurisdiction was a gift the bar no longer needed. Ergo, out went *quasi in rem* jurisdiction.

Rise of Pretrial Disclosure and Discovery

As the technicalities traditionally appended to pleadings were abandoned, the use of the pretrial disclosure devices rose in almost inverse proportion. The expansion of disclosure, inspired in large measure by the Federal Rules of Civil Procedure, was another of the CPLR's prime accomplishments. Narrow restrictions on depositions and on discovery were abandoned, and the whole of the disclosure arsenal was made available to both sides in litigation, with only a few narrow exceptions (mainly for privileged matter and materials prepared for litigation).

This attainment, ironically, was largely the work of the Court of Appeals rather than the Legislature. The Legislature carried forward as the disclosure criterion the requirement that the "matter" sought be shown to be "material and necessary," a standard that produced constant dispute under prior law. Granted that the information sought was relevant, was it "material"? Did the other side really need it? What the drafters of the CPLR wanted to do was adopt the federal standard, which makes all relevant information available without any brook with materiality or necessity. They failed with the Legislature, which struck the recommendation and just brought forward the "material and necessary" criterion. But with just a brief wave of a magic wand that it saves for special situations, the Court of Appeals itself did the original drafters' bidding. In *Allen v. Crowell-Collier Publishing Co.*,¹⁰ it just construed the old—and continued—terminology into the more generous federal standard, and disclosure has been a procedural monarch ever since.

Summary Judgment Motions

The summary judgment remedy as contained in prior law was a narrow and restricted device, available only in a small category of actions. With the adoption of the CPLR, where its place is CPLR 3212, it lost most of

its fetters and in due course lost them all. While not easy to get in any action—it has to convince a judge on paper alone that there is no issue of fact in the case that requires a trial—summary judgment is now available in all of them including the matrimonial action, the last of the previously restricted categories.

Trial by Jury

Trial by jury is now before a panel of six in a civil action, as against the traditional 12 of the past, and in some categories of cases the right to trial by jury has itself been shaken up a bit. Under procedures drafted during the last half-century, money cases below certain figures can be directed to mandatory court-annexed arbitration in some parts of the state. Unconstitutionality is avoided by allowing the loser in the arbitration to secure a "trial *de novo*" in court, and with a jury, albeit with some additional expense imposed on the party who seeks the trial *de novo*.

The Rise of Arbitration

Not to be confused with the "court-annexed" arbitration just noted is the regular out-of-court "arbitration," currently governed by Article 75 of the CPLR. This is the better known voluntary system of dispute resolution—as opposed to the court-connected system mentioned, which is compulsory.

Getting its start a few decades into the 20th century, arbitration at first met resistance and had to undergo quite a metamorphosis. Even into the last half of the century it had some significant restrictions, but most of these were gradually overcome.

The trend toward a more generous judicial attitude about recognizing the arbitral remedy as an alternative to a court action can be seen in a Court of Appeals opinion handed down just as the century drew to a close. In 1999, in *Board of Education v. Watertown Education Ass'n*,¹¹ the Court allowed arbitration in a teacher-firing case in which it had hardly two decades earlier taken a more restrictive view.

Arbitration itself has expanded beyond the commercial realm in which it started and can be seen today in labor, no-fault (tort), and still other cases, in some of which it takes on quasi-compulsory form.

Alternative Dispute Resolution (ADR) is the caption that today governs all devices for resolving disputes short of an ordinary action in court. Arbitration is the most prominent entry here, but not the only one. Mediation is another, and the ADR realm has other devices as

CONTINUED ON PAGE 14

As the technicalities traditionally appended to pleadings were abandoned, the use of the pretrial disclosure devices rose in almost inverse proportion.

well. With its potential for helping judicial calendars by relieving the judiciary altogether of cases which in an earlier age had nowhere else to go, ADR is another development of the late 20th century.

Article 78 and the Prerogative Writs

The disorderly trio of prerogative writs known as mandamus, certiorari and prohibition lost most of their disorder in the 1930s, when the Legislature adopted what has come to be known as the Article 78 proceeding, named after the niche it happened to get in the old Civil Practice Act when the article was first enacted. So great a place did the proceeding then earn for itself in the affections of the bar, that when the CPLR came in to replace the Civil Practice Act in 1963, the one article that the drafters made sure to keep in its same niche was Article 78. Article 78 had become the proceeding's name and it was unlikely that any other could be made to stick in short order.

Lawyers had been confusing the function of the writs for years, bringing on one when the mission was really another's. The result for this relatively innocent mistake was a dismissal. What the Article 78 proceeding did was abolish the three writs and provide instead that if the petitioner was seeking any item of relief previously associated with any of the three writs, all the petitioner had to do was invoke Article 78 and it would do the job. It would not even be necessary to identify which old writ might previously have been the one in point.

The later aspect of the Article 78 proceeding to be credited to the last half of the 20th century is the adoption of a device that would avoid the still lingering prospect of a dismissal in situations involving the old writs. If the petitioner using Article 78 was wholly mistaken, and none of the three old writs was appropriate to the relief sought, the result before the CPLR was adopted was still a dismissal. The proper vehicle was an ordinary action, but it was often now too late for it. The CPLR cured this by including CPLR 103(c), which allows the court to convert the improperly brought proceeding into the should-have-been-brought action.

The Age of the Money Sanction

While with few exceptions attorneys' fees remain unavailable as part of the winner's recovery in an ordinary money action, the last half of the 20th century saw the

introduction of what has come to be known as the "frivolity" sanction. Begun in earnest in federal practice under Rule 11 of the Federal Rules of Civil Procedure, in due course the federal rule inspired New York counterparts. In the mid 1980s, CPLR 8303-a was enacted, allowing the courts to impose compensatory (recompensing the other side) and punitive sanctions for the interposition of what the court found to be a frivolous claim or defense: that it had no ground whatever in law or fact and was interposed just to harass or threaten.

It was limited to tort cases, however, and since it covered only frivolous claims and defenses, it didn't cover the myriad of other points in a litigation at which a party could be accused of frivolous conduct. This was

cured by the court system itself, which decided to act without further invitation from the Legislature. Rule 130-1 was adopted. It allows the court to make a costs assessment and/or impose a punitive sanction for any frivolous conduct at all: frivolous motion, appeal, delay, courtroom conduct, etc.

The rule just about took over the realm, generating scores of cases punishing with monetary assessments

frivolous conduct by parties or lawyers. Both are subject to the assessments. With the rule taking over, the statute, CPLR 8303-a, was seldom heard from afterwards.¹²

A later development was the elimination of any limit on the amount of the compensatory assessment. It could be in any sum a party showed it incurred because of the other side's behavior. On the punitive side, however, a \$10,000 limit applies.

Enforcement of Judgments

A plaintiff seeking to levy on a judgment or attachment under prior law was confronted with a bewildering list of property interests of the defendant that the plaintiff would be allowed to pursue. The CPLR eliminated the list and eased the creditor's path by authorizing pursuit of any property interest the defendant had which by law he could assign.¹³ Since modern property concepts permit the assignment of just about everything, this made just about everything available to the owner's judgment and attachment creditors.

A big and a clearly troublesome exception, however, was the intangible property interest. Where the defendant was owed a debt of some kind by a third person (a garnishee), and the debt would not become due until

The disorderly trio of prerogative writs known as mandamus, certiorari and prohibition lost most of their disorder in the 1930s when the Legislature adopted what has come to be known as the Article 78 proceeding.

some contingency occurred, CPLR 5201(a) would not allow the creditor to pursue the debt unless it was shown that the contingency was certain to occur, as by mere passage of time, or upon the death of some designated person.

This made contingent intangibles unavailable to creditors—in an age when contingent intangibles could prove to have enormous value—if there was anything at all in the picture that might prevent the debt from ripening into an economically valuable thing. The Court of Appeals did the system a great service by in essence abolishing this restriction in 1976 in *Abkco Industries, Inc. v. Apple Films, Inc.*¹⁴ P had a contract that entitled it to part of the profits of a Beatles film. It tried to levy against those profits but was met with the argument that since the film could fail, this “debt” turned on a contingency—the success of the film—and it might not be a success. Let me take that chance, pleaded the creditor, and the Court of Appeals did. It held in *Abkco* that the plaintiff could treat the “debt” as “property,” and thus bring it within subdivision (b) of CPLR 5201—which had no contingency restrictions—and thus avoid the bar of subdivision (a), which did. This seemingly narrow holding was a big step in the enforcement of judgments.

Conclusion

Those are a few of the developments of the last half of the 20th century. We could of course cite many others, but these are all we’ve got space for in this article.

1. See *Foley v. D’Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964), which was to be followed throughout the state and cited favorably by the Court of Appeals.
2. See, e.g., *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).
3. *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 301 N.Y.S.2d 23 (1969); CPLR 214-a.
4. 95 U.S. 714 (1877).
5. 326 U.S. 310 (1945).
6. Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.
7. See David D. Siegel, *New York Practice* § 86 (3d ed. 1999).
8. *Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc.*, 297 F. Supp. 1149, 1150 (S.D.N.Y. 1969) (Tyler, J.).
9. 433 U.S. 186 (1977).
10. 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).
11. 93 N.Y.2d 132, 688 N.Y.S.2d 463 (1999).
12. See David D. Siegel, *New York Practice* § 414A (3d ed. 1999).
13. CPLR 5201(b).
14. 39 N.Y.2d 670, 385 N.Y.S.2d 511. See David D. Siegel, *New York Practice* § 489 (3d ed. 1999).

Dramatic Changes Affected Procedural and Substantive Rules

BY PETER J. MCQUILLAN

Fifty years ago, J. Edgar Hoover blamed Communists for the spectacular Brink's robbery in Boston, observing that the loot "would be a fine sum of money to have for subversive purposes." A few years later we learned that the perpetrators were Specs O'Keefe and other ordinary career hoodlums. In 1950 the NYPD unabashedly announced that 75% of all burglaries reported during a three-year period were solved, but the FBI unhesitatingly denounced the statistics as bogus. Around this time period Senator Estes Kefauver opened his crusade against organized crime. The double helix of DNA was discovered but Judge Crater was still missing and the search for the Mad Bomber continued.

During the past 50 years, we have seen both continuity and change in New York's criminal justice system. Continuity is in place because there has been no public inclination to scrap or radically transform workable procedures or established doctrines of criminal justice. The fundamental legal principles still prevail. The criterion of criminal responsibility declared by M'Naghten's case in 1843 continues to be the law in our state and we still have capital punishment for first-degree murder. All of the changes are in the details.

Since 1950, many of the particulars of constitutional, substantive and procedural criminal law have been altered. The 1960s, especially, saw rapid and seismic changes. This, of course, was a time of great social ferment. Established precedents constituting excessively stringent and unreasonable penal law policies were often challenged. Many of the criminal law changes wrought during the 1960s were not complete innovations but had long roots to the past. Some supercharged and titanic modifications—like *Mapp* and *Miranda*—were applauded by many but they had vociferous critics who viewed their authors as iconoclasts who should be impeached.

Our criminal justice system has unquestionably felt the influence of changing times. At least five noteworthy events during the past half-century have had dramatic effects on the practice of criminal law:

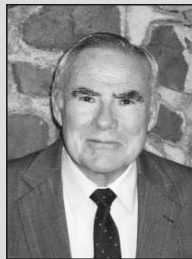
1. A legislative and judicial expansion of rights protections for the accused. The Court of Appeals facili-

tated this development by its reliance on the state constitution to supplement or expand rights guaranteed by the federal constitution. One product of this expansion is that there were many more criminal law appellate court opinions issued in 2000 than in 1950.

2. More than a five-fold increase in criminal case filings. This startling jump in court activity necessitated the recruitment of many more judges, prosecutors and defense lawyers who, incidentally, are better trained today than they were 30 or more years ago, thanks in large measure to the widely available CLE programs developed after 1970.

3. The approval of the Model Penal Code in 1962 by the American Law Institute, which prompted a revision in the 1960s of New York's substantive and procedural criminal law. The model code was a product of the analytical abilities of the late Professor Herbert Wechsler. The revision in New York was a result of the leadership roles of Richard J. Bartlett and the late Richard G. Denzer.

4. A greater sensitivity to the concerns of crime victims. This awareness finds expression in the repeal of the corroboration requirement for most sex crimes, the



PETER J. MCQUILLAN retired in 1992 after serving 21 years as a Justice of the New York State Supreme Court in New York City. Earlier, he was counsel to the New York State Penal Law Revision Commission and director of the New York State Office of Crime Control Planning. He is currently an adjunct professor at Fordham Law School and a member of the State Commission on Forensic Science and the Criminal Jury Instructions Committee. A graduate of Long Island University, he received both an LL.B. and an LL.M. from Fordham Law School.

enactment of a rape shield law, establishment and funding of the Crime Victims Compensation Board, and the statutorily guaranteed right of victims to be heard at sentencing.

5. The development in the 1980s of DNA “fingerprinting” as a technique for correctly identifying a perpetrator and absolving a wrongfully accused suspect. This was the single greatest contribution made to the cause of justice by forensic science during the past 50 years. A heightened concern, however, is required from the entire law enforcement community so that DNA samples are not misused in a manner that violates a person’s privacy rights.

Rights of the Accused

Fifty years ago, there was no discernible “activist” attitude among most judges handling criminal cases. Appellate courts—with some notable exceptions—had no greatly enhanced concern that prosecutors and police sometimes overreached their authority. (“If the constable blunders, must the criminal go free?”) Courts seldom took an active role to correct systemic deficiencies. Some people on the ideological left would say that public anxieties about crime coupled with conservative reform impulses created an atmosphere in which practices that were unfair or outmoded continued in place.

In the late 1950s the U.S. Supreme Court began to show an increasing tendency to scrutinize and criticize police action. A sea change began in 1961 with *Mapp v. Ohio*¹ announcing that the well-established federal exclusionary rule barring the use at trial of illegally seized evidence would now be applicable to the states. Other Supreme Court landmark decisions quickly followed during the remarkable 1960s and include:

*Miranda v. Arizona*²—certain warnings required before a police officer may interrogate a suspect in custody.

*Massiah v. United States*³—restrictions on post-indictment interrogation.

*Terry v. Ohio*⁴—a prerequisite to a “stop and frisk” is reasonable and articulable suspicion of criminal activity.

*Wong Sun v. United States*⁵—evidence that is the “fruit of the poisonous tree” must be excluded.

*Gideon v. Wainwright*⁶—indigent defendant has right to counsel at trial.

*Duncan v. Louisiana*⁷ and *Baldwin v. New York*⁸—jury trial required where possible penalty exceeds six months’ imprisonment.

*Bruton v. United States*⁹—admission of a non-testifying co-defendant’s confession denies defendant his rights under the confrontation clause.

*Chapman v. California*¹⁰—infraction of basic rights may not be treated as harmless error.

*Brady v. Maryland*¹¹—duty of prosecutor to disclose exculpatory information to defense.

United States v. Wade,¹² *Gilbert v. California*¹³ and *Stovall v. Denno*¹⁴—mandated procedures to minimize mistaken identification.

Statutory Changes

The most noteworthy criminal law event in 1950 was the decision by the American Law Institute to begin development of a Model Penal Code. Twelve years later, a proposed official draft was promulgated. The code—its pragmatism tempered by principle—represented an effort to make criminal law rational. It was primarily intended to encourage states to revise their substantive criminal laws. That intent was fully realized because almost every state, including New York in 1967, has enacted a revised criminal code based largely on the Model Penal Code.

The New York Penal Code of 1881 was essentially a restatement of earlier statutes. The next recodification occurred in 1909 with the adoption of a Penal Law that was simply a rearrangement of the earlier code without any substitutions of substance. The 1909 law—which remained in place for nearly six decades—arranged crimes in alphabetical order under “articles” (Abandonment, Abduction, Abortion, Anarchy . . . Tramps, Treason, Usury, Women and Wrecks). An alphabetical listing works for the Yellow Pages, but not for a criminal code.

By the early 1960s, the Penal Law—which had developed in a hodgepodge fashion—was disorganized, internally inconsistent and permeated with absurdities and ambiguities. The revised Penal Law of 1967 made many changes of both substance and form. Part one of the new law stated such general provisions as rules of construction and accessory responsibility, definitions of terms, mental culpability principles, and defenses involving lack of culpability. Mistake of fact or law, under certain circumstances, was recognized as a defense. The concept of an affirmative defense was introduced into New York law. Criminal conduct having a similar character and theory were grouped together; e.g., offenses against the person.

Basic crimes in the 1909 law were retained but largely rewritten. The former definitions of murder one and murder two distinguished between an intentional killing that was deliberate and premeditated and one that was not. But the determination of whether an actor “premeditated” was essentially an exercise in semantics. The 1967 law abandoned the old formula and made murder a single, degree-less crime. The super-technical “breaking” element—essential in every burglary case since before Blackstone—was eliminated. A number of new crimes were created; for example, larceny by false promise, solicitation and facilitation.

The Court of Appeals construed a variety of new provisions in the revised Penal Law during the 1970s and 1980s. Some of the noteworthy decisions during this period include:

*People v. Goetz*¹⁵—self-defense involves a mix of subjective and objective factors.

*People v. Patterson*¹⁶—affirmative defense of extreme emotional disturbance is constitutionally valid.

*People v. Casassa*¹⁷—meaning of extreme emotional disturbance as a mitigating factor in an intentional murder case.

*People v. Register*¹⁸—depraved mind murder construed.

*People v. Gladman*¹⁹—determining what constitutes “immediate flight” in felony murder.

*People v. Haney*²⁰—meaning of criminally negligent homicide.

*People v. McDowell*²¹—an objective level of physical injury is required for an assault.

*People v. Dlugash*²² and *People v. Bracey*²³—factual impossibility is no defense to the inchoate offense of an attempt to commit a crime.

*People v. McGee*²⁴—a conspirator is not necessarily an accomplice.

*People v. Liberta*²⁵—the statutorily prescribed gender and marital exemptions for rape are invalidated.

It is widely believed that a more reasonable approach to drug offenses such as the treatment courts currently being established statewide would be more humane and cost-effective.

The most significant achievement of the 1967 revision was an innovative sentencing structure, designed by former Correctional Services Commissioner Peter Preiser. The new law, characterized by rationality and fairness, eliminated the suspended sentence and the practice of suspending the execution of sentence. It introduced a sentence of conditional discharge. Aside from a class A felony, a basic one-year minimum was required for all state prison sentences, but the court was accorded discretion to fix a greater minimum. However, alterations in the past two decades—some wrought by hasty legislative responses to unstudied demands for higher penalties—have imbued the present sentencing statutes with unnecessary complexity, confusion and unfairness.

In the 1930s, the Baumes’ Laws mandated enhanced penalties for multiple offenders. The 1967 revision substituted a permissive persistent felony offender sentence in somewhat comparable cases. Within a decade, however, the Legislature reinstated the mandatory aspect of the old laws. What is true today as it was many years ago is that while excessive judicial discretion produces unwarranted sentencing disparities, unreasonably restrained discretion causes unconscionable injustices in individual cases.

Drug Crimes

Fifty years ago, there was a growing concern in New York about the “drug problem.” The sale of any quantity of narcotics before 1950 carried a sentence of up to 10 years; and possession of such substance—regardless of weight—was a misdemeanor subject to a one-year sentence. In 1950, the Legislature made possession of drugs with intent to sell punishable by the same sentence prescribed for an actual sale. The new law presumed such intent if the defendant possessed a specified quantity of the substance containing a specified purity. At its next session, the Legislature created a new felony based solely on the weight of the drug.

At about the same time, a civil procedure was enacted for the mandatory treatment of addicts under 21 years of age. Shortly thereafter, New York opened the first institution of its kind in the nation devoted solely to the treatment of young addicts. A few years later, an official report concluded that “[t]reatment facilities [for addicts] in the city and State . . . continue to be hopelessly inadequate.” In 1966, the Narcotics Addiction Control Commission was created, putting in place a massive program for the compulsory treatment of all addicts. The agency was dismantled in the 1970s when, following the president’s declaration of war on drugs, the governor and the Legislature opted for stringent and mandatory prison terms rather than treatment.

New York’s typical response to the substance abuse problem during the protracted “war on drugs” has been to increase the penalties for sale and possession offenses. Today, very few crimes are punished more severely and more inflexibly than drug offenses. Five decades of long prison sentences have failed to eradicate drug abuse in our communities. Many objective observers question the fairness and societal necessity of inordinately high penalties for controlled substance offenses. It is widely believed that a more reasonable approach such as the treatment courts currently being established statewide would be more humane and cost-effective than the scheme now in place.

Old and New Crimes

Some crimes that were once prosecuted in New York no longer exist. And, of course, changing times have ne-

cessitated the creation of new crimes. In the years before 1965, there were numerous prosecutions in New York County for offenses committed on the busy “waterfront.” Most of these cases related to loansharking and the “public loading racket.” The cause for this conduct—as moviegoers learned from Brando’s performance in “On the Waterfront”—was due largely to an antiquated method of hiring dockworkers. The virtually abandoned “waterfront” is no longer “a spawning place of crime.” Today’s sophisticated “rackets” include money laundering, enterprise corruption and computer frauds.

During the two decades before 1965—a particularly intolerant time in New York for homosexuals—there was an over-zealous enforcement of subdivision eight of the state’s disorderly conduct statute. That penal law offense—known in law enforcement parlance as a DC 8—stated that a person was guilty if “he loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.” Dozens of men were arrested each week in New York City by police decoys and brought the next morning before a city magistrate.

Shortly after taking office in 1966, the new mayor and his police commissioner announced an abandonment of “police decoys” arresting gays. The new city policy was that only a private citizen could bring charges against a person for making an unwanted sexual proposition. And finally, in 1980, the Court of Appeals held that non-commercial, cloistered, personal sexual conduct between consenting adults may not be criminalized.

For many years, a significant number of people were arrested and prosecuted in New York because they simply placed a 50-cent bet with a numbers collector or made a \$2 bet with a local bookie on that day’s favorite at Saratoga. The Legislature did not exempt the casual player from the prohibitions of the state’s gambling laws until 1967.

Criminal Procedure

Thirty years ago, a newly revised Criminal Procedure Law replaced the 1881 Code of Criminal Procedure. The old code, essentially a restatement of earlier statutes, was peppered with archaic terminology that remained extant until 1971. For example, one section authorized “the binding out of disorderly persons” and then declared that such “binding out has the same effect as the indenture of an apprentice.” There were puzzling references to the “testing of a writ of process,” to an “undertaking to keep the peace” and to “overseers of the poor.”

The Criminal Procedure Law, essentially a restatement of earlier statutes, was peppered with archaic terminology that remained extant until 1971.

Many of the code’s provisions—still in effect in 1970—assumed that every indictment charged but one crime against one defendant. This “one crime, one defendant” concept was largely true in the 1800s but was superseded in the years before World War II.

One of the principal defects of the old code was the wide variety of motions challenging indictments, informations and judgments of conviction. The multitude of motions, and the necessity of selecting the “right” one, unnecessarily burdened the practice of criminal law. The 1971 CPL greatly simplified motion practice by introduc-

ing the “omnibus motion.” The new law also effected reforms in many other areas, including grand jury practice, accusatory instruments, bail and pre-trial discovery.

Juries

Today we revere and respect the ideas that grand and petit juries must be selected at random from a fair cross section of the community, and that all eligible citizens shall have the opportunity to serve as jurors—as well as an obligation to serve when summoned. These ideas were not unqualifiedly accepted in New York 40 years ago. For example, the law at that time gave women the opportunity to serve as jurors but, when summoned, they might claim exemption solely because of their gender. This discriminatory law was repealed in the 1970s. The 1995 jury reform measures eliminated a long laundry list of other exemptions.

Other old practices prevented some people from contributing their “wisdom and life experiences to the deliberative process.” One was an 1896 law that authorized a “blue ribbon” jury for the trial of “important cases” in New York County. This special jury was formed from a separate “blue ribbon” panel of jurors chosen from the regular lists of jurors. Compelling arguments were made that the “blue ribbon” panel existed solely to obtain “upper class” jurors who held “conservative views.” A Judicial Council study found that special juries were “prone to convict.” The “blue ribbon” statute was unsuccessfully challenged as being constitutionally infirm. In 1965, however, this unseemly statute was finally repealed and the “blue ribbon” jury became part of New York’s less glorious legal history.

Between 1940 and 1960, grand jurors in some counties formed associations and allied themselves closely with law enforcement groups. The larger associations, assisted by their own staff, engaged in such activity as publishing a newsletter, proposing legislation, lobbying

and filing lawsuits. Some associations encouraged “friends” to volunteer for service as a grand juror. In some few counties there was a belief that grand jurors tended to be those who were members of the association or who were recommended by a member. Some observers suspected such grand juries of having “blue ribbon” exclusivity. The associations—if any still exist—became less active with the need beginning in the late 1970s to empanel in many counties a larger number of grand juries to deal with escalating caseloads.

A few noteworthy revisions have been made to grand jury procedures during the recent past. For more than a century, a defendant in New York could not waive indictment by a grand jury when charged with a felony. In 1974, that practice was abandoned following a constitutional amendment that authorized a felony prosecution by a superior court information. In many counties, the SCI has proved to be a popular and fair accusatory instrument.

For many years it was assumed by most prosecutors that a grand jury was empowered to file a “report” of its findings and recommendations (sometimes known as a “presentment”), but that the court had the discretionary authority to reject such filing. In the 1950s, following a grand jury investigation of the “Television Quiz Show” scandal, the jury sought to file its report. The trial judge refused to accept it, holding that a grand jury has no power to issue a report that criticizes the non-criminal conduct of private persons engaged in a private enterprise.

In 1961, the Court of Appeals held that a grand jury has no power to make any kind of a report—even one that relates to non-criminal misconduct by a public officer. Following this decision—which validated the much-criticized action of the trial court in the “Quiz Show” case—the Legislature enacted a comprehensive statute permitting a grand jury to file a report.

With some exceptions, anyone charged today with a misdemeanor—in any part of the state—is entitled to a jury trial. This, however, wasn’t always the case. Up until the early 1970s, a misdemeanor defendant in New York City was never accorded a jury trial in the local criminal court. Depending on the misdemeanor, the defendant had either a bench trial with one judge or a trial before three judges. And the unique three-judge “jury” did not require a unanimous verdict. (A 2-1 vote would suffice for a verdict.) This “peerless” New York City practice was declared unconstitutional nearly 30 years

ago, and those who favor trial by jury applauded the judicial invalidation.

Changes in Customs and Practices

Up until 35 years ago, private attorneys assigned by a New York court to represent indigent defendants in non-capital cases were not compensated for their time or expenses. It was not until the enactment in 1965 of the Anderson-Bartlett Act (County Law article 18-B) that New York established a comprehensive and government-funded program of compensating assigned attorneys and necessary experts.

In New York City, in the years before 1962, the “superior courts” for the trial of indictments were the County Courts and the Court of General Sessions. A peculiar practice in some of these courts was the preparation and control of the court’s calendars by the People—one of the parties to the litigation. This practice, lacking at least the appearance of propriety, continued to about 1962. Today, calendar control resides largely with the court.

Before 1970, an insurance company bail bond was the most common instrument used for the release of a defendant charged with a crime. Licensed bondsmen had storefront offices near every New York City courthouse and they seemed to be everywhere at once. Some were honest and honorable, while others were unsavory. With the creation by the Legislature in 1971 of other forms of bail, the use of the insurance company bail bond has dramatically declined. Today, very few bondsmen roam the courthouse hallways looking for business.

Two cases from New York County ended up in the Supreme Court a half-century ago, where each set something of a record. In one, a bookseller was convicted of violating a statute that proscribed the sale of magazines “primarily devoted to stories of deeds of bloodshed, lust or crime.” Following an affirmance by the Court of Appeals, the defendant appealed to the U.S. Supreme Court. A record was set after the case was fully argued on three separate occasions over a period of three years. The Court finally ruled in a 6-3 decision that the statute was impermissibly vague.

In the second case, Doubleday & Co. was convicted of obscenity for publishing “Memoirs of Hecate County” by Edmund Wilson. The prosecutor’s argument in the U.S. Supreme Court was less than one minute and an equally divided Court affirmed the conviction four days later.

It was not until the enactment in 1965 of County Law article 18-B that New York established a comprehensive and government-funded program of compensating assigned attorneys.

In 1950, a Youth Term of the Magistrates Court was created in each borough of New York City. Every youthful defendant (16 to 19 years of age) was arraigned in this special part. Social workers from the Youth Counsel Bureau (affiliated with the district attorneys' offices) screened the young offenders for eligibility in a program operated by that bureau. Charges were dismissed if the youth successfully completed the prescribed regime. The director of this pioneer diversionary program was Philip Heimlich (the father of the physician who developed a "maneuver" to aid choking victims). The YCB organization was terminated in the early 1970s. Other "alternatives to prosecution" programs, following the YCB model, were subsequently introduced for both young and adult offenders and continue to operate today in all parts of the state.

Discovery

Fifty years ago, discovery in criminal cases was much more limited than it is today. For example, defense counsel was not automatically furnished a copy of a witness's grand jury testimony after the witness had testified at trial. Instead, the trial judge would privately read the grand jury minutes to determine if there was a discrepancy between the witness's grand jury and trial testimony. Defense counsel would be given only that portion of the grand jury minutes that, in the view of the trial judge, constituted a variance.

In 1961 (in *People v. Rosario*²⁶) the Court of Appeals removed this roadblock to the search for truth. The *Rosario* Rule, now 40 years old, states that the defense is entitled to examine a prosecution witness's prior statement if that statement relates to the subject matter of the witness's trial testimony and contains nothing that must be kept confidential. A similar rule favors the prosecution when a defense witness testifies at trial.

The 1971 Criminal Procedure Law expanded somewhat the information required to be disclosed by the prosecution, but New York still does not have the desirable "open file" discovery system that would save the parties and the court time and effort. It has been long recognized that expedited and liberalized discovery—with necessary and reasonable redaction provisions—promotes the cause of justice.

Witness Identification

The notorious unreliability of eyewitness identification testimony has long presented special difficulties for fact-finders. The author of a 1948 study observed that "no legislative solution to the problem of erroneous identification is possible. We must agree with the nineteenth century student of the problem . . . that the remedy 'lies alone in caution and prudence' . . ." In his 1948 report, the New York County district attorney, after recounting several wrongful convictions based on eye-

witness testimony, lamented that "the entire problem is a baffling one—and perhaps insoluble."

For more than 40 years, defense lawyers have often characterized certain identification testimony as constituting a "Trowbridge violation." They refer to *People v. Trowbridge*,²⁷ a 1953 decision by the Court of Appeals. The facts in *Trowbridge* were rather routine. The manager of a drug store testified that, while alone in the store, he was robbed at gunpoint. The defendant's first-degree robbery conviction was based entirely upon the complainant's testimony that there was a robbery and that defendant was the perpetrator.

At trial, the complainant positively identified defendant as the gunman and as the person he previously identified at the police station. The prosecution was permitted by the trial judge to call a detective who testified that the complainant identified defendant at the station house as the robber. A majority of the Court concluded that it was reversible error to permit the detective to recount the complainant's prior identification of the defendant. A new trial was ordered.

The dissenting judges, invoking the harmless error rule, wrote that the judgment should be affirmed "in the light of the victim's positive and unequivocal trial identification of defendant."

Mr. Trowbridge never had a "new trial" as ordered by the Court of Appeals. In preparing for the second trial, a prosecutor learned that there had been no robbery at the drug store. The complainant manufactured the robbery story to cover his embezzlements and later falsely identified Trowbridge as the perpetrator of the robbery that never happened. After being imprisoned for more than three years, the charges against defendant were dismissed and he was released from jail. Two lessons learned from the *Trowbridge* aftermath are that complainants may not always be a "victim" and that "positive and unequivocal trial identification of defendant" may not always be correct.

DNA Evidence

Unlike uncorroborated eyewitness testimony, the newly developed DNA "fingerprinting" science allows a suspect to be either identified as the perpetrator with near-perfect accuracy or exonerated with confidence. Its use depends on the guilty actor leaving some of his or her DNA material at the crime scene (e.g., saliva or hair follicles). Its accuracy depends on the competence of those who collect and examine such evidence.

New York and other states have recently begun building a computer database of DNA samples from convicted felons. The expansion of this database in the coming years will increase the likelihood of matching crime scene evidence against the DNA profile of a known person but only if there is a continual concern for accuracy by all who are involved in this new process.

In February 2000, we learned that Great Britain's national DNA database—the world's largest—had mistakenly matched an innocent man's DNA to DNA material found at the scene of a burglary. The profiles matched at six points of identification (or loci) along the DNA molecule. When it was learned that the suspect, fortuitously, had a convincing alibi, the profiles were retested by examining 10 loci. Since a 10-gene analysis is more rigorous than a test using six genes, the suspect was exonerated when it was determined that his DNA did not match with the crime scene DNA.

The mismatch in this unusual case may have been caused by the rapidly increasing size of the database. As more profiles are added, and when the points of identification are limited to six or less, the possibility of finding people with similar DNA increases. To avoid erroneous matches, laboratory scientists and crime scene technicians should scrupulously follow their professions' prescribed protocols.

Conclusion

The criminal law must be responsive to society's demands and concerns. It should, therefore, continually adapt to changing times and conditions. Much progress has been achieved over the past half century. Pundits may speculate about how much progress we can expect in the future. Most of us simply hope that we achieve sustainable reductions in crime over the long term without impairing or compromising basic values.

Our criminal justice system does not represent perfection. Defenders of the foundations supporting it, however, have no reason to be apprehensive about the future. During the next fifty years the task of identifying

flaws, eliminating weaknesses and overcoming institutional resistance to constructive change will be a continuing one. We can be confident that New York will remain in the vanguard of progressive jurisprudence.

1. 367 U.S. 643 (1961).
2. 384 U.S. 436 (1966).
3. 377 U.S. 201 (1964).
4. 392 U.S. 1 (1968).
5. 371 U.S. 471 (1963).
6. 372 U.S. 335 (1963).
7. 391 U.S. 145 (1968).
8. 399 U.S. 66 (1970).
9. 391 U.S. 123 (1968).
10. 386 U.S. 18 (1967).
11. 373 U.S. 83 (1963).
12. 388 U.S. 218 (1967).
13. 388 U.S. 263 (1967).
14. 388 U.S. 293 (1967).
15. 68 N.Y.2d 989, 506 N.Y.S.2d 18 (1986).
16. 78 N.Y.2d 711, 579 N.Y.S.2d 617 (1991).
17. 49 N.Y.2d 668, 427 N.Y.S.2d 769 (1980).
18. 60 N.Y.2d 270, 469 N.Y.S.2d 599 (1983).
19. 41 N.Y.2d 123, 390 N.Y.S.2d 912 (1976).
20. 30 N.Y.2d 328, 333 N.Y.S.2d 403 (1972).
21. 28 N.Y.2d 373, 321 N.Y.S.2d 894 (1971).
22. 41 N.Y.2d 725, 395 N.Y.S.2d 419 (1977).
23. 41 N.Y.2d 296, 392 N.Y.S.2d 412 (1977).
24. 49 N.Y.2d 48, 424 N.Y.S.2d 157 (1979).
25. 64 N.Y.2d 152, 485 N.Y.S.2d 207 (1984).
26. 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961).
27. 305 N.Y. 471 (1953).

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Ethics

“Touting” in 1963 Was Replaced by a Flood of Information About Lawyers

BY LOUIS A. CRACO

In the late spring of 1963, the partners of Olwine, Connelly, Chase, O'Donnell & Weyher, a highly respected corporate firm populated mostly by alumni of Cravath Swaine & Moore, were publicly rebuked by the Appellate Division, First Department.¹ Their offense? They had cooperated with *Life* magazine in presenting—in the magazine's usual format of pictures and text—an account of life in a high-powered New York law firm. Unsurprisingly, it cast a generally favorable glow on the firm and its partners. But, again, the offense? “Touting.” The article, although accurate and not particularly colorful even by standards of the day, was a violation of the canonical prohibitions against self-aggrandizing publicity and inappropriate competitiveness that were thought to bring the profession into disrepute.²

The otherworldly quality of this account today highlights one of the two most dramatic changes in the professional and ethical landscape during the final decades of the 20th century. The Rubicon was crossed for good with the Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*,³ striking down as unconstitutional a state prohibition of truthful price advertising by attorneys. Justice Blackmun's opinion dismissed the bar's argument, “that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth” and tarnish the dignified public image of the profession.” “At its core,” Blackmun wrote, “the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception.”⁴ Arizona's own counsel was even blunter at oral argument: “[T]o term [law offices] noncommercial is sanctimonious humbug.”⁵

The organized bar reacted to this revelation with all the shock of Claude Raines confronting the discovery of gambling at Rick's Place. But the world had forever changed. There began first a trickle, then a flow, and finally a flood of information about the business of law and its practitioners—all of it unthinkable on that May day in 1963—that has reshaped lawyers' understandings of themselves and their calling.

It is no news that the vast amount of this information spans virtually every conceivable medium. There has grown up a whole journalistic industry reporting in a “trade press” (both print and television) the news, gossip and trends of the law business locally, nationally and internationally. Lawyers have become media stars, starred in their own television commercials, fastened their images and slogans to billboards and bumpers, conducted “beauty contests,” seminars, and created brochures and homepages. And, of course, they have cooperated with a vengeance in articles for the lay and legal press that make *Life's* portrait of the Olwine firm seem tame indeed.

As we all know, the kinds of information available in this deluge are as various as the media by which they are delivered. Who is representing whom, and why, and for how much; who won, who lost, and how; who has moved, who has stayed, who is up, who down; where are young lawyers going, where are they avoiding, how do they feel; what firm, city, practice area is hot, or cold, or heating up, or cooling down; and always, who makes how much money. All these data are sliced and diced and put back together again, made into soundbites and



LOUIS A. CRACO is senior partner in the Litigation Department at Willkie Farr & Gallagher. He was chair of the Court of Appeals Committee on Professionalism and the Courts. In 1996, the committee issued the widely quoted “Craco Report,” which recommended sweeping changes in many aspects of legal practice and education in the state. He was president of the Association of the Bar of the City of New York from 1982-1984. He is a graduate of Holy Cross College and received his LL.B degree from New York University School of Law.

graphs and graphics, then turned into the “buzz” of conference room, corridor, e-mail, bar association (and just plain bar) chatter from which the next trends will emerge.

Where information exists in such volume and variety, comparisons become possible as never before, and competition inevitably erupts. It is nonsense, of course, to pretend that competition—sometimes fierce—was absent from the law practice of yesteryear. However, the prevalence and openness of the contemporary marketplace for clients and talent is something so different in degree as to be different in kind. Although long-term, broad-scale representation of a client by a lawyer or firm has hardly disappeared from the practice, it is no longer, as once it was, the rule rather than the exception. The rise of client sophistication, fed by readily available banks of comparative knowledge, has led to the rise of the transactional practice, about which, in turn, so much ink has been spilled. Clients can now discriminate more acutely about quality and price in legal services; that they can do so means, in the real world, that they must do so. This dissolution of long-term ties between client and lawyer puts not only the lawyer but also the client in play. More lawyerly competition for now-available clientele ensues. None of this, I am convinced, is solely an artifact of big-firm, big-business practice. It is echoed in small cities and towns across the state, where it is often perceived as a loss of the “collegiality” of the local bar of former days.

The authors of the articles in this issue were likely introduced into an occupation where, among other homely truths, they were instructed: “Gentlemen do not poach on their colleagues” and “Gentlemen do not discuss their incomes.” These well-worn rules of English etiquette had become, literally, canonized and enforced as the norms of the legal profession. There, to be sure, is the rub. Scholars can debate (and they do) whether constraints like those at issue in *Connelly* and *Bates* were ever authentic ethical rules in service of the public rather than the lawyers. That historical and sociological issue is moot, not so much because *Bates* was decided but because *Bates* was eventually inevitable. A professional code substantially based upon keeping abundant knowledge about law practice from the public to whose service the profession is dedicated and at whose sufferance it enjoys its monopoly and self-regulatory authority could simply not be sustained as legitimate over the

long term. Especially it could not do so in the face of the rise of the information age.

Nor could codes of ethics premised on antique notions of “elitism” withstand the robust growth of a vastly more numerous, democratic and inclusive bar in the last decades of the 20th century. That change in numbers and composition of the bar constitutes the other great force altering the professional and ethical landscape of modern law practice. Its consequences are already profound; its implications are as yet only dimly perceived.

New Opportunities and Problems

The sheer number of lawyers in the practice creates new opportunities and problems. Obviously, the more lawyers there are, the greater the choices nominally available to clients. The greater, therefore, the competition among those lawyers and the consequent attenuation

of “collegial” behaviors and increasing levels of “incivility” in conduct and discourse among the competitors. To create an edge in the competition, the stimulus to specialize and establish a brand name for a line of practice becomes more acute (and runs into canonical restrictions on declaring such specializations). The proliferation of

lawyers of unequal talent and experience and the cacophony of their competing claims paradoxically makes the choice of a suitable attorney more, not less, difficult, especially for clients who are less sophisticated or moneyed. “The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest,” Justice Powell wrote in his partial dissent in *Bates*, “is as old as the profession itself.”⁶ The increase in both the numbers of lawyers and the information about them has changed, but not solved, that problem.

Moreover, the rise in the number of lawyers has stressed severely the formal and informal institutions that have traditionally trained and mentored new members of the profession. Firms, district attorneys’ and public defenders’ offices and other familiar institutional employers of new entrants can absorb only so many. The informal networks of small-community lawyers have shown signs of fraying under competitive pressure. Perhaps for the same reasons, many bar associations have experienced declines in membership while absolute numbers of attorneys are rising. All this complicates the acculturation responsibility that the profes-

The rise in the number of lawyers has stressed severely the formal and informal institutions that have traditionally trained and mentored new members of the profession.

sion owes to its new members and ultimately to the public.

It may well be a combination of these forces that has resulted in a change in the "typical" attorney referred to grievance proceedings. That profile had stereotypically been of an older practitioner overborne by personal financial woes and often alcohol abuse. The profile today, by contrast, is of a much younger practitioner "in over his head" or cutting corners to meet unflagging competition. All of these pressures on the younger cohort of the bar are exacerbated by the incidence of educational debt borne, according to most accounts, by more than two-thirds of new entrants.

What is almost completely unalloyed good news is the vastly greater diversity of the younger members of the profession. Recent statistics tell us that for African-Americans, the proportion of law school enrollments, nationwide, jumped from 1% to 7.5% between 1965 and 1999. The increase in women applying to law schools is arguably the single most important fact in the changing face of the bar. The proportion of female applicants rose steadily from 4% in the mid-60s to more than 50% in 2000.⁷ In New York, this year for the first time a majority of the class of 2003 in a majority of the state's law schools were women.⁸

These huge changes in the numbers and composition of the bar pose equally huge challenges to the structure of legal practice and the rules that govern it, and promise important changes in the attitudes and assumptions of the coming generation of lawyers. The difficulty of meeting those challenges and adjusting to new expectations is magnified by the necessity of making the required changes in the glare of unrelenting public scrutiny. All these developments are, in fact, the happy result of reforms of the profession to make it more accessible, open, and accountable. But like all reforms of one generation, they have created the agenda of professional concern for the next.

That is why, as the last century closed and the new one began, there has been a growing movement of self-conscious reexamination of the premises and precepts of our profession. Across the country, not least in New York, in the legal academy and in the practicing bar, the question is being pursued with fresh vigor: what does it mean to be a lawyer? Out of this will come, I have little doubt, new understandings about our common calling. These insights, I believe, will take account of the enormous economic, cultural, technological and demographic changes in law practice. They will also discern anew the bedrock principles of the distinctively American legal profession. The changes prompted by this self-examination may, like the common law itself, emerge as incremental adaptations of traditional doctrine. But, in the not-too-distant future they will produce a legitimate,

coherent and authentic regime of professionalism and ethics for contemporary American lawyers.

Then, fifty years from now, our grandchildren can take up the challenges that our reforms will have left them.

1. *In re Connelly*, 18 A.D.2d 466, 240 N.Y.S.2d 126 (1st Dep't 1963).
2. *Id.*; see Brill, *Of Dignity and Hypocrisy; the Olwine, Connelly Censure*, Am. Law. May 1983, at 9.
3. 433 U.S. 350 (1977).
4. *Id.* at 368.
5. *Id.*, n. 19.
6. *Id.* at 402.
7. See, e.g., NYSBA Special Committee on the Law Governing Firm Structure and Operation *Preserving the Core Values of the American Legal Profession*, April 2000, at 10-11 (and sources there collected); Victoria Rivkin, *Woman Outnumber Men in the Majority of State Law Schools*, N.Y.L.J., Oct. 10, 2000, p.1.
8. Victoria Rivkin, *Women Outnumber Men in the Majority of State Law Schools*, N.Y.L.J., Oct. 10, 2000, p. 1.

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Changes Made in Juries, Settlements, Trial Procedures, Liability Concepts

BY HENRY G. MILLER

Long ago I usually had the pleasure of being the youngest lawyer in the courtroom. Everything was a challenge and there was much to prove. Now, alas, all too often, I'm the oldest lawyer. More is expected and one has to live in fear of disappointing justifiable expectations.

Much has changed. And the more things change, the more they change. In fact, little is the same. The leaders of the then tort bar are gone.

Harry Gair, John Reilly, Emil Zola Berman, Mike Hayes (the father), Al Julien, Jack Fuchsberg, Harry Lipsig, Moe Levine, Izzy Halpern and, of course, Jim Dempsey, and too many other legends to name. All gone now. I wonder if they'd recognize today's world of torts and trials.

Trials and Judgments

The Jury Twelve was undoubtedly better, a sounder cross section of the community. There was less opportunity for a dominant juror to take over. However, twelve jurors can't be justified in every civil dispute. Twelve takes longer to select. Twelve takes a lot more citizens. Twelve remains a magical number but the change to six is a triumph of practicality.

Bifurcation Someone came up with the idea that we need not have a full trial lasting forever when one issue might be decisive. Splitting the trial into different branches originated with the hope of shortening the process. Some, usually on the defense, espouse the position that the purpose of bifurcation is the elimination of sympathy. Sometimes the plaintiff's counsel will seek bifurcation to save the expense of calling medical doctors, particularly when there are close issues of liability. However, our courts recognize that, in some cases, injury and liability are so intimately interwoven they can't be separated. This is almost always true in medical malpractice cases.

But splitting trials has served its purpose and saved time. When a single issue can be decisive, why spend weeks litigating the rest of the case?

In fact, we can split a trial into as many parts as we need. Some of you may remember the Yonkers Jewish Center fire case with such departed luminaries as Harry Gair, Jack Fuchsberg and Dennis O'Connor. It was the first trifurcation in the State of New York: a trial on liability, a trial on damages and a trial on contribution.

Sometimes we don't need a separate trial for liability when it's obviously clear-cut such as in the so-called "hit in the rear" auto case. We would hope our judges will not be timid in having a full trial when there are no legitimate issues on liability.

Verdicts Fifty years ago the jurors came out and simply said: "We find for the plaintiff," or "We find for the



HENRY G. MILLER, a past president of the New York State Bar Association, is the senior member of the White Plains law firm of Clark, Gagliardi & Miller, PC. His trial work has generally been for plaintiffs in civil cases. Governor Mario Cuomo appointed him to chair the Commission on Local Government Ethics. He is the author of *Settlements in the Art of Advocacy* and the editor of the *New York Practice Guide on Negligence*, both published by Matthew Bender. His play *Lawyers* was performed at the Emelin Theater and the Westport Country Playhouse. He is a graduate of St. John's College and received his J.D. from St. John's University School of Law.

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defendant." If they found for the plaintiff, they'd tell you how much. That was it. There were no specific questions answered. Everything was subsumed into the one answer. It was assumed that the jury listened to the charge and followed it.

However, some appellate courts started to complain. If the plaintiff prevailed on one theory, the plaintiff should win. But if the plaintiff prevailed on another theory, the plaintiff should lose. Since no one knew which theory prevailed, a new trial was needed. Slowly, a verdict with specific interrogatories became the norm. Now juries sometimes answer booklets full of questions. They answer more than whether the defendant was negligent and whether that negligence was a proximate cause of the injuries. We often learn what theory of recovery prevailed and what departure the defendant is responsible for. When we get to damages, as a matter of statute, the verdict must be itemized.

It must be admitted we get a much clearer view of what the jury decided. An itemized verdict on damages was probably intended to benefit the defense, but it often has the effect of expanding the amount by making a jury think about each and every item.

One of the reasons verdicts are itemized in tort cases is so that we can get ready for that fiercest monster ever designed by any legislature. Of course, I speak of structured judgments.

Structured Judgments There is almost nothing good to say about structured judgments. They are the Frankenstein of tort litigation. Structured judgments were created as part of a package to slow down tort litigation. They have done nothing of the kind. They have merely created a monster that is loathed by the judges and the practicing lawyers who have to endure it.

The entry of a judgment used to be a ministerial act taking an hour or so of a careful lawyer's time and then entered by a clerk. It has now become a major undertaking. Usually it requires a hearing. Very often both sides need experts such as economists.

Nobody likes this statute. The defense bar doesn't like the automatic 4% elevation. The plaintiff bar and, more importantly, the plaintiffs themselves don't like the state telling them that they can only be compensated in installments. Judges dislike the enormous complexity and waste of time mandated by this almost incomprehensible legislative scheme. Perhaps this law is perceived by some special interests as benefiting them. One wonders who they are.

Collateral Source Rule Once upon a time, liable defendants paid for all the damage they caused. Now certain collateral sources enure to the benefit of the defendant who has been adjudged liable. The liable defendant gets certain deductions for benefits paid to the plaintiff, even when the plaintiff paid premiums for those benefits. In turn, the plaintiff as part of this somewhat convoluted scheme gets a set-off for whatever premiums were paid.

The set-offs are calculated by the judge during the process of preparing the judgment.

Judges and Courts

Many will remember the bitter election struggle waged between Judge Breitel and not-yet-Judge Jack Fuchsberg for the chief judgeship of the State of New York. It left many wondering whether there was a better way. No doubt, many outstanding judges have been

chosen through the political and electoral process. However, some years ago, it was decided that judges on the Court of Appeals should be selected on a less confrontational basis. Now, the governor chooses from a list of seven selected by a committee designated for that purpose. Most agree

the system has worked splendidly. While some feel that having seven candidates may give the chief executive too much power, the system has been most helpful in taking the venom out of the process. Merit has been the dominant force in selection.

Unfortunately, at lower levels we continue to have political campaigns for judicial office. Once again, we have many fine judges chosen that way. But there are disastrous episodes that continue aplenty. We now have sitting judges who are forced to go out on the campaign trail to save their jobs, even though they have served well and honorably. We have judicial candidates campaigning in the political arena. And they need money for that campaign. Where are they going to get the money? From lawyers, of course. From which lawyers? The lawyers who will eventually appear before them. There is an inherent conflict in such a system. It is unseemly. It would appear that this is a necessary and essential change that has to happen and most likely will never happen.

Perhaps a modest suggestion can be advanced in this article. It is, of course, permissible for a lawyer to make a campaign contribution to a judicial candidate. That is a First Amendment right. However, why can't we have an ethical rule that any lawyer who makes a campaign

Structured judgments were created as part of a package to slow down tort litigation. They have done nothing of the kind.

contribution to a judge may not ever appear before that judge? True, it may serve to dry up political contributions. But that doesn't strike me as an overly painful possibility. And wouldn't it improve the climate of judicial selection and appearances immeasurably? More importantly, it might help to change the system.

The Appellate Division The Appellate Division of the Second Department has been one of the busiest courts in the nation. It has started the innovation of sitting with four judges rather than the traditional five. They only call upon the fifth in the rare instance when there is a tie.

This raises the question of why not have three judges such as we have in our federal Circuit Courts of Appeals. Five is undoubtedly better than three and some would argue that seven is better than five. But there is the question of judicial expense and judicial efficiency.

Court Consolidation The City Courts and the Municipal Courts in New York City are gone, replaced by the Civil Courts. The District Courts predominate in some areas, but Town Courts and town justices are still with us. The Surrogate's Court is still separate. There has been a movement toward commercial parts. Generally, court consolidation is recommended by all and silently opposed by political forces. Court reform remains a distant dream and, as always, is not for the short-winded.

The Individual Assignment System (The IAS) It was felt some years ago that the individual assignment system, which mirrors the federal system, would serve not only to expedite cases but to improve the quality of justice. It was felt that a judge who had the case from the beginning would develop a familiarity with it. It was also thought that it would be a matter of pride for some judges to move their cases along and to show how well they were doing with their caseload.

Alas, the abolition of a Trial Calendar Part and the replacement of it with a pure IAS system just didn't work. Busy trial lawyers could not be accountable to the many judges who might be calling upon them at one time. And frankly, some judges just were better than others at moving cases. Some just didn't respond to the pressure of the Individual Assignment System.

We seem now to be finding a middle ground where a judge will have a case for all pre-trial purposes but when it comes to trial, a number of judges will be ready to preside at the trial.

Pre-trial Procedures

Discovery Discovery has exploded. A few decades ago, some legal theorists advocated that many cases were being resolved unjustly because of the lack of discovery. Meritorious cases and meritorious defenses were not being discovered.

Now it's different. Some lawyers and judges believe that no witness should go on the stand unless he or she has been deposed. In my view, it has gone too far. In some states, although not in New York, there is regular discovery of all experts. This is expensive and not altogether necessary. We must be careful before we price litigation out of the range of the ordinary citizen. We need all the discovery that is necessary but not a drop more. Leave something for the trial.

Experts Now, no expert gets on the stand unless there is a 3101(d) statement of the expert's name and the substance of the expert's testimony. In the old days, the only advance notice lawyers had of an expert was when the other side called the expert for direct examination. Somebody on your team would frantically run to the phone to get a read on that person. In the old days, trial lawyers had to rely more on their wits, whereas now they have to rely more on preparation. (In medical malpractice cases, the expert's name is not disclosed. However, with the use of computers and the giving of credentials, the expert's identity is usually learned.)

Insurance A benefit of the discovery explosion has been the disclosure of insurance coverage. In the old days, one would call up the insurance adjuster and say, "What's the amount of your policy?," to which the answer would be invariably, "I don't have to tell you and I won't tell you." An absurd situation. One would have to guess at the amount of insurance.

Now at least in the early stages of litigation one is entitled to know. Obviously if a party has a minimal policy and there's a major injury, depending on the liability and the amount of personal assets, the case can usually be resolved expeditiously.

Medical Malpractice

Several decades ago, we witnessed another explosion. This time it was medical malpractice. While there had always been scattered cases, now for the first time, there was a rise in volume. Patients were seeking money damages from their physicians.

The name of John Tullman is remembered by many as the pioneer father of medical malpractice in New York. In response, an excellent and well-trained defense bar came into being to defend these claims. Bill Martin and Bob Bell made Martin, Clearwater and Bell a name famous around the state.

The 1974 Doctors' Revolt So successful were these claims that there came a time when physicians and hospitals rebelled against the increasing premiums that were being exacted from them. Certain specialists, such as neurosurgeons and obstetricians, were particularly hard hit. The Legislature enacted a series of changes most of which are still with us today. The Structured Judgment Statute and the abolition of much of the Col-

lateral Source Rule were changes first made only for medical malpractice claims before they were extended to all tort litigation.

The statute of limitations went from three to two and one-half years but counting from the end of continuous treatment.

The statute for suing for foreign objects went from two to one year from the date when the object was reasonably discoverable. Infants have up to ten years to sue.

The Medical Malpractice Panels were created to make admissible recommendations but then they too were abolished in 1991.

Fees Another major change that still exists and affects only medical malpractice was the diminution of plaintiffs' attorneys' fees. No longer was the traditional one-third that had been approved for all tort litigation tolerated as a matter of course in medical malpractice cases. Now it was a sliding scale that substantially reduced the fees of plaintiff's counsel, particularly in large recoveries where the fee for amounts over \$1,250,000 was only 10%. (Perhaps to discourage counsel in catastrophic cases from pushing for full value.)

In the old days, the biggest problem plaintiffs' lawyers had was the so-called conspiracy of silence. There were not enough doctors willing to testify against doctors.

The alleged purpose was to give plaintiffs, that is, the patients, a greater portion of any recovery. However, most would agree that that was really a pretense. Very rarely did a plaintiff, satisfied with the monetary recovery, complain about the fee. The real purpose was to put a dent into the willingness of lawyers to take these cases. In my view, and this may be a controversial statement, it has succeeded considerably. Many of these cases cannot find a lawyer. This, despite the fact that studies have been put out by Harvard and others showing that many aggrieved patients are not pursuing claims. Cases will often go begging for the reason that the fee is too low, the defense counsel too excellent, the procedures too onerous, the juries too favoring of doctors and hospitals, and the expense and effort of this kind of litigation too burdensome.

The legislature has voted to repeal Judiciary Law § 474-A, which mandates the reduced fee. While the mer-

its clearly favor the passage of this bill, Governor Pataki had it vetoed on November 15, 2000, stating that the bill "should be considered only in the context of a fair, balanced and comprehensive examination of New York's civil justice system."

Experts In the old days, the biggest problem plaintiffs' lawyers had was the so-called conspiracy of silence. There were not enough doctors willing to testify against doctors. There were a few who would do it, but they were tarnished by the fact that they testified frequently against doctors and often testified in field after field beyond their own specialty. Many a doctor still won't testify against another. But now there are a goodly number who will. But they are often expensive, very expensive.

Medical Reports This may be a good juncture to mention the escalating cost of medical reports. Forty to fifty years ago for \$35 or \$50 many a doctor would write a reasonably comprehensive report to help a patient in describing his or her injury. Now \$500 to \$750 seems to be more and more requested, and recently we even heard of one physician, a major practitioner in a major hospital, who wanted \$1,000 for the report and said it would take five to six weeks. Incidentally, the doctor refused to testify at trial.

Obviously, this is a problem that we have not yet solved, although some progress has been made with the establishment of joint committees between doctors and lawyers.

Premises

Medical malpractice got more difficult. But premises liability got a bit less difficult.

*Basso v. Miller*¹ did away in 1976 with the old trespasser, invitee, licensee artificialities in favor of reasonable care under the circumstances.

And criminal conduct on the premises is finally considered to be foreseeable so that a landowner may now be liable for injuries inflicted by a criminal.²

The Litigious Automobile

No-fault Years ago, the staple of tort litigation was the automobile accident. Often, it was a minor automobile accident. There is no doubt that those claims, which supported many a starting lawyer and with volume many a senior lawyer, also clogged the courts. The energy put into the resolution of these disputes could not be justified. I remember one of my first trials. Twelve jurors were sitting there and we were arguing over some minor injury as to who went through the light. No system can long tolerate that excessive expenditure of judicial time, jurors' time and attorneys' time to resolve minor disputes.

However, much of the promise of no-fault has not come true. Unfortunately, we see all too often efforts by

the insurance industry not to treat the insureds with their first-party claims in the amicable way they should. In short, the promise of no-fault was that the minor claim would be resolved between insurer and insured on a less adversarial basis. More and more we have seen no-fault claims become adversarial, requiring the insured to retain counsel. And to be candid, the Insurance Department hasn't always helped. Recently, it shortened the time for insureds and their physicians to report claims, which has as its effect the cutting off of claims by people who may not even know their rights. As we go to press, these rules have not gone into effect, pursuant to a court order that is on appeal. We shall see.

When a claim for injury is denied, the no-fault claimant has the option of going to arbitration or litigation. However, a negative finding in arbitration is binding on the claimant in a lawsuit against a third party. This discourages the use of arbitration in resolving denied no-fault claims of injury. We need legislation to remedy this situation.

The threshold for "serious injury" has had the salutary effect of eliminating lawsuits for many minor claims. However, many citizens are unhappy when they learn they cannot meet the threshold. They feel a wrong has been imposed upon them without a remedy. The no-fault system is clearly a trade off.

The academic and insurance sages who promised substantial reduction in insurance premiums have had to reluctantly agree that it hasn't happened.

Seatbelts Seatbelts do save lives. Therefore, failure to use them may be pleaded and proven by the defendant in mitigation of damages but not as a defense to liability.³

Owners In the active 1970s, the Court of Appeals did away with another annoying fiction, namely, that an owner when a passenger in his or her own car is in control of the driver and, therefore, the driver's negligence should be imputed to the owner. Now, an owner-passenger may sue the driver of another car despite the negligence of the owner's driver.

Underinsurance A benefit arose from the no-fault abolition of many automobile claims. Underinsurance, by statute known as Supplementary Uninsured Motorist (SUM), was mandated. SUM allows a prudent insured to take out a policy that covers the occupants of the insured's car when they are injured by a motorist whose insurance is inadequate to pay the recovery. In order to "trigger" underinsurance coverage, it is absolutely necessary that the injured party's liability coverage exceeds that of the wrongdoer.

SUM was originally intended to be part of the no-fault package. We thought it meant that the SUM would be stacked on top of the wrongdoer's policy. So if the injury was valued at \$250,000, and the wrongdoer had

\$50,000 insurance, and the SUM was \$100,000, we believed there would be a total payout of \$150,000—\$50,000 from the wrongdoer's insurance and \$100,000 from SUM.

Unfortunately, this is not the fact. The SUM carrier gets the benefit of the wrongdoer's insurance. Not only must the SUM be in excess of the wrongdoer's insurance policy before payment will be made, but the SUM carrier gets an offset for any monies paid by the tortfeasors. Consequently, in the example given, the injured person only receives the \$50,000 from the wrongdoer's policy and \$50,000 from the SUM carrier. Doesn't seem right to me. And it definitely was not intended in the original reform. Perhaps the Insurance Department will eventually side with the consumer on this one and help to get us back to the original intention.

Construction Work Is Dangerous

And the courts know it. The Court of Appeals interpreted §§ 240 and 241(6) of the Labor Law to place a non-delegable duty on general contractors and owners even in the absence of control.⁴ But § 240, which protects workers from falls, applies only when the injury is elevation-related.⁵

The Apportionment Conundrum

Dole v. Dow Chemical Co.⁶ The Common Law proved itself to be flexible once again.

Lawyers for years stood around in courthouse corridors trying to settle cases. Co-defendants in the old days would talk among themselves and settle a case on a percentage basis: 60/40; 90/10; whatever. But once they went into the courtroom, it was all or nothing. There was no apportionment among tortfeasors.

Along came *Dole v. Dow Chemical Co.* in 1972 (later codified in CPLR article 14). Common sense prevailed. The Court of Appeals decided that among wrongdoers in the tort field there may be apportionment. This became a wonderful instrument for the resolution of claims.

However, some felt aggrieved by it. Employers who believed they should be exempt from lawsuits brought by an employee who received Workers' Compensation benefits never liked being impleaded into a case where the worker was suing. Consequently, the Legislature abridged the *Dole* doctrine but didn't totally abolish it. Now an employer can only be impleaded in cases of "grave" injury as defined in § 11 of the Workers' Compensation Law. Recently, a case of lost vision in one eye, extraordinary to relate, was not considered a "grave" injury because it is not defined as such in the statute.

Practically, the disadvantage of this change is that it makes compromising the Workers' Compensation lien more difficult. The employer in most cases need not

longer fear any tort liability by an impleading wrongdoer.

Limitation on Joint and Several Liability Once upon a time before “tort reform,” two or more tortfeasors were jointly and severally liable for the injuries they caused. Wrongdoers in for a penny were in for a pound. It seemed only fair that wrongdoers, not the innocent victims, should bear complete responsibility for the injuries they caused. Now, under article 16 of the CPLR, there is limited liability for joint tortfeasors in many situations for pain and suffering, euphemistically called non-economic loss. A tortfeasor found 50% or less liable is responsible only for his or her apportioned share of the non-economic loss. Now, in many cases, the victim bears the loss when the major contributor to the accident is underinsured or not insured at all. Wrongdoers, rather than the innocent victims, are often favored in the world of tort reform.

Be alert, however, to the many exceptions to this limitation. The old rule of joint and several still applies in some cases (see CPLR 1602). Here are a few of the exceptions: use, operation and ownership of automobiles, “Labor Law” violations, intentional or reckless conduct, non-delegable duty and, happily, others.

Comparative Negligence Fifty years ago New York clung to the absurd and antique doctrine that one who was negligent, no matter how slightly, could make no recovery whatsoever. Many an unjust verdict resulted. Somebody pointed out that down in Mississippi they had something known as comparative negligence. It means if somebody was ten percent negligent, they should lose ten percent of the recovery. It took years for the common sense of that doctrine to be accepted. Finally, in 1975 our Legislature adopted comparative negligence. An injured party’s negligence would still be considered but it would only constitute an offset, not a total bar. The defendant had to plead it and prove it.

This was undoubtedly one of the major advances in tort litigation in the last fifty years.

Settlements

Let the settlor beware. While a release of one tortfeasor no longer releases all tortfeasors, the amount of the settlement or the tortfeasor’s percentage of fault, whichever is greater, reduces any verdict against any remaining defendants. GOL 15-108.

Thus, if you settle with a substantially negligent tortfeasor with a limited policy, you might be met by a jury determination of a high percentage of fault against the absent settling defendant. And that will reduce any recovery against the remaining defendants.

Down by the Sea

Once upon a time, longshoremen, and there are almost no women that I know of in that field, could sue

for negligence against the ship owner, who in turn automatically impleaded the plaintiff’s employer using the doctrine of “Failure to Perform in a Workmanlike Manner.”

However, they are now all restricted to Workers’ Compensation under the federal statute. Their claims have been outlawed. And with it went a segment of the bar that had specialized in that kind of a case. The dockworkers don’t love it, but I’m afraid their voice was too small compared to the employers who sought relief from these claims. The decline in this country’s share of international shipping was the reason for this change.

The dock workers now have the same remedy as other employees, namely, Workers’ Compensation. It is given to them irrespective of fault. But they may not sue their employers for pain and suffering.

Products Liability

Since *MacPherson v. Buick Motor Co.*,⁷ the field of products liability has grown. Yes, the citadel of privity has been successfully stormed.

*Codling v. Paglia*⁸ held that a bystander may recover against the manufacturer of a defective product. This, it seems to me, was inevitable in a consumer society where the makers of products are no longer local merchants but distant large corporations. Products liability is probably the proudest boast of the modern tort system. It has brought accountability where there may have been none or little without it. Now it very much behooves a corporate entity to send forth safe products because it’s just too expensive to send into commerce products rife with danger.

New York even adopted its version of market share liability in *Hymowitz v. Eli Lilly & Co.*,⁹ a DES case. The plaintiff needn’t prove which defendant manufactured the dangerous product. Liability against all the manufacturers of the same defective product was based on their market share.

Lobbying

Powerful interests do not appreciate this greater exposure to damage awards. There has been ceaseless lobbying. Many large corporations seek federal protection and legislation. They argue that products cross state lines and, therefore, the law should be federalized, State rights notwithstanding.

In a large and sprawling society such as ours, however, a vital system of products liability that protects consumers is absolutely essential. Clearly, it has to be fair to manufacturers who are entitled to every reasonable defense, and certainly to the defense that they were reasonable. But there can be in my view no closing of the courtroom door to injured consumers who do not have the power to lobby legislatures.

CONTINUED ON PAGE 34

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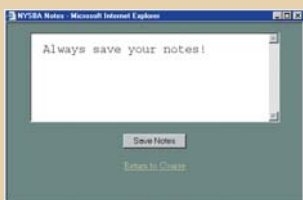
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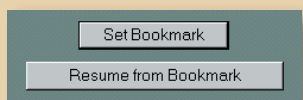
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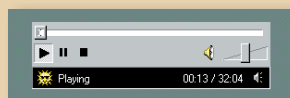
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Mass Torts and Class Actions

It started with Mer 29. It picked up with asbestos. It continued with Agent Orange. Now we are into the world of breast implants and environmental catastrophes.

Mass torts are big litigation. Wall Street firms that eschewed this kind of litigation years ago now have major departments to deal with mass torts. Some would make the system similar to Workers' Compensation. Others want all claims tried individually with little consolidation and no class actions. Often, these cases wind up in bankruptcy courts not originally designed to resolve this kind of problem.

The class action has generally been disfavored in the State of New York. Yet, some believe the class action is

the only way to process these claims. Others feel that recent Supreme Court decisions have discouraged the class action for mass torts, particularly as to future claimants. Some retort that class action is the worst possible way to handle mass torts until you consider all the other ways. Individually, these cases can overwhelm our courts.

Tobacco litigation has stubbornly refused to go away. For years, the tobacco companies prevailed. Some brave pioneers went beyond the frontier to represent individual smokers. To no avail. Damaging documents were hidden. Jurors held smokers liable for their dumb choice to smoke.

Then somebody came up with the idea of the states suing. Brilliant. They weren't smokers. And discovery was uncovering documents, and whistleblowers listened to their consciences and came forward. The tide has changed. And the tort system once again shows its vitality where the private gain of litigants and their lawyers coincides with the public good.

Conclusion

Yes, there have been changes in the last 50 years and rest assured, there will be many, many more in the next 50 years.

The old historic Courthouse in White Plains has given way to a skyscraper where the elevators don't always accommodate all the people at rush hour. That law school on Schermerhorn Street is now a condominium. Law students no longer go to St. John's there. We have federal courthouses now on Long Island and even one in White Plains. And most of those legendary trial lawyers of fifty years ago are gone. Sometimes we pause to remember them. They survived the Great War and the Depression, and they taught us much. Now we who had Korea and Vietnam must create our own tradition. Soon we will be the past. I see the young trial lawyers strutting into the courtroom full of promise with much to prove. Maybe in fifty years they'll even say something kind about us.

1. 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976).
2. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980).
3. *Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974).
4. *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 405 N.Y.S.2d 630 (1978); *Haimes v. N.Y. Telephone*, 46 N.Y.2d 132, 412 N.Y.S.2d 863 (1978).
5. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
6. 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972).
7. 217 N.Y. 382 (1916).
8. 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1973); 93 N.Y.2d 487, 541 N.Y.S.2d 941 (1987).

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Days of Conviviality Preceded Specialization and Globalization

BY STEWART F. HANCOCK JR.

Name a trial lawyer who doesn't remember his or her first case. Mine was in 1952. I represented the defendant driver in an intersection property damage case before Judge Abelson in the old Syracuse Municipal Court. The amount involved was \$64.32.

Alan J. Goldberg, now one of Onondaga County's most highly regarded trial lawyers, represented the plaintiff. Alan and I took all morning to draw the six-member jury, and we each concluded with an impassioned 25-minute summation. (The office had given me a file that was almost impossible to lose, defending an intersection action case in the days of contributory negligence. The jury obliged with a verdict of no cause for action.)

Was it unusual in those days to have a full-blown jury trial over \$64.32? Not really. Travelers Insurance Company, which our office (actually an overgrown partnership then) had represented for many years, was glad to have the young associates try their property damage cases. The amounts involved and the risks were small and the hourly rates were minuscule. It was an inexpensive way for insurance companies to participate in the training of the young trial lawyers who would be handling their more serious cases in the future.

Alan Goldberg and I were fortunate to be part of a group of 10 or 12 other neophyte lawyers (all young men in those days) who started off trying "fender benders" in Municipal Court and graduated to personal injury cases in Supreme Court. The experience was invaluable. We learned from our mistakes, from the cases we won and the ones we lost. We learned from each other and most of us had the advantage of learning from the senior lawyers in our own offices.

Our conduct was governed by an unwritten code based on common decency and mutual respect. We trusted each other. We made agreements with a handshake. I don't believe that there was ever a reference to the disciplinary rules. There was, of course, an effective deterrent for any lawyer who might be tempted to go back on his word or break the code in some other way—the virtually certain loss of a trial lawyer's most valued asset, the trust and respect of colleagues and the judges. The risk of being labeled as "someone you had to watch

out for" and, in effect, losing one's standing as a member of the "club" was sanction enough.

In a sense, the trial bar in the 1950s and 1960s in the upstate counties was a club, a fraternity. The trial lawyers thought of themselves as the warriors, the barristers who rode off to joust with each other in the courts. There was a tacit assumption that they were the *real lawyers* and that those who stayed in the office and drafted wills and contracts or did corporate work didn't quite measure up. Like the professional golfers who vie with each other on the tour each week, sometimes doing well and sometimes missing the cut, the trial lawyers tried case after case—winning some, losing some and settling some. As with the tour professionals, a certain camaraderie existed among these courtroom warriors. And like the leading money-winners on the golf tour, there were those at the top of their profession in each county—the experienced, talented, wily veterans. They were the Palmers and the Nicklauses of their trial bars.

In the 1950s and 1960s, there was no IAS system and no-fault insurance did not exist. Most of the liability in-



STEWART F. HANCOCK JR. retired in 1993 after eight years as a member of the New York Court of Appeals and 23 years as a judge. In 1962-1963, he served as the first full-time corporation counsel for the City of Syracuse. Since his retirement, he has returned as counsel to Hancock & Estabrook LLP, where he specializes in appellate practice, mediation, domestic and international arbitration, and serves an expert witness on New York law. In January 2000, the New York State Bar Association awarded him the Gold Medal for distinguished service in law. He is a graduate of the U.S. Naval Academy and received his LL.B degree from Cornell University School of Law in 1950.

insurance companies were still using local law firms rather than their in-house lawyers to handle the trial work. The thousands of automobile negligence actions that filled the general trial calendars provided steady work. At a calendar call each morning, the clerk would call off the 40 or 50 cases that were theoretically ready for trial. The justice presiding would order some juries drawn, some cases held for pretrial and others “over the term” or “ready-after.” The daily ritual of calendar call brought the lawyers together. They agreed on adjournments, trial dates and sometimes negotiated and settled cases, often stopping for coffee together on their way back to their offices.

Lawyers were more convivial in those days. The old Yates Hotel in downtown Syracuse—once celebrated as the finest hotel between New York and Chicago and renowned for having the longest bar in the state—was conveniently located directly across from our offices and not far from City Hall. The Yates Bar was a meeting place for lawyers, politicians and the reporters who covered local news. The younger lawyers from our office and from other offices would gather frequently at one end of the bar near the spot regularly occupied by Arthur Agan,¹ a highly talented, older trial lawyer and an accomplished raconteur. Mr. Agan would tell stories of trials won and lost (mostly won) and sometimes hold forth at length on the foibles of certain judges.

Everyone attended the annual dinners and clam-bakes of the Onondaga County Bar Association. They were huge, reveling affairs. There were always skits and songs lampooning the politicians and other local celebrities and “awards” for those who had “distinguished themselves” in some way during the preceding year. Judges, particularly those who took themselves too seriously or tended to be a little pompous, were often the targets. They didn’t seem to mind, and if they did, there wasn’t much they could do about it.

The lawyers as a group seemed happy with being lawyers. To be sure, there were two or three who had to scrape together a living by picking up cases in Police Court. One lawyer kept his files and conducted his business at the Yates Bar. Few, if any, lawyers became wealthy from their practices, but as a group the lawyers were doing well.

The four largest offices in Syracuse (with no more than 30 lawyers in each) represented the banks, the insurance companies and most of the local corporations. Small partnerships and individual practitioners handled the matrimonial and criminal cases and represented the plaintiffs in personal injury litigation. Several small partnerships had substantial estate practices.

A recent law school graduate could almost always find a position as a clerk, if not in one of the larger offices, in one of the smaller partnerships or with an indi-

vidual practitioner. The starting salaries were low, very low, \$25 to \$40 a week. But when you could buy a hamburger at the White Tower Restaurant for 10¢ and a draft beer at the Yates Bar for 25¢, a new lawyer could get by, particularly if he could serve a summons or two each week for \$5 apiece. The real consideration that a newly hired attorney received for his labors was worth many times the pay—the mentoring and guidance of an experienced attorney. There was a general willingness on the part of the senior members of the bar to help the younger lawyers and to teach them what to do and, more importantly, what not to do. A story about my friend Harrison Williams, which I related in a previous article for this *Journal*,² exemplifies the sort of mentoring that was so helpful for the new lawyers.

Harrison Williams, thinking that he was demonstrating his initiative and expertise as a newly hired clerk for Sidney B. Coulter,³ took a default judgment against a corporation when the corporation’s lawyer failed to file an answer before going out of town on vacation. Mr. Coulter, one of Onondaga County’s most respected attorneys, taught Harry Williams a lesson he has never forgotten. “We just don’t take defaults in these circumstances,” he was told. Mr. Coulter explained that a judge would undoubtedly permit the defendant to submit an answer and that moving for the default would, in the long run, do their client no good.

In this same article, I wrote of a lesson learned from George Richardson,⁴ a highly regarded, well-liked lawyer and corporation counsel of Syracuse at the time. In one of my first assignments for the office, I prepared a complaint against the City of Syracuse for damages resulting from a water-main break. I neglected to attach a summons. Shortly after having the complaint served, I was notified that the corporation counsel wanted to see me at City Hall. I speculated that perhaps, in view of the excellence of my pleading, Mr. Richardson wanted to discuss settlement, an idea that took on some substance when I noticed, as I was ushered into his office, that he was holding my complaint in his hand. “Did you have this complaint served?” he asked. “Yes, I did,” I replied. “Then,” he said, “don’t you think you should take it back, put a summons on it and have it re-served?” George Richardson’s thoughtfulness cost the city nothing but it saved me from an embarrassment. I thanked him and had the complaint with summons attached served again. No one but he knew of my oversight. And yes, we did eventually settle the case.

Years on the Bench

In 1971, when I became a Supreme Court Justice, not much had changed. No-fault insurance had not been passed. The IAS system had not yet been devised. The trial justices “rode the circuit” throughout the six coun-

ties of the Fifth Judicial District. The lawyers in the rural counties, where the active trial bars were small, welcomed a judge from outside their close-knit communities because the judge would ordinarily have no past association with any of the local lawyers. There were, inevitably, inside jokes and the occasional jealousies and resentments over matters that it was best not to inquire about. Visiting judges were treated with great respect and usually honored with a luncheon given by the local bar association. It was the task of the judge to take charge of the calendar and by mediating, cajoling, prodding and presiding over the lawsuits that had to be tried dispose of as many cases by settlement or trial as possible. The work was enjoyable and interesting, and a challenge to the judge's ability to work productively with the lawyers.

The trial bar in each rural county had a distinct character and tone reflecting the personalities of the lawyers, the clerks and the court attendants. Each county had two or three dominant trial lawyers who had most of the business. In Herkimer, the dean of the trial bar was Fred O'Donnell, uncle of former Supreme Court Justice James O'Donnell. Uncle Fred, as everyone called him, was a formidable, resourceful advocate and a workaholic. He was married but had no children. His wife, it is said, had not seen the dining room table for 30 years because it was covered with his case files and law books. Uncle Fred could be a bit cantankerous but he was highly respected and well-liked.

Uncle Fred loved to test out new judges and would take advantage of them if he could. During my first trial term in Herkimer, Uncle Fred, who always represented the Travelers, was in my chambers for a pretrial conference. I was trying to get the case settled but couldn't persuade him to make an offer. When I persisted, he reached into the depths of his case file and drew forth a yellowed, tattered paper bearing the Travelers letterhead. He didn't show me the contents of the paper—just the letterhead. Shaking his head sadly, he said, "I'd really like to make an offer to help you, Judge, but I'm afraid I have a letter from the Travelers here and it says I can't pay anything in this case." He put the letter back in his case file and we tried the case. Uncle Fred had been using this same letter on every Travelers case for years. It was very worn when I saw it, and I assume he had the company send him a new one.

In Oswego, there was a court attendant named Irwin Booth, a retired berry farmer. Irwin was 91 years old

when I knew him and had the lean, slightly craggy look of an upstate Yankee farmer. Sometimes after calling the court to order and directing all to be seated, Irwin would sit down in his chair next to the bench and promptly fall asleep. This posed no problem. If I wanted to call a recess, I would simply drop my notebook lightly on the bench and Irwin would wake up. For all that, Irwin was a keen observer of the lawyers and, after we became friends, never hesitated to share his sometimes wry observations with me. The two leading trial lawyers in Oswego County then were Richard Mitchell and Leonard Amdursky. Irwin liked Dick Mitchell because Dick, when

he was a teenager, had picked berries for him. He didn't like Leonard as much. Leonard and Dick were often on opposite sides of the lawsuits.

One day, Irwin was sitting outside the conference room while I was conducting a lengthy, hotly disputed pretrial conference in three personal injury cases in which Leonard Amdursky represented the defendant. After a great deal of loud talk and some shouting, we eventually settled all three. When the lawyers had left, Irwin commented, "Sounded like ya had a good one goin' there, Judge." "You're right Irwin," I said, "but we got the cases settled." I could see that Irwin was leading up to something when he offered, "There's one thing 'bout that Amdursky feller, Judge." Naturally, I asked, "What's that, Irwin?" He came out with, "He likes to take it in but he don't much like to pay it out."

Oswego had a quirky charm. Things happened there that happened nowhere else. One day after finishing a trial the four lawyers in the case and I were sitting in the conference room waiting for the verdict. One of the lawyers—who happened to be from the Village of Lafayette in the heart of upstate New York's apple country—excused himself and promptly returned carrying a quart jar full of rather noxious-looking yellow liquid. "Thought we all might like to sample a little Lafayette Special Brand, your honor," he said. Well, we did, and it was the finest hard cider that any of us had ever tasted. All a little irregular, of course, but we couldn't very well refuse, could we?

Return to Law Firm

My happy recollection of trying cases and presiding as a trial justice involve events that took place 30 to 40 years ago. Since then, I have had a career as an appellate judge and now am back practicing law full-time with

The trial bar in each rural county had a distinct character and tone reflecting the personalities of the lawyers, the clerks and the court attendants.

my former office in Syracuse. It is very different. Many of the changes reflect the Civil Rights Revolution and other cultural and societal transformations that have taken place in the intervening years. Here are a few observations from the perspective of a retired judge returning to what has developed from the overgrown law partnership that he left 30 years ago into a growing, flourishing firm of more than 70 lawyers.

Thirty years ago, there was no such thing as environmental law. Discrimination in employment cases under the ADA and Title IX did not exist. Intellectual property law was, for the most part, the province of specialized patent firms. Health law, which began with the increased federal and state regulation of hospitals and other care providers after adoption of Medicare in the late 1960s, was unheard of as a specialty. These new specialties form a large part of what the firm does now. On the other hand, no-fault insurance and the practice of using their own in-house trial lawyers adopted by many insurance companies have greatly reduced the volume of defense trial work, once a mainstay of the office.

Because property damage cases are now arbitrated, there are no more “fender-bender” cases for the young associates to try. The best chance for a newly admitted lawyer to get trial experience today is with the office of a district attorney or a public defender.

The trial bar, of course, has long since ceased to be an all-male club. For many years, women have been among the most accomplished appellate lawyers. Now, some of the best trial lawyers in both civil and criminal fields are women. In 1950, when I graduated from law school, there were two women in my class. In the fall of 2000, in the course that I teach at Syracuse Law School, more than one-half of students are women.

Two major developments in our profession were not on the horizon in the 1950s and 1960s: the ever-increasing use of mediation and arbitration as a means of settling disputes and the trend toward globalization of the legal profession in the United States and Europe. My own practice—in serving as arbitrator, mediator and expert witness on New York law in arbitrations or lawsuits pending in foreign jurisdictions—has made me acutely aware of both developments. One case, for example, involved an arbitration pending in the Hague, Netherlands, between a Swedish brewery and a U. S. multi-national corporation. When I think of the amounts of money at stake in some of these cases, I ask myself if I could really have tried a case in 1952 for \$64.32.

Today, everyone takes for granted the extraordinary innovations in the legal profession that have been brought about by the “information revolution.” The red volumes of Shepard’s citators are long gone and Shepard’s is now on Lexis. While most lawyers of my generation still prefer to consult the case reports and the digests in the library, the law students and the younger lawyers rely on computer printouts of Lexis or Westlaw. Syracuse Law School no longer provides its professors with the telephone numbers and addresses of their students. The e-mail addresses suffice. It is easy to forget the days when e-mail, Westlaw and Lexis were unknown and someone might have thought that a Palm Pilot was a device for guiding model airplanes.

Do the young lawyers have as good a time as we did back in the 1950s and 1960s? I have often been asked this question. I think they probably do, but not in the same way. The obligatory stop at the Yates Bar at the end of the day—like the Yates Hotel—is ancient history. Lawyers go straight home now to work out, mow the lawn, drive their children to Little League or soccer practice or

put the potatoes in the oven. Perhaps, this is better.

But, the “fun and games” that were part of the practice are gone. The bar association dinners and clam-bakes are staid affairs—no songs, no skits, no “awards” for “deserving” politicians and judges—and not well attended. The rollicking summer State Bar meetings at the Saranac Inn in the Adirondacks have long been happy memories. It is a different time, a different generation. I doubt if any lawyer would suggest a sampling of Lafayette Special Brand today, even in Oswego. Perhaps, it is better.

Are lawyers as a group as happy and satisfied as they seem to have been 30 or 40 years ago? I don’t have the answer. It is no secret, however, that today some young lawyers are practicing out of their homes and struggling to get by on the meager hourly rates permitted for 18(b) assignments in criminal and Family Court cases. Most of these lawyers, unable to find a position with a partnership or individual practitioner on being admitted, were forced to strike out on their own without the mentoring and encouragement of a senior lawyer. From my service on the Board of the Onondaga County Assigned Counsel Program, Inc., I know that many of these lawyers are dissatisfied and unhappy.

What about civility and the unwritten “code” that used to prevail? Except for one unpleasant episode, I have not experienced the “slash and burn” tactics, and

Today, everyone takes for granted the extraordinary innovations in the legal profession that have been brought about by the “information revolution.”

the discourteous, sometimes insulting conduct of lawyers in dealing with each other and even with the judges that I had heard about before I left the bench. From my service on Chief Judge Kaye's Committee on the Profession and the Courts, however, I learned that, indeed, things are not the way they were when Alan Goldberg and I started trying lawsuits. A recent decision of the U.S. Second Circuit Court of Appeals detailing the "Rambo" tactics of a lawyer is an unhappy reminder of what appears to go on.⁵ We miss the days when lawyers were trained to abide by the unwritten "we just don't do it that way" code of professional conduct that had prompted the instinctive reactions of Sidney Coulter and George Richardson.

What about the lawyers of my generation? Are they glad that they became lawyers? Have they felt that they've had a fulfilling, satisfying career in law? For most of my contemporaries, I believe, the answer to these questions is definitely "yes." Last May, the Onondaga County Bar Association had its annual luncheon for the members of the Association who had been admitted to practice for fifty years. Five of us (all men) were fifty-year honorees. One, Jack Setright, who had been part of our group of 10 to 12 young trial lawyers in the 1950s, is now one of Onondaga County's top advocates. He is in a small litigation firm and still tries lawsuits. The others, Mike Canestrano, Mark Terziev, and George Stephens, spent their careers doing general practice in small partnerships or as individual practitioners. George Stephens and Mike Canestrano are still actively practicing, and Mark Terziev has just retired.

In the response which I gave for our group, I quoted this paragraph from a letter that George Stephens had sent to me:

I'm still practicing out of my home office doing any general work that comes my way, with no plans to retire. *I enjoy my practice because I enjoy helping people. It's certainly not because I'm getting rich!* (Emphasis added)

I concluded with these words which represented the collective thoughts of the five fifty-year honorees:

We feel blessed to have been part of this noble profession. It has been a wonderful trip—these fifty years. We've had fun and if, as George Stephens says, we have helped some people along the way and made some contributions to society, we are glad. For that is really what it's all about, isn't it?

I hope (and my fellow honorees would join me in this) that the young lawyers of today will feel the same way when they have practiced for fifty years.

1. The late Arthur Agan, Esq., was a senior partner and trial lawyer with the predecessor firm of Hancock & Estabrook, LLP.

2. Stewart F. Hancock, Jr., *Preparing Law Students and New Lawyers for the Year 2000 and Beyond*, N.Y. St. B.J., vol. 69, No. 4, May/June 1997, at 12.
3. The late Sidney B. Coulter, Esq. was a senior partner and trial lawyer in Coulter, Fraser, Bolton, Bird & Ventre.
4. The late George Richardson, Esq., was the father of M. Catherine Richardson, Esq., a former president of the New York State Bar Association.
5. Mark Hamblett, *'Rambo' Lawyer Beats a \$50,000 Court Sanction*, N.Y.L.J., Aug. 7, 2000, p. 1; *Burstein v. Cinque & Cinque*, 221 F.3d 71 (2000).

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A Formerly Arcane Practice Now Handles a Wide Range of Issues

BY MELVIN H. OSTERMAN

Recently I had occasion to interview a candidate for a secretarial position. As I generally do in these situations, I asked her whether she had any questions for me. Not surprisingly, she asked, "What exactly does a labor and employment attorney do?" In the course of answering her question, I reflected that very little of my work today involves things that I was doing 43 years ago, when I first started to practice.

In 1957, I worked for a 135-person law firm. The firm was divided, as most firms are, even today, into departments: litigation, corporate, real estate and trust and estates. Labor and employment law was not a department or even a subdepartment. Instead, one senior associate handled all of the firm's labor and employment work. He seemed to have very little contact with the rest of the firm. Labor and employment law was somehow arcane and confrontational. It was not the sort of thing that Wall Street lawyers (or Wall Street clients) liked to do.

For much of its history, labor "law" involved efforts by employers to prevent unions from ever setting foot on their premises. Too often, much of the creativity in the practice involved efforts to see how you could use existing laws, including the antitrust laws, to make sure that workers were denied basic rights of organization and representation. Even the enactment of the National Labor Relations Act in 1935¹ did not make a profound practical change. While employees were granted fundamental rights to organize and be represented, in the 1930s the country was recovering from a profound depression. A worker's ability simply to have a job and steady income often was paramount. As union activity started to peak at the end of the 1930s, we were hurled into World War II, which essentially subordinated individual interests to the national interest in defeating the countries with which we were at war. Essentially, much of labor and employment law was put on hold for the four-year duration of the war.

It really was not until the end of the 1940s that the country returned to a peacetime economy. Much of labor and employment practice at that time related to establishment of the ground rules and the turmoil that accompanied moving away from the wage/price controls in place during the war. In part, there was a post-

war pulling back from some of the more significant advances of the New Deal.² There was legislation limiting discrimination and employment, at least in New York. That, however, was about it. Labor law at the half century was, in relative terms, a fairly narrow specialty.

In the next fifty years, all this changed. My firm now has 50 lawyers, seven of whom practice labor and employment law. Labor and employment law provides a central focus of our practice, even in Albany, which had not previously been regarded as a hotbed of labor activity. Twenty-two law firms in the Capital District advertise themselves in the Yellow Pages as having capacity in the area of labor and employment law. Labor lawyers are a separate category in *Best Lawyers in America* and there are even separate bar associations specializing in areas such as plaintiffs' labor and employment work.³ We deal daily with laws that did not exist and issues I did not contemplate fifty years ago.

Laws Against Discrimination

In the 1940s, New York, in pioneering legislation, enacted a Human Rights Law prohibiting discrimination on the basis of race, creed or color.⁴ In a curious side-light, the extraordinary significance of that law is docu-



MELVIN H. OSTERMAN is a partner at Whiteman, Osterman & Hanna in Albany. After serving as co-counsel to the 1966 commission that proposed what became known as the Taylor Law, he served as special counsel to the governor on employee relations from 1968 to 1972, and as director of employee relations of the State of New York from 1972 to 1975. He has been a member and chairman of numerous committees on employment and arbitration matters. He is a graduate of Cornell University and received his LL.B. from its law school.

mented by an explanatory note next to the governor's signature on the legislation. Traditionally, the pen with which a governor signs a law is preserved and often is given to the person or persons responsible for enactment of the law. In the case of the Human Rights Law, Governor Dewey's handwritten note suggests that the reader should not be surprised that his signature appears unrecognizable. He explains that he had to use 47 pens to sign his name because of the interest in the legislation.

As dramatic as the Human Rights Law may have been, it pales in significance to the issues now confronting labor and employment attorneys. While then we had a state law, we now have the Federal Civil Rights Act of 1964,⁵ which greatly expands the scope and enforcement of the laws against discrimination. While we surely have not solved problems of discrimination on the basis of race, creed or color, that has not stopped the lawmakers from adding whole new categories of protected classes. Labor and employment attorneys are now concerned with discrimination on the basis of age, sex, disability, marital status and, most recently, sexual orientation.⁶ Each of these has marked a significant change in both law and social conscience.⁷ Some of these categories have themselves subdivided. Discrimination on the basis of sex, for example, now includes concerns with denial of employment or promotional opportunity, equal pay and sexual harassment. Title IX and § 504 of the Rehabilitation Act extend many of these protections to our state's schools. The requirement of reasonable accommodation is now a significant component of the laws prohibiting "discrimination" on the basis of disability. Litigation in this area is probably the fastest-growing segment of my firm's practice.

Public Sector Labor Law

In 1962, I became an assistant counsel to the governor. Then, as now, assignments in the governor's office were made based on the agencies that made up state government. One of the agencies to which I was assigned was the Labor Department. With that assignment came responsibility for what we now know as public sector labor law.

In 1962, however, that entire body of law consisted of one statute, the Condon Wadlin Law, prohibiting strikes by public employees, but it was widely ignored. The burgeoning growth in public sector employment fostered a desire of public employees to participate in determining the terms and conditions of employment. In the early 1960s, however, there was probably no public official who would endorse the right to strike by public employees. By the same token, there were few who were willing to attempt to enforce legislation prohibiting such strikes.

Much of that changed in the next few years. A series of increasingly confrontational strikes by public employees, particularly in transit and education, led to a growing recognition that prohibitions alone would not work. Somehow a system had to be crafted to permit public employees to sit down with their employers and negotiate concerning salaries, benefits, hours and other terms and conditions of employment. The process started in the City of New York with a local law authorizing collective bargaining between the city and its employees. On the federal level, an executive order promulgated by President Kennedy authorized federal employees to negotiate with respect to most non-economic terms and conditions of employment.

The most significant advance occurred in 1966, when Governor Rockefeller appointed an extraordinary group of individuals to what became known as the Taylor Committee. George W. Taylor, the head of the committee, was a giant in the field of labor relations who was then teaching at the University of Pennsylvania. Its other members, E. Wright Bakke, David Cole, John Dunlop and Frederick Harbison, each had established significant academic reputations in the field of labor relations. None of them were lawyers, however, and finding a lawyer for the committee proved nearly impossible. Lawyers who had some experience in this field were few and far between. The governor first selected Sol N. Corbin, who had been counsel to the governor, as first counsel to the Taylor Committee. Sol recalled my experience with the Condon Wadlin Law and I was picked as co-counsel. Somehow credentials in how to stop public sector strikes did not seem like credentials to craft a whole new structure of collective bargaining for the public sector. They were, however, all we had.

The Taylor Committee was remarkable, not only for the quality of its members but also for the speed with which it completed its assigned task. We are familiar with committees and commissions, which take years to resolve the most minute or arcane subjects. The Taylor Committee, by way of contrast, was appointed by the Governor on January 15, 1966, and issued its final report two and a half months later, on March 31, 1966.⁸

In substance, the committee proposed essentially what has become the Taylor Law, §§ 200 through 214 of the N.Y. Civil Service Law. Proposing a statute, however, did not end the controversy. It took more than a year to sort through a maze of competing Democratic and Republican bills until the final statute became law. Even then, it was highly controversial. On the day of its enactment, it was described by a prominent labor leader as the "Rockefeller/Travia [the then-Speaker of the Assembly] Slave Labor Act." It also was characterized as the "RAT Bill" (again Rockefeller and Travia).

How much has changed in little more than 30 years. Today, 18% of the work force in the private sector is organized. Almost 100% of public employees in New York State are members of negotiating units. I am told that 80% of the grievances administered by the American Arbitration Association consist of public sector rather than private sector matters. Members of this Association's Labor and Employment Law Section are now almost equally divided between the public and private sectors.

Regulatory Statutes

For the first fifty years of this century, our state and federal legislatures addressed fundamental problems in the workplace. Legislation was enacted limiting the hours employees could work without receiving overtime compensation, providing a system of unemployment insurance and providing benefits for employees injured on the job. A variety of state statutes attempted to protect the abuse of employees and to place limits on child labor. These statutes are still with us. Much, however, has changed in the past fifty years to expand the scope of these basic protections.

We now deal with a whole variety of regulatory statutes that did not exist fifty years ago. In addition to the Fair Labor Standards Act, Workers' Compensation and unemployment insurance, we now deal with a range of statutes employing almost every letter in the alphabet. We deal with FMLA (the Family Medical Leave Act of 1993, guaranteeing employees unpaid leave for medical and family emergencies),⁹ WARN (the Workers' Adjustment and Retraining Notification Act, designed to require notice of runaway shops and to provide employees with notice of impending lay-offs),¹⁰ OSHA (the Occupational Safety and Health Act of 1970, guaranteeing basic safety standards in the workplace),¹¹ PESH (the Public Employees' Safety and Health Act),¹² and many other statutes that have an effect on the employment relationship.

A mere listing of the chapters in title 29 of the U.S. Code gives some idea of the range of these regulatory statutes. These chapters include apprentice labor, vocational rehabilitation, job training partnership, migrant and seasonal agricultural worker protection, employee polygraph protection, technology-related assistance, displaced homemakers self-sufficiency assistance, women in apprenticeship, workers' technology skill development and assertive technology for individuals

with disabilities. Added to these are dozens of new state statutes added yearly which expand or refine some aspect of workplace protective. The range of legislation is extraordinarily wide.

Traditional Labor Law

Traditional private sector labor issues of representation, protected activities and unfair labor practices are still with us. Issues of union access to employees now must consider shopping malls and e-mail. Company unions may now include "quality circles." Doctrines developed in an older and simpler time must be redefined to accommodate technological and societal changes.

We now also deal with the duty of fair representation, a court-constructed doctrine developed first under the Railway Labor Act¹³ and later extended throughout the public and private sectors. The duty of fair representation provides a mechanism for enforcement of a union's duty to its

members and prohibits arbitrary discrimination, defining the responsibility of unions to their members.

ERISA,¹⁴ the Employee Retirement Income Security Program, provides basic protections securing the benefits of employee pension plans. The Labor Management Reporting and Disclosure Act,¹⁵ enacted in 1959, provides a mechanism to enforce democracy in internal union affairs and provides for the availability of basic data concerning union activities. Copies of union constitutions and the like are available through this process. The federal courts now have jurisdiction of claims of alleged breaches of collective bargaining statutes without regard to jurisdictional amount or citizenship.

Conclusion

In addition to traditional corporate and litigation specialties, our firm (which is probably appropriately called a boutique) practices environmental, corporate, litigation, immigration, intellectual property, trust and estates and education law, as well as labor and employment law. We debate from time to time, particularly with the environmental lawyers, about whose practice has changed the most since our firm was founded in 1975. To the extent that labor and employment law has roots extending at least to the 1930s, environmental lawyers can probably claim the greatest change. On the other hand, we can make a pretty fair case based on the

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Large Firm Practice

Women and Minorities Joined Firms As Rivalry Opened for Business

By S. HAZARD GILLESPIE

In the spring of 1934 at the end of a year at Yale Law School, I talked my way into a summer job with what was then Davis Polk Wardwell Gardiner & Reed. Its office was two doors from Wall Street at 15 Broad Street, but like many well-known law firms with offices in greater Manhattan, but not right on Wall Street, its legal practice in the corporate, litigation, estates, taxes and real property fields had come to be known as "Wall Street Practice." Back then, the title "summer associate" had never been heard of. In fact, I believe I was the first law student to get summer employment at Davis Polk.

From the outset, it was made clear that my status would be nothing more than "deputy court clerk," an outside messenger, if you will, and that my place of work would be a seat on a 10-foot bench near the front door, which I would share with four or five venerable court clerks for whom I would be substituting during their summer holidays. It was also made abundantly clear that I should not attempt to perform any library or other legal services (apparently lest a firm opinion or brief be tainted by the input of someone who was not yet a licensed practitioner).

Wide Array of Changes

Since those days, I have seen many beneficial changes in Wall Street practice, particularly greatly increased participation in the practice by women and minorities. An open rivalry has also emerged among law firms for professional business (e.g., "Beauty Contests," journalistic, TV and radio advertising) as well as ruthless competition among them through munificent financial rewards to recruit the best law students, plus the introduction of advanced electronic devices such as computer typing machines and computer assisted legal research (CALR).

At the same time, however, nothing in my experience compares with the integration of law students (male, female, minorities, et al) into the matrix of the practice.

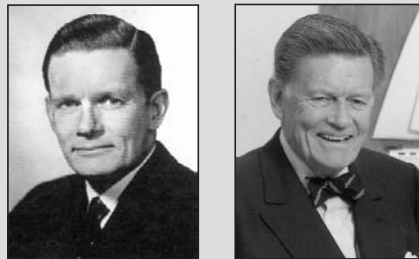
The change has come from an era when no would-be lawyer was hired at a Wall Street firm until he or she had successfully completed three years of law school, to today when every summer at least 10 Wall Street firms are each hiring as many as 90 law school students with just two years of exposure to law training, and on the

other side of the coin, to where 75% of second year students at some law schools¹ have direct participation in law firm practice before graduating from law school.

Turning for a moment to conditions as they are today: instead of law firms resisting employment of not-yet-graduated law students, it is recognized that the "overriding purpose of the summer program is to provide summer associates with interesting work and a memorable 'New York' experience," and to that end, to provide them "with the type of work that is roughly equivalent to what they might experience as a junior associate," and to "encourage summer associates to enjoy New York City."² What a change!

And certainly for the better. Obviously the end product, the law school graduate, is today far more experienced and useful than his or her counterpart of 70 years ago, and not only are the law schools relieved of providing practical courses in what a student will be facing when permanent employment begins;³ the law firms are today getting graduate personnel far better equipped to provide the service that a law firm's ever-expanding industrial and financial clients are needing and calling for.

And "Wall Street Law Firms" are meeting the responsibility for continuing law student education by ag-



S. HAZARD GILLESPIE is senior counsel at Davis Polk & Wardwell in New York City. He was president of the New York State Bar Association in 1958-1959 and served as U.S. attorney for the Southern District of New York in 1959-1960. Most of his career has been spent in trial and appellate practice. He now serves as chairman of the America Skin Association and president of the Tappan Zee Preservation Coalition. He is a graduate of Yale University and received an LL.B. from its law school.

gressively instructing their incoming classes in what “lawyering” in today’s “Internet” world will expect of them. In addition to covering antitrust law, securities law and the like, the lessons include personnel matters, ethics, *pro bono* work and attorney-client privilege. The subjects demonstrates the importance that Wall Street practitioners today place on these subjects in training young professionals. In other words, practicing law is much more than an intellectual exercise for personal gain. It demands integrity (“Ethics”), concern and care for the poor (“*Pro Bono*”) as well as protection and care of those who seek legal service (“Attorney-Client Privilege”). Truly, law practice today is a way of life.

Memorable Experience

Before leaving the subject of introducing law students (summer and graduate) to Wall Street Practice, it might be well to visit briefly just what one was called upon to do 70 years ago.

An incident that stands out in my mind occurred on a very hot summer afternoon in 1934 (and remember, there was no air conditioning in those days) when Davis Polk’s “Mr. Bruder,” (office manager and managing clerk without peer), summoned me to his desk. It was from this point (also directly adjacent to the front door) that William Bruder alone presided over all aspects of the office’s administration (bookkeeping, the law library, the file department, and stenographic services) in addition to the firm’s contacts with the courts, the clerks of the courts, the county clerk’s offices, and other law firms. To me, this figure was awesome. When I came under his supervision, he had been with the firm since 1887, almost 50 years, and told stories of watching people walk on the ice across the East River during the blizzard of 1888. A real taskmaster, if ever there was one, he was nevertheless always ready to teach and to guide kindly in the intricate matters of court practice.

Said Mr. Bruder, “Mr. Gillespie, I have an order to show cause which I want you to take to the Bronx County Supreme Court and get signed by Judge Hammer, who is sitting this month in the Motion Part.” He handed me a set of papers, showed me where the judge’s signature should be placed and told me how to find the Bronx County Courthouse near the northern end of the Eastside IRT Subway.

Off I went, wearing a suit jacket over my shirt and tie (there was no such thing as “dressing down” in those days), and finally found the courthouse north of the Harlem River.

Judge Hammer’s chambers were on the fourth floor of this formidable granite building. A handsome heavy wooden door reassuringly bore the name, “Honorable Ernest E.L. Hammer.”

I pounded on the door, and there was no response. I tried again in five minutes, still to no avail. And with

difficulty I found a telephone booth. I reached Mr. Bruder. He was most unsympathetic; “I told you to get Judge Hammer’s signature. Wait until he returns or responds; don’t come back without it!”

About every 15 minutes I renewed pounding my fist on the oaken door. Still no response. I was getting very discouraged, thinking that this summer work was not doing very much to further my legal career, when finally, about two hours after I had taken up my post, the door swung open and there stood a giant pink cherub, stripped to the waist except for a sleeveless undershirt, a glow of light sunburn on his forehead and shoulders. Obviously a true forerunner of “dressing down,” he held out his hands in a welcoming gesture. “Come in.” Before I could tell him the purpose of my visit, he ushered me onto the roof of the courthouse through a window in his large office and pointed down to the old Polo Grounds where the New York Giants were in the 10th inning of a tied-up ball game. Needless to say, we had to wait for the outcome, which fortunately was favorable to the judge. Thereafter he resumed his judicial duties and signed my order to show cause, but not until he asked my name; and with true interest, how I came to be working as a messenger-clerk for a Wall Street law firm. He very obviously had never heard of law school students working even as messengers. I returned after dark to Wall Street in triumph and next day earned the sincere approval of Mr. Bruder.

About 10 years after this impromptu visit with Judge Hammer, I had occasion to assist the late John W. Davis of Davis Polk, a leader of the American bar, in the preparation of a complex motion for summary judgment to dismiss a stockholders’ derivative suit brought by minority stockholders of the U.S. Rubber Company against its directors challenging the legality of the company’s executive compensation plans and other corporate action. The motion was made under old Rule 113 of the New York Rules of Civil Practice. The motion papers were largely documentary consisting of minutes of corporate proceedings, proxy statements, and formal filings with governmental authorities. They created a bound volume at least six inches thick.

When the time came to present this motion in the State Supreme Court (New York County), Mr. Davis suggested to my astonishment that I should argue the motion, an opportunity which I, still an associate, was keen to accept. The motion came on for oral argument and equally to my astonishment who should ascend the bench but the Honorable Ernest E.L. Hammer. In his black robe, he did not appear at all as he had when I had last seen him on the roof of the courthouse, but even more to my amazement when I got up to present the motion, he smiled warmly, “Good morning, Mr. Gillespie. It is nice to see you again.”

The argument progressed satisfactorily. The briefs were filed and a few months later a favorable decision resulted. Appeals to the Appellate Division and to the New York Court of Appeals followed, with affirmances in both courts.⁴

The meeting with Judge Hammer in his undershirt on the roof of the courthouse has been with me ever since, and the fact that he very obviously had not forgotten the incident has given me confidence in dealing with the judiciary

throughout my professional life. It taught me that, first and foremost, judges are human beings, they like what people like, such as ball games; and second that, when not called upon to personify justice, (*i.e.*, the rule of law), when not on the bench, (where they properly wear a distinguishing black robe), they like to dress down just like anyone else.

Working With Clients

Not all Wall Street litigation practice back in the mid 20th century was working in the library followed by an occasional court appearance to present, or hear the presentation of, a position that had been so laboriously produced. Occasionally Wall Street litigation practice actually meant going into the field and developing a client's factual case just as investigators and detectives would have done in an earlier era.

One such case was presented in June 1956 by the collision over the Grand Canyon of a TWA Constellation and a United Air Lines DC-7 in which all 128 persons aboard the planes lost their lives. At the time, it was the worst disaster in aviation history. Both planes fell deep into the Grand Canyon's Inner Gorge about a mile apart very close to the Colorado River. After preliminary efforts to remove remains had been completed, the problem of fixing liability for this devastating occurrence came to the fore, and an on-site investigation was called for.

Personnel for TWA's insurance carrier, Associated Aviation Underwriters Inc. (AAU), originally recommended descent of the Colorado River by rafts or boats with experienced National Park Rangers to lead the search. But the area to be covered (at least 100 square miles), and the wickedly steep terrain (gorge after gorge after gorge) with constant temperatures night and day in excess of 125° F made random hunting of the area on foot from river boats quite impossible.

The chief pilot of TWA informed AAU's attorneys that he had flown at low altitude in a small aircraft over

the flight paths of the two planes (both of which had taken off from Los Angeles) and had seen what he believed to be a big piece of the tip of the main wing of the

United DC-7 about five miles short of the TWA crash site. This information moved the balance in favor of a lawyer-led helicopter expedition into the Canyon. After the decision had been made, AAU's chief investigative engineer, Everett Chapman, on August 8, 1956 wrote AAU:

I phoned Pat Reilly this af-

ternoon and called off arrangements for the boat trip to the crash site as per instructions from Gillespie. Reilly's comment on Chief Ranger Coffin's statement was "Certainly, it's dangerous." He and I have never underestimated the expedition by boat.

I regard the helicopter operation as the more dangerous of the two methods because of the fatigue history of copter blades, hubs and power transmissions.

In boats, one's danger can be seen; faced and coped with. If the oncoming rapids look tough, you walk around and line the boats through: there is time to evaluate and make a decision.

I weigh this situation against hidden, insidious hot spots in the copter mechanism whose existence is announced by failure of the part.

The copter pilot must have specialized skills comparable to Reilly's. Canyon flying is at an altitude of 7000 feet and in hot air most of the day. The landing sites are small and will be plagued by thermal updrafts. Many trips will be necessary. I cannot take the copter for granted.

Notwithstanding, these premonitions, the Wall Street practitioners pressed forward with the on-site helicopter investigation that was needed because preliminary views based on an authorized change in altitude from the flight plan filed by TWA pointed to it being responsible with consequent liability to its insurer in "run-away" amounts beyond estimation.

AAU's lawyers authorized chartering of two helicopters from Denver, Colo., each manned by a single pilot in a glass bulb with a bench next to him for two persons plus accompanying ground crew consisting of a specialized mechanic and fuel truck drivers.

The planes involved in the disaster had taken off in the morning of June 30, 1956, three minutes apart from Los Angeles International Airport. The TWA Constellation departed first at 10:01 a.m. followed by the United DC-7 at 10:04 a.m. Both headed in a westerly direction to begin with, out over the Pacific and then turned east, TWA for Kansas City and United for Chicago. The new

Occasionally, Wall Street litigation practice actually meant going into the field and developing a client's factual case just as investigators and detectives would have done in an earlier era.

DC-7 was 45 miles per hour faster than the Constellation. They met just east of the California-Arizona border at 21,000 feet, close to an aviation checkpoint known as Painted Desert.

Both aircrafts were flying under Visual Flight Rules (no ground control), requiring the crews of each aircraft to maintain a lookout “to see and be seen,” and for the overtaking aircraft to keep clear of the one in front. (It was the “burdened aircraft” in air navigation parlance.)

Although a ground controller was aware that both aircraft were at 21,000 feet and that the courses of their compass headings one for Kansas City and the other for Chicago at some point would cross, under then-existing U.S. Flight Regulations the controller was not called upon to advise them of the very remote chance that the two aircraft might reach the crossing point at exactly the same instant and at exactly the same height (21,000 feet above sea level), and he did not do so.

However, in terms of which aircraft had responsibility to avoid a collision, the position of each aircraft versus the other just before the impact (which was “the burdened aircraft”) was crucial.

In September 1956, about two months following the disaster, the TWA-AAU investigation team assembled in the desert approximately 30 miles east of Grand Canyon Village, Ariz. Two Bell helicopters with their pilots plus a mechanic, a National Park Service Ranger, a representative of the Civil Aeronautics Board’s Bureau of Safety Investigation, the chief flight engineer for TWA, a construction engineer from the Lockheed Aircraft Company (manufacturers of the Constellation), a consulting investigation engineer representing AAU, Everett Chapman, an attorney, Paul G. Pennoyer Jr. of Chadbourne & Parke (“Wall Street practitioner”) representing TWA, and S. Hazard Gillespie of Davis Polk & Wardwell, representing AAU, made up the AAU party.

The helicopter pilots, mechanic and fuel drivers had established a base camp at the assembly point on the edge of the South Rim of the Canyon about 3000 vertical feet above the site of the TWA wreckage (near Cape Solitude and the confluence of the Little Colorado and Colorado Rivers). This transportation crew trucked from Flagstaff, Ariz., about 50 miles distant, a week’s supply of flying fuel and food and camping equipment for the 10 persons involved in the expedition.

In addition, the pilots of the helicopters and their mechanic had flown into the Canyon floor 3,000 feet below, and created a landing pad on top of a tiny butte, about 50 feet by 50 feet, less than 100 feet from the three rudder stabilizer, which was all that was left of the Constellation.

Two by two, our team, strapped into a helicopter, each person with a bedroll and backpack, descended to

this scene of devastation—and it was that. The plan was to spend five to seven nights at the site with daily helicopter expeditions searching for evidence.

The temperature was brutal, never below 125° F night or day and frequently over 130° F.

Before descending to this spot, a small fixed-wing, single-engine, sightseeing aircraft and local pilot were chartered to explore for wreckage that might have fallen up the flight paths of the stricken aircraft. This effort, which took many hours, proved fruitful. It required not only flying up and down the deep gorges of the Canyon in many directions, it also meant that, when two very key pieces were finally observed, they had to be located on a geodetic survey map so that they could later be found first from a lower-flying helicopter and finally by a team on foot, and thus retrieved for helicopter airlift up to the rim of the Canyon.

(Parenthetically it was very evident from the outset that United Air Lines and its insurer, United States Aviation Group (USAIG), though not initiating this investigation, were interested in its outcome to the extent that they established a duplicate operation, camping on a butte adjacent to that occupied by the TWA-AAU investigating team).

After two days of helicopter exploration at altitudes varying from the river bed of the Colorado River at 2,000 feet above sea level up to levels south and north of the river of about 7,000 feet above sea level, we were satisfied that we had spotted the only significant piece of material evidence, the wing tip of the DC-7.

The problem was getting to this piece and then getting it out of the steep-sided gorge where it had fallen. The site was too precarious to land even a helicopter. It was located about five miles “as the crow flies” from the in-Canyon landing pad from which the helicopter had launched its exploratory flights.

The TWA-AAU team camped on this site sleeping on top of their bedding rolls in stifling heat and climbing down occasionally to refresh themselves by a dip in the treacherous eddies of the Colorado River, only to be overheated by climbing back to the launching pad. On more than one occasion members of the party woke in the morning to find rattlesnake skins left during the night only inches from their sleeping bags.

At first light on the third morning in the Canyon, Pennoyer, attorney for TWA (a Navy Reserve Pilot), and Gillespie for AAU led a team consisting of a National Park Ranger, a Lockheed Aircraft Construction Engineer, a CAB Safety Investigator and Al Brick the Chief of TWA’s Flight Engineers on a down-river Canyon hike in an effort to locate and inspect close-up the DC-7 wing tip.

The trek of about five miles took more than five hours. It meant climbing the steep side (vertically 250

feet) and descending the other side of about 20 ridges in a mile, five times (five miles) or a total of about 100 such ascents and 100 descents, when finally one of the leaders spotted the piece resting where it had fallen in a gulch of bruising boulders.

Next in excitement to finally standing beside this piece of vital evidence was the immediate identification by the Lockheed construction engineer and the chief TWA flight engineer of a small piece of cream-colored vinyl cloth, jammed in the leading edge of this wing-tip, which the engineers identified as a piece of the headliner of the Constellation's bathroom located at the rear of the aircraft. In other words, the United Airlines DC-7 had come from the rear and the front-edge of its main wing had driven into the tail of the Constellation, tearing from it a piece of the cabin lining from that very spot, clearly establishing that the DC-7 was the overtaking aircraft.

There still remained the task of getting this evidence back to civilization. Pennoyer and Gillespie remained with the wing tip.

The Park Ranger led the others back to the base camp and prepared the helicopter pilot and a helper to return with the "bird" and a stout rope of approximately 150 feet.

When the helicopter arrived at the wing site, Pennoyer stood off several hundred feet from the site and directed the pilot as the helicopter dragged a long drop line into position to be tied to the rope sling that Pennoyer and Gillespie had previously fastened to that bulky piece.

Slowly but skillfully, the pilot elevated the bulky mutilated piece from its place amid the rocks; then as the bird swung out toward the depth of the Inner Canyon the wing tip hanging a hundred feet below quickly gained more and more clearance space as it was flown down the five miles back to the landing pad.

The next morning, before dawn when the air was less heated and could provide more lifting support than at any other time in 24 hours, the helicopter with the wing strapped between its landing skids took off. After three tries, it lifted its precious load over the edge of the South Rim of the Canyon to the main base camp where a truck was waiting to take it to Flagstaff and by a Civil Aeronautics Board DC-6 to airlift it to Washington.

While which aircraft was responsible never had to be decided because existing litigation and the issue of liability as between the parties were ultimately disposed of by an agreed settlement, the sense of achievement in this experience and of service to a client are rarely to be

found and never to be forgotten. Yet this was a real part of Wall Street litigation practice and perhaps explains why those seeking the ultimate in professional service turn in that direction.

Women in the Practice

One final Wall Street Practice experience that illustrates the great progress made during the past 70 years in incorporating women into the practice of law.

In 1975 the Federal Food and Drug Administration began an investigation into the manufacturing and distribution of certain antibacterial dressing pads; gauze pads that were impregnated with Furacin (trade name for nitrofurazone ointment) used in hospital operating rooms and emergency rooms for sterilizing wounds resulting from operations and accidents.

The principal manufacturer and the suspect in this investigation was Morton-Norwich Products Inc. and its vice-president of operations, the late James J. Mahoney, who were subsequently indicted for

interstate shipment of adulterated drugs in contravention of 21 U.S.C. §§ 331(a) and 333. The substance of the charges was that goods that had been labeled, sold and distributed as "sterile" were in fact contaminated, and that they had been manufactured under conditions that did not conform to current good manufacturing practice (CGMP).

The FDA's agents had picked up samples of the labeled product in hospital supply rooms in northern New York State that the FDA's testing laboratories subsequently concluded were adulterated with mold (*paecilomyces varioti*). Subsequent official visits of FDA investigators to the suspect's manufacturing facilities near Norwich, N.Y., uncovered evidence of mold and flies in the packaging area.

The defense strategy required education of six attorneys in the chemistry of the product and the methods of manufacturing and packaging it to assure sterility. Last, but most important of all, the methods of testing the product had to be reviewed to be sure that the reported contaminates had not been introduced in the process of the testing itself.

One of the most important members of the legal forensic team, Virginia Worden, a graduate of New York University Law School in 1975, led the defense groups' study of testing methods, pharmacopoeia standards and treatises dealing with this subject. Her responsibilities included not only locating but briefing and preparing expert witnesses and officials of the manufacturing

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An experience in 1975 illustrated the great progress made during the past 70 years in incorporating women into the practice of law.

company (Morton Norwich) to demonstrate the frailty in the FDA's testing process; it also involved the preparation of witness sheets for her attorney-colleagues to conduct cross-examination of the government's agents and experts.

In September 1976, after a year's tedious preparation and about the time when the court fixed January 1977 for the commencement of trial (in the U.S. District Court for the Northern District of New York in Syracuse), Ms. Worden let it be known that she was expecting the birth of her first child almost simultaneously with the commencement of the trial. Knowing the importance of her participation in the defense of this serious criminal matter, Ms. Worden valiantly volunteered to work until her child arrived and thereafter to come with the defense team to Syracuse accompanied by her newborn infant and her mother so that Ms. Worden could fulfill her courtroom responsibilities and at the same time provide whatever attention was necessary to the infant.

A daughter was born on January 6, 1977, and Ms. Worden, her baby and Ms. Worden's mother settled in at the Syracuse Hotel in time for the opening on January 13 of what turned out to be a nine-week trial in most severe winter conditions.

The skillful devotion of this lawyer to all the professional responsibilities that she faced in the course of this arduous legal struggle did much to produce an almost completely favorable outcome of the litigation. But more than that, coming as it did as early as 1975 just as women were making their way into the forefront of Wall Street Practice, it proved to all who dealt with her that women were to be relied upon professionally to the full extent of their male counterparts.

1. Columbia University Law School and New York University Law School.
2. Memo to all lawyers at Davis Polk & Wardwell "2000 Summer Associates Program," May 1, 2000.
3. In 1935-36 the late Honorable Bruce Bromley (later Judge of the New York Court of Appeals) gave a weekly seminar at the Yale Law School on Wall Street Practice.
4. *Diamond v. Davis*, 38 N.Y.S.2d 103 (Sup. Ct., N.Y. Co.), *aff'd*, 265 A.D.2d 919, 39 N.Y.S.2d 412 (1st Dep't 1942), *aff'd* 292 N.Y. 552, 54 N.E.2d 683 (1944).

overwhelming change in our practice over the past fifty years.¹⁶ That, I guess, is what makes law fun.

As a labor and employment lawyer, I learn the businesses of new clients and re-examine areas I already know in the light of newly enacted statutes or court decisions. Each June we await decisions of the U.S. Supreme New York Court or the Court of Appeals, for their pronouncements are likely to impact our practice over the next several years. When the Supreme Court announces the existence of a cause of action for environmental sexual harassment, or the definition of a disability, or the ability of the Boy Scouts to bar homosexuals as troop leaders, our legal world shifts. Our work for the foreseeable future is redefined.

We are taught in law school the values of *stare decisis* as part of our system of law. *Stare decisis* holds little significance in a changing society where both federal and state legislative bodies, as well as the courts, are constantly redefining and expanding our world. It's confusing, it's sometimes frustrating, but more often than not, it's fun. Certainly it is no place for people who want to do what they did a half century ago.

1. United States Code, title 29 §§ 141-157 (U.S.C.).
2. The Taft-Hartley amendments, enacted in 1947, were widely regarded as Republican efforts to redress the balance between management and labor which followed the enactment of the NLRA.
3. An example is NELA, the National Employment Lawyers Association.
4. 1945 N.Y. Laws ch. 118 (presently codified at N.Y. Executive Law §§ 290-301).
5. 42 U.S.C. § 2000 e-2.
6. See *New York Lawyer's Deskbook* 9-24-9-26 (NYSBA 2d ed. & Supp. 2000).
7. Unfortunately, our efforts to enforce both old and new laws have not kept pace with advances in the law. Delays of ten and 14 years in bringing cases from charge to hearing are still too common.
8. The final report was not the last report. Over the next several years, the Taylor Committee issued two additional reports.
9. 29 U.S.C. §§ 2601-2654.
10. 29 U.S.C. §§ 2101-2109.
11. 29 U.S.C. § 651-678.
12. N.Y. Labor Law article 2.
13. *Vaca v. Sipes*, 386 U.S. 171 (1967).
14. 29 U.S.C. §§ 1001-1461.
15. 29 U.S.C. §§ 401-531.
16. The first American "labor" case, the Philadelphia *Cordwainers* case, was decided in 1806.

From Father Knows Best to New Rights for Women and Children

BY LUCIA B. WHISENAND

In 1950, the popular image of the family was reflected in the television series "Father Knows Best." The evolution of families and of family law that has occurred in the last fifty years has dramatically changed the father knows best perception of family relationships.

As we enter the new millennium, women are recognized as partners in a marriage relationship. Now women can even have their wishes communicated to the court when the family is being rearranged by divorce. Children are also entitled to their own lawyers in many proceedings.

Family law is on the forefront of societal change, making it a dynamic and rapidly changing area of law. Both the Legislature and the courts are active in attempts to resolve issues in this ever-evolving area of law. Regardless of whether the enormous increase in the number of women in the legal profession has had a direct impact on family law issues, without question the rights of women and children have increasingly been recognized in the last fifty years.

Matrimonial Law Changes

A brief view of the changes in matrimonial law in the last half-century is illustrative. Before 1967, the only ground for the dissolution of marriage in New York State was adultery. In 1967, grounds for divorce were expanded to include cruel and inhuman treatment, abandonment, confinement of one of the parties in prison for three or more consecutive years, and divorce based on the substantial compliance with a written separation agreement for a period of one year.¹

It was the enactment in 1980 of the Equitable Distribution Law,² however, that took away any illusion that "father knows best" in matrimonial proceedings. Before the enactment of that law, New York had been a title state, meaning that at the time of the dissolution of a marriage, the titled spouse had a right to all the real and personal property titled to, usually, him. Except in cases where there were considerable assets and lifetime alimony was a possible option, divorce often reduced women to poverty. Child support awards were also often abysmal, not beginning to make a realistic financial contribution to the needs of the children of the mar-

riage. The court in 2000 is given much more flexibility in reaching a financial resolution that protects both of the parties as well as the children than it had in 1950.

Not only is tangible property, such as houses and bank accounts, subject to equitable distribution, but also property items such as professional licenses, practices and businesses must be valued and taken into consideration when making an award of equitable distribution.³ Each spouse is entitled to share in the pension and retirement funds held in the name of the other spouse. While each party is entitled to keep separate property—for instance, property inherited or brought into the marriage, gifts from persons other than the spouse, and compensation claims paid—what was "separate" property may also become "marital" property due to specific actions by either one of the spouses. Thus, at the time of divorce, each party is entitled to full financial disclosure from the other, and the court may award property as equity requires.



LUCIA B. WHISENAND maintains a private practice in Syracuse with an emphasis on family and matrimonial law and is an adjunct professor of practical family law skills at Syracuse University College of Law. From 1980 to 1992, she served as law clerk to Judge Edward J. McLaughlin of the Family Court in Onondaga County. She is a member of the Permanent Judicial Commission on Justice for Children. In 1981-1982, she was a consultant to the New York State Temporary Commission to Recodify the Family Court Act, and from 1984 to 1990 she was a member of the New York State Commission on Child Support. A graduate of Connecticut College, she received a master's degree in public administration from the Maxwell School at Syracuse University and a J.D. from Syracuse University College of Law.

Alimony no longer exists. Maintenance is available in some cases, but is usually “rehabilitative,” with the expectation that the spouse seeking maintenance will upgrade job skills and assist in becoming economically self-sufficient. Of course, maintenance is now gender neutral.⁴ It may be awarded to either the husband or the wife as the facts of the case dictate. Custody is also gender neutral, a father and mother having equal rights to seek the custody of a child.⁵

The rights of children in matrimonial proceedings continue to increase as we approach the new millennium. In contested custody proceedings, which are often bitterly controversial, lawyers are regularly appointed to represent the children in the proceeding.⁶ Known as a law guardian,⁷ the lawyer for the child is assigned to protect the child’s interests, to protect the child and to convey to the court the child’s wishes. The lawyer for the child fully participates in the proceeding and acts as an advocate for the child’s wishes. Thus, children, who are properly represented even though they continue to be presumed to lack “legal capacity” to make decisions, can have their concerns about future family arrangements made clear to the court, before the court determines what is in their “best interest.”

Modernized Child Support

Child support has also been modernized. In 1982, a Child Support Commission was created by the governor in response to federal mandates. Hearings and research undertaken by the commission revealed that the amount of money provided by the non-custodial parent for the support of children in New York was extraordinarily low. Court orders of \$10 a week were not uncommon. Arrears for unpaid child support were routinely forgiven by the courts because the payor had car loans, credit card debt, a new family or some other excuse, with the result that many children were forced into public assistance who had a parent capable of contributing, sometimes significantly, to their support. Children were often left with no health insurance.

The great increase in the number of children born out of wedlock created an entire class of children who often did not receive support from their non-custodial parent and were forced onto the public assistance rolls. Contrary to popular stereotypes, “deadbeat dads” at the time of the commission’s research included people with six-figure incomes as well as people of more modest means. Payment, when it was made, was often erratic, so rents could not be paid on a timely basis, there was no cash for groceries, and children were forced into poverty.

In 1986, extensive modifications were made to both the Family Court Act and the Domestic Relations Law⁸ establishing guidelines for the calculation of child sup-

port that significantly increased the non-custodial parent’s obligation to contribute to the support of a child until the child turned 21. The guidelines had to be applied in any case where the combined parental income was under \$80,000. Over that amount, the guidelines could be applied at the discretion of the court.⁹ Enforcement methods were greatly improved and penalties for non-payment increased. For example, tax refunds can be intercepted and licenses of all sorts revoked. Now, due to the cooperation of the states and the federal government, children are much more likely than they were in 1950 to receive some support from a non-custodial parent who has reportable income.

Greater Sensitivity to Families

The change in attitudes goes beyond divorce. For example, rather than having police attempt to resolve a domestic violence issue on the scene, with the victim having to be in critical physical distress before an arrest was made, there is now mandatory arrest for the primary perpetrator of any domestic violence.¹⁰ The issue is not ignored. District attorneys throughout the state have Special Victims Units that deal with domestic violence cases. There are shelters for victims of domestic violence and their children, and non-lawyer advocates to assist with the initial court process necessary to secure an order of protection. No longer does the victim have to choose whether to pursue a case in civil or criminal court. Relief is available in both. An order of protection may also be obtained as part of a divorce proceeding.¹¹ In short, domestic violence is now viewed as a crime, a far cry from how it was viewed, if it was viewed at all, in the 1950s.

At one time cases concerning abused, neglected, abandoned and delinquent children were heard in the same civil and criminal courts as were the cases of adults. By the 1920s, a variety of separate courts, with jurisdiction organized on a county basis, had emerged. The Family Court was created in 1962¹² and the specialized courts were abolished. Family Court was constitutionally created as a statewide court.¹³ It was given jurisdiction over matters concerning families other than divorce. The Family Court has jurisdiction over adoptions, persons in need of supervision (PINS), support, paternity, custody (other than in matrimonial proceedings), guardianship, juvenile delinquency, family offenses, abuse and neglect, and termination of parental rights. It also has jurisdiction over the modification of enforcement of divorce decrees other than issues concerning equitable distribution. The Supreme Court may refer custody cases to the Family Court for determination during a matrimonial proceeding, and the determination made by the Family Court becomes part of the Supreme Court decision. This practice is not universal throughout the state, however.

Legal Counsel for Children

For the last fifty years, New York has been a leader in providing legal counsel to children as well as to indigents. The basic due process right is now in jeopardy because of the very low fees provided to legal counsel by the state and counties—\$25 per hour for out-of-court time and \$40 per hour for in-court time. Law guardian and assigned counsel cases are time-consuming. In some localities, attorneys are refusing to take these cases because they just cannot afford to work at such low rates and pay the expenses necessary to maintain a law office. Various legislative proposals recommending a fee of \$75 per hour for both in-court and out-of-court work by lawyers have been put forth, but none have yet been found to be acceptable by the New York Legislature. Thus, some of the families most at risk are denied timely access to the courts due to a lack of available counsel. This is a step backward from the progress made in the last fifty years.

Supreme Court judges have addressed the problem of inadequate fees by assigning lawyers for children to be paid by the parties at a variety of rates, usually ranging upward of \$100 per hour. Because a great many divorce cases involve people who have only W-2 incomes and many debts, this added cost to the matrimonial proceeding is financially daunting.

Exploding Caseloads

Since the creation of Family Court in 1962, its caseloads have grown exponentially. Drug and alcohol abuse, physical and mental illness, family breakdown and personal violence are hallmarks of family law cases. The severity and complexity of the problems created for families, it is safe to say, are beyond the expectation, or indeed comprehension, of most people active in the law in the 1950s.

These problems, often involving young children, cross economic and class lines. They occur within all racial, ethnic and religious groups. They occur among the families of educated professionals as well as the families of school dropouts. The Family Court, with limited resources, is expected to deal with them all. And while the judges of the Family Court valiantly strive to keep up with their immense dockets, matters often proceed very slowly. When young children are involved, this is disastrous. Children do not flourish when left in a hostile environment. They need the prompt and efficient intervention of the court, if court intervention is required.

As we enter the 21st century, two different approaches to court reform emerge. One is court consolidation, which would enable the administrators of the courts to distribute resources more effectively. Various proposals have been put forth, but as of this time, none has been adopted by the Legislature. (It is necessary for

two sessions of the Legislature to pass a proposal before it can be put on the ballot and considered as a constitutional amendment by the voters.)

Given the stalemate, other attempts are being made to streamline the Family Courts. In some courts, special parts have been created within the existing court structure to focus on an identified problem. Drug courts and domestic violence parts are an example. The emphasis with the specialized parts is to provide oversight and follow-through to the cases that come before the part. In some courts, special efforts are underway to ensure that children who are placed in foster care do not languish there for long periods of time, and that the courts monitor their cases and develop administrative procedures to track such cases with particularity. In at least one Criminal Court, a special youth court has been created to deal with young people who find themselves in Criminal Court. Chief Judge Kaye is a leader in these innovative projects.

Matrimonial courts are also engaged in an attempt to streamline procedures so that a matrimonial case may be heard from start to finish within a reasonable time frame. Judges have been assigned to dedicated matrimonial parts, special matrimonial referees have been appointed, and stringent rules adopted in an attempt to move cases to completion more quickly. Because the divorce caseload is much higher than it was in the 1950s, the pressure on everyone who is part of the process is much greater than it was fifty years ago.

When one is dealing with family law issues, however, it is often unclear how a legal resolution solves a family problem on a long-term basis. We are all familiar with bitter, contested divorce cases that go on for years, ensnaring children in the fallout. Mediation or counseling can sometimes teach people to deal with one another without destroying everyone else in the family. In some courts across the state, mediation is attempted before litigation can begin.

Family law is destined always to be a rapidly changing area of the law. Fifty years ago presumptions we take for granted today did not exist, and many of the presumptions that were prevalent in the 1950s now appear quaint, to say the least. There are no crystal balls to tell what will happen in the next fifty years. Change is constant, however. The challenge for persons involved in family law will be to recognize changes and to fashion the law to respond to the reality of the families of 2050.

1. N.Y. Domestic Relations Law § 170 (DRL).
2. DRL § 236, Part B.
3. See, e.g., *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000); *McSparron v. McSparron*, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985); *Arvantides v. Arvantides*, 64 N.Y.2d

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Fundamental Shifts Have Altered The Role of Local Governments

BY JAMES L. MAGAVERN

In the day-to-day practice of law, the most pervasive change in municipal law has been ever-increasing specialization. This is attributable in small part to the continuing elaboration of common law doctrine and in larger part to a dense overlay of state and federal regulation (including regulation through grant conditions), not only of the private sector but of local government itself. For example, consider the State Environmental Quality Review Act, Taylor Law, and Freedom of Information and Open Meetings Laws, and the federal civil rights, employment discrimination and environmental protection laws.

An extreme example of the inexorable tendency of our political system to generate ever more intricate legal regulation can be seen in the requisites for federal income tax exemption of interest on municipal bonds. The Internal Revenue Code of 1954 provided for the exemption in a short section of the code,¹ declaring simply that gross income does not include interest on the obligations of a state or any political subdivision thereof. Today the exemption is defined by 30 to 40 pages of fine print in the code² embodying a highly detailed complex of definitions, cross references, exceptions and exceptions to exceptions, not to mention 100 pages of regulations.³ This nearly impenetrable scheme can be comprehended only by super-specialists. No bond counsel firm is complete without its own arbitrage expert, for example.

The practice of law within local government has become more professionalized. The law departments of some local governments include lawyers appointed, or at least retained, without regard to political affiliation. Even a lawyer initially appointed because of a tie to a county chairman, elected official or political faction may survive a change in administration. Among the causes of this admittedly uneven evolution are the value of the specialized expertise developed by the lawyers, the Fourteenth Amendment and 42 U.S.C. § 1983 restraints against political retaliation,⁴ the decline in the power of local party organizations, and public distaste for the cruder forms of partisan politics. Still, patronage remains a powerful motivation, and elected officials quite properly want to be confident of the loyalty and com-

patibility of the lawyers who advise and represent them in sensitive political matters.

Fundamental issues involving the role of local government in the state and federal constitutional systems have shifted radically. Fifty years ago the principal concern of the home rule movement, dating back to the late 19th century and strongly influenced by the experience of the City of New York, was to give effect to state constitutional principles designed to afford cities a fair measure of autonomy in local affairs and protect them from arbitrary, inequitable and partisan interference by the state Legislature.⁵ At the federal level, it had become well settled that municipal corporations had no rights of due process or equal protection against the state governments that created them,⁶ but there was an open issue regarding whether the federal courts could properly remedy gross under-representation of urban areas in state legislatures.⁷ Those issues of the early and mid-20th century have been bypassed by the surge of suburban development and the enactment of federal and state financial mandates and grant programs in the post-World War II era.



JAMES L. MAGAVERN is a member of the firm of Magavern, Magavern & Grimm, L.L.P., and an adjunct professor of law at the State University at Buffalo. He has been counsel to the state comptroller and county attorney of Erie County, a United Nations expert in legal aspects of environmental planning, a member of the New York State Commission on Government Integrity (the Feerick Commission), and chair of the Buffalo Charter Revision Commission, which drafted the new city charter adopted last year by the city's voters. He is a graduate of Dartmouth College and received his LL.M. degree from the State University of New York at Buffalo School of Law.

Today the crucial issues for effective local government fall into two classes, metropolitan fragmentation and intergovernmental fiscal relations. These include inequalities and tensions between cities and suburbs, lack of structures for effective planning and decision-making at the regional level, severe fiscal stress of cities, federal and state mandates, and fiscal dependence of local government on the state. The older issues of home rule and equitable representation of cities were addressed in the 1960s by, respectively, amendments to the state constitution and the one person-one vote decisions of the U.S. Supreme Court. In both cases, however, the beneficiaries have been the suburbs, not the cities. At both state and federal levels, the record of the last fifty years has been one of entrenchment of suburban political power.

The State Level

In 1963 the people of the state adopted at referendum a comprehensive set of home rule amendments drafted by Governor Nelson Rockefeller's Office of Local Government. The amendments were presented as "a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them."⁸ Essentially they represented a re-codification and extension to towns and villages of home rule principles developed in the 19th and early 20th century: the right to local selection of local officers; a broad grant of power to enact local laws, not inconsistent with state legislation, in relation to both their own internal organization and the general police power; a concomitant restriction of the power of the Legislature to enact special laws relating to the property affairs or government of local governments; restriction of the power of annexation by requiring the consent of a majority of the residents of the territory to be annexed; authorization for counties to design and adopt alternative forms of county government; and authorization for local governments to enter into inter-municipal agreements for cooperative services.⁹

The principles embodied in the 1963 Home Rule Amendments have served reasonably well to broaden the police power of local governments¹⁰ and, especially in the case of counties, to enable them to reform the internal organization of their governments.¹¹ Generally, however, the amendments have not freed local government from excessive restriction by and dependence on state government, nor have they enabled local government to address effectively critical problems of fragmentation of government and disparities of wealth within metropolitan regions. Rather, the home rule principles of the New York Constitution have tended to entrench suburban resistance to a more equitable sharing of regional obligations and resources.

Metropolitan Fragmentation

Each of the principal means by which local government might be reorganized to deal with regional needs

is severely curtailed, if not effectively nullified, by a constitutional requirement of consent on the part of existing intra-regional municipalities. Because city and suburban municipalities tend to represent distinct class interests, they are not often ready to consent to a reorganization that might dilute their particular economic and political advantages under the status quo.

Consider how each of the obvious means of metropolitan reorganization is curtailed by the state constitution:

Annexation Annexation was once the principal way that local government accommodated urban growth, and it is still used for that purpose in other parts of the nation. In New York today, however, Article IX § 1(d) of the state constitution, carrying forward a 1927 constitutional amendment, prohibits annexation except upon the consent of a majority of the residents of the territory to be annexed.

In the early post-war decades, federal and state grants were available to subsidize new infrastructure development in the suburbs. Consequently, suburban developers and residents did not have a financial incentive to approve annexation in order to tie into the city infrastructure and tax base.

Today the suburbs often have a richer tax base than the cities. (The Town of Amherst, with a population of 110,000 now has a greater real property tax base than the City of Buffalo, with a population of 295,000.¹²) As a result, annexation is now virtually useless except as an occasional way for the owners of small tracts of undeveloped land to connect to the water and sewer systems of mid- and small-sized cities.

Inter-governmental Agreement Article VIII, § 1 and the more recent Article IX, § 1(c) of the state constitution empower local governments to enter into agreements to cooperate or perform services for one another. Inter-governmental agreements have been used for a wide variety of small scale arrangements and for significant city-county capital projects, such as convention centers and sports arenas. The usefulness of the technique has been limited by two restrictions.

First, by its own terms the constitutional authorization is available only when each of the participating municipalities is itself empowered to perform the function. Counties lack constitutional housing and urban renewal powers, and the state Legislature has never granted counties comprehensive spending powers of the kind enjoyed by the cities.¹³ Consequently, cities, towns and villages cannot by contract delegate to county government the performance of certain functions that could be more appropriately performed at a regional level.¹⁴

Second, the comptroller and the Appellate Division, Fourth Department, have taken the position that the participants to an inter-municipal agreement cannot

validly delegate policy-making power to a joint board or independent entity.¹⁵ Inter-municipal contracts therefore require the specific consent of every one of the participating cities, towns and villages for each successive policy decision entailed in the joint project or program. This makes it virtually impossible for the municipalities of a region to create a decision-making body empowered to pursue the broader interests of the metropolitan region when its these interests conflict with the particular interests of any one of them. Apart from those limitations of the power of local governments to contract with one another, it is unrealistic to expect city, suburban and rural governments to overcome their disparities of wealth and privilege by voluntary agreement unaided by higher authority.

Alternative Forms of County Government

County government is the natural form of metropolitan government in most of the upstate urban areas: it is a directly elected, general purpose form of government, and it is in place. An upstate county, although it may not cover the entire metropolitan region, typically represents a fair cross section of central city, suburban and rural people and interests. It is therefore in a position to transcend narrow class interests, to distribute costs and benefits equitably, and to pursue the common good of the region.

Article IX § 1(h) of the state constitution enables counties to adopt charters laying out alternative forms of government of their own design, and in that context to transfer functions among the county and its cities, towns and villages. That power is restricted, however, by the requirement that approval be obtained in a split referendum, that is, by separate majorities of the voters of all of the cities in the county considered as one block, the voters of all of the towns as a second block, and, if the new form takes away a function of any village, the voters of all of the villages so affected as a third block.¹⁶

This constitutional authorization has proved effective in enabling urban counties to reform the internal structure of their governments, often by establishing a separate executive branch headed by an independently elected county executive.¹⁷ But it has not proved effective in encouraging metropolitan reorganization through transfers of functions among local governments within counties.¹⁸ The natural political resistance to transfers involving a loss of power on the part of transferor governments (generally but not necessarily cities, towns and villages) or the assumption of additional costs on the part of transferee governments (generally counties) is powerfully supported by the split referendum requirement. In Niagara County, a proposed County Charter, which did not involve any explicit transfer but created new offices of county executive and county comptroller, was approved by a majority of the

voters of the county but defeated for lack of a separate majority in the towns, which apparently feared a more vigorous county government.¹⁹ In Erie County a 1968 proposal to consolidate police functions at the county level was approved by a majority of the voters of the county, but defeated for lack of a majority in the towns and villages.

The evolution of county governments into more comprehensive regional governments has been retarded by the lack of a general power to spend public funds for any public purpose,²⁰ by the decision of the 1938 Constitutional Convention to grant housing and urban renewal powers to cities, towns and villages, but not to counties,²¹ by the fiscal stress imposed on them by the state's decision to shift nearly half the cost of non-federal share of its public assistance and Medicaid programs to the county tax base (causing taxpayers in poorer counties to pay more than twice as much as those of the richer counties),²² and by the reluctance of suburban voters to accept a greater share of the public burdens of the larger regional community to which they belong. In recent years an additional source of resistance has emerged—the reluctance of African-Americans to dilute the hard-earned political clout they have gained in city government.

The State Legislature

Given the lack of effective local structures, responsibility for mitigating intra-regional disparities and for the articulation and the pursuit of regional interests has remained almost entirely with the state Legislature.²³ The Legislature has created transportation authorities, off-track betting corporations and the Adirondack Park Agency to function on a regional basis. It blundered badly, though, in authorizing the creation of industrial development agencies for towns, villages and cities, as well as counties, each with the power to exempt development projects not only from the taxes of its own municipal sponsor, but also from state, county and school district taxes, thereby promoting inter-municipal competition, unnecessary tax exemption giveaways, and suburban raiding of city business firms.²⁴

The Legislature has offset city-suburban fiscal disparities to a considerable extent by increasing state financial assistance to the central cities.²⁵ For example, consider the City of Buffalo and the adjacent Town of Amherst. State assistance now accounts for more than 30% of the city's revenues and less than 4% of the town's. The difference is still greater when one compares the city's School District and the town's Williamsville School District. State assistance accounts for almost 80% of the city district's revenues and less than 25% of the Williamsville district's.²⁶

In upstate New York, the Legislature has placed the financing of the local share of welfare functions on a re-

gional basis by transferring welfare functions to the county level.²⁷ And it has empowered county governments to take on additional functions, such as solid waste management and a variety of specific major public works projects (for example, sports arenas and convention centers).²⁸

Although the state has provided essential financial support, it has also imposed expensive mandates on local government. The most disruptive mandate has been in the state's public assistance and Medicaid programs, which impose close to one-half of the non-federal share on the counties and the City of New York. Because need tends to be inversely proportional to resources (the poorer counties have larger case loads and smaller tax bases), the effect is strongly regressive. Worse, welfare and Medicaid are open-ended entitlement programs, and costs have at times risen rapidly and unpredictably as the result of economic recession or increases in benefit levels and eligibility standards. In Erie County, from 1973 to 1976 Medicaid costs rose nearly 50%, aid to dependent children nearly 250%, and home relief more than 200%.²⁹ A similar jump in welfare and Medicaid costs occurred in the early 1980s. In both cases, and in other urban counties as well, the effect was to engender large deficits, tax increases, cuts in local services, and destructive political stress in county government.

Every year the big city mayors must lobby the governor and the Legislature for sufficient funds to balance their budgets and finance major development projects. Delay by the Legislature in adopting the state budget requires city governments to adopt their budgets and fix their real property tax levies before they know what their state assistance revenues will be. In the early 1990s, the state cut financial assistance in mid-year, after it had already been budgeted by the recipient local governments. As a result, the City of Buffalo incurred its first operating deficit in many years.

The restriction of the power of the Legislature to act by special law in relation to the property, affairs or government of a county, city, town or village³⁰ except upon a home rule message was derived from the 1923 City Home Rule Amendments, which had already been substantially nullified by a long line of decisions by the Court of Appeals declaring that in matters of concurrent state and local concern the Legislature is not restricted.³¹ The Court of Appeals has continued to find substantial state concern in almost every subject of state legislation.³² A recent decision of the Court of Appeals³³ emphasizing that the state concern must be substantial in order to escape the restriction seems to be too little, too late to affect more than the most marginal issues of state interference in local affairs. Whether by general or special law, local governments remain subject to expensive

and restrictive state mandates in their employment and contracting functions.³⁴

The Legislature has misused public authorities to circumvent constitutional limits on city debt. The constitutional provisions adopted in 1938 to protect the fiscal and political integrity of cities and other local governments from the diversion of revenues and functions to new public authorities³⁵ have been eviscerated by the Legislature with the acquiescence of the Court of Appeals, which, ignoring substance and looking only at form, has held that public authority debt is not to be considered municipal debt even though it is to be repaid from what in reality are municipal revenues, and even though the municipality has no real choice but to pay.³⁶ One of the 1938 amendments³⁷ was designed to protect cities against state legislation transferring a revenue producing function to a public authority, as experienced by the City of Buffalo in 1935 when the Legislature transferred control of the city sewer system to the newly created Buffalo Sewer Authority.³⁸ The amendment prohibits the creation of a public corporation with the power both to issue bonds and to collect charges from the owners or occupants of real estate for services formerly supplied by the city, except upon approval of the city's voters at referendum. The amendment has been circumvented to transfer the water systems of the cities of New York and Buffalo to public benefit corporations, without submitting the question to the voters, by the creation for each city of two corporations, both controlled by appointees of the mayor, one with the power to issue bonds, the other with the power to fix and collect the charges necessary to pay off the bonds.³⁹ In the case of Buffalo, the proceeds from the "sale" of its water system to one of the two public corporations were used to balance the city's operating budget.

The Federal Level

The U.S. Supreme Court's one person-one vote decisions⁴⁰ required reorganization of the county boards of supervisors, and thereby served as a stimulus to the modernization of upstate urban county governments, often under county charters providing for an independent executive branch.⁴¹ But coming at a time of a rapid shift of population from the cities to the suburbs, legislative reapportionment did not strengthen the cities, rather it served only to assure suburban dominance of the county governments.

The enormous development of federal regulatory and grant programs has done more to harm than to help the cities of our state. By subsidizing urban development, federal grant programs have accelerated the shift of people and jobs both to their own suburbs and to the Sun Belt. Categorical grant programs have distorted spending priorities (in favor, for example, of destructive urban renewal and highway projects), and federal regu-

lations and grant conditions have imposed expensive mandates. By enacting programs to address virtually every social problem to gain the attention of the national media, often with complex intergovernmental implementation schemes or with a commitment of merely token resources, and without any attempt to articulate general principles of inter-governmental allocation of responsibility, the federal government has contributed to a confusion of roles and a consequent dilution of political accountability at all levels of government.⁴²

The U.S. Supreme Court has recognized the value of local home rule in rejecting equal protection challenges to state decisions allocating legislative power and fiscal resources to municipal governments in a manner that perpetuates city-suburban disparities of wealth and class.⁴³ The Court has not, however, altered its view of municipal corporations as mere agencies of state government, without rights against their creator,⁴⁴ and municipal action has always been considered a form of state action so as to subject local governments to Fourteenth Amendment restrictions. At the same time, the Court has declined to extend to local government the benefit of either the states' exemption from § 1983 liability and federal antitrust laws, or the Court's recently expanded doctrine of state sovereign immunity under the Eleventh Amendment.⁴⁵ The result is that local governments have the worst of both worlds: on the one hand, they are characterized as mere agencies of state government, denying them rights against the state and subjecting them to Fourteenth Amendment restrictions; on the other hand, they do not share in the state government's exemptions and immunities from liability to private parties.

Prospects for Reform

Ideally, a thorough re-examination and sorting out of the respective roles of federal, state and local government would enhance political accountability and strengthen government at all levels.⁴⁶ That seems unlikely. The need of federal and state office holders, candidates and political party organizations to respond to public perceptions of societal issues of every kind, as articulated through the national news media, seems likely to prevent a radical shift of power to local government by means such as general revenue sharing formulas accounting for inequalities in wealth. And dominant suburban interests seem likely to block any wholesale reorganization at the metropolitan level.

Federal financial assistance, with strings attached, seems likely to continue to attract attention in national politics far out of proportion to its impact in improving the performance of local functions. The state will almost surely be required to continue to increase its level of financial assistance to the central cities. Although a certain degree of ad hoc, year-by-year assistance to meet

the occasional unpredictable crisis or to support major capital projects will be necessary, the state Legislature could strengthen fiscal and political accountability at both state and local levels by developing reliable revenue sharing formulas transmitting to local government part of its growing income tax revenues. Especially welcome would be an equitable formula for large-scale general revenue sharing adjusting for inequalities in local tax bases. The Legislature could also help by relieving local government of expensive mandates such as compulsory arbitration of collective bargaining disputes with police officers and firefighters, other onerous aspects of the Taylor Law, and the requirement of separate contracts for plumbing, HVAC and electrical work in construction projects.⁴⁷

The most promising prospect for reform is further evolution of county government in something approximating a two-tier system of local government, with the counties serving as the regional tier and the cities, towns and villages as the more local community tier. County governments continue to evolve, albeit slowly, as metropolitan governments in the urban regions of upstate New York. In Erie County, the county government has assumed important responsibilities for central police services and funding of cultural institutions and sports arenas; and through a sales tax agreement the county transfers a disproportionate share of county sales tax proceeds to its three cities. Water supply, sewage disposal, and solid waste management are obvious functions for county government.⁴⁷ There is no good reason for the state Legislature not to grant counties the same comprehensive spending powers it has conferred upon cities. If the state were to relieve county government of responsibility for almost half of the non-federal share of its public assistance and Medicaid programs, the counties would gain ample fiscal capacity to assume new regional responsibilities.⁴⁸

In principle, city, town and village industrial development agencies should be consolidated into county agencies, or at least the Legislature should restrict the power of a city, town or village agency to exempt projects from state, county, and school district taxes. Even modest reform of agency practices has been difficult, however.⁴⁹ At a minimum the Legislature should strengthen anti-pirating provisions, so as to stop the destructive practice of granting tax subsidies merely to induce business to move from one local municipality to another, with no gain to the region as a whole.⁵⁰

Under the influence of the current call for "smart growth" and intra-regional municipal cooperation, local governments may step up their cooperation in establishing regional land use and economic development policies and in providing services across municipal boundaries. It is difficult to believe, however, that the outer suburbs will agree to limit their own growth

in favor of the central cities and inner suburbs, or to accept a significantly greater share of regional costs and responsibilities. The counties now have extremely limited regional planning powers.⁵¹ They should be empowered to perform regional economic development and land use planning functions in an integrated two-tier system along the lines proposed by the American Law Institute's Model Land Development Code of 1975, but that will be difficult to achieve under current political conditions.

Political change is inherently unpredictable. Perhaps an unexpected reform movement will lead to significant change in the muddled role of local government that has evolved in the last fifty years. In view of the current political landscape, however, it is difficult to foresee anything but a continuing process of marginal changes at federal, state and local levels to mitigate the effects of metropolitan fragmentation and continuing movement of people and wealth from central city to suburban fringe.

1. United States Code, title 26 § 103 (U.S.C.) (repealed in 1986).
2. 26 U.S.C. §§ 141–150.
3. Treasury Regulations §§ 5c.103-1, 1.103-1–1.103-18.
4. See *Branti v. Finkel*, 445 U.S. 507 (1980).
5. See Richland, *Constitutional Home Rule Law in New York*, 55 Colum. L. Rev. 598, 610 (1955) Hyman, *Home Rule in New York, 1941-1965: Retrospect and Prospect*, 15 Buffalo L. Rev. 335 (1965).
6. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933).
7. See *Colegrove v. Green*, 328 U.S. 549 (1946), as discussed in *Baker v. Carr*, 369 U.S. 186 (1962).
8. Hyman, *supra* note 5, (quoting N.Y.S. Office for Local Government, Newsletter, No. 15, Sept. 18, 1963).
9. For an excellent analysis of the 1963 amendments and the background and issues of home rule in New York, see Hyman, *supra*, note 5.
10. See, e.g., *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349 (1987), *aff'd* 487 U.S. 1 (1988); *41 Kew Gardens Road Assocs. v. Tyburski*, 70 N.Y.2d 325, 520 N.Y.S.2d 544 (1987).
11. The requirement of approval at referendum for any shift of power among elected officers has been given broad effect by the Court of Appeals. *Morin v. Foster*, 45 N.Y.2d 287, 408 N.Y.S.2d 387 (1978).
12. Susan Schulman et al., *As Assets Shift, City Falls Short of Amherst*, Buffalo News, Oct. 8, 2000, at 1.
13. Article XVIII was added to the New York State Constitution in 1938 to confirm and broaden the powers of the state and cities, towns and villages—but not counties—to engage in housing and urban renewal activities. The N.Y. County Law lacks an equivalent to § 20 of the N.Y. General City Law, which grants cities comprehensive spending powers. But see *Informal Opinion of Attorney General* No. 1 92-4 (Feb. 6, 1992), to the effect that, by exercise of their power to enact local laws for the general welfare, counties may create their own spending and housing powers.
14. For example, Erie County was unable to finance sewer and industrial park projects in the City of Buffalo during the

- 1970s, even though the projects were expected to benefit the entire region.
15. *Rice v. Cayuga-Onondaga Healthcare Plan*, 190 A.D.2d 330, 599 N.Y.S.2d 344 (4th Dep't 1993).
16. This was sustained as against a one-person-one-vote challenge after a proposed county charter for Niagara County, creating new offices of County Executive and County Comptroller, had been approved by a majority of the voters of all of the county, but not those of towns alone. *Town of Lockport v. Citizens for Community Action at Local Level*, 430 U.S. 259 (1977).
17. As of 1986, 16 counties had adopted charters with an elective County Executive and two with an appointed manager or administrator. N.Y. Dep't of State, *Local Government Handbook*, 4th ed. 1987.
18. For a rare example of a successful, though minimal, transfer, see *Town of Smithtown v. Howell*, 31 N.Y.2d 365, 339 N.Y.S.2d 949 (1972).
19. See *supra* note 16.
20. See *supra* notes 13 and 14.
21. See *supra* note 13.
22. See *Toia v. Regan*, 54 A.D.2d 46, 387 N.Y.S.2d 309 (4th Dep't), *aff'd*, 40 N.Y.2d 837, 387 N.Y.S.2d 832 (1976), *appeal dismissed*, 429 U.S. 1082 (1977). In view of the subsequent state assumption of the Medicaid payment function and the decision of the Court of Appeals in *Foss v. City of Rochester*, 65 N.Y.2d 247, 491 N.Y.S.2d 128 (1985) and 66 N.Y.2d 872, 498 N.Y.S.2d 758 (1985), the state's Medicaid financing system could again be challenged under the equal protection clause of the state constitution as imposing different tax burdens based solely on geography.
23. For simplicity of reference, I use the term Legislature to include the Governor in his role as a leading participant in the state's budgeting and law making processes.
24. N.Y. General Municipal Law art. 18-A ("Gen. Mun. Law").
25. Whether it has done so to a sufficient degree is of course debatable. See *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643 (1982); *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995).
26. These are rough approximations based on the current municipal budgets, which are not strictly equivalent.
27. In the 1940s the State Legislature shifted public welfare and public health functions from the cities to the counties. When state Medicaid and mental health programs were developed in the 1960s in response to federal reimbursement incentives, the local components were naturally lodged in county government.
28. In 1970 the Legislature made solid waste management a permissive county function (County Law § 226-b), enabling Monroe County, for example, to create a regional program. See *Riley v. County of Monroe*, 43 N.Y.2d 144, 400 N.Y.S.2d 801 (1977).
29. See *Toia v. Regan*, 54 A.D.2d 46, 387 N.Y.S.2d 309 (4th Dep't), *aff'd*, 40 N.Y.2d 837, 387 N.Y.S.2d 832 (1976), *appeal dismissed*, 429 U.S. 1082 (1977).
30. N.Y. Const. Art. IX, § 2(c).
31. See *Adler v. Deegan*, 251 N.Y. 467 (1929).
32. See, e.g., *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85, 428 N.Y.S.2d 197 (1980); *Kelley v. McGee*, 57 N.Y.2d 522, 457 N.Y.S.2d 434 (1982). See Richland, *supra*, note 5, Hyman, *supra*, note 5.
33. *City of New York v. Patrolmen's Benevolent Ass'n*, 89 N.Y.2d 380, 654 N.Y.S.2d 85 (1996).
34. See *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 371 N.Y.S.2d 404 (1975); *Building Contractors Ass'n v. State*, 218 A.D.2d 722, 630 N.Y.S.2d 763 (2d Dep't 1995). In *Board of Educ. v. Buffalo Teachers Fed'n*, 89 N.Y.2d 370, 653 N.Y.S.2d

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Substantive and Procedural Laws Have Undergone Fundamental Change

BY FRANCIS T. CARR

Fifty years is virtually the entire time since I graduated from law school, when I joined one firm and stayed there until retirement. My first recollection is the amount I was paid for my efforts. Jobs were hard to come by, and after a series of detailed interviews, I went on vacation (the first I had since beginning law school). Before I could unpack, I received a telegram advising me that I was offered a position at \$3,600 per year and if this was acceptable, I should report to the office on the following day.

One might say that the amount of money paid was a function of the nature of our practice. My offer had come from a highly renowned patent law firm in New York City, but patent law was then considered rather a backwater practice. However, I was also offered a job by a large general firm, at the same salary.

Attitude Toward Intellectual Property

I started the practice of patent law in an atmosphere of mixed indifference and hostility toward patent rights. A patent was viewed as a monopolistic intrusion upon free market competition. Patents were regularly held to be invalid by the federal courts. The standards of patentability were cast to be impossibly high.

Certain Supreme Court justices did little to mask their antagonism to the entire patent system. Any efforts by a patent owner to exploit patent rights, particularly by licensing, were scrutinized relentlessly for potential antitrust violations and for acts which were termed to be “patent misuse.” Patents weren’t worth much.

To say that there has been a startling reversal of this attitude is hardly an exaggeration. Intellectual property rights today are regarded as a major company asset. In a typical merger or acquisition, the scope and value of a company’s patents and exposure to the patent rights of other companies are matters of concern which are carefully evaluated. Damage awards in patent litigation can be staggeringly excessive. Patent licenses abound and royalty rates are often very different from the 1% to 5% rates of the 1950s and 1960s. The scrutiny of patent licenses for antitrust violations or patent misuse has largely fallen by the wayside.

The Applicable Law

Substantive and procedural statutory and decisional laws that are second nature to IP practitioners today

were on the threshold when I began my practice. All practitioners in the federal courts were still struggling to become acquainted with the nuances and potentialities of the Federal Rules of Civil Procedure.

For patent lawyers there was an even more fundamental innovation, namely the patent statute of 1952¹ which represented the most significant overhaul of statutory U.S. patent law in more than 100 years and which, albeit with some major revision and amendment, remains the governing patent statute to this day. In the year 2000, every significant paragraph of this statute has been interpreted and reinterpreted many times over, but in the 1950s it was often a blank tablet. Case law was also being restated. In 1950 the U.S. Supreme Court decided *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*,² a decision that was to govern the application of the all-important “doctrine of equivalence” in determining whether a patent is infringed, for the next 47 years throughout my practice until 1997 when the Supreme Court again visited that issue in the *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*,³ case.

Jury Trials

In the 1950s, jury trials were virtually unheard of in patent cases. It was known then that jury trials produced the potential of large verdicts, but there was a suspicion—strong enough to be a conviction—that juries were incapable of understanding the issues involved in patent cases, and that this could lead to zany verdicts that would not stand up on appeal.

At the outset, the cases began with verdicts that did not seem to accord with the merits. There was no breakthrough, but the Court of Appeals consistently affirmed the decisions. Finally, one very large jury verdict came down; it seemed to swing the attention of all trial lawyers toward juries for patent cases, which are now common.

FRANCIS T. CARR, a registered patent attorney with the U.S. Patent and Trademark Office, recently retired as counsel at Kenyon & Kenyon in New York City. He has conducted major patent litigations in cases that involved high polymers and catalysts, instant photography, explosives, chemical structures and electronics. He is a graduate of Lehigh University and received his LL.B from the University of Virginia School of Law.

The Court of Appeals for the Federal Circuit

In 1982, a major change was made in the judicial system when the new Court of Appeals for the Federal Circuit was established in Washington, D.C., and given exclusive jurisdiction over all patent appeals. Before its creation, appeals from District Court decisions in patent cases, as in all others, were heard by the appropriate geographic Circuit Court of Appeals. Different Circuit Courts had sharply divergent views on many substantive issues of patent law and forum shopping was very much the indoor sport of patent litigators. Now the Federal Circuit is virtually the last word in patent cases, because appeal from its decisions is only to the U.S. Supreme Court, which only rarely hears such appeals. Although there is some disagreement among patent lawyers about the effects of the creation of this new court, the majority of lawyers in practice believe that it set the stage for a re-awakening of the patent system.

Computers

The next big change over the last fifty years has been the use of computers. The firm I joined had established an elaborate system for retrieving cases. This system required that every case, as it was issued be reduced to a paragraph. This paragraph was linked to thousands of other such paragraphs, and the collection was then subjected to an elaborate indexing system enabling one to go into the collection and retrieve cases of interest.

When the federal West System and the United States Patent Quarterly arrived on the scene, our digest fell into disuse. I confess that I don't know what happened to all of the cards and filing cabinets used in the system. I do know something of its demise, however. One day, a firm meeting was called in the conference room. Before anything else happened and while it was quiet in the room, I was heard to proclaim that the old digest should be jettisoned. At that, the senior partner announced the death of the person who originated the system, a person who happened to be the senior partner's sister.

The good plain paper copiers enabled some partners to avoid the library completely; cases of interest could be copied and brought to them. This development by Haloid, now Xerox, in replacement of the cumbersome photographic copying may have been the precursor of the desktop research so common with computers today.

Years ago, libraries were a fundamental part of a lawyer's practice. The young lawyer was weaned on the library and learned the intricacies of patent law by reading decisions; in fact law schools had mandatory courses on library science. First-year lawyers spent 100% of their time in the library, and then as time wore on they spent less time there. The library itself could be a relatively dark and forbidding place, devoid of air conditioning. As time wore on, libraries were improved, air conditioned and made more attractive, and sup-

The majority of lawyers in practice believe that the creation of the Court of Appeals for the Federal Circuit set the stage for a re-awakening of the patent system.

ported by a staff of professional librarians. Thank goodness they remain at least a part of a young lawyer's experience.

Generalists as Patent Lawyers

Early on, general lawyers developed an interest in intellectual property. I was a chemical engineering graduate with a law degree. I was advised by the hiring partner of the general firm that it had a new matter—a plant explosion—on which I could be of assistance, not to use my own expertise, but to talk to the experts hired to advise in the matter. It seemed that the general lawyers were having difficulty in communicating with the technical experts. In that regard not much has changed.

For the first 30 years of my practice, it was virtually unheard of for a general practice law firm to attempt a patent litigation. Nowadays however, IP law is a hot number, a growth industry in which general practice firms are eager to participate.

The trial counsel who obtained the jury verdict I referred to above moved to a general law firm where he headed a section of lawyers seeking to handle intellectual property matters. That movement is not unusual now in the sense that general law firms have been attempting to pick up promising patent lawyers, not just individually but as a group, and to form them into an intellectual property section.

As for general lawyers practicing patent law, I have my doubts. The intellectual property field is broader than just patents—it includes all industrial property, such as trademarks, copyrights, and the like. However readily a lawyer with general experience can learn to handle trademarks and copyrights, the technology now represented by computers, pharmacology and biotechnology, and the practical and legal aspect of handling it, is not quickly learned. Certainly firms devoted solely to intellectual property are prospering, notwithstanding the newcomers to the field. It will be interesting to see how the practice is formed in the coming years.

1. 35 U.S.C. §§ 1-376.

2. 336 U.S. 271 (1949).

3. 520 U.S. 17 (1997).

Difficulties Early in the Century Gave Way to Present Openness

BY EDITH I. SPIVACK

I am often asked what it was like for a woman to practice law in the 1930s. The difficulties bear telling so that the advantages women have brought to the law and the profession's present openness can be fully appreciated.

My own experience was no different from that of other educated women coming of age at a time when our opportunities were so limited. Until I was in the fifth grade of elementary school, I planned to be a teacher. The profession of schoolteacher was highly regarded and considered an appropriate career for a woman. Working hours, holidays and vacation time all followed school schedules, making it possible to have the domestic life considered suitable for a woman.

In the fifth grade, my career plan changed. My teacher, (Ms. Bigelow, maiden lady who wore a long black skirt, stiff white shirt and piled her hair on top of her head) spoke with me about my career plans. She advised against teaching, calling it an unrewarding profession and suggesting that I pursue a more exciting and stimulating career. My mother had often spoken with high praise about lawyers she had met at the Educational Alliance, an organization on the Lower East Side that she had attended as a young girl. And so, I decided that if I was not going to be a teacher, I would be a lawyer. From that point on, everything I undertook was directed toward that goal. My next four years were spent at Hunter High School from which I graduated with honors. After winning a Regents' Scholarship that provided \$300 a year for tuition (15 credits at \$10 a credit), I applied to Barnard College and was accepted.

For law school, however, I could not anticipate my financial support, and, in 1925, Yale was the only top-ranking law school in our area that accepted women. But with tuition and living expenses, Yale was an impossible dream. There were two-hour-a-day law schools in New York City that accepted women. However, the women graduates of those schools, by and large, did not practice professionally but became legal secretaries. This was not what I wanted. Fortunately, Columbia Law School opened up for women in 1927. The story of how this finally came about was told by Professor Milton Handler of the law school at the 1997 Stone Agers' (alumni/ae over 65 years) luncheon.

A Barnard graduate, Class of 1927, with an excellent scholastic record, applied for and was denied admission to the law school, but did not accept defeat. Instead, she checked into the history of the university and learned that the original King George Grant, which created the university, specifically provided that anyone who earned a degree at any of its undergraduate schools was automatically eligible for admission to any one of its graduate schools. She applied again, this time after submitting the cater. The faculty concluded that she was right and could no longer be denied admission. Even so, the law school imposed one additional requirement, namely, that female applicants pass a legal aptitude test.

Four women were admitted in 1927, all of whom finished with credible records. In 1928, six entered. Only two graduated, one of whom made the Law Review. In September 1929, my class entered with 12, but, as I recall, only six graduated.

I do not remember the women in my class experiencing any discrimination from either the faculty or the



EDITH L. SPIVACK is executive assistant corporation counsel *emerita* in the Office of the Corporation Counsel of the City of New York, where she began as a volunteer in 1934. She graduated from Barnard College in 1929 and from Columbia University School of Law in 1932, which awarded her its Medal for Excellence in 1988. During her professional career she has received a honorary doctor of laws degree from St. John's University School of Law, the New York County Lawyers Association's William Nelson Cromwell Award, an award for "Outstanding Public Service" from the Fund for the City of New York Public Service, and the City of New York Citation for "Distinguished and Exceptional Service." She wishes to thank Ned Parker for his assistance with this article.

male students. That we were not unfavorably received is, perhaps, best evidenced by the several marriages and many close friendships that resulted.

At the end of September 1929, the stock market, which had boomed all through the decade, took a downturn. In October, one month later, the stock market crashed, ushering in the Great Depression. Some students, both male and female, were forced to drop out; some transferred over to the less expensive two-hour-a-day law schools, enabling them to work at the same time, and some were forced to give up the idea of becoming lawyers altogether. Jobs in any area were hard to come by. Unlike today, law firms did not hire law students for the summer, or pay lavish sums in hopes of retaining them after they graduated. I earned money for tuition (still \$10 a credit), by continuing to work as (a) a camp counselor in the summer months, (b) as a clerk for the College Entrance Examination Board, assigned to assist out-of-town faculty members assembled at Columbia College for correcting college entrance tests; and (c) as a saleslady during the Christmas and Easter holidays, selling stockings and pocketbooks at Shoecraft's, a fancy shoe store.

Graduation came at the end of May 1932. To be admitted to the bar, it was necessary to serve a clerkship for six months before applying to the Character Committee for approval. The application for the committee required letters attesting to good character, at least one of which had to be from someone personally known to a member of the committee.

To find a clerkship in June 1932 was no easy task. Apart from reduced hiring due to the adverse effects of the Depression, law firms were based on religious lines and very few employed women. Women who were fortunate enough to have legal jobs were generally assigned to the trusts and estates area, where they did not have contact with the clients. I cannot recall any woman lawyer being involved in the hiring process at any firm. The circulation of resumes was not the custom, and it was exceedingly difficult to get interviews.

I went to see every lawyer whose name was suggested to me, and even took the chance of knocking on the doors of some I did not know. All to no avail. The interviewer would tell me how he would like to hire me but his partners were opposed to hiring women. At the end of June, discouraged by not even the prospect of a job, I returned to my camp counselor position.

In mid-July, James P. Gifford, the assistant dean at the law school, called to say that he had found an alumnus who was willing to take on a female law clerk. I came home from camp and was interviewed along with two other women from my class. I was chosen with the understanding that I would start after the camp season. My duties as a clerk were the usual: filing papers in county clerks' offices, answering court calendars and taking care of what was then called "sup-pros," *i.e.*, ex-

aming defendants to ascertain whether assets were available for the payment of judgments. One of my classmates, who, after several months of looking, obtained a position with a small firm, had the additional task of buying cigarettes and coffee for the male members of the office, a task that she understandably hated.

In February 1933, my six-month clerkship was completed. I submitted the necessary papers and, in March, was called to appear before the Character Committee. The member before whom I appeared asked as his first question: "Are you a secretary?" Not only had I carefully avoided any connection with secretarial work (and I mean in no way to denigrate it), but I thought the question was colored by sexism, particularly since male applicants were never asked such questions. Already upset, I faced still another hurdle. I was asked to give the facts and holding in a case with the specific names of all the parties involved. By this time I was so nervous and unsettled that I resorted to *Marbury v. Madison*, the only case in which I could recall the specific names at that moment. Although I had never so much as walked on the grass where there was a "keep off" sign, I was sure I had flunked the Character Committee. I walked from the 26th Street courthouse to my home at West 99th Street crying all the way. But my mother, to whom I related my experience, assured me that I had passed.

I was "sworn in" on April 10, 1933. I continued at the same law firm, but my salary was increased from \$10 to \$20 per week. Now, in addition to my other chores, I was assigned to trials in the Municipal Court, then the lowest of the civil courts, with jurisdiction up to \$1,000.

Not to appear differently from the male lawyers, whenever I went to court, even when I was only answering the calendar, I removed my hat. While today it is considered almost obligatory for a woman to wear a suit in any professional activity, in those years when air-conditioning was not common, modest dress was equally acceptable. Women who dressed in strictly manish attire were often subjected to demeaning comments. I also recall that a woman lawyer who refused to follow the established practice of removing her hat in a courtroom was held in contempt by the court. I followed the customs and carefully avoided doing anything different to attract attention. As a result, I think I was well treated by the court staff and even by judges who were considered "tough."

In December 1933, I was married. When I returned from my honeymoon, my employer told me that, although my work was excellent, he did not want to employ a married woman. Her place was home and her duty was to raise a family. He firmly believed that a married woman was the chattel of her husband and had no independent rights.

In 1934 with the Depression in full swing, I started once more on the job rounds with no luck. At one point,

I thought about abandoning law altogether and applying to Macy's Training Squad to become a buyer. I appeared for an appointment but, before I could be interviewed, I walked out. I could not give up the law.

Through a chance meeting with a classmate, I learned that Justine Wise Tulin (later Polier) had been appointed to head the Workmen's (now Workers') Compensation Division in the corporation counsel's office. I went to see her, though I had never met her, and volunteered to work with her. She accepted my offer, making it clear that she could not promise me a job. This did not bother me. Besides, not wanting to be idle or to keep looking for work, I believed that Workmen's Compensation Law served the public interest. In July, on Justine's recommendation, I was appointed an assistant corporation counsel.

In 1934, the salary for an assistant was fixed at \$3,500 a year. Because that was considered an excessive sum for one who was out of law school for a year and a half, the salary was divided between a young male lawyer, also a recent graduate, and me. However, the division was not even: \$1,800 for him, \$1,700 for me. Also, while male assistants received increases almost annually, my \$1,700 remained the same for about six years. The reason given for my different treatment was that I had a husband to support me.

With the passing of years, salaries in the office became attached to positions, and sex and marital status were less and less significant.

In the 1930s, government service provided the best

opportunities for women. Sick leave and vacation time were more generous than in the private sector. While there was no pregnancy leave, it was possible to arrange for some coverage by saving up sick leave and vacation days. Another advantage was that a woman could be secure in the knowledge that she could have a job to return to.

Yet, despite these advantages, the public sector was still not perfect. Once a woman became noticeably pregnant, it was tacitly understood that she would not come to the office. Depriving an expectant mother of her salary was so unfair. A pregnant woman's need for money was, at least, the same, if not greater than before.

When I became pregnant with my first child, I asked to be relieved of trying compensation cases at the Labor Department, but to continue to work in a different capacity in the office. The male head of my division reacted as if I was asking for special favors for which continued payment of the same salary would be unwarranted. That I worked as hard as I did before I changed my duties did not prevent him from making me feel as though I was taking unfair advantage.

Although women continued to enter the profession during the 1930s, the number did not significantly grow until the World War II years, when the draft reduced the availability of males. Thereafter, as the numbers continued to increase and the competency of women to practice law became a well-established fact, the 1930s comment, "My partners will not hire a woman," became history and was never to be heard again.

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- 250 (1996), a bad faith error by its bargaining representative was held by the Court of Appeals to bind the Buffalo Board of Education to a collective bargaining contract proposal that had not been approved by the Board. This will cost the taxpayers \$62.8 million (funded in part by the state) to settle back wages claims.
35. N.Y. Const. art. VIII, § 3, art. X, § 5.
 36. See *Robertson v. Zimmerman*, 268 N.Y. 52 (1935); *Comereski v. City of Elmira*, 308 N.Y. 248 (1955); *Wein v. City of New York*, 36 N.Y.2d 610, 370 N.Y.S.2d 550 (1975); *Metropolitan Transp. Auth. v. County of Nassau*, 28 N.Y.2d 385, 322 N.Y.S.2d 228 (1971); cf., *Schulz v. State*, 84 N.Y.2d 231, 616 N.Y.S.2d 343 (1994).
 37. N.Y. Const. art. X, § 5.
 38. See *Robertson*, 268 N.Y. 52.
 39. See N.Y. Public Authorities Law §§ 1045-a—1045-bb, §§ 1048-a—1049; *Giuliani v. Hevesi*, 90 N.Y.2d 27, 659 N.Y.S.2d 159 (1997).
 40. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968); *Abate v. Mundt*, 403 U.S. 182 (1971).
 41. See *supra* note 17.
 42. See Advisory Commission on Intergovernment Relations, *The Federal Role in the Federal System: The Dynamics of Growth* (10 volumes) (1980-82); Advisory Commission on Intergovernment Relations, *Regulatory Federalism: Policy, Process, Impact and Reform* (1984).
 43. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Town of*

- Lockport v. Citizens for Community Action at Local Level*, 430 U.S. 259 (1977); See also Briffault, *Our Localism*, 90 Colum. L. Rev. 1346 (1990).
44. See Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980).
 45. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Alden v. Maine*, 527 U.S. 706 (1999).
 46. The former Advisory Commission on Intergovernmental Relations provided in-depth empirical and theoretical studies and recommendations to that end. See the Reports cited at note 42, *supra*. For an outstanding analysis, see Alice M. Rivlin, *Reviving the American Dream: The Economy, the States and the Federal Government* (1992).
 47. See *supra* note 33.
 48. Public assistance and Medicaid expenditures account for about half of the counties' tax revenues.
 49. A modest reform package was enacted in 1993 (1993 N.Y. Laws ch. 356) with sunset provisions which were extended in 1997 and 1999 pursuant to compromises between proponents of further reform and proponents of expansion of agency powers (1997 N.Y. Laws ch. 444; 1999 N.Y. Laws ch. 444).
 50. See *Main Seneca Corp. v. Town of Amherst Indus. Dev. Agency*, 248 A.D.2d 930, 670 N.Y.S.2d 279 (4th Dep't 1998). I represented the petitioners in that litigation.
 51. Gen. Mun. Law art. 12-B. Cf. *Town of Smithtown v. Howell*, 31 N.Y.2d 365, 339 N.Y.S.2d 949 (1972).

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