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PROBLEM-SOLVING COURTS PROVIDE NEW APPROACHES

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Shown on the cover with Judge Alex Calabrese (foreground) are (from left) "Team Red Hook" members Sandra Martin-Smith, clerk of the court; Cathy Savage, senior court clerk; Sean Egan, lieutenant; Leroy Davis, court officer; Mirna Mompelas, court attorney; Xiomara Hinestroza, court officer; and James Dolinger, senior court clerk.

Photograph by Steve Hart *Cover Design by Lori Herzing*

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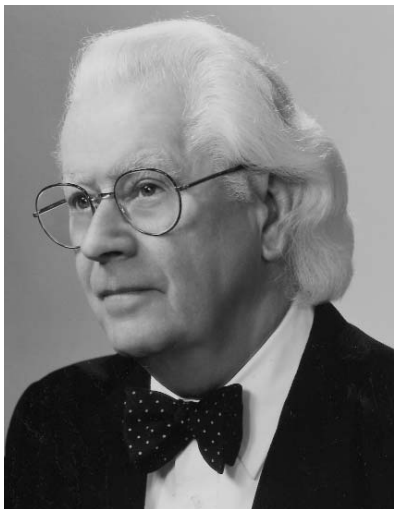
President's Message



Paul Michael Hassett

Justice: Not a Matter of Opinion

I was sitting in the window at the Bar Center in Albany on February 25th, the day that four New York City Police Officers were acquitted in what has come to be known as the "Amadou Diallo Case." We had watched throughout the day while security precautions were heightened as a verdict grew near. When it was apparent that the jurors had reached a verdict, their return to the courtroom was delayed to give the police sufficient time to prepare for the expected reaction in the streets of Mr. Diallo's Bronx neighborhood.

As I reflected further in preparing this message, young Elian Gonzalez was forcibly removed from the custody of his mother's relatives and returned to the arms of his father in Washington.

Both of these events have generated considerable reaction. There are those who believe that the Amadou Diallo killing was the result of systemic racism in the New York City Police Department on the one hand, and those who believe that the police officers were justified in their reaction to what they believed was happening that evening on the other. The Cuban-American community in Miami and its supporters elsewhere saw serious political overtones to the unfortunate saga of this young boy when others believed that his return to the custody of his father could not justifiably be delayed any longer.

That large numbers of people should have strongly held positions on either side of very publicized legal problems is neither surprising nor disturbing. What is disturbing, however, is the length to which many of our citizens were willing to go to insure that the result of each of these events coincided with their version of justice. Civil rights leaders and others so incited the emotions of Bronx residents that the Appellate Division found it necessary to change venue of the trial to Albany County. There were repeated suggestions, some by very public figures, that Mr. Diallo was "murdered" many months before the trial even began. Others suggested that all police officers were at risk if these four were not acquitted, again before the jury heard all of the evidence. Throughout the trial itself, demonstrators paraded and chanted in Albany, so loudly at times that the trial judge restricted them to positions away from the immediate area of the courthouse. In Miami, prominent members of the Cuban-American community threatened to shut down the Port of Miami and to cause such congestion on the streets of the city that its commercial life would be halted. The news media reported that a sign carried in a convoy of supporters of the young boy's Miami relatives bore the legend: "Are you ready for another Waco? We are."

And to what end? Although their feelings are obviously strongly held and emotionally charged, do those who lead and participate in these public demonstrations really believe that the processes in question, the deliberations of the jury in the criminal trial in Albany and the judgment of the U.S. attorney general and review of that judgment by the courts in the Gonzalez matter, can be, or more importantly should be, influenced by their actions? Do they really believe that the number of the demonstrators and the volume of their chants can cause a jury to convict an accused of a crime when the evidence suggests otherwise? Do they believe that their number and their volume should influence a public official or a court to reach conclusions contrary to established law and precedent? Sadly, it seems that they do. There seems to be support for their expectation in the national news media, which publish daily polls reporting the number of Americans who support one side or other of these very public controversies. Leaving aside for the moment the issue of whether those being polled have sufficient knowledge of the actual facts on which to base an opinion, are we suggesting that these important decisions affecting the very lives of those involved should somehow be influenced by the numbers of those who line up on either side of the issue?

Lawyers believe fervently in the rule of law, the expectation that 200 years of statutory and decisional law will provide a framework for decisionmaking not subject to the vagaries of a particular case. We believe that the principle of *stare decisis* will allow all of our citizens to have confidence that our government is truly a government of law and that results are predictable, regardless of their popularity. In her report to the House of

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Delegates in April, Ellen Lieberman, chair of the Special Committee on Public Trust and Confidence in the Legal System, said: "Our legal system underlies the operation of our democratic government, the protection of our civil rights and liberties, and the effective functioning of our entire economic system."

But the very existence of a committee on public trust and confidence, an outgrowth of a national symposium on the subject last year, suggests that not all believe so confidently in the rule of law. In a recent article in the Albany *Times Union*, columnist Fred LeBrun quoted the response of the head of Albany's Law & Justice Center when he asked her if she thought the four accused officers in the Diallo case could get a fair trial. "Of course they'll get a fair trial," she said. "I have no doubt that will happen. The real question is, though, will there be justice?"[1] Most lawyers believe that a fair trial guarantees that justice will be done and that the process that has developed throughout our history is the essential foundation of a just government, even when the result may appear erroneous—unjust—to large numbers of people.

As Fred LeBrun concluded in his thoughtful article: "There in a nutshell is the dilemma that faces us. . . . For some—perhaps many—the fundamental fairness of the process . . . will all be forgotten or trivialized if the verdict isn't what they want. Justice is in the eye of the beholder."[2] And Ellen Lieberman expressed her concern as well: "But if those who should be using the legal system lack confidence in its fairness, in its ability to deliver justice in a timely way, in their ability to have access to that system, the appropriate and effective operation of the system is clearly impaired."

These two very publicized and very polarized cases have crystallized the conflict between these two views. Those who believe in the rule of law are presumably comfortable with the result in a particular case if the process has been fair. And those who lack confidence in the role of the judicial system in American society judge the fairness of the system by the result. The problem, of course, is that regardless of whether the result in a particular case is a just one is a purely subjective inquiry. On the other hand, those who rely on the fairness of the process can evaluate it with some objectivity.

Our continuing analysis of the problem of trust and confidence in the judicial system is not purely an academic one. For any system of law to survive, at least in a democratic society, it must enjoy the voluntary compliance of an overwhelming number of its citizens. Only in a totalitarian society can the government insure enforcement of the law by police power and then only by risking the loss of liberty of its citizens.

Is the conflict resolvable? And if it is, what can we as lawyers do to help resolve it? In his Law Day speech at the Court of Appeals, Attorney General Eliot Spitzer expressed the sentiment that courts should not "temper the zeal" with which they address controversial issues for fear of eroding public support. He said: "As contentious issues are resolved in court, there are bound to be times where court action sparks controversy, protest and dissent. It is my firm belief, however, that when courts display their ability to adjudicate in a decisive, efficient and thoughtful manner, public confidence in the judiciary will only grow." If we as lawyers spoke out frequently and consistently on the essential necessity for a predictable system of justice, one which cannot and should not be influenced by the voices of those who demonstrate, would it have any effect? Can we reinforce Attorney General Spitzer's conclusion that by the skillful exercise of judicial power "people are assured that the rule of law is not created haphazardly, or in an ivory tower, but by citizen judges who understand the human condition and the important issues in our lives." We, as members of the legal profession, are the repository of the rule of law and its most eloquent advocates. It is our responsibility to ourselves and to the nation to do all we can to convince all Americans that it deserves their confidence.

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1. Fred LeBrun, *Diallo Jury Can Reflect Our Divisions*, Times Union (Albany, NY), Feb. 21, 2000, at B1.
2. *Id.*

New York's Problem-Solving Courts Provide Meaningful Alternatives To Traditional Remedies

By Susan K. Knipps and Greg Berman

Across New York State, a new crop of specialized courts—community courts, drug treatment courts and domestic violence courts—are testing innovative ways to deliver justice. Their objective is to provide more lasting and meaningful resolutions for thousands of difficult cases that pass each year through the courthouses in New York State.

The conditions that have given rise to these new tribunals—often generically called "problem-solving courts"—are not hard to identify. In recent decades, the state courts have increasingly become the public institution of choice for dealing with numerous social problems: drug-fueled crime, family dysfunction, repeated petty assaults against property and social order in urban communities. Not surprisingly, traditional litigation approaches can yield distinctly unsatisfactory outcomes when applied to these non-traditional issues. The signs of systemic failure are all too familiar: drug abusers who cycle through the criminal justice system again and again, batterers who resume their domestic abuse shortly after leaving the courthouse, minor offenders who repeatedly erode the quality of life in distressed urban neighborhoods.

Rather than lamenting that these cases don't fit the mold, problem-solving courts seek to change the mold. By taking a step back, examining the results that courts are actually achieving, and asking, "Isn't there a better way to do this?" the problem-solving courts seek to improve case outcomes for parties and systemic outcomes for the community at large.

An overview of the three types of problem-solving courts currently in operation in New York State follows.

Community Courts

The Unified Court System's first foray into problem-solving jurisprudence was the Midtown Community Court, located on West 54th Street in the heart of Manhattan. Opened in October 1993, the Midtown Court was designed to address the high volume of low-level crime—prostitution, shoplifting, minor drug possession and other petty offenses—that was degrading the quality of life for residents and businesses in midtown Manhattan.

In an overburdened criminal justice system, minor offenses always compete with more serious matters for resources and attention. In New York City, severe caseload pressures meant that nearly half of all misdemeanor cases were resolved without any formal sanction beyond "time served." While such outcomes may be administratively understandable, they can have devastating social side effects. If the justice system is viewed as a revolving door for petty offenders, citizens may see little point to reporting low-level crime, police may view enforcement efforts as futile, and offenders themselves may perceive little downside to repeat offending. Over time, the downward spiral accelerates.

The Midtown initiative set as its goal the development of a court that would respond to low-level crime fairly, visibly, and in a manner that was meaningful to victims, defendants and the community. Rather than just process cases, the Midtown court would use its legal authority to help restore distressed neighborhoods and promote lawful behavior.

Sanctions at the Midtown Court tend to combine punishment and help. Offenders are sentenced to perform public restitution projects—cleaning up local parks, painting over graffiti, sweeping neighborhood streets. In an effort to help solve the problems that often lead to criminal behavior, the Midtown judge may also link offenders to drug treatment, job training, health care and other social services. At many courts, a referral to services is a name on a slip of paper or an appointment with an agency across town. At Midtown, services are offered on-site, just a few floors above the courtroom. On an average day, the court's social service center bustles with defendants participating in GED classes, AA groups and individual counseling sessions.

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The uniqueness of the Midtown model goes beyond what the judge does on the bench. The court has become the hub for an array of programs that address quality-of-life issues in the community—everything from mediation of neighborhood disputes to street outreach programs for the homeless. The court has also pioneered new ways to get citizens involved in the court process, convening advisory boards, town hall meetings and "impact panels" that allow residents to confront offenders in facilitated conversations and bring home the community consequences of petty crime.

The results of the Midtown experiment have been promising. According to independent evaluators at the National Center for State Courts, the Midtown Community Court has helped reduce local crime, improve compliance with alternative sanctions and enhance public confidence in courts.

Results like these have not gone unnoticed. Across the country, more than two dozen replications of Midtown are currently planned or in operation. And closer to home, three new community courts—in Harlem, Hempstead, Long Island and Red Hook, Brooklyn—are in various stages of development, each testing new ways to bring courts and communities closer together.

Drug Treatment Courts

The impact of drugs on the criminal justice system is staggering. Three-quarters of the defendants in urban areas test positive for drugs at the time of arrest. Nearly half of all prison commitments in New York State are for drug offenses. More than half of drug offenders placed on probation or parole recidivate within three years.

Members of the Red Hook Public Safety Corps and community members painted over graffiti on the side of a supermarket in Brooklyn during Red Hook Graffiti Removal Day.

New York's drug treatment courts are a response to these statistics. Modeled on the groundbreaking drug court developed in Dade County, Florida, in the late 1980s, New York's treatment courts offer non-violent, drug-addicted offenders the opportunity to earn dismissal of their charges through completion of a court-ordered program of drug treatment. From a handful of experiments established in the mid-1990s in Brooklyn, Buffalo and Rochester, New York's drug treatment court network has steadily expanded, with more than 30 treatment courts expected to be up and running across the state by the end of next year.

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Judicial Roundtable

Reflections of Problem-Court Justices

During its annual judicial seminar at the end of 1999, the Unified Court System convened a roundtable of problem-solving judges to discuss how their courts operate and how they affect the roles that judges play inside and outside the courtroom.

John Feinblatt, director of the Center for Court Innovation, moderated the panel. The participants were Jo Ann Ferdinand, presiding judge of the Brooklyn Treatment Court; Judy Harris Kluger, administrative judge for the New York City Criminal Court and a former judge of the Midtown Community Court; John Leventhal, presiding judge of the Brooklyn Domestic Violence Court; Rosalyn Richter, an acting Supreme Court justice and a former judge of the Midtown Community Court; and Joseph Valentino, presiding judge of the Rochester Drug Court.

Contrast With Traditional Courts

JOHN FEINBLATT: Each of you has presided over both traditional courts and problem-solving courts. What's the difference?

JUDGE FERDINAND: Problem-solving courts broaden their scope and deal with the larger issues—for example, the problem of addiction that often leads to crime. They take the approach that courts should address people's underlying problems and that judges have an important role to play in that. And problem-solving courts allow judges to develop a substantive expertise in a particular area. When I was in Criminal Court, I used to give defendants one chance at drug treatment, and if they messed up, I would give them a harsher sentence or disposition. But since presiding at the Brooklyn Treat-

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Problem-Solving Courts

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Unlike traditional courts, the drug treatment courts shift the focus of proceedings from adjudicating past facts to changing future behavior—specifically, to the promotion of defendant sobriety through rigorous judicial monitoring of drug treatment. Treatment court judges play an active role in defendants' recovery process, imposing sanctions when program requirements are violated, dispensing rewards when treatment goals are reached. Because of the reduced emphasis on litigation, many practitioners describe proceedings in these courts as distinctly less adversarial, with the prosecution and defense both working toward the same goal of defendant sobriety.

When that goal is achieved, everybody wins: the community is safer, the defendant has improved life prospects and the justice system has one fewer future recidivist to process. All this, at a fraction of the cost of incarceration. National research has shown that drug court participants have much lower drug use rates, drug court graduates have much lower re-arrest rates, and the long-term savings to the system are substantial.

But the numbers tell only part of the story. New York's drug treatment courts actually change lives. One visit to a treatment court "graduation"—a courtroom ceremony to celebrate defendants' successful completion of treatment—provides a powerful insight into the human dimension of these programs.

Although the assembled graduates may lack caps and gowns, the sense of hard-earned achievement is no different from any other commencement exercise. "I had spent every day stealing for the money to buy drugs, and every free minute getting high," one Rochester graduate recounted at a recent graduation event. "I got caught numerous times, but still I couldn't stop. I had no support system, and no incentive to stop. Drug court finally provided me with both." Or as another graduate put it, "I didn't just get arrested—I got saved."

Domestic Violence Courts

For many years, courts, prosecutors and the police viewed domestic violence as essentially a private matter—a family problem best left to the parties to work out on their own. Today, more and more policymakers agree that domestic violence is a serious public issue—a social problem that requires an immediate and effective response from the criminal justice system.

The urgency of the problem is reflected in the rising volume of domestic violence cases in New York's courts. In New York City alone, more than 25,000 criminal cases alleging domestic violence were filed in 1998. These are complicated cases. By definition, victims and defendants have ongoing relationships, which raises the risk of additional violence. Further complicating matters, many victims—whether because of fear, or love, or economic dependence—may be reluctant to pursue legal remedies, making it difficult for the courts to provide a meaningful intervention.

Given these realities, the New York court system has begun to re-think how it handles cases involving domestic violence. One result of this effort is a growing network of specialized domestic violence courts. There are currently five such courts in New York, with another half dozen in the planning stages. They can be found in urban, suburban and rural jurisdictions. Some are designed to handle only misdemeanor cases, others only felonies, and some handle both.

For all of their diversity, New York's domestic violence courts all follow a common set of principles that were first developed at the Brooklyn Domestic Violence Court in 1996. Key among them is an emphasis on victim safety. Complainants are linked to an on-site victim advocate, who helps them locate needed services such as shelter and counseling. The advocate also serves as a liaison between the court and victims, assuring that complainants are aware of new court dates, court orders and case outcomes—and that the court knows immediately if any further abuse occurs.

Defendant accountability is another key element for promoting victim safety. Domestic violence courts rigorously monitor the behavior of defendants, requiring them to return to court regularly while their cases are pending—whether they are in custody, on probation or released on bail. The goal here is to send the message that the court takes domestic violence seriously and that any violation of a protective order will be dealt with swiftly and decisively.

Victim safety requires more than just the best efforts of the judiciary, however. It also requires the cooperation of outside partners such as the police, probation offices, victims organizations and social service providers. All of these agencies have always played a role in responding to domestic violence, of course, but domestic violence courts affirmatively seek to bring all the pieces of this traditionally fragmented system together, assuring that all stakeholders are working together to offer a coordinated response.

Technology plays an important role in this effort. A state-of-the-art computer application allows New York's domestic violence courts to keep track of the status of each case, minimizing the risk that any matter will tragically "slip between the cracks."

Early signs suggest that the new courts are making a difference. For example, the flagship Brooklyn court has seen dramatically reduced dismissals, warrants and probation violations—common problems that often plague traditional judicial responses to domestic violence. ◆

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ment Court, I've learned that recovery is not an event; it's a process. It's not all or nothing. Giving them just one shot at rehabilitation is not helpful. At the Treatment Court, I follow defendants' progress in treatment and try to maximize their chances for success.

JUDGE VALENTINO: There's accountability and immediacy. I was really skeptical about drug courts at first, thinking that they were one of those liberal touchy-feely programs where you just pat somebody on the back, get them on probation and get them out of the courtroom. But after watching the drug treatment court in Rochester a couple of times, I realized that it was not a social worker type of court. It was the first time that I saw defendants having to take responsibility for their actions. Defendants were immediately accountable. The judge knew whether they were following their program within a couple of days, not months later.

JUDGE RICHTER: Rather than just focusing on what's the minimum sentence and the maximum sentence, problem-solving courts have broadened the judicial horizon and really asked the question, "What's the solution? What's the right remedy?" Judges have been doing this all along, and problem-solving courts are allowing us to have that discussion, not back in our offices and not on the phone, but in the courtroom with information and resources. Problem-solving courts are just giving judges more choices than we have ever had.

JUDGE FERDINAND: Another major difference is the role of attorneys. In the Brooklyn Treatment Court, the traditional adversarial process is very much intact when it comes to working out the disposition of the case. But once a defendant pleads guilty, everybody shares the same goal: to help the defendant stop using drugs and have the case dismissed. My D.A. stands up in dismissal ceremonies and says that she feels terrific as the prosecutor dismissing 20 felonies. There aren't too many prosecutors who could say that. The D.A. is successful because Treatment Court graduates have become law-abiding and responsible for their own behavior.

"Real" Judging

JOHN FEINBLATT: Have these courts changed your role in the courtroom?

JUDGE LEVENTHAL: There is a whole set of basically common sense things that I didn't do before but I now do as a matter of routine. For example, I bring the defendants back regularly for observation, supervision and monitoring. I let them know that the same judge who arraigns them is the same judge who is going to watch them. All defendants who are out on bail come back before my court every two to three weeks, even if nothing is going on. The ones on probation or with a split sentence come back to my court every two to three months for the first year and a half of their probation.

JUDGE FERDINAND: It's funny, I get asked a lot, "When are you going to go back to being a real judge?" I really believe that what I'm doing now is the "realest" bit of judging that I've ever done. I don't simply sentence people; I make sure that the sentence makes sense, that it is something they can do. I work with them and provide the tools they need to complete the process.

JUDGE RICHTER: I've found that we as judges have enormous psychological power over the people in front of us. It's not even coercive power. It's really the power of an authority figure and a role model. You have power not only over that person, but over their family in the audience, over all of the people sitting in that courtroom.

JUDGE KLUGER: I think that's definitely true. One of the lessons that I have learned is that you can't just place a defendant in treatment and expect the process alone to work. You need the oversight of the court. I once attended a meeting at the Midtown Community Court where defendants said that having a judge monitor what they were doing affected them almost as much as having a sentence over their heads.

Cultural Change

JOHN FEINBLATT: It seems to me that one of the principal themes that unites drug courts, domestic violence courts and community courts is partnership. They all rely on outside agencies—to provide social services, to monitor offenders, to supervise community service sentences. How do you make inter-agency partnership work?

I don't simply sentence people; I make sure that the sentence makes sense, that it is something they can do.

JUDGE FERDINAND: The foundation of the Brooklyn Treatment Court is the partnership between service providers and the courts. Treatment providers are often distrustful of courts because they fear that judges will make irrational judgments about their clients. We had to articulate the advantages of partnership for them. By working together, the treatment providers can tell judges what's happening in treatment and courts can assist providers in keeping a defendant on track. It allows both to do their jobs better. We've also formed an unexpected partnership with the Police Department's

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warrant squad. In the early days of the Treatment Court, warrant officers discovered that they could find our defendants relatively easily because they tended to return to the same street corner or drug location. So the officers started coming to court day after day and asking the D.A. to give them a list of people on warrants. To give you a sense of context, this is New York City where there are literally hundreds of thousands of warrants issued each year. At the Treatment Court, warrant officers would actually come into court and say, "I brought back so-and-so last week. How's she doing?" And we'd say, "Oh, she's out on a warrant again." And sure enough, they'd go out, they'd pick her up, they'd be back that afternoon. It's a partnership that we really wouldn't have thought about forming but it has made their job better and our job more effective.

It has made me look at everybody on the other side of the bench—both defendants and lawyers—not as adversaries but as people who bring their own life experiences to the table.

JUDGE RICHTER: I think that the kind of collaboration that Judge Ferdinand is describing amounts to a real cultural change within the criminal justice system. To give another example, a couple of months ago I was at a panel organized by a social service agency on domestic violence when a police officer, just a regular precinct officer, came up to me and said, "I was at a meeting in my precinct and they're all over us about recording the injuries in police reports. Are you getting them? Are they helpful? Because if they're not helpful, what would be helpful?" I was really surprised that he cared if his paperwork was actually being used. The change from the police not caring to this officer asking about his paperwork was really quite significant.

JUDGE VALENTINO: I remember the police thinking that the Drug Court was one of those goofy programs that spring up every once in a while, but now we've got a policeman in court every day. A sergeant assists us with warrants, new arrests, things of that nature, and we invite the police officers to come to the graduations. They are highly impressed when they see that a defendant is a year clean with a GED and a job. They clap; they hug him. I was in the D.A.'s office for eight and a half years and I never thought I'd ever see that.

JUDGE LEVENTHAL: At the Domestic Violence Court, Judge Matthew D'Emic and I convene monthly meetings with police, probation, prosecutors, defense counsel and others to look at how the project is doing. It has been a wonderful tool. It keeps everyone's eye on the ball. We can anticipate problems before they come up. As a result, we've resolved some very crucial issues. For example, we found out offhand from the Police Department that if a defendant wants to get his belongings from the house, he can't just go to the precinct any more. The judge has to put it in the order of protection that on a specific date and time he is to go to the house with the police and pick up his belongings. At another meeting, we looked at immigration issues. If the complainant has a status derivative of the defendant, then she might not want to prosecute because she's worried about getting deported. So we had immigration lawyers come in to talk about the issue. We've had similar meetings on dealing with mentally ill defendants.

JUDGE KLUGER: Service providers and the police are obviously two important partners, but I don't think we should lose sight of the community. Community courts in particular rely on partnerships with local residents, merchants and community groups. In the early days of the Midtown Community Court, there were many judges—and I must say that I was one of them—who worried that by meeting with the community we would be opening the court up to criticism. It was something I was very concerned about initially. But I realized that we are public officials and there is nothing improper or incorrect with us speaking to members of the public. I had been afraid that people would talk about particular cases and would try to influence me in some way, but I realized after the first advisory board meeting that I attended that they just wanted to express their appreciation for the court and have an interaction with the judge. The meetings created a spirit of partnership and collaboration that allowed community members to embrace ideas such as having defendants perform community service in their neighborhoods. They even volunteered ideas for where to send defendants and what they should do. The meetings resolved any distrust between the court and the community and were beneficial in helping the court grow.

Making a Difference

JOHN FEINBLATT: What has happened on a more personal level? What has it meant to be presiding at one of these courts?

JUDGE RICHTER: I think it has changed my view of what a court can do. It has made me look at everybody on the other side of the bench—both defendants and lawyers—not as adversaries but as people who bring

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their own life experiences to the table. In a world where caseload volume demands that judges move cases quickly, it is incredibly rewarding to have an opportunity to step back and ask how can we work together as a team to achieve better outcomes.

JUDGE LEVENTHAL: A lot of judges and lawyers want to help people and the society at large, but it's rare to get a case that actually means something to humanity. At the Domestic Violence Court, I feel like I'm doing meaningful work every day. But there's a down side, too. I live with my cases all the time, which can interfere with my time outside of the court. On weekends and when I'm on vacation, I watch the news and I want to see if there is a homicide. I want to know if it's in Brooklyn and I want to know if it involves my court.

JUDGE VALENTINO: Judges see a lot of failure and not many successes, but since I've been at the Drug Court, I've seen quite a few successes and that spurs me on. Here is an example of what I find most rewarding. This guy graduates from Drug Court who had been a thief in our community for about 20 years. He came up to me the other day and introduced me to his fiancee, who herself had been an addict but now has a drug-free baby. He asked me to marry the two of them. That was probably the most gratifying thing.

JUDGE FERDINAND: It's an incredible feeling to know that I played a part in the success of these people coming out of the Treatment Court—people that probably would never have achieved this if it weren't for the court's intervention. I have watched people go through the process of recovery. I have watched them become drug-free and come to court dressed beautifully, bring their children, bring their mothers, bring their wives. It really is an incredible experience.

JUDGE KLUGER: The bottom line is that judges can experiment with something new. And if we're given the right tools, it can work. We can make a difference.

"Team Red Hook" Addresses Wide Range of Community Needs

Alex Calabrese is the presiding justice at the Red Hook Community Justice Center, a multi-jurisdictional community court that opened this year in a renovated parochial school in southwest Brooklyn. Red Hook is a waterfront neighborhood that has long been plagued by drugs and crime. Home to one of New York's oldest and largest public housing developments, Red Hook is notorious for the 1992 slaying of Patrick Daly, an elementary school principal who was accidentally killed in a drug-related shoot-out.

The following reflects Alex Calabrese's experiences with the project as told to Pamela Young of the Center of Court Innovation.

It's no secret that the residents of Red Hook face a wide range of problems that don't conform to the jurisdictional boundaries of our court system. A single family could find itself in Criminal Court, Housing Court and Family Court under the traditional court system. At the Red Hook Community Justice Center, we are combining these jurisdictions, bringing all of these cases into one courtroom with one judge. The goal is to offer, as much as possible, a coordinated approach to people's problems.

We began in April by hearing criminal cases, including misdemeanors and Class D and E felonies, desk appearance tickets and summonses. Like the Midtown Community Court before it, the Red Hook Community Justice Center tries to determine the underlying problem that led to the defendant's criminal behavior, whether it is addiction, homelessness, lack of education or something else. We require defendants to address their problems, while at the same time repaying the community harmed by their crime.

A typical sentence can include mandatory drug treatment, job training, GED classes, community service or a combination. The community benefits directly, not only from the mandated community service—such as painting over neighborhood graffiti and cleaning local parks—but, more important, from having a member of the community who has gotten to the cause of his or her criminal activity and addressed it.

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Alex Calabrese moved to the Red Hook Community Justice Center after three years in Brooklyn Criminal Court. Before becoming a judge, he served as a lawyer for the Legal Aid Society and as a law assistant to Judge Leslie Crocker Snyder in Manhattan Supreme Court. A native of the Bronx, he has lived in Brooklyn for 20 years. He is a graduate of Notre Dame University and received his J.D. degree from Fordham Law School.

Entrance to the Red Hook Community Justice Center in Brooklyn.

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One-Stop Shopping

On-site services at the Justice Center include alcohol and drug treatment, job training, GED classes, computer labs, medical examinations and mental health counseling. To help families with small children, we even have on-site day care so that they can drop off their children while they are taking advantage of the services we offer.

Needless to say, courts can't provide all of these services on their own. We need partners. The Justice Center has brought together some of the city's best service providers, including Phoenix House, Victim Services, the Community Health Care Network and the Board of Education. They are all on-site and working side by side. The bottom line is that we can offer "one-stop shopping" for people in need, whether they are defendants or walk-ins from the community.

Having these services at our fingertips allows us to respond to problems in the neighborhood quickly and effectively. For example, a local school called us recently to say that a group of kids were starting to form a gang. I went to the school to talk to the students. Our clinical director put together an anger management curriculum. A court officer who grew up in the neighborhood offered to talk to the kids about his perspective as a member of the community. And the Brooklyn district attorney's office brought in a former gang member who runs anti-violence programs across the country.

Team Red Hook

The real power of the Justice Center is the people who work here. I am proud to be just one of the members of what we call "Team Red Hook." Sandra Martin-Smith has put together a team of clerks, cross-trained to handle criminal, family and housing issues. Lieutenant Sean Egan and the other court officers set the tone for the Justice Center at the entrance to the building.

The clerks and the court officers—along with attorneys from the Brooklyn D.A.'s Office and the Legal Aid Society—have helped sponsor a local youth baseball league run by the Justice Center. And a few have volunteered to manage teams and mentor some little leaguers during the week.

But the people who work at the Justice Center are just part of the Red Hook story. This project would not be possible without the support of hundreds of community residents. In fact, it was a group of local residents who actually selected the site for the Justice Center. A task force from the local community board toured a number of potential locations before settling on the old Visitation School as the right choice. I think they were interested in seeing a valuable community resource brought back to life after being vacant for a number of years.

The Urban Red Cross

We have only recently opened our doors to hear court cases, but the Justice Center has been a presence in Red Hook for years. The first piece of the Justice Center actually started in 1995, well before construction of the courthouse was completed. The Red Hook Public Safety Corps is an AmeriCorps community service program that consists of 50 members from Red Hook and surrounding neighborhoods. In return for an educational award, they perform one year of community service—fixing broken windows in the Red Hook Houses, helping out in our child care center, and escorting domestic violence victims. Essentially, it's a program that provides civic-minded residents with a chance to do positive things for their own community.

The Public Safety Corps has become a big part of the Justice Center team—they do whatever it takes to get the job done. For example, last August a tremendous rainstorm in Brooklyn left some houses in the neighborhood flooded. During the storm, I came out to Red Hook to check on our neighbors. Sure enough, several

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Center for Court Innovation Provides Research and Development

Much of New York's experimentation with problem-solving jurisprudence has grown out of the Center for Court Innovation, an innovative public-private partnership that serves as the court system's independent research and development arm.

Under the direction of John Feinblatt, the center is responsible for investigating problems within the courts, devising new solutions and field-testing their effectiveness. Starting with the Midtown Community Court, the center has helped to create a wide range of problem-solving courts in New York City, including drug courts, domestic violence courts and family drug treatment courts. It has also provided technical assistance to problem-solving courts throughout the state, serving as the host for site visits, writing how-to manuals and helping planners figure out what will work best in their community.

In recognition of its pioneering efforts to foster ongoing court innovation, the Center for Court Innovation received an Innovations in American Government Award, an honor annually bestowed upon 10 of the nation's most groundbreaking public programs by the Ford Foundation, Harvard's John F. Kennedy School of Government and the Council for Excellence in Government.

More information about the center and its programs from the following, or from the web site, www.communitycourts.org.

Center for Court Innovation:
John Feinblatt at (212) 373-8080
Domestic Violence Courts:
Emily Sack at (212) 373-8085
Drug Treatment Courts:
Valerie Raine at (718) 643-7626
Community Courts:
Alfred Siegel at (212) 373-1699
Technical Assistance:
Michael Magnani at (212) 428-2109

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of them had flooded basements. So, I called the Public Safety Corps at about 7:30 in the evening. The next morning, when I visited them again, I saw that the Public Safety Corps was already on the job. That is how committed they are to helping the community. They are like an urban version of the Red Cross.

A Jury of Peers

Another important component of "Team Red Hook" is the Red Hook Youth Court, which focuses on low-level youth offenders. Youth Court is composed of local teenagers who are trained to be the judge, jury and advocates. The court uses positive peer pressure to ensure that young people who have committed offenses such as truancy, fare beating and shoplifting understand that their behavior has an impact on not just themselves but also their families and the community. As sanctions, they are required to perform community service, write a letter of apology or attend a session of life-mapping skills where they are shown what is necessary to attain their personal goals.

I attended one hearing where a youth offender was caught with a box cutter in school. At first he said he was holding it for a friend and the teacher just happened to catch him "at a bad time." Once the members of Youth Court started questioning him—the jury is allowed to ask questions—it became clear that he had indeed taken the box cutter to school. Then the jury asked, "Does your little brother look up to you?" The client answered, "Yes." The jury asked, "Would you want him carrying a box cutter to school?" The client answered, "Of course not!" The young judge asked the clinching question, "If your younger brother sees you take a box cutter to school and he looks up to you, why isn't he going to do the same thing?" You could almost see the offender start to think about being a role model and the message his behavior sent to his family and the community.

We have found that young people are more effective in delivering these kinds of messages to their peers than adults. I've seen a lot of Youth Court sessions and I know that an adult could talk to the offenders for two weeks straight and not get the same results as one Youth Court session. Most important, an effective intervention at a young age may save a kid from coming before me in criminal court when he or she is older and their problems have grown bigger.

One More Time: Custody Litigation Hurts Children

BY MARJORY D. FIELDS

Most lawyers and judges dislike custody and visitation litigation because they find it emotionally distressing. Yet these are some of our most important and challenging cases. The court must predict the future welfare of children based on evidence of the parents' past behavior. Counsel have the duty to represent a parent zealously,[1] while being concerned for the well-being of the children.

Another element of difficulty in these cases is the need for speedy resolution, which is essential to provide children with security and stability.

Custody and visitation determinations affect the rights of privacy, liberty and association. Often, decisions must be made on complex issues involving child development and mental and physical health. Thus, we are faced with philosophical, intellectual and emotional components in addition to the factual and legal issues that arise in any type of litigation.

Despite the obvious advantages that a settlement agreement can have for the parents, children, counsel and the court, a settlement may not be appropriate in all these cases. The cases that obviously require judicial determination are those in which it is alleged that one parent is a threat to the emotional or physical well-being of a child, is unable to provide adequate care and supervision, is unable to protect a child from harm by others, or is a threat to the health and safety of the other parent.[2] Other cases that require a trial may involve two parents with serious parental deficits, in which the court must determine who poses the lesser risk to the children or whether a third party should have custody.

We need to keep an open mind, because any custody case may involve genuine safety issues. These cases place the trial judge in the position of attempting to assure that children are protected and in the care of a protective parent. A trial or hearing provides the court with the information to order sole custody, with supervised visits, or no visits, as the facts require. Thus, children benefit when these difficult cases are tried to judgment promptly.

By contrast, children are harmed when custody or visitation issues are contrived to advance another agenda, such as revenge, spite, power or control. Plenary trials under these conditions place unnecessary stress on children and waste family income that could benefit the children. For these reasons, we should use the resources at our disposal to encourage parents to settle custody cases that are based on inflated or fabricated allegations.

Set the Tone

Judges and lawyers should set a tone that encourages settlement. Pretrial conferences should address issues concerning the best interests of the child, and not be used as a forum to further a parent's vindictive or pecuniary agenda. One should discourage the notion that a parent's "rights" will be vindicated in a custody hearing or trial. We should inform parents that custody and visitation determinations are based on the best interests of the child, not the "rights" of the parents only.[3] The Court of Appeals articulated the standard: the child's needs are paramount:

> While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered, it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation.[4]

We might remind difficult parents that being parents impairs personal freedom and creates financial obligations that cannot be avoided except through the termination of parental rights. We should tell them that "winning" does not bar the "unsuccessful" parent from

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MARJORY D. FIELDS was appointed to New York City Family Court in 1986 and has been assigned to the matrimonial complex in Supreme Court, New York County, since June 1999. Before being appointed to the bench, Justice Fields practiced matrimonial law for 15 years at Brooklyn Legal Services Corp. She is a graduate of City College of New York and received her J.D. degree from New York University Law School.

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liberal access to the child, unless that parent is demonstrated to be a risk to the child. The child is a third-party beneficiary: entitled to physical protection, emotional care and financial support from both parents.

Usually, when a case is to be tried, the court will appoint a law guardian or a guardian *ad litem* for the children to ascertain their wishes or needs. As shown in the appellate decisions, there is a strong policy in favor of law guardians in contested custody cases.[5] When Chief Judge Judith S. Kaye announced new Family Court initiatives for custody cases in April 1996, a law guardian for every child who is the subject of a custody hearing was first on the list.

Settlements usually produce enduring solutions, because the terms are based on the needs and wishes of the parents and children. They create an environment in which future cooperation between parents is more likely.

Children of sufficient maturity may express their views and wishes through their counsel. Frequently, information from children provides a check on the parents' unrealistic claims, and reveals their bad behavior. It also gives the court vital information for evaluating proposed settlements or the terms of any order.

Parents should be told that when custody is tried, the court makes the decision. The parents are disenfranchised and lose control over the process, the outcome and the costs. They also lose control of their time: the court sets the dates and times for hearings at the convenience of the court. The parents' schedules must be adjusted around the court proceedings.

Often, the parents become further alienated from each other and their children as a result of rehearsing their grievances in open court. Future events in the child's life such as birthdays and graduations become unpleasant for the children whose parents remain hostile after a bitter custody trial. These children may be faced with continuing fear of major life events attended by both parents.

Settlements, on the other hand, allow the parents to retain control over their lives. Settlements usually produce enduring solutions, because the terms are based on the needs and wishes of the parents and children. They create an environment in which future cooperation between parents is more likely.

The Use of Resources

This educational effort is advanced by urging parents to attend a parental education program. Parental education courses show parents how to focus on global legal, social and psychological issues affecting all divorcing parents. This information helps parents to diffuse their hostility, and to solve their disagreements for the benefit of their children.

Today, the Family Courts have several collateral services such as children's centers, parental education programs and specialized parts, which make New York courts better able to respond expeditiously to custody cases. Counsel and the court can use these services to produce better resolutions for parents and children.

Once such program is PEACE (Parent Education and Custody Effectiveness).[6] It has several components. In the first session, a judge or lawyer describes the legal process for resolving disputes that the parents do not settle. The lawyer-client relationship is explained, and the function of a law guardian and a forensic evaluator is described. Litigation, arbitration and mediation are compared as methods for resolving disagreements.

In other sessions, mental health professionals explain how adults and children experience divorce and separation. They describe the common progression of divorcing parents' feelings. They explain how children of different ages perceive their parents' separation, and how children respond to conflict between their parents. Mental health professionals offer suggestions regarding effective ways for parents to help their children through this difficult time.

There is group discussion, and individual questions are answered. Each parent attends sessions at different times from the other parent. The program is five hours in total, usually divided into one two-hour session and one three-hour session. Sessions are available at night and on weekends to accommodate working parents. PEACE is free of charge. Other educational programs for parents are available in some counties with different formats but similar content.

An innovative program established by Administrative Judge Vincent E. Doyle in Erie County is for the children themselves. They receive emotional support from the adult group leaders and from the other children. Children are taught skills to cope with their changing family structure. They are given accurate information about the divorce process. Children aged 9 through 12 years may attend the two sessions of 2 1/2 hours each. Both parents are encouraged to attend a group meeting while the children attend their program.

The Use of Sanctions

Misuse of the custody or visitation issue is ineffective and costly for the parent who acts inappropriately.

Obviously, a parent's counsel fees increase whenever a case is tried instead of settled. In addition, the court may assess all the costs of a custody litigation against the losing party. The court may appoint a law guardian or a guardian *ad litem* for the child (depending on the child's age) and a forensic mental health professional, and it may direct one parent to pay all their fees.

The parent found to have brought a baseless custody or visitation proceeding also may be ordered to pay the fees of the counsel for the other parent.

Judges have the primary duty to protect the safety and well-being of children, and to discourage abusive litigation. If counsel do not request that penalties be imposed on a parent who brings a meritless custody or visitation proceeding, the court may do so on its own motion. Thus, there are direct financial disincentives to custody litigation that is without merit.

Statewide Procedures

Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, responding to the disparity in matrimonial procedures among the counties, created the statewide position of deputy chief administrative judge for matrimonial matters and appointed Justice Jacqueline Winter Silbermann to that position. Justice Silbermann works with judges to establish consistent procedures throughout the state. The Administrative Board has promulgated uniform rules for trial courts and attorneys in matrimonial cases.[7] Thus, the procedures and remedies discussed are available throughout the state.

Using these resources and procedures, we can shape the divorce process to limit the harm it causes to children. The court system has made significant improvements to advance this effort. It falls to judges and lawyers, collaborating, to produce better results.

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1. *The Lawyer's Code of Professional Responsibility*, DR 7-101.
2. N.Y. Domestic Relations Law § 240 (hereinafter "DRL"); *A.F. v. N.F.*, 156 A.D.2d 750, 549 N.Y.S.2d 511 (2d Dep't 1989); *Irwin v. Schmidt*, 236 A.D.2d 401, 653 N.Y.S.2d 627 (2d Dep't 1997); *Lukaszewicz v. Lukaszewicz*, 256 A.D.2d 1031, 682 N.Y.S.2d 696 (3d Dep't 1998); *Smith v. Purnell*, 256 A.D.2d 619, 682 N.Y.S.2d 889 (2d Dep't 1998); *Keating v. Keating*, 147 A.D.2d 675, 538 N.Y.S.2d 286 (2d Dep't), *appeal dismissed*, 74 N.Y.2d 791, 545 N.Y.S.2d 106 (1989); *S.Z. v. S.Z.*, N.Y.L.J., Sep. 28, 1999, p. 26, col. 6 (Sup. Ct., N.Y. Co.); *R.K. v. V.K.*, N.Y.L.J., Jan. 18, 2000, p. 29, col. 4 (Sup. Ct., N.Y. Co.); Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 Cornell J. L. & Pub. Policy 221, 241 (1994).
3. DRL § 240; *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996).
4. *Tropea*, 87 N.Y.2d at 739 (citations omitted).
5. The appellate decisions show that the courts *assume* that a law guardian or guardian *ad litem* was appointed for the children.
6. PEACE programs exist in all five counties in New York City; the Fourth Judicial District counties of Saratoga, Schenectady, Warren, Washington and Fulton; Onondaga County (Syracuse) in the Fifth Judicial District; the Sixth Judicial District counties of Broome, Tioga, Chemung, Schuyler and Tompkins; the Seventh Judicial District counties of Monroe (Rochester) and Steuben; the Eighth Judicial District counties of Erie (Buffalo), Genesee and Chautauqua; the Ninth Judicial District counties of Rockland, Dutchess and Orange; and the Tenth Judicial District Counties of Nassau and Suffolk.
7. N.Y. Comp. Code R. & Regs. tit. 22, §§ 202.16, 1400.1-1400.7.

How Should Law Firms Respond To New Forms of Competition?

BY STEPHEN P. GALLAGHER

Today we are witnessing the early, turbulent days of a revolution as significant as any other in human history. As these new mediums of human communication reach the lives of more and more individuals, law firms and all professional service providers face uncharted challenges in trying to shape the direction of future services.

The competitiveness problem being faced by law firms today is not a problem of "foreign" competition, but rather one of "nontraditional" competition.[1] This competition among and between all professional service providers has given the consumer the opportunity to shop among various professions for many of the services that have been traditionally provided by attorneys.

Ross Dawson in his powerful book, *Developing Knowledge-Based Client Relationships: The Future of Professional Services*, states, most professional service organizations already recognize that "the value added to clients will increasingly be in sharing knowledge with them—making them more knowledgeable—and that this approach is also central to developing the closer and richer relationships on which sustainable competitive advantage is based."[2] "Those who attempt to hang on to their expertise will soon find themselves supplanted by competitors who are willing and able to make their clients more knowledgeable."[3]

Many business leaders are beginning to believe that competition for the future of legal services will actually be competition to create and dominate emerging opportunities—to stake out new competitive space. Where the traditional law firm business model allowed practitioners to focus on the problem of getting and keeping market share, competition for the future is competition for *opportunity share* rather than market share, which will challenge law firms to provide new products or services that are still underdefined, and where client preferences are still poorly understood. Only those who can imagine and preemptively create the future will be around to enjoy it.[4]

It seems apparent that market conditions now dictate the need for a new paradigm for the practice of law, a paradigm in which the client drives the price, delivery and efficiency of legal services. Quality or value in the mind of the customer or client is different—sometimes radically so—from the way the supplier perceives "quality" or "value" with respect to the same product or services,[5] and unfortunately, there is no sure way of accurately estimating whether the market will favor a particular type of new service until it is actually available. The supplier's perception, let alone the perception of the governmental regulators of the legal profession, counts for little in this point. The jury is out until consumers have a chance to vote with their pocketbooks.[6]

Until recently, each of the professional service industries thought of itself as distinct from others, and so looked primarily to its direct peers and competitors in learning how to confront key business challenges. Each professional service industry has a tremendous opportunity to learn from the methods of all other professional fields. Confronted with new competitive and market challenges, lawyers across the country face a critical choice: either wait and see what happens to demand for traditional legal services, or anticipate the changes certain to affect their future and act now to shape the direction of these new services.

Because scenario planning is a creative, forward-looking, open-ended search for patterns that might emerge in a profession, the process should help readers better anticipate opportunities and avoid disasters. This article will explore the dynamics of offering integrated services to individual consumers and to business clients

STEPHEN P. GALLAGHER is the director of the Law Office Economics and Management Department of the New York State Bar Association. Before joining the Association, he worked as director of administration for Temple University School of Law and as a legal administrator for several law firms and for First Fidelity Bancorporation. He is a graduate of LaSalle University and received a master's degree in counseling from West Chester University.

in today's networked economy. The focus will be on looking at each situation from the client's perspective.

Crafting the Future of Legal Services

Through an examination of current business literature, we will attempt to scan the current business environment to provide readers with a framework for thinking creatively and making informed choices about what may be, rather than what already is. We will make every effort to expose readers to significant issues, including but not limited to global network forces that may provide opportunities and challenges for readers to create a viable, long-term future for themselves within this turbulent business environment.

The core values of the legal profession are the essential and enduring beliefs that lawyers have upheld over time, notably the independence of the profession and the commitment to work in the client's best interests without any conflicting allegiance. In exploring the future of legal services, the assumption is that these core values will remain intact, enabling lawyers to retain their unique character and value as the profession embraces the changing dynamics of the global economy.

People throughout the legal community are beginning to realize that success takes more than intellectual excellence or technical prowess, and that lawyers will need another sort of skill just to survive—and certainly to thrive—in the increasingly turbulent business environment of the future.

Law firms, as currently structured, are organizations designed to deliver competent legal services to clients who contract for those services. Legal services in this context include all those services that are usually and customarily performed by a licensed attorney. Where formerly law firms were able to control most of the resources needed to provide new products and services, the most exciting new opportunities will require the integration of complex systems rather than innovation around a stand-alone product. There is no reason that law firms in the future should need to restrict their services and practices to the contracting of legal services.

In mid-1995, the New York State Bar Association conducted a telephone survey of middle income New Yorkers on Access to Legal Services and Use of Legal Services. Six hundred New Yorkers with incomes between $25,000 and $95,000 were contacted to test respondents' attitudes towards attorneys and their familiarity with attorneys' services. The survey showed that middle income New Yorkers had little difficulty finding an attorney when they wanted one, but did not turn to lawyers in every situation where legal assistance was needed. There appeared to be many opportunities for lawyers to provide significant *new* services to New York consumers.

Rather than building the new model for legal services based on Multidisciplinary Practice (MDP)[7] / unauthorized practice of law (UPL) standards left over from a different age, a new and more promising legal services model can be based on future opportunities. In a new book, *Blown to Bits: How the New Economics of Information Transforms Strategy*, lawyers can learn a great deal from Philip Evans and Thomas S. Wurster, leaders of The Boston Consulting Group's Media and Convergence Practice, when they describe how managers must put aside the presuppositions of the old competitive world and compete according to totally new rules of engagement. Lawyers, like the managers discussed in *Blown to Bits*, must make decisions at a different speed, long before the numbers are in place and plans formalized. They must acquire totally new technical and entrepreneurial skills, quite different from what made their organization so successful.

It has been known for some time that traditional academic aptitude, school grades, and advanced credentials simply did not predict how well people would perform on the job or whether they would succeed in life.[8] However, many law firms continue to restrict their search for talent to what they consider to be the top 2% of graduates from the nation's premier law schools. From the corporate sector, data tracking the talents of star performers over several decades show that two abilities considered relatively unimportant for success in the 1970s have become crucially important in the 1990s—team building and adapting to change.[9] These skills or talents have never been a primary consideration in traditional law school training, but there is no reason to believe that these talents should not be in equally high demand in today's law firms.

Daniel Goleman, co-chair of the Consortium for Research on Emotional Intelligence in Organizations at Rutgers University, has found in his research that emotional intelligence is the *sine qua non* of leadership.[10] When Professor Goleman calculated the ratio of technical skills, IQ, and emotional intelligence as ingredients of excellent performance, emotional intelligence[11] proved to be twice as important as the others for jobs at all levels; in fact, research showed that emotional intelligence played an increasingly important role at the highest levels of the company, where differences in technical skills are of negligible importance.

It is important for all lawyers to think creatively in order to begin to make informed choices about what may be, rather than what already is. To help lawyers identify the new rules of engagement, it is necessary to explore how consumer expectations are changing. It is also necessary to demonstrate how law firms can reshape service portfolios by providing fundamentally new types of client benefits. If the *new* practice of law

must be crafted to anticipate and address what the consumer considers of value or quality, there is no reason that it should not enable law firms to extend the boundaries of their influence beyond the inner circle of traditional "legal self."[12]

Let's begin to explore a new paradigm for legal services by starting with a fundamental understanding or belief, namely that "we have reached the limits of incrementalism," which can be drawn from the writings of Gary Hamel and C.K. Prahalad in their bestseller, *Competing for the Future*. Squeezing another penny out of costs, getting a product to market a few weeks earlier, responding to customer inquiries a little bit faster, ratcheting quality up one more notch, capturing another point of market share, tweaking the organization one additional time—these are the obsessions of managers today. But pursuing incremental advantage while rivals are fundamentally reinventing the industrial landscape is akin to "fiddling while Rome burns."[13]

Another important belief or theory in legal circles, as expressed by Ross Dawson in his book *Developing Knowledge-Based Client Relationships*, is the belief that much of the basic legal services are becoming "a commoditized market in which clients perceive little or no differences between products and service offerings—they have become indistinguishable commodities. In this case the market becomes price and cost-driven—price is the only way clients differentiate between offerings, and sustainable price competition, in turn, depends on achieving lower costs in producing the offering."[14] Ten years ago, William C. Cobb, chair of the second ABA "Seize the Future" conference, estimated that 60% of all available legal work could be considered commodity work, because clients believed that any good lawyer could perform the services.[15] His predictions pre-dated the emergence of electronic networks and the greatly enhanced level of consumer (client) sophistication in all aspects of practice.

"One of the most fundamental choices every business must make is whether it will follow the path of commoditization, competing on cost and price, or differentiation, in which it competes on offering greater value to the client, with the potential to achieve premium pricing. Today, even those who choose the path of differentiation must accept that it will always be eroding, and they will have to continually keep running just to stay in the same spot, let alone move ahead."[16] With either approach, law firms can no longer afford to just catch up to the competition in order to successfully compete in the future.

Crafting Consumer-Driven Legal Services

The practice of law can no longer be viewed principally through the historical prism of a regulated "profession." Legal services are no longer designed, priced and offered to the public based on what the profession deems suitable or appropriate. Many current substantive practice areas are under attack from a variety of forces. Insurance defense practice, family law, estate planning and tax work are literally changing overnight as new Internet-based products and services hit the market. Demands for new legal services are based predominately on market-driven forces, that is, on what the consumer of legal services wants and is willing to pay for.

Law firms are beginning to realize that what got them here isn't going to support them in the future. Business as usual is just not sustainable. The changes from a product-driven economy to a consumer-driven economy are having a dramatic impact on all professional services, and law firms will need to bring about a revolution in the marketplace if they hope to provide expanded services in this consumer-driven economy. As a result, one of the most important challenges facing the legal profession is identifying the new range of legal services and client benefits that will be regarded as offering the greatest value in tomorrow's products and services. The next most pressing challenge will be to determine how lawyers can best deliver these services in the ever-changing marketplace.

The Internet and the emerging network economy is changing how companies do business, and this is creating an enormous economic power shift from service providers to the consumer. Gary Hamel and C.K. Prahalad report that few companies (law firms) will be able to create the future single-handedly.

> The need to bring together and harmonize widely disparate technologies, to manage a drawn-out standards-setting process, to conclude alliances with the suppliers of complementary products, to co-opt potential rivals, and to access the widest possible array of distribution channels, means that competition is as much a battle between competing and often overlapping coalitions as it is a battle between individual firms.[17]

In this emerging network economy, we are already seeing changes in the traditional model of commerce, where a seller advertises a unit of supply in the marketplace at a specified price, and a buyer takes it or leaves it. The Priceline shopping system was the first credited with turning that model around. Now, buyers are able to advertise a unit of demand to a group of sellers. The sellers can decide whether to fill the order or not. In effect, Priceline provides a mechanism for collecting and forwarding units to interested sellers—a demand collection system.[18] One can argue the relative merits of acquiring legal services in this manner, but one still needs to explore the potential impact such a model will have on one's business.

Currently, more than 140 million people worldwide have access to the Internet.[19] Within the next five years, no corner of the economy will be untouched by downward cost of price pressure created by business models like Amazon.com. Many sectors of the economy that seemed impervious to systematic improvements are also under assault—for the better. In 1999, 34.9 million people sought medical information on the Web, double the number in 1998, according to Cyber Dialogue, a Manhattan firm that tracks Internet usage. There are at least 15,000 health sites on the Web, and more are springing up all the time.[20] This new information is changing the relationship between doctors and patients, who are using the Web to get background information to help frame questions before approaching doctors. Will these sites have an impact on how doctors provide future medical services?

In a recent article, "Technology from Hell Challenges, Scares Bar," author Darryl Van Duch wrote, "more than a dozen . . . Internet-based legal services appealing to low-to-middle income consumers have been launched in the U.S. in the last 12 months. Nearly all of them are owned or financed by free-spending venture capitalists." Van Duch continues, "an estimated $100 million has been poured into such 'e-law sites' in recent months, including former New York Mayor Ed Koch's 'Thelaw.com' and Harvard Law School Prof. Arthur Miller's 'Americounsel.com.' Many more well-financed clones are expected to be launched in the coming weeks."[21] Keep in mind the NYSBA Middle Income study that showed the public's lack of understanding of the lawyer's role, and the public's interest in self-help. The Internet will certainly be offering the public and the legal lawyers exciting challenges.

Another subtle refinement to this consumer-driven economy that promises to have an impact on the delivery of legal services is highlighted by a recent *Harvard Business Review* article, where author Adrian J. Slywotzky describes how customers are already taking the Priceline approach on exact pricing to another level. Customers are now gaining control over the design of products. Customers will soon be able to describe exactly what they want, and suppliers will be able to deliver the desired product or service. Slywotzky uses the term, *choiceboard* to describe an interactive, on-line system that will allow individual customers to design their own products or services by choosing from a menu of attributes, components, prices, and delivery options.[22]

The role of the customer in this scenario shifts from passive recipient to active designer. The author acknowledges that the choiceboard model is still in its infancy, but by the end of this decade, it is anticipated that choiceboards will be involved in 30% or more of total U.S. commercial activities, as the economy moves further away from a supply-driven to a demand-driven system. If Adrian Slywotzky is correct about choiceboards dominating commerce in the future, could "self help" on the Internet begin to displace many of today's legal services? And, what will the role of the *new* law firm be when customers become product makers?

Managing Knowledge and Creating Client Value

Today, millions of people are using the Internet to exchange massive amounts of information directly and for free. Many people are beginning to believe that much of the existing core legal information will be readily available to the consuming public without the need for any law firm. For the first time, the client would be in control: paying flat fees, having multiple firms bid for legal

business, and sometimes bypassing a conventional relationship with a lawyer altogether.

However, no matter what the firm's strategy for adding value is, what seems to be of greatest value is making clients more knowledgeable while helping them make better decisions and enhance their capabilities. Knowledge distribution, without developing the closer and richer relationships with clients, will do very little to help clients gain sustainable competitive advantage.

Ross Dawson has stated that the greatest fear of professionals (*lawyers*) is that if they make their clients more knowledgeable, they are giving away the key product so that knowledge gained from previous experiences can be efficiently recycled for new applications, do not overlook the possibility of reaching beyond immediate law firm competitors. MDPs tend to be well in advance of law firms in the area of knowledge systems and management.

Twelve Steps to Developing

1. Establish a Sense of Urgency[1] Does senior management have a clear understanding of the dangers and opportunities posed by new, unconventional rivals?

Gary Hamel and C.K. Prahalad suggest that, to prepare for the future, you need to ask yourself, "Am I more of a maintenance engineer keeping today's business humming along, or an architect imagining tomorrow's businesses?"[2] Law firms need to pay particular attention to the changing business environment and how professional service providers are realigning their products and services in response to these new challenges. Firms that are unaware of what the competition is doing will find themselves unable to participate in the new competitive space.

2. Listen to the Revolution Law firms have traditionally delivered competent legal services to clients who have contracted for those services. The legal profession must do a better job of listening to its customers, because the insights into the customer's individual needs and preferences will become one of the most important business challenges facing lawyers.

There is no reason for law firms in the future to restrict their core services to traditional "legal self." Although it is important to ask how satisfied current customers are, it is equally important to ask yourself which customers are not even being served.

3. Reshape the Legal Marketplace Lawyers can no longer afford to wait and see what happens. Instead, they need to anticipate "value" as perceived by customers and provide new products or services based on an entirely new business model or paradigm.

The challenging opportunities to reshape the direction of the profession and the legal marketplace will need a massive transfusion of talented individuals sensitive to emerging consumer demands. Experience is showing that innovation and creativity take place when diverse groups of individuals get together to solve problems. Law firms need to learn from business partners to explore new approaches to problem solving.

4. Think Outside the Box Take a close look at how other professional service providers are incorporating new strategies and techniques to gain competitive advantage.

If you are looking to establish a knowledge management system to collect and organize internal work prod-

5. Maximize Your Time at Bat According to Gary Hamel and C.K. Prahalad, "Getting to the future first, and being first up on the scoreboard, requires that a company (law firm) learn faster than its rivals about the precise dimensions of customer demand and required product performance. When the goal is to create new competitive space, it is usually impossible to know in advance just what configuration of product or service features, offered at what price point and through what channels, will be required to unlock the potential market."[3]

To learn faster, Hamel and Prahalad propose, "A firm needs to maximize its time at bat, rather than sit on the sidelines waiting for the perfect conditions for the home run attempt."[4] Law firms should begin rewarding staff for experimenting with innovative approaches to client services. Some of these experiments will fail, but others will exceed all expectations.

6. Develop New Skills and Competencies The *new* practice of law must be crafted to anticipate and address what the consumer believes is valuable or quality work.

Lawyers need to reinvent the industrial landscape, and new core competencies will be needed to create new benefits or "functionalities." These new technical and entrepreneurial skills will be quite different from what has made their organization (and them personally) so successful, so many lawyers may need to look beyond the scope of traditional CLE programs to acquire these new skills that will enable them to create new types of legal services. Law firms will need to look beyond the top 2% of law school graduates to identify the individuals with the leadership skills and abilities needed to address consumer demands. Law firms will find some of these talents beyond the law school itself.

7. Escape the Bonds of Legacy The practice of law can no longer be seen as a regulated profession. Law firms will need to bring together widely disparate technologies, manage standards-setting processes, and build alliances with suppliers to shape the direction of future

tive assets from which they make money.[23] Since electronic networks now allow information to flow largely independently of the economics of things, information is freely available to anyone with Internet access. Slowly, law firms are beginning to realize that, as a result of the emerging network economy, knowledge transfer is not about teaching your clients to do what you do but about making them better at what they do. And that by no means results in doing yourself out of a job.[24]

According to Dawson, professional services firms can either try to hold on to knowledge and perform "black-

Consumer-Driven Legal Services

legal services. A glimpse of the future can be seen from the changes taking place in the medical profession and the activities of Internet-based legal services providers.

As legal ethicists warn that some of the Internet legal services may be violating ethics rules against fee-sharing, offering legal advice without a license, and the solicitation of clients, consider the possibility of changing the effected legal ethics rules. Law firms can continue to measure individual timekeeper productivity and profitability, while nevertheless exploring ways to replace hourly billing strategy before clients demand it.

8. Think Beyond the Numbers Compensation or performance-appraisal systems can force individuals to choose between the new vision of the future and their self-interests. If the firm is currently successful in terms of strong billable hours, complacency can be high, so change initiatives can take time.

The longer the firm contemplates its action, the sooner the firm faces irrelevancy. Price pressures created by new e-commerce business models will only accelerate in the years ahead. These changes will affect every sector of the economy, so the legal profession cannot afford to sit back while other professional service providers redefine their own *new* areas of practice.

9. Make the Internet Your Best Friend Sharing knowledge with clients, and maintaining closer, richer relationships with them remains a highest priority for all professional service providers. Although there is nothing new about this strategy, the Internet is providing clients with new tools to acquire knowledge, and using these tools has given clients a much higher level of sophistication.

Because the consumer is driving the direction of future legal services, and the consumer is demanding greater access to information, lawyers will increasingly need to become more comfortable with network technologies in order to be a player in shaping future services.

10. Create Practice Quality Standards Any law firm's competitiveness—and *raison d'etre*—is based on its competencies and capabilities and their relevance to its business environment. As law firms continue to expand alliances and affiliations with outside service providers, their infrastructures will need to change to support the delivery of consistent, high-quality legal work product.

Law firm infrastructure will need to provide all professionals with the tools to work collaboratively among many offices. It will also require work habits supporting remote collaboration, a mutual understanding of the elements that define work quality, and a set of common standards for satisfactory client service.[5] Consumers demand standards of quality, so law firms will have to develop the internal processes and controls to assure that standards of quality are met.

11. Implement Knowledge Management Systems Firms that are able to help clients make better decisions and enhance their business capabilities will flourish. In an era where information that once was sold on an hourly basis is available free on the Internet, firms that rely on Ross Dawson's *black-box* services, where the client is left none the wiser for the experience, will be called on less and less.

Sophisticated clients are no longer interested in simply obtaining a lawyer's legal advice; they want a lawyer's assistance in crafting a solution to a business problem. The process has become as important as the outcome.

12. Form Alliances and Partnerships Many corporate clients have become quite sophisticated consumers of legal services, so law firms find themselves forming alliances or partnerships to provide clients with highest quality services.

Certainly the much-publicized merger of Clifford Chance with the New York law firm of Rogers & Wells LLP, and the German law firm of Püender, Volhard, Weber & Axster is a good example of how some of the largest firms are positioning themselves to provide seamless client services. The Internet provides sole practitioners and firms of all sizes some of the same tools available to the nation's largest firms to form seamless client services.

Stephen P. Gallagher

1. *See* John P. Kotter, Leading Change 4 (1996).
2. Gary Hamel & C. K. Prahalad, Competing for the Future 2 (1994).
3. *Id*.
4. *Id*.
5. *See* E. Leigh Dance, *Delivering Seamless Service: Best Practices of Multidisciplinary Partnerships*, Law Firm Governance, Vol. 4, No. 3, at 6 (Spring 2000).

box" services for their clients, or they can proactively share their knowledge, working with their clients to create value. Dawson describes *black-box* services as the traditional approach, providing services in which the outcome or result is valuable to the client, but the process is opaque and the client is left none the wiser for the experience.[25] A critical difference between black-box services and knowledge transfer is that, by the nature of black-box services, the client sees only the outcome. It is relatively easy for competitors to replicate that result, meaning that the services can easily become commodities. In knowledge transfer, however, the process is often as important as the outcome.[26]

"Those who attempt to hang on to their expertise will soon find themselves supplanted by competitors who are willing and able to make their clients more knowledgeable."[27] Ultimately, lawyers will realize that refusing to transfer knowledge to clients will be an unsustainable position. Law firms that are able to help clients make decisions and implement them will add the greatest client value.

Changing times have always created opportunity for aggressive, innovative competitors, while threatening the strength, and even the survival, of those too slow to respond. Today, turbulent economic and technological changes are challenging law firms to take bold, unconventional steps to add greater value to client services in this new world fraught with nontraditional competition. One of the key factors that will differentiate today's successful law firms from those in the future will be the ability to adopt approaches to managing change that differ profoundly from the ways they have habitually operated.

The opportunities for lawyers in these turbulent times have never been more challenging. The laws governing e-commerce have yet to be written, as legal ethicists warn that some of the Internet legal services may be already violating ethics rules against fee-sharing, offering legal advice without a license, and the solicitation of clients. Lawyers need to be vigilant about the dangers posed by new, unconventional rivals; yet they must also take immediate steps to acquire new skills that will enable them to use emerging technologies in ways that exceed client expectations.

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1. *See* Gary Hamel & C. K. Prahalad, Competing for the Future 18 (1994) (hereinafter "Competing for the Future").
2. Ross Dawson, Developing Knowledge-Based Client Relationships: The Future of Professional Services (2000) (hereinafter "Knowledge-Based Client Relationships").
3. *Id*. at 28.
4. *See generally* Competing for the Future, at 1-25.
5. *See* Peter F. Drucker, Management Challenges for the 21st Century 29 (1999).
6. *See id*. at 9.
7. *See* Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* (May 2, 2000) <http://www.nysba.org/whatsnew/maccrate.pdf>.The special committee is solely responsible for the contents of this report. Unless and until adopted in whole or in part by the Executive Committee and/or the House of Delegates of the New York State Bar Association, no part of the report should be considered the official position of the association. *See also* ABA Commission on Multidisciplinary Practice, *Report to the House of Delegates* (June 8, 1999) <http://www.abanet.org/cpr/mdpfinalreport.html>; *Updated Background and Informational Report and Request for Comments* (Dec. 15, 1999) <http://www.abanet.org/cpr/febmdp.html>.
8. *See* David C. McClelland, *Testing for Competence Rather than Intelligence*, Am. Psychologist, at 46 (1973).
9. Daniel Goleman, Working with Emotional Intelligence 10 (1998).
10. Daniel Goleman, *What Makes a Leader*, Harv. Bus. Rev., Nov.-Dec. 1998, at 94.
11. Emotional intelligence determines potential for learning the practical skills that are based on its five elements: self-awareness, motivation, self-regulation, empathy, and adeptness in relationships. *See* Daniel Goleman, Emotional Intelligence (1997); Daniel Goleman, Working with Emotional Intelligence (1998).
12. *See Facing the Inevitability, Rapidity and Dynamics of Change: A Report to the Board of Governors of the Florida Bar Favoring Adoption of MDP Model and Other Actions*, Jan. 7, 2000, at 14.
13. Competing for the Future (paperback edition).
14. *See* Developing Knowledge-Based Client Relationships, at 39.
15. William C. Cobb, *The Value Curve and the Folly of Billing-rate Pricing*, in Beyond the Billable Hour: An Anthology of Alternative Billing Methods 17 (Richard C. Reed ed., 1989). The value curve is further discussed in: Win-Win Billing Strategies 35-48 (Richard C. Reed ed., 1992); Robert J. Arndt, Managing for Profit 56-62 (1991); *Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation*, 16 Campbell L. Rev. 154-56 (1994).
16. Developing Knowledge-Based Client Relationships, at 208.
17. *See* Competing for the Future, at 34.
18. Jay Walker, *Redesigning Business, a Conversation with Priceline's Jay Walker*, Harv. Bus. Rev., Nov.-Dec. 1999, at 19-20.
19. International Data Corporation, (visited May 12, 2000) <http://www.idc.com>.
20. Jeanne Lee, *The Internet Can Save Your Life*, Money, Vol. 29, No. 3, at 121 (Mar. 2000).
21. Darryl Van Duch, *Technology from Hell Challenges, Scares Bar*, N.Y.L.J., Apr. 11, 2000, p. 5.
22. *See* Adrian J. Slywotzky, *The Age of Choiceboard*, Harv. Bus. Rev., Jan.-Feb. 2000, 40-41.
23. Developing Knowledge-Based Client Relationships, at 22.
24. *See* Arthur N. Turner, *Consulting is More Than Giving Advice*, Harv. Bus. Rev., Sep.-Oct. 1982, 28-34.
25. Developing Knowledge-Based Client Relationships, at 5.
26. *Id*. at 23.
27. *See id*. at 28. This book should be required reading for all professional services knowledge workers. The book is available for purchase through <http://www.ahtgroup.com/book.htm>.

Roundtable Discussion

U.S., British and German Attorneys Reflect on Multijurisdictional Work

The globalization that has driven the world financial markets for the past decade has had a far-reaching impact on both lawyers and their clients. Global consolidation—jointly fueled by the financial services and technology industries—has fed a boom in mergers and acquisitions that outperformed the 1980s in the size, scope and complexity of legal issues. The globalization of the capital markets has been accelerated by the introduction of the euro, creating a deeper European market and reshaping multijurisdictional offerings. As these transactions have increased in scale and dimension, so too has litigation.

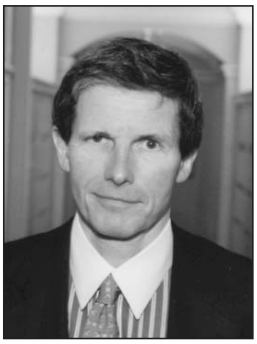
British and American firms responded by opening offices and hiring local law capability "across the pond." In 1992, Clifford Chance became the first major British firm to practice U.S. law. Firms such as Allen & Overy, Freshfields and Linklaters followed suit and today have dozens of U.S.-qualified lawyers on staff, including partners hired away from firms such as Cravath, Davis Polk and Sullivan & Cromwell and associates recruited directly from the top U.S. law schools. American firms likewise grew organically—to such an extent that today four-fifths of the lawyers at Baker & McKenzie, almost one-half of the White & Case lawyers, one-third of the Cleary, Gottlieb lawyers and one quarter of the Shearman & Sterling lawyers are based outside the United States.

International alliances were the next step as, for example, when Linklaters & Alliance and Cameron McKenna established referral networks with limited fee- and profit-sharing arrangements. And, the single European market generated a spate of mergers among U.K. and European firms in the late 1990s.

Then, in July 1999, three firms entered new territory as Clifford Chance, Rogers & Wells and Frankfurt-based Pünder, Volhard, Weber and Axster announced a transatlantic merger to create a fully integrated global firm with a single profit pool. The new firm—comprising more than 3,000 legal advisers worldwide—is the most ambitious approach to date in fostering international cooperation among lawyers. Managing the operation of the firm's 29 offices alone is a gargantuan task—understanding and delivering what global clients really want from their lawyers will be an even greater challenge.

The *Journal* recently asked a group of partners at Clifford Chance Rogers & Wells to reflect on U.S., British and German styles of lawyering, the expectations of clients with global interests, and the way their firms have approached multijurisdictional assignments. Discussion participants were Laurence E. Cranch (moderator), the Americas managing partner of Clifford Chance Rogers & Wells whose practice focuses on international finance; Jan ter Haar, a Dutch native and finance partner who has been based in the firm's London, Dubai, Amsterdam, Frankfurt and most recently New York offices; James N. Benedict, global practice area leader of the firm's litigation and dispute resolution practice and resident in New York; Simon Burgess, a British corporate and commercial partner who has spent more than five years in New York; Andreas Junius, a German native and cross-border finance and corporate partner in New York; Robert E. King Jr., global practice area leader of the firm's capital markets practice who concentrates on corporate securities and mergers and acquisitions transactions and is resident in New York.

The Emergence of a Global Style


Laurence E. Cranch

MR. CRANCH: In a recent *New York Times* article, Michael Bray, the CEO of Clifford Chance, was quoted comparing the British, German and U.S. cultures represented within our firm as follows: "'The British way is a bit understated and unsaid. . . New York's way is much more open and in your face. And the Germans are very frank and get to the point.'"[1] Is this your experience? How does it play out in your daily interactions?

MR. BURGESS: I agree with Michael to an extent. I think a lot of the differences flow from variations between U.S. and U.K. lawyering and client expectations. I think the U.S. lawyer has a tendency to lead the transaction. The client expects him or her to get the job done and that tends to make negotiations more confrontational. The U.K. lawyer is not quite as far in front of the client. He tends to hang back and play a more legalistic role. My experience is that German lawyers look to the

client to lead. So, Americans lead the client, the Brits are with the client and the Germans are very much led by the client. This is reflected in the ways lawyers act and react across the negotiating table.

Also, the practice of American law is more preventative. U.S. lawyers fully explore absolutely every avenue, much more so than the British do. This can make for endless negotiations.


Robert E. King, Jr.

MR. KING: I agree with a lot of Simon's views on the cultural difference. I have learned a lot since we began our merger discussions about the English negotiating style and find it quite different from what I have been accustomed to. For example, I thought that American drafting style was the most verbose in the world. I was surprised to discover that the British are even more loquacious.

MR. BURGESS: It is a richer language!

MR. JUNIUS: To take the Continental European position, we always prided ourselves on drafting very short, simply written agreements. Our rationale was that the contract did not need to address every point. It is all in the Civil Code and thus there is 120 years of case law behind every letter. But I think we have come a long way in terms of understanding the advantage of spelling out certain things.

MR. BENEDICT: You can spell it out on the document or let a jury do it for you 10 years later.

MR. BURGESS: What is interesting is to watch how all of those styles are beginning to converge.

MR. CRANCH: Exactly. My impression is that there has developed over the past 10 years a way of practicing law and a way of doing business at the "elite" level globally. Within this community, people of all nationalities tend to deal with each other in a fairly consistent way and to speak essentially the same language. We are all generally focused on similar issues.

This is very different from when I first started practicing law with English law firms years ago. When I did my first euro-dollar deal in London, there was a huge gap in terms of communication. The documentation was different, as was the approach to the practice of law.

I am involved in a large transaction right at the moment that is being principally run out of our firm's London office for an American client. The style, the approach and the drafting of our U.K. team are almost identical to the work we produce for that client in New York. It is really surprising how much of a convergence there has been globally in the way large transactions are done, both at the business level and in terms of the practice of law. It is inevitably going to keep moving in that direction in step with the process of globalization.

MR. JUNIUS: One particular instance of the trend toward a global style is in the field of mergers and acquisitions, where there is a tendency today to be more transparent, more open. Traditionally, in Germany, we did not grant full disclosure. You trusted your counterpart, had good faith and expected good faith. If something went wrong, you sought damages. But now we have been exposed for many years to full disclosure and due diligence reviews. Among the older generation of management this caused real reluctance and problems. The new generation in Germany, however, is much more comfortable with it. They have generally adopted the Anglo style.

MR. BENEDICT: Within the litigation practice, while the system of adjudication may be different, I find more similarities than differences in the style and approach of the lawyers. My British and German colleagues who are doing business for Merrill Lynch, Chase or Citibank have the same client contacts and the same level of accountability and responsibility as we have here in America. Our styles *have* to be the same.

Bridging the Gap

MR. CRANCH: We've mentioned serving clients globally. What are clients looking for when they ask for global service?


Andreas Junius

MR. JUNIUS: The IPO market is an obvious example of where clients need global counsel. German and European companies are awakening to the emerging global capital-raising opportunities. Companies that wouldn't have dreamt of going public a few years ago want to be listed today on one of the German exchanges or market segments. While they are going through the process of an issuance, they want to do an offering in London or New York or both. Rather than having to go through three different law firms and taking on the responsibility of managing those interfaces, they can come to us for "one-stop shopping." Not many lawyers seem comfortable with that term, but that's really what clients tell us they want.

MR. KING: In another example of a recent assignment, there is a forthcoming IPO, involving parties in France, Germany, Spain and potentially the United Kingdom, that will be offered globally, including the United States. We are able to advise on all aspects of this transaction through a truly coordinated use of lawyers from five of

our offices and all three legacy firms working very closely together.

MR. BENEDICT: We have a number of transnational litigations going on at the present time where there is a two-continent struggle over jurisdiction and venue. One example involves a suit brought in the United States over a derivatives contract issued by a European bank and purchased by British citizens.

Because the U.S. law tends to be much more favorable to plaintiffs, our client would prefer, if it has to litigate at all, to litigate in Europe or London. We were able to put together a multijurisdictional team of litigators in London and the United States with one partner in charge. We successfully moved to dismiss the U.S. action on grounds of *forum non conveniens*. If the suit is reinstituted in London, as we expect it to be, we will be ready. In the past, the client would have had the burden of essentially starting over with U.K. counsel. Here, the same team of lawyers is able to collaborate on the problem on both continents.

Beyond that, because we are one firm, there is no jockeying among the lawyers over who is going to take the lead in drafting or interviewing the witnesses. There is no reluctance—not that there ever *should* be—in having the case dismissed and sent to another country. Until now, a U.S.-based firm would have lost that work. Instead, the client is able to use the same law firm and continue to handle that lawsuit efficiently with the same group of litigators and the same litigation support systems.

MR. JUNIUS: The multijurisdictional team genuinely adds value in that case. Essentially, you're able to anticipate British suit while you are disposing of the U.S. case. Likewise, on transactions, we're able to approach a problem not from the parochial perspective of a single legal system, but with the many jurisdictions in which we operate in mind. We're able to open our clients' minds if they aren't already thinking globally.


Simon Burgess

MR. BURGESS: And you save the client a considerable amount of money. A U.S. corporation that operates in seven of the major business centers around the world recently approached us because it was fed up with the inefficiencies in terms of costs and management time of having seven separate firms. It wanted international lawyers who would work together, so it would not have to reinvent the wheel in each jurisdiction.

MR. KING: That really is a trend. Clients want ease of communication and administration in the relationship they have with their lawyers. They would like to have fewer firms and depend on those relationships to do more for them in terms of managing their legal needs and providing strategic advice.


Jan Ter Haar

MR. TER HAAR: In a sense, I think clients are ahead of firms on this. I find the clients have a full understanding of what a global client relationship is and they see the benefits to them.

MR. CRANCH: The client's expectation is that the style of service and the way in which it is going to be represented throughout the world are going to be the same. By integrating our practice, we are in the position to make that happen.

I am involved in a transaction right now where a large financial institution retained the firm to do a major merger and acquisition transaction in London. It is clear to me that the client had an expectation that the service that it would get in London would match what it got from the firm in New York. To a certain extent that was true and to a certain extent it was not. As Simon said, I think the American lawyers tend to be more aggressive in terms of taking control of transactions and making sure that they get done. My impression is that the English lawyers tend to be a little bit more pedantic and sit back and raise the 35 considerations behind each course of action.

MR. BURGESS: They are very good at spotting the problem . . .

MR. CRANCH: . . . not as good at solutions.

MR. BURGESS: But we are getting better!

MR. CRANCH: As work on this particular transaction proceeded, there was a sense on the part of the client that the team in London didn't quite understand what the client wanted and the client was having difficulty describing it to them. It was very easy once we understood the situation to have a very frank conversation with our partners in London. As a result, our partners took a more aggressive approach and the client is happy. But, without that filter, without the trust inherent in the interface between our partners and without the ability for the client to speak openly to us in New York, the client would probably still be frustrated.

MR. KING: I agree. In particular, with American clients entering new markets, it is of great value for us to be able to bridge the gap. For example, we have a client who recently bought a major office building in London. They knew they needed to go there and they knew they needed English help. There was no way U.S. lawyers would be able to do what the client needed. Our ability

to consult with them about it and make them feel it was within one "house" made a great deal of difference to the client. We were able to talk them through each step as they experienced the process for the first time.

Keeping Up With Technology

MR. CRANCH: One resource that I think is key to international cooperation is technology. What kind of potential does technology offer for the practice of law on an international basis?

MR. JUNIUS: I don't think this merger could have been even conceived of without the phenomenal advances in technology, without the Internet, faxes and cell phones that make geography and time zones far less of a factor than they were a few years ago.

Clients have a real interest in having their U.S. and U.K. lawyers, and all of their lawyers internationally, work together.

MR. BENEDICT: In my experience, e-mail is the only really effective way to communicate for all but five or six hours of the business day. I am able to send an e-mail to London or Hong Kong as I am leaving the office in the evening and come in the next morning to a response.

In litigation management, technology is making an enormous difference. We have 20 million documents in our litigation document imaging and management systems. We are able to bring up those documents at a moment's notice and prepare a witness. Twenty years ago, you would have to go through millions of pieces of manually coded paper to try to find out the documents a particular witness may have authored. Now you type in the name and run a simple search.

MR. TER HAAR: Intranets are another place where technology is really boosting communication and collaboration. We have set up Intranet sites dedicated to a particular client where members of our client team from around the world can contribute and access the latest information pertaining to that client. It enables everyone to stay up to date on media coverage of the client, public filings, matters in progress, best practices and the like. Clients have even offered to give us feeds from their Intranets so we can have even closer collaboration.

MR. KING: I think the computer is going to dramatically change the way we practice law. In 15 years, we have taken it from a situation where at closings we were marking documents in pen and ink. Today the lawyer is often the cog, the slowest part of the way things get done, as technology speeds up the preparation and revision of documents. I think we are on the cusp of figuring out ways to truly exploit the emerging technologies. We'll see transactions and relations with clients go online over the next two to three years in ways we cannot fully grasp today.

MR. CRANCH: I agree with that, Bob. I think technology presents an enormous challenge because transactions now can be done at an incredible pace. The time frames within which clients are asking us to get large transactions done are much shorter than they have ever been before and all of the mechanics can be easily executed; business plans and contracts can be drafted very, very quickly.

You can have e-mails come in as you are participating in the meeting. A new draft can be completed during the course of a negotiating session and sent to everybody simultaneously; you can all look at it and comment on it.

The problem is you don't have time to think. You are subject to a constant barrage of information and expected to review it, digest it and respond to it. And, it is becoming a 24-hour-a-day job. I don't know what the answer is. I don't think the human brain is going to speed up at all and we are just going to have to find a way to control the process somehow and continue to do a careful and considered job with the practice of law within the context of these demands for incredible speeds.

MR. CRANCH: One last question: what's next?


James N. Benedict

MR. BENEDICT: A global consolidation like ours is so difficult to do. We got here through a combination of each firm being in the right place at the right time, having great synergies in our client bases and practices and tremendous persistence in getting the deal done. For us, the next challenge is to continue to work together to pioneer the development of a new firm culture that builds on the best of the U.S., British and German styles.

MR. CRANCH: Our experience is that multinational clients have a real interest in having their U.S. and U.K. lawyers, and all of their lawyers internationally, work together. It's up to us as a profession to keep pace with the way clients do business worldwide. We're really thrilled to be the first to do so.

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1. Andrew Ross Sorkin, *Responsible Party: Michael Bray; A Lawyer's Lawyer, Bridging Borders*, N.Y. Times, March 26, 2000, sec. 3, p. 2, col. 5.

"Project Exile" Effort on Gun Crimes Increases Need for Attorneys to Give Clear Advice on Possible Sentences

BY WILLIAM CLAUSS AND JAY S. OVSIOVITCH

"Project Exile," a cooperative program between local law enforcement offices and regional offices of the U.S. attorneys to work together in evaluating and prosecuting gun offenses, is expanding to cities throughout New York State after initial implementation in Rochester. This initiative prosecutes defendants in either federal or state court based on where prosecutors believe the longest sentence can be obtained after conviction.

The underlying concept is to use mandatory federal sentencing requirements for firearms offenses to remove, or "exile," offenders from the community.

To adequately advise a client facing a weapon's charge in communities where this initiative is being pursued, the defense attorney must be familiar with United States Code title 18, §§ 922(g) and 924(c) (U.S.C.) and the relationship between the sentencing guidelines and statutorily imposed minimum and maximum sentences. After receiving a plea offer from the prosecution, the attorney must not only advise the client of the offer and available choices, but must make an informed recommendation to the client based on the relevant law and the government's policy objectives.

Attorneys representing clients facing weapons charges must consider both the short-term and long-term implications of a case. Experience has shown that clients who unreasonably reject pleas in state court often face mandatory minimum sentences of 5 years or more in federal court. The implications become more severe. Clients with long criminal histories are finding themselves labeled armed career criminals. This label comes with a 15-year mandatory minimum sentence.

In these circumstances, the importance of making an informed decision on a plea bargain becomes more critical. Generally, the risk is that refusal of a plea bargain in state court, where the penalties are less, could lead to a prosecution in federal court where there is no chance to negotiate a plea and the penalties are likely to be higher. Clients with long criminal histories are particularly at risk, because they face a 15-year mandatory minimum sentence if they are labeled career criminals.

Project Exile Strategy

Begun as a joint program between U.S. Attorney Helen F. Fahey and local police in Richmond, Virginia, in an effort to reduce that city's high violent crime rate,[1] Project Exile is credited, at least in part, with the dramatic reduction in Richmond's homicide rate.[2]

Richmond's early success led U.S. Attorney Denise O'Donnell and Monroe County law enforcement officials to implement Project Exile in Rochester, New York in October 1998.[3] Its effectiveness is measured by the statistics it generates. Several factors are widely reported, including the number of indictments, the number of convictions and the length of sentences. During the program's first year of implementation, the U.S. attorney's office indicted 76 defendants under Project Exile, and credited the program with removing more than 300 firearms from the street.[4]

The National Rifle Association quickly endorsed Richmond's efforts by contributing more than $100,000

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to promote the program.[5] President Clinton, after some initial reluctance, signed on as a supporter.[6] Along with Richmond and Rochester, Project Exile has also been established in Albany, Buffalo, Niagara Falls, Syracuse, Denver, Atlanta, Birmingham, Alabama, Fort Worth, Texas, New Orleans, Norfolk, Virginia, Philadelphia, and San Francisco.[7]

At the center of a Project Exile prosecution is 18 U.S.C. chapter 44, which deals with unlawful acts involving a firearm. The majority of Project Exile cases in the Western District of New York have been brought under 18 U.S.C. § 922(g), which prohibits specified persons, including convicted felons and individuals convicted of misdemeanor crimes of domestic violence, of possessing a firearm that is in or affecting interstate commerce.[8] A firearm need only have traveled in interstate commerce to have been in or affecting interstate commerce.[9]

Section 924(c) of 18 U.S.C. establishes mandatory minimum penalties for persons who possess or use a firearm in furtherance of a crime of violence or drug trafficking.[10] Probation is unavailable to a defendant convicted under this statute, and the penalties are to be served consecutively to any other sentence that is imposed by the sentencing court or to an existing sentence.[11] Mere possession of a firearm during a crime of violence or drug trafficking can result in a term of imprisonment of not less than 5 years.[12] If the firearm is brandished, the minimum term of imprisonment is not less than 7 years; if the firearm is discharged, the minimum term of imprisonment is not less than 10 years.[13] A mandatory minimum sentence of 25 years imprisonment will be imposed if the defendant has a prior 18 U.S.C. § 924(c) conviction.[14]

The most significant decision is whether to accept a plea agreement in state court before the charges are sent to a grand jury.

In addition to any statutorily mandated sentence, a defendant convicted either of a drug trafficking charge or a crime of violence is also sentenced in accordance with the U.S. Sentencing Guidelines.[15] A defendant convicted under 18 U.S.C. § 924(c) will be sentenced in accordance with its statutory requirements. The sentencing judge is bound by the statutory minimum sentences imposed by § 924(c).[16] Statutory minimum sentencing requirements control the sentencing court.[17] The 18 U.S.C. § 924(c) conviction is served consecutively to any other sentence imposed by the court; the sentencing judge has no discretion to impose a concurrent sentence.[18]

The statutory sentences establish a floor below which the sentencing judge must not depart. However, if enhancements or the criminal history category under the Sentencing Guidelines determine that the defendant is to receive a sentence greater than the statutory minimum sentence, the judge generally follows the guidelines. If the judge intends to depart from the guidelines' range, the judge is prohibited from imposing a sentence below the statutorily required minimum sentence.

Representing a Client

The most significant decision that must be made shortly after a client is arrested is whether to accept a plea agreement in state court before the charges are sent to a grand jury.

Although the ultimate decision on whether to accept a plea agreement is always the client's,[19] the attorney faces a heightened obligation to ensure that the client is fully informed of the consequences of the decision that is made.[20] As the commentary to the ABA Standards of Criminal Justice explain, "[t]he client should be given sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[21]

In cases that predate Project Exile, failure to properly advise a client about whether a plea agreement should be taken may result in a defendant raising an ineffective assistance of counsel claim in a *habeas corpus* petition. In several recent cases, the Second Circuit Court of Appeals has found that defendants did not receive effective legal representation when their attorneys failed to adequately advise them of the sentencing ramifications of rejecting a plea offer.[22]

Although not a firearms case, *Boria v. Keane*[23] presented a common fact pattern that many criminal attorneys have encountered while representing clients during plea negotiations. Claiming innocence, the defendant rejected a plea offer in state court that would have resulted in the defendant being charged with a Class A-II felony, and a term of imprisonment of one to three years.[24] The defendant's attorney had also been advised that if his client rejected the plea offer the prosecutor would seek a superseding indictment for a Class A-I felony that, under the Rockefeller laws, would have resulted in a substantially longer sentence.[25] While discussing with the defendant strategies that they would pursue once the new indictment was issued, the defendant's attorney never expressed his belief to his client that the rejection of the plea was "suicidal."[26] At the conclusion of the trial the defendant, a first-time offender, was sentenced to 20 years to life.[27] Reviewing the defendant's petition for *habeas corpus*, the Second Circuit held

that the client had received ineffective assistance of counsel.

A potential problem reminiscent of *Boria* was seen in one of the early Project Exile cases. An attorney represented a client in federal court who had been found in a drug house with cocaine and money. Several short-barreled rifles and a pistol were found in a closet. A key to the house was found in the client's pocket. The client was initially arraigned in state court and offered the opportunity to plead to two misdemeanors under state law. Acceptance of the plea bargain would have resulted in the client serving 12 months in jail. Because of the immigration consequences of serving a 12-month sentence, the client rejected the offer. The client's state court attorney, who was unaware of Project Exile and the consequences of rejecting the plea, did not work with the prosecutor to see if a better deal could be obtained for the client.

Other problems may emerge from dual sovereignty, the effect of multiple charges on sentencing, and the effect of the Armed Career Criminals Act.

The assistant district attorney then sent the case to Project Exile for evaluation, and it went before a federal grand jury. When the assistant federal public defender was assigned to the case, the client asked whether a better plea offer could be arranged, only to learn that the opportunity to negotiate a favorable plea had vanished once the case went to Project Exile. It is too early to know what claims this client may raise in a post-conviction proceeding. The assistant defender who represented this client in the federal proceedings expects to see an ineffective assistance claim based on the representation provided by the attorney who handled the matter in state court.

Potential Problems

As recently as 10 years ago, it was possible for criminal defense attorneys to limit their practice to state court. However, the increased federalization of criminal law means that all criminal attorneys, regardless of where they practice, must now understand the interconnected relationship between state and federal criminal law.

Myriad problems can be encountered during the representation of a Project Exile case. The potential ineffective assistance of counsel claim is only one of them. Other problems that may emerge can result from dual sovereignty, the cumulative effect of multiple charges on sentencing, and the effect of the Armed Career Criminal Act.

Dual sovereignty The Office of the Federal Public Defenders for the Western District of New York has not yet seen the effects of dual sovereignty in the context of defending a Project Exile case, although the dual sovereignty doctrine has adversely affected clients in other situations. At some point during the implementation of the Project Exile initiative, an attorney defending a client on a weapon's charge is likely to encounter the dual sovereignty doctrine, which permits "the state and federal governments to prosecute someone successively for the same criminal acts without violating double jeopardy."[28]

Successive prosecutions often occur when a defendant is either acquitted in one jurisdiction or has received a punishment that prosecutors deemed too lenient.[29] The Department of Justice has a policy limiting successive prosecutions. According to this "Petite Policy," the department will limit successive prosecutions to cases that are "compelling."[30] However, if the case does not meet the criteria set forth in the Petite Policy, the government may still prosecute the case.[31]

There is one exception to the dual sovereignty doctrine. In *United States v. 38 Whaler's Cove Drive*, a Second Circuit panel explained that the "Double Jeopardy Clause may be violated despite single prosecutions by separate sovereigns when one 'prosecuting sovereign can be said to be acting as a "tool" of the other.'"[32] This is known as the *Bartkus* exception,[33] based on a U.S. Supreme Court decision which stated that the petitioner's conviction after the second prosecution did "not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution."[34]

It is difficult to sustain a claim that one sovereign is acting as a tool for another sovereign. Mere cooperation between state and federal prosecutors is not enough.[35] Even significant cooperation between federal and state prosecutors has not been sufficient to apply the *Bartkus* exception.[36] The high bar established by the courts to demonstrate that one sovereign is acting as a tool for another makes it difficult for defense counsel to succeed on a double jeopardy claim if a client is first prosecuted in state court and then brought into federal court.

This is not meant to imply that all defendants convicted in state court will then be facing federal penalties. The Rochester office was assigned to represent a client who was facing a misdemeanor weapons charge in state court. The client was also indicted by a federal grand jury on two counts of possessing a firearm with a barrel less than 16 inches in length and having an overall length of less than 22 inches.[37] The government was

willing to withdraw the federal indictment after the client pleaded guilty in state court because he had no prior criminal record. However, to get this agreement the client's state court counsel had to first understand the penalties the client faced in case the plea offer was not worked out, and communicate the implications of rejecting the offer to the client. It also required communication between the client's federal and state court attorneys, as well as the assistant U.S. attorney and the assistant district attorney. Ultimately, the client was sentenced to only 90 days in jail.

Unexpected sanctions Section 924(c)(1)(C) of 18 U.S.C. provides a mandatory minimum sentence of 25 years for a second or subsequent conviction under that section. Depending on how the government charges the offense, a client may actually face a sentence of more than 30 years. A conviction under § 924(c) does not require the entry of a final judgment of conviction in order for the court to apply the statutory sentence enhancements.[38] The first and the second conviction under § 924(c) may be the result of the same trial.[39]

An attorney in Rochester encountered this problem representing a client arrested during a "buy and bust operation." It is common practice for the Rochester Police Department to first make a confirmatory buy before executing a search warrant of a residence that the police suspect houses a drug operation. In this instance, the police made a confirmatory buy and, within five minutes, executed a search warrant. One weapon was found in the premises during the execution of the warrant. The client was charged with one count of distributing a controlled substance and one count of possession with intent to distribute a controlled substance.[40] The client was also charged with two counts of possessing a firearm during a drug trafficking crime.[41] One count was tied to the distribution charge, and the other count was tied to the possession charge. The client faced a 10-year and then a 25-year term of imprisonment on the firearms counts, to be served consecutively to the term of imprisonment for the narcotics offenses.[42] He was ultimately sentenced to 477 months (39 years, 9 months) imprisonment.

The client faced a mandatory term of imprisonment of more than 35 years for possession of one weapon because 18 U.S.C. § 924(c)(1)(D) looks only at whether there is a second or subsequent conviction. The second conviction under § 924(c) can come from the same trial or plea as the first conviction.[43] Nonetheless, a proactive attorney who is aware of this pitfall can minimize the client's exposure by negotiating with the assistant U.S. attorney before an indictment is filed.

Armed Career Criminal Act A defendant who has three previous convictions for a "violent felony" or for a "serious drug offense" can be charged as an armed career criminal.[44] This label carries a statutory mandatory minimum sentence of 15 years.[45] It is irrelevant whether the prior convictions were the result of federal or state court proceedings.[46]

The court will use a categorical approach when determining whether the prior conviction is a "violent felony" or a "serious drug offense."[47] This requires the court to determine whether the crimes charged fall within certain categories rather than examining the facts underlying the prior convictions.[48]

Conclusion

This article's emphasis on advising a client about a plea offer is not meant to imply that a client charged with a weapons violation cannot be acquitted at trial. Attorneys do successfully defend weapons charges in federal court.[49] However, both the attorney and the client need to be fully aware of the pitfalls that counsel may encounter when representing a client subject to "Project Exile." Once the risks are clearly known, the attorney will be in a position give the client realistic advice on whether to take a plea offer at the earliest opportunity or proceed to trial.

It is also important to remember that both the judges and prosecutors understand that the statutory penalties faced by a client may be unduly harsh and excessive. Even after conviction, the courts and prosecutors may be open to suggestions that can improve a defendant's situation. After trial but before being sentenced, for example, the client sentenced to 477 months was offered a plea bargain (on the record) where his sentence would have been reduced by 300 months (25 years) if he waived his right to appeal. It rests on the defense attorney to instill confidence in the client that you have considered every option and are making recommendations that are in the client's best interest.

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1. *See* Tom Campbell & Gordon Hickey, *Project Exile Aims to Break Guns, Drugs Link City Wants Federal Arrests, Stiff*, Richmond Times Disp., Feb. 22, 1997, at B1.
2. *See* Carrie Johnson, *Richmond's Homicide Rate Drops Year Ends With 96 Deaths - The Fewest Since 1987*, Richmond Times Disp., Jan. 2, 1999, at A1.
3. *See* James Goodman, *U.S. Joins County, City Against Guns*, Democrat and Chronicle (Rochester, NY), Sept. 26, 1998, at 1B; James Goodman, *Billboards to Trumpet Tougher Policy on Guns*, Democrat and Chronicle (Rochester, NY), Sept. 30, 1998, at 1B.
4. *Summary Statistics for Project Exile Cases*, Nov. 9, 1999, at 1. The Monroe County District Attorney's Office indicted 30 defendants under Project Exile and filed Superior Court Informations on 62 defendants. *Id*. at 2. *See* Greg Livadas, *Schumer Praises Project Exile*, Democrat and Chronicle (Rochester, NY), Aug. 12, 1999, at 1B (quoting Rochester Police Chief Robert Duffy, who claims that Project Exile is working because "[w]e've had undercover investigators

try to buy guns and they were told they wouldn't sell them a handgun because they don't want to go to federal prison.").

5. *Project Exile, Homeward Get Grants*, Richmond Times Disp., Apr. 11, 1999, at B5; David S. Cloud, *Prosecutor's Strategy Scrambles Gun Control Alliances*, Wall St. J., Aug. 31, 1998, at A20; *see* Wayne Lapierre, Executive Vice President of the National Rifle Association, News Conference on Legislative Proposals Regarding Violent Crime, 1999 WL 287782 (Federal Document Clearing House, May 10, 1999).

6. *Compare* David S. Cloud, *Prosecutor's Strategy Scrambles Gun Control Alliances*, Wall St. J., Aug. 31, 1998, at A20 *with The President's Radio Address*, 35 Weekly Comp. Pres. Doc. 488 (Mar. 29, 1999) *and Memorandum on Deterring and Reducing Gun Crime*, 35 Weekly Comp. Pres. Doc. 489 (Mar. 29, 1999).

7. In Syracuse, the initiative is known as Project SAFE, for Strategically Applied Firearms Enforcement. John O'Brien, *Partnership Sets Sights on Gun Crimes County, Federal Prosecutors to Designate Representatives in Each Other's Offices*, Post-Standard (Syracuse, NY), Mar. 10, 2000, at B3; John O'Brien, *Illegal Firearms Traffic Targeted Federal , Local Teaming of Prosecutors to Trace Contraband Guns, Dealers*, Syracuse Herald-Journal, Mar. 9, 2000, at B3.

8. 18 U.S.C. § 922(g) provides the following:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien—
>
> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
>
> (7) who, having been a citizen of the United States, has renounced his citizenship;
>
> (8) who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

9. *United States v. Carter*, 981 F.2d 645, 647 (2d Cir. 1992).

10. 18 U.S.C. § 924(c)(1) provides the following penalties:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.
>
> (C) In the case of a second or subsequent conviction under this subsection, the person shall—
>
> (i) be sentenced to a term of imprisonment of not less than 25 years; and
>
> (ii) if the firearm involved is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
>
> (D) Notwithstanding any other provision of law—
>
> (i) a court shall not place on probation any person convicted of a violation of this subsection; and
>
> (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

11. 18 U.S.C. § 924(c)(1)(D).

12. 18 U.S.C. § 924(c)(1)(A)(i).

13. 18 U.S.C. § 924(c)(1)(A)(ii), (iii). Brandishing a firearm is defined under § 924(c) as "display[ing] all or part of the firearm, or otherwise mak[ing] the presence of the

firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. § 924(c)(4).

14. 18 U.S.C. § 924(c)(1)(C)(i).
15. *See* 18 U.S.C. § 3553.
16. *See Almendarez-Torres v. United States*, 523 U.S. 224, 244-45 (1998).
17. *See* 18 U.S.C. § 3553; *see also* Alexander Bunin, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, Champion, Mar. 1997, at 34 (noting that statutory requirements are controlling while the Sentencing Guidelines are subject to departure).
18. 18 U.S.C. § 924(c)(1)(D)(ii); *see United States v. Lawrence*, 928 F.2d 36, 38-39 (2d Cir. 1991) (discussing Congress' intent to impose consecutive punishments).
19. *Jones v. Barnes*, 463 U.S. 745, 750-51 (1983) (noting that a defendant has the ultimate authority to make certain decisions regarding a case, including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *see Model Rules of Professional Conduct*, Rule 1.2(a); *The Lawyer's Code of Professional Responsibility*, EC 7-7 (hereinafter "*Code*").
20. *ABA Standards for Criminal Justice*, Standard 4-3.8(b); *Code*, EC 7-7.
21. *ABA Standards for Criminal Justice*, Standard 4-3.8 (commentary).
22. *See Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998); *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996); *but see Purdy v. United States*, 208 F.3d 41, 46-48 (2d Cir. 2000) (distinguishing *Boria*).
23. 99 F.3d 492 (2d Cir. 1996).
24. *Id*. at 494.
25. *Id*. at 495.
26. *Id*.
27. *Id*. at 494. The petitioner had served approximately six years of his sentence by the time his case reached the Second Circuit. *Id*. The panel ordered that the sentence be reduced to time served and remanded the case to the District Court with an order to grant the petition for habeas corpus. *Id*. at 499.
28. *United States v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *accord Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992); *see Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).
29. *See generally*, Adam Harris Kurland, *Lurking Pitfalls of Successive Prosecutions: Immunity, Plea Agreements, Promises not to Prosecute, and Cooperation Agreements*, Crim. Just., Winter 2000, at 4.
30. U.S. Department of Justice, U.S. Attorney's Manual tit. 9-2.031 (2d ed. 2000). The policy, more commonly known as the "Petite Policy," states that the federal government will bring forth a prosecution based on substantially the same facts raised in a state trial if it "involve[s] a substantial federal interest," in which the prior prosecution "left that interest demonstrably unvindicated," and the federal government believes that "the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact." *Id*.; *see Rinaldi v. United States*, 434 U.S. 22, 28-29 (1977) (discussing the purposes of the "Petite Policy"); *Petite v. United States*, 361 U.S. 529, 530 (1960) (noting "that it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.'").
31. *Rinaldi*, 434 U.S. at 28-29 (noting that the Petite Policy is not constitutionally mandated).
32. *38 Whaler's Cove Drive*, 954 F.2d at 38 (quoting *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984)); *see United States v. G.P.S. Automotive Corp*., 66 F.3d 483, 494 (2d Cir. 1995).
33. *Bartkus*, 359 U.S. 121.
34. *Id*. at 123-24.
35. *See id.* at 123.
36. *G.P.S. Automotive Corp*., 66 F.3d at 495. Judge Calabresi noted that even "the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution does not by itself bring a case within the *Bartkus* exception to the dual sovereignty doctrine." *Id*.
37. This was in violation of 26 U.S.C. §§ 5822, 5845(a), 5861(c), and 5871.
38. *See Deal v. United States*, 508 U.S. 129, 132 (1993) (finding that "'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction.").
39. *United States v. Bernier*, 954 F.2d 818 (2d Cir. 1992) (per curiam).
40. 21 U.S.C. § 841(a)(1).
41. 18 U.S.C. § 924(c)(1)(A).
42. 18 U.S.C § 924(c)(1)(D)(ii) prohibits the imposition of a consecutive sentence for any term of imprisonment under § 924.
43. *See Deal*, 508 U.S. at 134-38.
44. *See* 18 U.S.C. § 924(e)(1). The Armed Career Criminal Act states the following:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Id.

45. *Id*.
46. *Cf. Taylor v. United States*, 495 U.S. 575, 578 & n.1 (1990) (noting that at least two of the petitioner's four prior convictions were based on state law).
47. *Id*. at 600-601.
48. *Id*.
49. Alexander Bunin, the Federal Defender for the Northern District of New York, identified several strategies for successfully defending a federal weapons charge. *See cf*. Alexander Bunin, *Firearms Cases: Building an Arsenal*, in Federal Criminal Defense Practice Seminar, Presented by the Federal Public Defender's Office, Western District of New York, Dec. 3, 1999 (on file with the authors).

Normal Rules on Liability for Failure To Use Seat Belts May Not Apply In School Bus Accidents

By Montgomery Lee Effinger

In most automobile accident cases the question of whether an injured party was wearing a seat belt as required by New York law[1] is an issue. Although narrow restrictions on the proper use of seat belt evidence have evolved through case law and statutes, different rules and sources of authority may apply when school buses are involved in accidents. This article looks at the special considerations and legal authority that affect a school's liability when a school bus is in an accident and pupils were not wearing seat belts.

In general, the impact of seat belt non-use on litigation is constrained to mitigation of damages.[2] In the usual personal injury automobile accident case, a defendant is not excused from liability merely because the injured party was not wearing a seat belt at the time of the accident.[3] Indeed, under this body of authority, when injuries result from an automobile accident "[i]t is well settled that failure to use an available seat belt is to be considered in mitigation of damages and should not be considered by the triers of fact in resolving the issue of liability."[4] As noted below, there are very few exceptions where the failure to wear a seat belt may become a basis for determining liability. The controlling "Seat Belt Law"[5] clearly embodies this restrictive approach concerning use of seat belt evidence for the usual motor vehicle accident case.

Although the legal issue is far from settled, when a school bus is involved in an accident the rules on who can be held liable for injuries to pupils who are not wearing seat belts may be different from the rules that apply to accidents involving passenger cars. The analysis of liability in school bus accidents must include consideration of special statutes and administrative rules that distinguish school buses from other vehicles.

These distinctions may be used by plaintiffs in an effort to impute liability to schools notwithstanding the Seat Belt Law. Counsel may further endeavor to rely upon administrative regulations promulgated by the New York State Department of Education regarding seat belt instruction and use on school buses in a bid to circumvent the limitations contained in the statute. In New York, however, considerable authority exists to prevent liability from being premised upon the non-use of seat belts. Although a few cases have considered the impact of the Seat Belt Law on school liability, reasonable arguments on both sides may clearly be derived from the statutes, rules and case law.

Limiting School Liability

Although the New York Court of Appeals has not specifically addressed the impact of seat belt non-use on school liability, a large body of case law has developed that favors precluding liability based upon non-compliance with seat belt requirements both before[6] and after[7] enactment of the current Seat Belt Law in 1985. In this manner, New York courts have at times applied the precedential authority to dismiss as a matter of law those actions where liability was predicated upon the failure to employ seat belts.

When enacted in 1985, N.Y. Vehicle and Traffic Law § 1229-c(8) (VTL) incorporated the prior case law, which had limited evidence of non-use of seats belts to the issue of damages.[8] Subsequent decisions have held that the statute was intended to codify and expand the rule established by the Court of Appeals in *Spier v. Barker*.[9] The statute, therefore, maintained the prohibition against causes of action directly or indirectly predicated upon noncompliance with the Seat Belt Law as a basis for liability, while stating that such evidence of seat belt non-use "shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages."[10]

Montgomery Lee Effinger is an associate with O'Connor, McGuinness, Conte, Doyle & Oleson in White Plains, N.Y., where his practice includes defense work for municipalities and school districts. He was appellate counsel for the defendant in the *O'Connor v. Mahopac Central School District* case cited in the article. He is a graduate of Bucknell University and received his J.D. from Pace University School of Law.

Among the appellate courts, only the Second Department in *O'Connor v. Mahopac Central School District*[11] has considered the impact on liability resulting from the failure to use seat belts. The court affirmed summary judgment to the defendant school because the plaintiff acknowledged that there was no evidence that negligence by the school or the school bus driver contributed to the vehicular accident. Even before *O'Connor*, however, it could be argued that the principles limiting the viability of claims based on seat belt non-use would have precisely the same impact when applied to injuries suffered by children while riding a school bus. Generally speaking, there is no legal distinction between vehicular accidents involving infants or adults, because the Seat Belt Law prohibits proof in support of causes of action predicated, directly or indirectly, on noncompliance with VTL § 1229-c(8) without regard for age.[12] Indeed, the Fourth Department has read the statute to prohibit any exemption to § 1229-c(8) for failure to require young children to "buckle up."[13]

Administrative code provisions also have an impact on school bus safety issues.

While confirming the prohibition against liability predicated upon the non-use of seat belts pursuant to the language of VTL § 1229-c, the Fourth Department in *Baker v. Keller* also "invited" the legislature to consider amending § 1229-c(8) in its application to cases involving infants or young children. This invitation emphasized the lack of latitude provided in the current statute.[14]

It should also be noted that § 3813(4) of the N.Y. Education Law provides that a school district (as well as a school bus operator under contract with a school district) shall not be held liable for personal injuries of a passenger on a school bus "solely because the injured party was not wearing a seat safety belt." The ample case law and statutory authority thus serve to bolster a school's defense against claims of liability premised upon a student's failure to wear a seat belt.

Liability on the Basis of a Failure to Buckle

In response to limitations on liability imposed by the Seat Belt Law, plaintiffs have often relied on the body of case law holding that the statute has no applicability when failure to wear a seat belt is the "cause" of the accident. This approach was enunciated by the Court of Appeals in *Spier*[15] and generally has been used to permit the imposition of liability under narrow circumstances in which a plaintiff's non-use of a seat belt somehow brought about the accident.[16]

For example, a lower court allowed liability to be imposed upon the City of New York for non-use of restraints where the cause of injury to a firefighter was the removal of seat belts.[17] Before passage of the Seat Belt Law, the Second Department similarly held in *Curry v. Moser* that evidence of non-use of seat belts could be used on the issue of liability because the failure to use a seat belt caused the plaintiff to fall from the vehicle before a collision occurred.[18] Efforts on behalf of plaintiffs have, however, met with much resistance since the passage of the Seat Belt Law. The Third Department pointed out that these cases were decided prior to passage of VTL § 1229-c(8) and that the Seat Belt Law prohibited this approach.[19]

Although there is legislative authority tending to undermine the imposition of liability on the basis of seat belt non-use, the language of these statutes is not without exceptions. Indeed, while Education Law § 3813(4) does provide that a school district shall not be held liable for personal injuries of a passenger on a school bus solely on the basis of seat belt non-use, it also allows for certain exceptions including failure to maintain equipment in operating order as required by statute, rule or regulation[20] and failure to comply with applicable statutes, rules or regulations.[21]

Administrative code provisions also have an impact on school bus safety issues. For example, one such regulation entitled "Instruction on use of seat belts" provides that, when pupils are transported on school buses equipped with seat safety belts, instruction on the use of such seat belts is to be provided at least three times a year.[22] Further details regarding the nature of instruction to be provided by a school, including fastening, and placement of such belts are also included in the regulation. Nevertheless, this regulation does not require that all school buses be equipped with seat belts; rather it provides guidelines *if* such equipment is present. Furthermore, obvious hurdles of proximate causation are presented to plaintiffs who wish to rely on such rules as a basis for liability.

Conclusion

Plaintiffs may seek general support for a breach of school duty through reference to violations of specific code provisions including those that deal with seat belts.[23] Nevertheless, it must be remembered that an Education Department regulation cannot overrule a state statute that presents a clear prohibition against advancing claims based on non-use of seat belts.[24]

Ultimately, a defendant school will call upon the clear intent and public policy behind the prohibition contained within the statutes while plaintiffs will seek

both to invoke the exceptions as well as to apply the special rules applicable to school buses as a basis for supporting their liability claims. However, definitive determination of school liability predicated on seat belt non-use must await further case law or statutory developments.

1. N.Y. Vehicle and Traffic Law § 1229-c (VTL).
2. VTL § 1229-c(8).
3. *Bifaro v. Smith*, 242 A.D.2d 892, 665 N.Y.S.2d 950 (4th Dep't 1997); *Baker v. Keller*, 241 A.D.2d 947, 947, 661 N.Y.S.2d 330, 330 (4th Dep't 1997).
4. *Stein v. Penatello*, 185 A.D.2d 976, 976, 587 N.Y.S.2d 37 (2d Dep't 1992) (citations omitted).
5. VTL § 1229-c(8).
6. *See Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974); *Bongianni v. Vlasovetz*, 101 A.D.2d 872, 476 N.Y.S.2d 186 (2d Dep't 1984); *Tome v. Buitrago*, 75 A.D.2d 521, 426 N.Y.S.2d 1008 (1st Dep't 1980).
7. *See Davis v. Bradford*, 226 A.D.2d 670, 642 N.Y.S.2d 48 (2d Dep't 1996); *Normoyle v. New York City Transit Auth.*, 181 A.D.2d 498, 581 N.Y.S.2d 28 (1st Dep't 1992); *Hamilton v. Purser*, 162 A.D.2d 91, 563 N.Y.S.2d 163 (3d Dep't 1990); *Bifaro*, 242 A.D.2d 892.
8. *See Biafro*, 242 A.D.2d at 892 (citing *Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974)).
9. 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974); *see Hamilton*, 162 A.D.2d at 93.
10. VTL § 1229-c(8).
11. 259 A.D.2d 530, 692 N.Y.S.2d 76 (2d Dep't 1999).
12. *See Hamilton*, 162 A.D.2d 91; *Bifaro*, 242 A.D.2d 892.
13. *Baker v. Keller*, 241 A.D.2d 947, 947, 661 N.Y.S.2d 330, 330 (4th Dep't 1997).
14. *See id.* at 947-48.
15. 35 N.Y.2d 444, 450, 363 N.Y.S.2d 916, 920 (1974).
16. *See Roach v. Szatko*, 244 A.D.2d 470, 472, 664 N.Y.S.2d 101, 102 (2d Dep't 1997).
17. *Weyant v. City of New York*, 162 Misc. 2d 132, 616 N.Y.S.2d 428 (Sup. Ct., Kings Co. 1994).
18. *Curry v. Moser*, 89 A.D.2d 1, 454 N.Y.S.2d 311 (2d Dep't 1982).
19. *Hamilton v. Purser,* 162 A.D.2d 91, 93, 563 N.Y.S.2d 163, 165 (3d Dep't 1990).
20. N.Y. Education Law § 3813(4)(a) ("Educ. Law").
21. Educ. Law § 3813(4)(b).
22. N.Y. Comp. Code R. & Regs., tit. 8 § 156.3(i).
23. *See, e.g., Womack by Womack v. Duvernay*, 229 A.D.2d 488, 490, 645 N.Y.S.2d 831 (2d Dep't 1996); *Chainani v. Board of Educ.*, 201 A.D.2d 693, 696, 608 N.Y.S.2d 283 (2d Dep't 1994), *aff'd*, 87 N.Y.2d 370, 639 N.Y.S.2d 971 (1995); *Blair v. Board of Educ.*, 86 A.D.2d 933, 448 N.Y.S.2d 566 (3d Dep't 1982).
24. *See Board of Educ. v. Licata*, 42 N.Y.2d 815, 396 N.Y.S.2d 644 (1977).

Editor's Mailbox

Court Adjournments

Justice Stephen G. Crane and Mr. Robert C. Meade Jr. are to be commended for their thorough exposition in the May issue of the *Journal* of when judges should and should not grant adjournments and what counsel can do to avoid having a problem getting an adjournment. Unfortunately, the realities of practice, particularly in New York City, make compliance with the lofty goals of the Comprehensive Civil Justice Program and the Uniform Court Rules a frequent impossibility.

If nothing else, the economics of the legal business prevent one from hiring enough attorneys to do all the scheduled depositions, serve all the authorizations, write all the motions and briefs, cover all the conferences, respond to all the discovery and try all the cases within the time frames allotted. There is a vast shortage of qualified support staff and competent junior attorneys. Many judges take months to deal with infant's compromise papers and then refuse to reimburse disbursements. Our office could have hired at least one additional attorney on the amount of disbursements that have been denied in the last year or so.

It takes four to six months for a file to be transferred from one county to the next when venue has been changed. It takes a month or two to enter an order. These delays count against the pre-note of issue deadlines.

It is always a pleasure when a judge has read the papers in advance of an argument, but most have not. Therefore, attorneys operate on the assumption that the judge hasn't read the papers, which frequently leads to delays, problems and mischief. The courts bring these problems on themselves.

The new pretrial conferences are, in most parts, an absolute joke. No issues are narrowed, or even discussed. Settlement is rarely entertained in any meaningful way. Instead, the conferences merely involve setting up trial dates, a process that could have been handled by mail, phone or Internet. Most offices send junior attorneys when possible.

A last thought. Just as there are lawyers who lack basic diligence and professional courtesy, there are too many judges, both elected and appointed, who do not have the temperament necessary to deal with crowded calendars and busy attorneys. These judges make issuing threats and having temper tantrums their *modus operandi*. Decisions that are either blatantly unlawful or gross abuses of discretion are part and parcel of the courtroom karma for these judges. The bar has no effective way of dealing with them. A couple of them in each county are more than enough to severely damage the timely and efficient administration of justice.

The foregoing are just a few of the reasons why the courts should make sure cases are decided on the merits, not on the question of whether one side asked for one adjournment too many.

Mark J. Elder
New York City

The writer is of counsel at Gorayeb & Associates, P.C.

Meet Your New Officers

President

Paul Michael Hassett, managing partner of the Buffalo law firm of Brown & Kelly, LLP, has been named president of the New York State Bar Association (NYSBA).

Hassett served as president-elect, chaired the House of Delegates, the state bar's policy and decision-making body, and co-chaired the President's Committee on Access to Justice.

He has served as a NYSBA vice president, a member the Committee on Attorney Professionalism, Task Force on the Profession and the Trusts and Estates Law Section, member-at-large of the Executive Committee, chair of the Commission on Providing Access to Legal Services for Middle Income Consumers and the Special Committee to Improve Court Facilities. He is also a former chair of the New York State Conference of Bar Leaders.

Hassett is a past president of the Bar Association of Erie County, chaired its Committee on Grievances and is a member of the Finance Committee. He previously served on the board of directors of the Volunteer Lawyers Project, the Aid to Indigent Prisoners Society, and the Erie Institute of Law. He is also a past president of the Erie County Bar Foundation. Hassett will be the 10th Buffalo lawyer to serve as president of the 124-year-old state bar association.

A graduate of Canisius College (1962), he earned his law degree from Georgetown University (1965), where he was associate editor of the *Georgetown Law Journal*. His practice is concentrated in the areas of probate, estate and trust administration, and general business law.

President-Elect

New York attorney Steven C. Krane, a partner in the Litigation and Dispute Resolution Department of Proskauer Rose LLP, has been named president-elect. As president-elect, he will chair the House of Delegates.

Krane assumed office on June 1. He will become president of the NYSBA on June 1, 2001, the youngest person ever to hold that post.

Krane is a graduate of SUNY at Stony Brook (1978), where he was elected to Phi Beta Kappa, and earned his law degree from the New York University School of Law (1981). He served as a law clerk to then New York Court of Appeals Judge Judith S. Kaye (1984-1985).

Since 1995 he has chaired the Special Committee to Review the Code of Professional Responsibility, shepherding major changes in the Code, which governs the daily business and ethical behavior of New York lawyers, through the House and the courts. He also represented the state bar on the Office of Court Administration's Task Force on Attorney Professionalism and Conduct.

A sports law practitioner, Krane has litigated major cases for the National Hockey League, Major League Soccer and the National Basketball Association. He also regularly represents law firms and individual attorneys in disciplinary and professional liability matters.

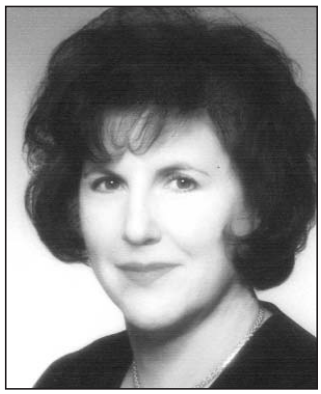
Treasurer

Frank M. Headley, Jr., a partner in the Scarsdale and Bronxville law firm of Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn, was re-elected treasurer of the New York State Bar Association (NYSBA).

A graduate of Denison University, Headley earned his law degree from Fordham Law School, where he was a member of the *Fordham Law Review*.

He has served as a NYSBA vice-president, Ninth Judicial District, and a member-at-large of the Executive Committee. Headley is a past president of the Westchester County Bar Association, Westchester County Bar Institute and Legal Aid Society of Westchester County.

Secretary



Lorraine Power Tharp, a principal in the Albany law firm of McNamee, Lochner, Titus & Williams, P.C., was re-elected secretary of the New York State Bar Association (NYSBA).

A graduate of Smith College, Tharp earned her law degree from Cornell Law School. She has served as a member of the state bar's Executive Committee since 1994. She is the immediate past chair of the Real Property Law Section and a past member of the Committee on Women in the Law.

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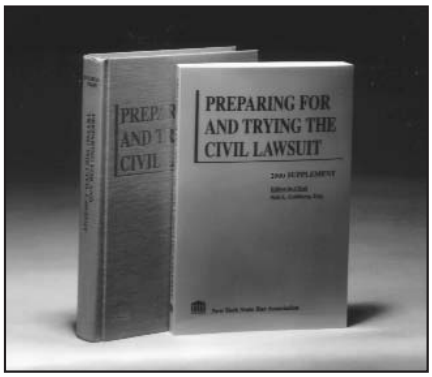

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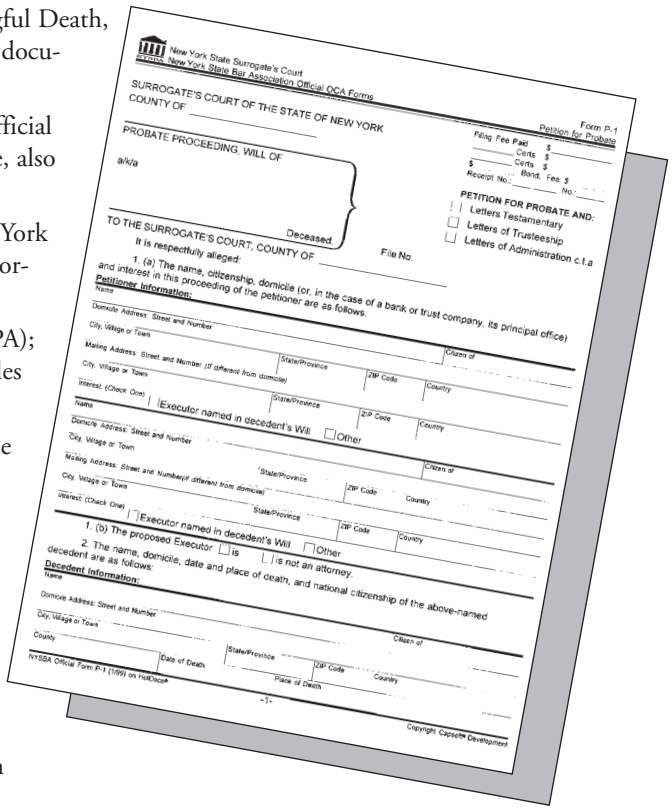

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TAX TECHNIQUES

Proposed GST Regulations Clarify Exemptions for Grandfathered Trusts

BY ARTHUR D. SEDERBAUM

Ever since the generation-skipping transfer (GST) tax provisions were enacted as part of the Tax Reform Act of 1986 (TRA 86), the application of the grandfather provisions has generated a significant number of private letter ruling requests.[1] The majority of these ruling requests have concerned modifications made after September 25, 1985, to trusts created before that date.[2]

On November 18, 1999, the IRS issued proposed regulations to "provide guidance with respect to the type of trust modifications that will not affect the [GST tax] exempt status of a trust."[3] The proposed regulations take a more liberal standard with respect to modifications that may occur in a grandfathered trust without the loss of GST tax-exempt status. The hope is that this ruling will lessen the need for private letter rulings on the subject.

Section 1433(b)(2) of TRA 86 exempts certain trusts and transfers from trusts from the imposition of the GST tax. These exemptions are:

1. Any transfer from a trust that was irrevocable on September 25, 1985, to the extent the transfer is not made out of additions to the trust after that date.[4]
2. Any transfer under a will or revocable trust executed before October 22, 1986, if the testator or settlor died before January 1, 1987.
3. Property included in the gross estate of a decedent if, on October 22, 1986, he/she was under a mental disability to change the disposition of his/her property and did not regain competence to do so before death.

Scope of Modifications

Five different situations are covered in the proposed regulations. Practitioners in this area are familiar with each situation.

First, if a court construction proceeding resolves an ambiguity in the terms of the trust instrument, the implementation of the court's decree will not cause the trust to lose its GST tax exempt status provided the issue is "bona fide" (whatever that means) and the *Bosch*[5] test is satisfied. The Treasury Department views such construction proceedings as determining the settlor's intent as of the date of the instrument, which was grandfathered to begin with. An example in the proposed regulations describes the case of an ambiguous provision in the trust instrument regarding whether the principal is to be distributed per stirpes or per capita. Practitioners have all had instances of these construction proceedings, which are not reformation proceedings because the proceeding relates back to the initial date of the instrument. Therefore, the construction by the court is really not a modification at all; the court is clarifying what the settlor intended to say in the first place.

Second, and related to the court construction proceedings, is a court-approved settlement of a bona fide controversy relating to the administration of a trust or the construction of the terms of its governing instrument, but only if "(1) [t]he settlement is the product of arm's length negotiations, and (2) [t]he settlement is within the range of reasonable outcomes under the governing instrument and applicable state law addressing the issues resolved by the settlement."[6] What is "within the range of reasonable outcomes?" Obviously, the IRS will be the arbiter of this. The example in IRS's explanatory provisions to the proposed regulations is singularly unhelpful and there is no example in the proposed regulations themselves.

Third, and of great interest to New York State practitioners due to the presence of N.Y. Estates Powers and Trusts Law § 10-6.6(b) (EPTL),[7] is a situation in which the trustee possessing invasion power distributes principal of an exempt trust to a trust created under an instrument other than that under which the power to invade is created. If the governing instrument of the exempt trust authorizes such distributions without the consent or approval of any beneficiary or court, the new trust will also be exempt provided that the perpetuities period is not extended beyond any life in being at the date of the creation of the original trust plus 21 years.[8] A period of 90 years measured from the date of the creation of the original trust will not be considered an exercise that postpones absolute ownership beyond the perpetuities period.

What if court approval or beneficiary consent is required to make the distribution, as is the case under the New York statute? An example in the proposed regulations, quoting EPTL 10-6.6(b) verbatim without actually citing it, concludes that the consent requirement regards use of the statute a "modification," making this exception to the loss of grandfathered status inapplicable.[9] However, because the distribution to the new trust in the example did not shift a beneficial interest in the trust to any beneficiary of a lower generation than that of the beneficiaries of the original trust, it met the requirements of the separate exception, discussed below, under which exempt status will be retained.

In effect, if the trust settlor's authorization is all that is required to make the distribution to a new trust, the trust provisions may be extended to younger generation beneficiaries with-

out the loss of exempt status, so long as the new trust does not last beyond the perpetuities period. A distribution under a statute such as New York's to a new trust with younger generation beneficiaries will cause the trust to lose its exempt status. Thus, at this juncture, the underlying purpose of EPTL 10-6.6 is being attacked by the proposed regulations. If no change is made in the final regulations, the EPTL may have to be amended to enable a previously grandfathered trust to be extended into more remote generations within the original perpetuities period.

Fourth, in a catch-all provision, a grandfathered trust modified by a reformation, judicial or nonjudicial, that is valid under state law will remain exempt for GST tax purposes if the modification does not shift a beneficial interest in the trust to a beneficiary who occupies a lower generation than those who held the beneficial interest before the modification.[10] Also, the modification cannot extend the time for vesting a beneficial interest beyond the period originally provided for in the trust.

Fifth, the exercise of a general power of appointment after September 25, 1985, is treated in detail by the proposed regulations in order to reconcile the differences between the Eighth Circuit in *Simpson v. United States*[11] and the Second Circuit in *Peterson Marital Trust v. Commissioner*.[12] The question to be answered is whether exercising a general power of appointment and allowing a general power of appointment to lapse are any different. Treasury believes they are not, concluding that an individual possessing a general power of appointment possesses the equivalent of outright ownership in the property. Thus, the proposed regulations take the position that the exercise, release or lapse of a general power of appointment created in a grandfathered GST tax trust is a transfer that occurs when that exercise, release or lapse becomes effective.[13] This position seems correct to the author, because the GST tax arises from a transfer made from the transferor (defined as the person whose transfer was subject to either the federal gift tax or the federal estate tax[14]) to a skip person. The transfer occurs with the act of exercising, releasing or lapsing. A lapse of a testamentary power of appointment occurs upon the date of death. If that date is after September 25, 1985, the lapse should be subject to the GST tax.

Conclusion

The joke is often made that the statement "I'm from the IRS and I'm here to help you," is second only to "the check is in the mail" in accuracy. Yet, these proposed regulations are another recent example of IRS's attempt to be more user-friendly. The agency has recognized taxpayers' concerns with grandfathered GST tax trusts, and these proposed regulations, acknowledging that there has been no previously published position, constitute an attempt to give taxpayers guidance on modifications that will be acceptable to the IRS in maintaining the grandfathered status of a GST tax-exempt trust. We will, however, be compelled to follow the progress in these proposed regulations as they affect the use and operation of EPTL 10-6.6.

1. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1433(b)(2), 100 Stat. 2717 (TRA 86).
2. The GST tax does not apply to any transfer that was irrevocable on September 25, 1985, to the extent the transfer is not made out of additions to the trust after September 25, 1985. TRA 86 § 1433(b)(2)(A).
3. 64 Fed. Reg. 62,997 (1999).
4. See Treasury Regulation § 26.2601-1(b)(1)(ii) ("Treas. Reg.") for exceptions to this rule.
5. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) (court's decision must be consistent with applicable state law that would be applied by the highest court of the state).
6. Proposed Treas. Reg. § 26.2601-1(b)(4)(i)(B).
7. Under that section a trustee with absolute discretion to invade principal for the income beneficiary may, under certain circumstances, exercise that discretion by appointing trust principal to a trust under a different instrument.
8. Prop. Treas. Reg. § 26.2601-1(b)(4)(i)(A).
9. Prop. Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example 2.
10. Prop. Treas. Reg. § 26.2601-1(b)(4)(i)(D).
11. 183 F.3d 812 (8th Cir. 1999) (holding that the exercise of a general power of appointment over a trust that was irrevocable on September 25, 1985 is exempt from the GST tax).
12. 78 F.3d 795 (2d Cir. 1996) (holding that the lapse of a general power of appointment over a trust that was irrevocable on September 25, 1985 is *not* exempt from the GST tax).
13. Prop. Treas. Reg. § 26.2601-1(b)(1)(i).
14. Internal Revenue Code § 2652(a).

Arthur D. Sederbaum is a member of Patterson, Belknap, Webb & Tyler LLP in New York City. He is a fellow of the American College and Trusts and Estates Counsel and a frequent lecturer and author.

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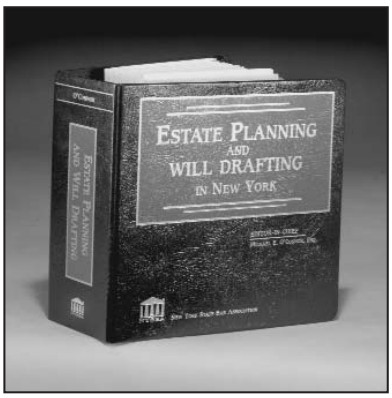

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Lawyer's Bookshelf

Evidentiary Privileges (Grand Jury, Criminal and Civil Trials), by Lawrence N. Gray, New York State Bar Association (1999), 241 pages, $50 ($38 for members). Reviewed by David O. Boehm.

Lawrence N. Gray is an author of remarkable and prodigious productivity. His extensive writings on many subjects, including *Grand Jury Proceedings and Criminal and Civil Contempt*, have made significant and invaluable contributions to the jurisprudence of New York. And now he has completed an expanded third edition of his *Evidentiary Privileges*, which illuminates an interesting area of the law that deals as much with human relationships as it does with the rules of evidence.

The rules of privilege are a reflection of the historic tension between the high importance given to fact-finding in the legal process and the impediment to that goal created by developing human values and priorities. Professor Lawrence M. Friedman, in his excellent history of American law, writes that many of the limitations imposed on the receipt of evidence are the result of the early distrust in post-colonial law of both the judge and jury as fact-finders. The rules of evidence grew up as some sort of countervailing force.[1] Thus, the hearsay rule evolved, as did its numerous exceptions.

Similarly, as Friedman points out, the rules limiting the kind of evidence that could be heard from witnesses became equally complicated. Early law barred husbands and wives from testifying for or against each other. Neither plaintiffs nor defendants could testify in their own behalf because no person with a financial interests in the outcome of a case could testify as a witness. The so-called "Dead Man's Rule" is a very much alive survivor of that mistrust[2] and, for what are deemed to be sound policy reasons, so are the ever-expanding evidentiary privileges.

Those policy reasons, however, have failed to establish a logical coherence in the present rules of privilege that bar a witness's testimony. For example, there may be policy reasons for continuing the common law prohibition against disclosure of a confidential communication made by one spouse to the other.[3] However, those reasons give no logical support to the distinction between spousal incompetency to testify in a matrimonial action based on adultery[4] and the absence of similar incompetency in a divorce action based on other grounds. Of course, that distinction is not based on logic but on historical attitudes in New York against divorce.

As is apparent, the myriad rules of evidentiary privilege, with their incongruities and varying applications, can be labyrinthine. However, they have been ably harnessed and presented by Lawrence Gray in his encyclopedic treatment of the privileges in our law. He has made a scholarly survey of this complex subject that is both authoritative and immensely readable.

In addition to the older, well-known privileges, he covers the newer privileges, such as the those of the social worker-client and rape counselor-client, and the privilege given to library records. It also informs us of the failed attempts to assert privilege by pharmacists and scholars. There is an extensive discussion of the privilege against self-incrimination with an interesting history of its origins in the early 16th century of English history and its even earlier roots in the Talmud.

As to the Talmud, a digression may be in order. Under Talmudic law, a party to a civil suit could admit the obligation for which suit was brought on the assumption that every person is entitled to give away his or her property as a gift. Not so under the criminal law. There, the assumption is that one does not belong only to oneself. Just as one has no right to inflict injury upon another, so one has no right to inflict injury on oneself. Therefore, the confession of a defendant had no legal validity and was unacceptable as evidence.

The passage of centuries has imposed limitations on this broad exclusion against self-incrimination. Gray comprehensively deals with its present lesser breadth, in the New York courts, in the U.S. Supreme Court, and in every federal circuit with the varying interpretations under the Federal Rules of Evidence.

The journalists' privilege, which is a product of the N.Y. Civil Rights Law,[5] rather than of the CPLR, is the subject of a penetrating analysis by the author. As he points out, the statute creating the privilege as it was interpreted by the Court of Appeals in 1988 appears to be in direct conflict with Article I, section 6 of the state Constitution dealing with the willful misconduct of public officers, as well as the Sixth Amendment of the U.S. Constitution. Interestingly, as Gray further notes, the Court of Appeals decision in *O'Neill v. Oakgrove Construction, Inc.*,[6] appears to be in direct conflict with its earlier decision in *People ex rel. Mooney v. Sheriff of New York County*.[7]

Similar trenchant review is given to the judicially created parent-child privilege. Despite a number of Second and Fourth Department cases, that privilege is found neither in the common law nor in legislation. It is the legislature alone that in New York has the power to create a privilege, and the author admonishes with some justification that, in the absence of legislative action, a privilege should neither be "created or 'evolved.'" As he points out, all of the federal circuit courts have rejected the parent-child privilege, whether based on maintaining a successful parent-child relationship or on the theory of the best interest of the child. However, as an alumnus of the Fourth Department, I feel obliged to

suggest that in *In re Application of A. & M.*,[8] that court based its decision not so much on privilege as on the constitutional right of privacy and "the integrity of family relational interests" that requires constitutional protection.

Gray's book is a learned and global guide to this sheltered area of the law. His thoughtful and thorough discussion of the privileges arising under the Bill of Rights, the circumstances under which a privilege may be waived, and his procedural instructions with respect to grand jury proceedings, together with the many helpful state and federal case and legislative references, make this an invaluable text to include in every practitioner's library.

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1. Lawrence M. Friedman, A History of American Law 153 (2d ed. 1985).
2. N.Y. Civil Practice Law and Rules § 4519 (CPLR).
3. CPLR 4502(b).
4. CPLR 4502(a).
5. N.Y. Civil Rights Law § 79-h(b).
6. 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988).
7. 269 N.Y. 291 (1936).
8. 61 A.D.2d 426, 433, 403 N.Y.S.2d 375 (4th Dep't 1978).

David O. Boehm, a retired associate justice of the Supreme Court, Appellate Division, Fourth Department, is now senior counsel at Harris Beach & Wilcox, LLP, in Rochester.

World Dictionary of Foreign Expressions: A Resource for Readers and Writers, by Gabriel G. Adeleye with Kofi Acquah-Dadzie, edited by Thomas J. Sienkewicz with James T. McDonough Jr., Bolchazy-Carducci Publishers, Inc., 1999, 411 pages, hardbound $70; paperback $29.95. Reviewed by Susan McCloskey.

If you have ever wondered, in the small hours of a new day, what *nolle prosequi* actually meant to native speakers of Latin, the World Dictionary of Foreign Expressions is the reference book for you.

In an easily legible format, you will find a helpful word-by-word translation of the phrase ("**nolle** to be unwilling, not to wish; **prosequi** to prosecute, continue, follow up") followed by a polished translation ("to be unwilling to continue or follow up"). Then you will see a definition of the term as used in the law: "A formal entry on the record of an action, indicating that the plaintiff or prosecutor will no longer continue with the suit or action either wholly or partly." Then you will find a sentence in which the phrase properly appears, followed by related terms—in this instance, "**non prosequitur**; **qui semel** etc.; and **retraxit**"—to which you might turn.

Your first question settled, you will find other riches in store. If you're uncertain about the plural form of *amicus curiae*, you'll find it here: *amici curiae*. If you have wearied of using the Latin *res judicata*, you'll find the French equivalent, *chose jugée*. And if you're curious about expressions from other languages that have nothing to do with the law, you can explore the entries for the Japanese *honcho*, the Hebrew *shibboleth*, the Italian *adagio*, and the Spanish *fandango*.

You'll be reassured to find that lawyers are not alone in relying on foreign languages to adorn their prose; foreign expressions current in philosophy, history, rhetoric, and the sciences appear here as well. The book is a *cornucopia* for those who love words and revel in the English language's habit of begging, borrowing, and stealing its lexicon from other tongues, living and dead. The authors and editors of this collection—a professor of ancient history, a teacher of law, and a classicist—are expert guides. Together, they have assembled an elegant and useful reference tool.

All that the *World Dictionary of Foreign Expressions* lacks is the caution that legal writers should rifle its treasures sparingly. A legal writer's first duty is to communicate clearly in English. That an inviting entry appears here is not warrant to jimmy it into a brief, legal memorandum, or letter to a client. The bright line between legitimate terms of art, on the one hand, and musty expressions with perfectly serviceable English equivalents, on the other, should not be crossed. Keep *habeas corpus*, but renounce *sub suo periculo* forever. Turn to this book for its seductive information and lexical charms, but go home with the language you came with.

Susan McCloskey is president of McCloskey Writing Consultants in Verbank, N.Y., and a frequent contributor to the *Journal*.

Mobbing: Emotional Abuse in the American Workplace, by Noa Davenport, Ph.D., Ruth Distler Schwartz and Gail Pursell Elliott, Civil Society Pub., 213 pages, $14.95. Reviewed by Judith A. La Manna.

Do you remember when you were a kid on the school playground and for some reason that was important at the time one group of kids decided to pick on some other kid? They would all decide to make life miserable, every day, for a classmate, apparently for sport.

Well, that about sums up the premise of this book, except that the playground is the workplace and the bullies are one or more fellow employees, or a superior or subordinate climbing over superiors to get to the top.

Of course, this is said in many more pages and in more words, over and over. It takes up almost 200 pages, but that includes a seven-page index, an Authors' Note, Forward and Introduction and numerous charts, lists and other made to be easy-read graphics, followed by an Epilogue, Bibliography and Index. Did I forget to mention the chapter endnotes?

What we learn from the authors (Noa Davenport, a cultural anthropologist and an adjunct assistant professor at Iowa State University; Ruth Distler Schwartz, president of a consulting and marketing firm; and Gail Pursell Elliot, a human resources and training consultant) is that bullying is now to be called "mobbing" in the workplace,

even though it can be the act of one person against another.

As to the explanations offered about who does it, who has it done to them, why and how to guard against it, the readership of this *Journal* will not find any of the information earthshaking. Soft, sensitive, feeling, maybe, but not earthshaking.

To be fair, the information is interesting, certainly, but only the first or second time it is repeated. Mostly it is overly general and not very grounded. The authors rely heavily on limited European study, for example, and they offer broad statements, mostly meaningless, as if it is actually informative, like listing the "parts" of the "mobbing phenomenon," as

> the psychology and the circumstances of the mobbers; the organizational culture and structure; the psychology, personality, and circumstances of the mobbee; a triggering event, a conflict and factors outside of the organization, i.e., values and norms of the U.S. culture.

Amid limited text, there are a multitude of interview vignettes from "mobbees" who stand in a variety of treatment circumstances. They "share" paragraphs of their stories of being mobbed, and especially their "feelings" with the reader about their experience. A lot of fluff, a lot of emotional purging, a lot of words. A lot of the same words. A lot.

There is not much to recommend of this book to the legally trained. Any labor and employment law practitioner can tell you that this type of action, in its blatant and provable form, is civil harassment, which might be actionable in a different forum if the harassing touched a protected class. But do not rely on this book for the law.

The part of the book that offers legal advice, mercifully, is short and harmless enough. It takes up two pages of the chapter entitled "How You Can Cope." This includes the sub-subtitles of "Concerns That May Keep You From Taking Legal Action" (*Example,* "Since you have no written contract, you believe you have no recourse.") and "Considerations That May Lead You to Decide to Take Legal Action" (I like, "You want your employer to be more vigilant in preventing future occurrences.") Get the general picture?

There is a later chapter that portends to be about "Mobbing and the Law." Danger. Danger. It offers a Layman's Restatement of Employment Law, made to look reliable, but akin in substance (and depth) to what a friend was told by a friend who knows for a fact that another friend's attorney said.... Well, you get the idea. And the explanation on "hostile environment" is a must-miss. No law here.

No. I correct myself. Law is covered in this chapter. In fact, on the first page of the chapter the reader is offered two very sound legal concepts. Under the subtitle "Present Rights and Statutes" the authors "wish to emphasize that mobbing is a new cause of action" which "per se is not covered under present laws in any of the 50 U.S. States." (Whoops. So much for the chapter title.) And they did a nice job with their footnoted disclaimer, "This chapter is in no way a substitute for the services of an attorney." Truth and honesty. Thank you.

The authors of *Mobbing* cannot decide if this is to be a self-help book or an employer's reference book or something else, as it clearly addresses different chapters to different audiences. What it is not, is anything near to being a legal review and analysis. Simply put, this is a moderately interesting pop-psych article, stretched almost beyond recognition.

Judith A. La Manna, an attorney who serves as a mediator in employment and civil matters and as a labor arbitrator, was for more than 10 years the editor of the *Labor and Employment Newsletter* published by the Labor and Employment Law Section.

Language Tips

By Gertrude Block*

Question: A Rochester lawyer who does not want his identity disclosed because he considers his question "too basic" asks which relative pronoun (*which*, *that*, or *who*) is correct in the following two sentences:

- The identity is unknown to this defendant . . . did not sell the goods.
- The identity is unknown to ABC Corporation . . . did not sell the goods.

The lawyer need not have been concerned about revealing her/his identity. This question has befuddled many writers, legal and lay, and has caused many an ulcer for authors whose manuscripts have been returned by editors, with every relative clause red-lined.

A short answer to the question: in the first sentence, add either *which* or *who*, depending on whether the defendant referred to is a person or an institution. In the second sentence, in which the entity referred to is a corporation, use *which*. In both sentences, add a comma before the relative pronoun.

The explanation is easy enough; only the grammatical terminology may be confusing. A few definitions first. A relative clause is any independent clause that is introduced by a relative pronoun (*who, which*, or *that)*. A restrictive relative clause "defines or restricts" the language that follows. In a non-restrictive relative clause, the language following the relative pronoun has already been "defined or restricted." Commas enclose non-restrictive relative clauses; no commas are used around restrictive clauses.

(I told you that the grammatical terminology might be confusing; now pity your clients who must deal with legal language.) In an effort to reduce the confusion, the editors of the Associated Press *Stylebook* adopted the designation "essential clause" as a substitute for "restrictive clause" and "non-essential clause" for the non-restrictive clause. "The difference between them," the book states, "is that the essential clause cannot be eliminated without changing the meaning of the sentence—it so 'restricts' the meaning of the word that its absence would lead to a substantially different interpretation of what the author meant."

Regardless of the terminology you adopt, the principle is easy to understand when you use as examples the two sentences that follow:

- The member of this faculty who is on sabbatical at present is Professor Mary Smith.
- Professor Mary Smith, who is a member of this faculty, is on sabbatical at present.

In the first sentence, *who* "defines" which faculty member is on sabbatical. In the second sentence, the member of the faculty has already been identified ("defined"), and the non-restrictive relative clause that follows *merely* adds information. I tell my students that a simple way to decide whether a relative clause is restrictive (no commas) or non-restrictive (commas) is to ask the question: "Which one?" If the clause answers that question, it is restrictive. In the first illustration, that question ("Which faculty member?") is answered by the relative clause that follows. In the second illustration, we know who the faculty member is, so the question does not apply.

Although this rule is often breached, it is important to follow because judges sometimes decide cases based on the "Doctrine of the Last Antecedent," the legal language for the grammatical rule of punctuation in relative clauses.

Question: As a legal secretary for more than 20 years, I have often typed the following sentences:

- I have no alternative other than to file this motion.
- I will need this form no later than September 17.

Recently, however, three young associates have criticized my use of *than* in these sentences, maintaining that *then* is the correct word to use. Are they wrong, or have I been ungrammatical all these years?

Answer: They are wrong; you are right. The word *than* is a conjunction, used to express comparison in sentences such as "He is taller than I am," and "I like sweets more than salads." The word *then* is a temporal adverb indicating the time of occurrence. It means "at that time," as in "It happened then," or "Then the plaintiff realized that something was unusual."

The young associates may be confused into thinking that the temporal adverb *then* is appropriate because a date follows *than* in the second sentence. But change the sentence, removing the date, and one can see why *than* is correct: "I will need this form earlier than I previously stated." Substituting "at that time," and you'll get the unidiomatic, "I will need this form no later at that time September 17."

From the Mailbag

A number of correspondents responded to my request for substitutions to the salutation *Gentlemen*. The most popular suggestion was *Greetings*, the pejorative association with the former military draft apparently having disappeared. One correspondent, Illinois attorney Fred Carman, objected, arguing that the subject was off-target because the salutation *Dear,* which means, "beloved, loved, precious," is inappropriate. *Dear*, he said, "should be consigned to the Home for Old Words (where it can live with wherefor and *whereas*)," unless the person to whom you are writing is really "dear" to you. Other correspondents also objected to *Dear*, but none so eloquently.

*Lecturer emeritus and writing specialist at Holland Law Center, University of Florida, Gainesville, FL 32611, and consultant on language matters. She is the author of Effective Legal Writing, fifth edition (Foundation Press, July 1999), and co-author of Judicial Opinion Writing Manual (West Group for ABA, 1991).

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu

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Rachelle DeGregory
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Kip Steven Zimmerman
Robert Mayer Zimmerman
Sam Zodeh
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Jason D. Sanders
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Dawn M. Velez
Charles R. Whitt
Woodrow J. Wilson
Constance R. Brown
Dawn W. Hadley
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Susan M. Narkewicz
Paul D. Schwartzberg
Annabel V. Teiling
Megan P. Van Aken

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Barbara M. Friend
Edward J. Murphy
Drew D. Peabody
Therese M. Wittner

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Pamela M. Pozzi
Charles R. Welch

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Martin E. Engstrom-Heg
Peter F. Finnerty

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Andrew B. Levy

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Jean M. Pyle
Antonia Rodriguez

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Guilherme Carvalho
Scott Charles Eisenberg
Joan M. Feeley
Kelly Flood-Myers
Kenneth Harold Frenchman
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Michael J. Hurley
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John Alden Millard
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Andrew Proto
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Jacob T. Septimus
Walter R. Sevastian
Ting-Ting Shi
Denise E. Singh-Skeete
Barry H. Steinfink
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Lorenzo V. Delillo
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Reine H. Glanz
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Lora R. Groginsky
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Thane Benedict
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El Wong Chon
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Brian Stephen O'Connor
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Yogesh Kumar Rai
Timur Slonim
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Richard K.E. Warner

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Archibong Mendie Archibong
Llinet Beltre
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Elizabeth Jane Williamson
Richard G. Wood
Andrew Lawson Wright
Masayuki Yamada
Shengjin Yang
Shin Yokota
Melissa You
Lydia R. Zaidman
Kexin Zhao

In Memoriam

Fritz W. Alexander
New York, NY

Albert D. Early
Sarasota, FL

Alfred P. O'Hara
New York, NY

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS	JANUARY 1, 2000 THROUGH MAY 17, 2000	2,207
NEW LAW STUDENT MEMBERS	JANUARY 1, 2000 THROUGH MAY 17, 2000	630
TOTAL REGULAR MEMBERS	AS OF MAY 17, 2000	54,452
TOTAL LAW STUDENT MEMBERS	AS OF MAY 17, 2000	4,546
TOTAL MEMBERSHIP	AS OF MAY 17, 2000	58,999

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