NEW YORK STATE BAR ASSOCIATION

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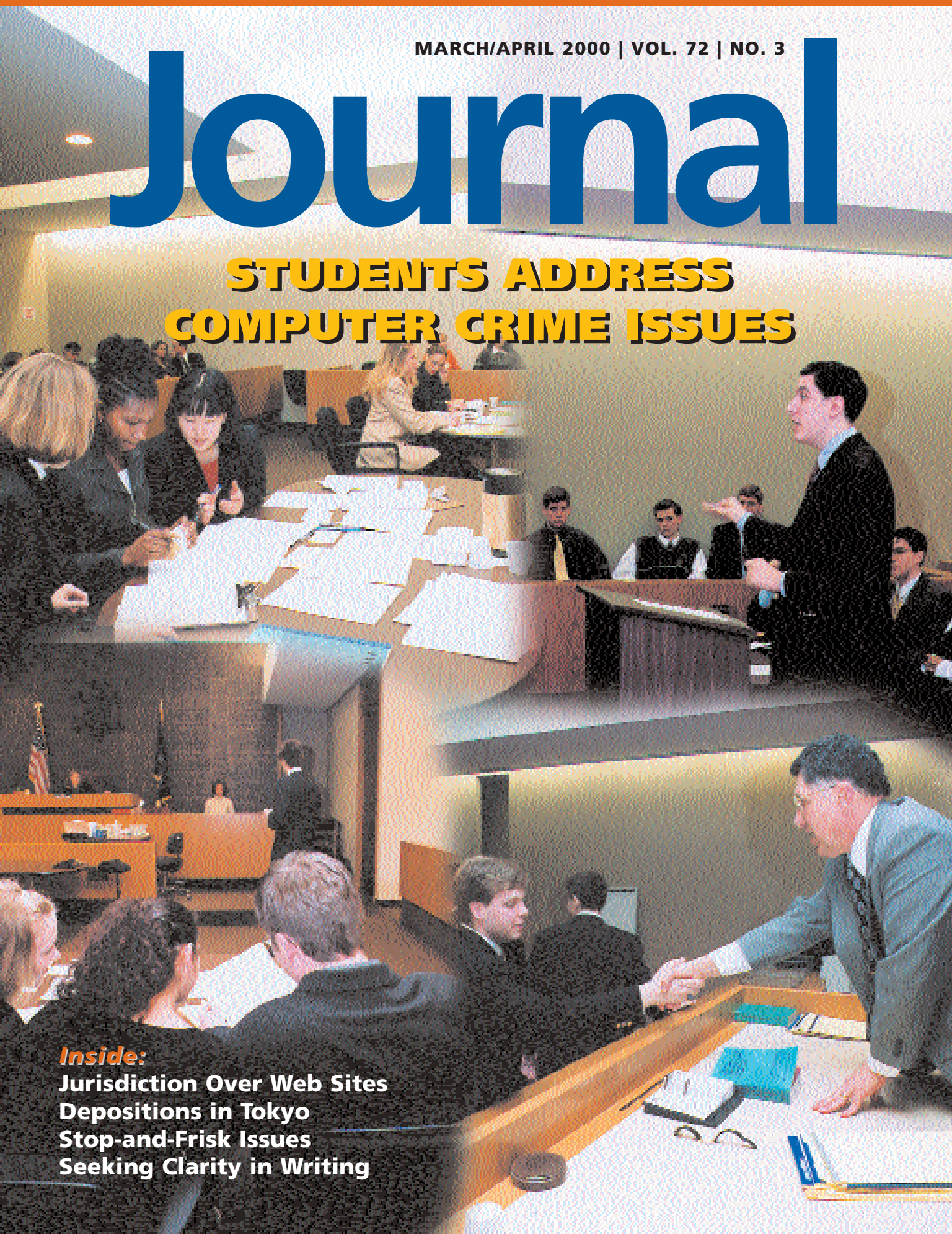
Journal

STUDENTS ADDRESS COMPUTER CRIME ISSUES



Inside:

Jurisdiction Over Web Sites
Depositions in Tokyo
Stop-and-Frisk Issues
Seeking Clarity in Writing

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ON THE COVER

This collection of scenes depicts high-school students at work during the 2000 Mock Trial Competition, where participants argue a case involving unauthorized computer use, trespass and tampering. These photos were all taken at the Buffalo City Court House in Buffalo, NY on February 26, 2000.

Photographs by Tom Gietzen

Cover Design by Lori Herzing

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President's Message

THOMAS O. RICE*

Awards to Distinguished Members

As law students, we are taught to look to case law, statutes, and the Code of Professional Responsibility for guidance on how lawyers are to conduct themselves. As attorneys, we apply that knowledge. Each day, we discharge obligations that result from our privilege to practice law, including opportunities for service.

Sadly, some not friendly to the profession claim that professionalism and public service are concepts that have become passé and are incompatible with today's rapid "New York minute" pace and demanding times. They cynically assert that our traditional sources of guidance are out of date.

When responding to skeptics, recall the standards and aspirations of our profession. When doing so, look only to *In re Estate of Freeman*[1] for a comprehensive one-paragraph description of what it is we are a part:

> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in nonprofessional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.[2]

In addition to basic standards, The Lawyer's Code of Professional Responsibility, Ethical Consideration 9-6 offers us aspirational guidance:

> Every lawyer owes a solemn duty to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with other lawyers in supporting the organized bar through devoting time, efforts, and financial support as the lawyer's professional standing and ability reasonably permit; to act so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Despite the sheer magnitude of our responsibilities, unceasing daily pressures, and the reality that adhering to our duties is not unlike scaling all the peaks of the Adirondacks, news of the demise of professionalism is greatly exaggerated. It is as untrue as is the notion that lawyers lack contemporary role models.

Thousands of members who were present at the Association's Annual Meeting had the opportunity to meet and honor some of the many attorneys from across New York whose exemplary conduct and service are models and inspirations for us all. Each of us in attendance left the meeting with an enormous sense of pride and resolve to speak out whenever the bar is the subject of derision or unfair criticism.

Several of our colleagues from the bench and bar were honored for their distinguished careers and contributions to the profession and the public. Each of our honorees demonstrated that zealous advocacy and professionalism are not incompatible. Each has shown that a career in the law can and should encompass service to society.

The Committee on Civil Rights presented the Haywood Burns Memorial Award to New York City Civil Court Judge Pam B. Jackman Brown of Jamaica. The award is presented annually in memory of the late dean of CUNY School of Law, colleague, and member of our House of Delegates. This year's honoree is the first CUNY Law graduate to ascend the bench.

Acknowledging Dean Burn's message to give unselfishly in helping the poor and oppressed, Judge Jackman Brown movingly described her immigration from Guyana, her work to achieve a law school degree, and her service on the bench, based on her belief in "law in the service of human needs."

Known for her ability to resolve complex legal problems, the judge is active in helping young people and has established mentoring programs for troubled youths. Prior to election to the bench, she represented the indigent and helped them secure counseling, hous-

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PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 5

ing and employment. "We must be builders of bridges and not destroyers of dreams," she eloquently proclaimed. She urged her colleagues to train young professionals in the tradition of Dean Burns and to be mindful that "talent and dedication can make a difference, that strength and power when wielded with grace, respect and understanding can lead to lasting victories."

For extraordinary service in addressing issues affecting women, we honored Rachel Kretser of Albany with the Ruth G. Schapiro Memorial Award. Rachel has combined a career in public service with numerous voluntary initiatives that have assisted and encouraged women in the profession and in the public.

In charge of the state attorney general's legal education bureau, Rachel is a founder of a domestic violence legal services program. She is active in providing support and education for breast cancer patients, and in mentoring women in the law. She has worked assiduously to promote greater diversity on the bench and opportunities for women in the legal profession.

As one of her associates in her volunteer program commented, Rachel has the ability to bring issues to the forefront and to initiate programs and services that on a daily basis change lives for the better. "While we congratulate ourselves on our many successes," Rachel told the House of Delegates at the award presentation, "we should not lose sight of the distance we have still to travel."

And then there is Barry Kamins of Brooklyn, who is well described as having "an unassailable sense of what is right, fair and just." With a stellar reputation in criminal law and legal scholarship, he is the first honoree of our newly established award for excellence in professionalism. Barry's generosity in sharing his knowledge through teaching, writing and informal discussion has benefited a host of judges, lawyers and law students.

The Attorney Professionalism Award is to be presented annually by the Committee on Attorney Professionalism and this year was sponsored by Lexis Publishing. It is reserved for an attorney whose dedicated service to clients' pursuit of justice and the public good is characterized by exemplary ethical conduct, competence, sound judgment, integrity and civility. "There are thousands of lawyers across the country who do what we do; we're not the exception, but the norm," Barry observed. "That's what I hope the public will understand; we all try to be strong advocates for our clients, and help our colleagues and our communities as best we can."

Looking again to the judiciary, we have the example of Joseph W. Bellacosa, senior associate judge of the Court of Appeals. This year, Judge Bellacosa will leave the bench to assume another challenge, dean of St. John's Law School.

Judge Bellacosa was the first honoree of an award established by the Committee on Attorneys in Public Service for excellence in public service. From his court opinions, to his writings, his speaking engagements to attorneys and law students, and his one-on-one conversations, Judge Bellacosa extols the virtues of the legal process and the opportunity to make a difference through the law. In his every deed, he is educating. His contagious enthusiasm for the law and the profession permeates his words and actions.

Judge Bellacosa reminds us that members of the bar set the tone of respect for the legal process and for its work. "It will really be noticed by those with whom you are engaged to work — whether they are adversaries or clients."

As president of our Association, I have ample occasions to meet members of the profession in both the private and public sectors, at different stages of their careers and in many fields of practice, in communities throughout the state. At every stop, I find judges and lawyers who reflect the finest traditions of the profession, in pro bono service, using their talent to seek improvements in the law, sharing their knowledge with colleagues, and helping those in dire straits to unravel and resolve legal problems.

Lest we think that the public's perception of the profession is irreparably negatively skewed, we might recall the observations of a recent OCA committee as to what its members did not find when it went about gathering input on the public's views of the profession. While identifying certain "hotspots" of client dissatisfaction, the Committee on the Profession and the Courts reported that "those levels of discontent did not seem to recur in the practice at large."

The professional ideal, the committee stated, thrives in New York "not because it has been given the general recognition it in fact has earned, but because New York lawyers, in vast numbers, believe it is right." This year's honorees and award recipients have proved that the committee is right. Now it is for each of us even more earnestly to practice that ideal.

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1. 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974).
2. *Id.* at 7.

Annual Mock Trial Competition Introduces High School Students to The Law and Court Procedures

By Gregory S. Wilsey

For thousands of students from more than 500 high schools in 35 counties, the annual Statewide Mock Trial Tournament brings law and court procedures to life in a challenging and interesting way. Students gain a wealth of educational advantages, from learning how to read complex materials to experience in developing analytical abilities and making public presentations. They also benefit from direct contact with their attorney-advisors, who help them prepare for the competition.

Photo by Tom Gietzen

Contact between students and attorneys helps demystify and humanize the legal system for young adults, giving many their first personal contact with an attorney. The tournament goals are to foster understanding of the law, court procedures and the legal system; improve students' basic life skills such as listening, speaking, reading and reasoning; and promote cooperation and understanding between the school community and the legal profession. The goals are realized through the good efforts of almost 1,500 volunteer attorneys and judges throughout the state. (see map on page 14).

New York's mock trial tournament, the nation's largest, is sustained through multiple partnerships with representatives of the legal and the education communities across the state. The New York State Bar Association (NYSBA) and the State Education Department are co-sponsors of the Law, Youth and Citizenship Program, which administers the competition on behalf of the NYSBA Committee on Citizenship Education. Members of the committee guide the selection of each year's fact pattern and critique drafts for balance in the facts and accuracy in the application of relevant law. They also judge the state semifinals in Albany each May. Each year, the NYSBA provides the new case and 12 printed mock trial manuals for every participating school, along with technical assistance in conducting orientations.

How the Tournament Unfolds

The local tournaments provide each school with at least two trials—one as prosecution/plaintiff and one as defense; some counties use modified formats where teams go three, four or more times before any team is eliminated. The pattern of switching sides in the case is repeated throughout the subsequent single elimination rounds, into the regionals, and at the state semifinals. Students are therefore challenged to very carefully construct the strongest prosecution and defense cases possible, giving them the opportunity to consider the "facts" from all points of view. (see Appendix I on p. 16)

While the program strives for relevant and compelling fact patterns, an equally important goal is to create a well-balanced case, one in which each side has relatively as good a case as the other. Ultimately, then, the

Gregory S. Wilsey is the Director of the Law, Youth and Citizenship Program of NYSBA and the State Education Department. He is a graduate of Roberts Wesleyan College and received his M.A. and Ph.D. in American History from the University of Kentucky.

team that prevails advances based on its own greater ability and better performance.

The New York Bar Foundation annually provides funds to bring the six winners of regional tournaments to Albany for the state semifinals and finals. This year, the tournament will take place on May 10-12. The New York champion will later move on to Annapolis, Maryland, to compete against the Maryland state winner. This Interstate Tournament, begun in 1984 and now renewed after a three-year hiatus, is also funded by the New York Bar Foundation. To make this competition possible, Maryland and New York work together in creating the mock trial hypothetical. (see Appendix II on p. 22)

Engaging Students' Interest

Case topics are carefully selected, with the goal of creating a legal learning experience that is directly relevant to students, where both the law and the facts raise real-life issues which resonate as authentic to students and schools.

Thus, in the past five years, the mock trial has revolved around: a negligence case involving student drinking and driving following a high school graduation party (1996); a school-based sexual harassment claim, where a female student sued the school district over allegations of peer to peer sexual harassment (1997); a suppression hearing over cocaine found in a teenager's backpack during a police search of an adult's vehicle (1998); a charge of endangering the welfare of a child lodged against a parent who relied on a spouse with a history of substance abuse to care for an infant while the defendant pursued a new job in a distant city (1999).

This year the fact pattern involves a charge that a high school student committed three computer crimes—unauthorized use, computer trespass, and computer tampering—by illegally accessing and disabling an Internet filter system installed by the district to further school safety.

These cases have all been constructed so that students would be presented with the central legal concepts at issue and be confronted with realistic situations involving complex real-life scenarios. The 1996 negligence fact pattern, for example, featured parents who refused to allow alcohol at a party, and when it was discovered, insisted on getting sober drivers to take partygoers home. They allowed their own teenager to drive his date home, just before a thunderstorm descended on their town, and that storm encouraged two other teenagers to run across the street into a tragic rendezvous with the teenage driver.

The 1998 Fourth Amendment case featured three teenagers returning from a trip to New York City, waiting for a parental ride, in a train station. When the parent failed to appear, they accepted a ride with a local

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Tournament Teaches Skills for a Lifetime

BY TAMMY S. KORGIE

The ability to think on one's feet is not a skill that's easily obtained. It takes practice, experience, and hard work. Once learned, however, it's an ability that provides a lifetime of rewards. Participants and coaches involved with the Statewide Mock Trial Tournament know this firsthand.

Dr. John E. Tsavaris, II, of East Northport, coaches for George W. Wingate High School in Brooklyn and has judged the competition in Albany. He is counsel at Kenyon & Kenyon, and is a member of the NYSBA's Committee on Citizenship and Education. He said the coaches and judges gain the satisfaction of seeing the growth and confidence in the students, while the students gain "the knowledge that they can be lawyers and are not intimidated by it. Most of all, the students learn time management skills that will serve them in good stead when they go on to college. It's a great program."

Because the students must be able to argue either side of the issue, he continued, "they learn that there are indeed two sides to every issue. They learn to see an issue from another person's point of view. That is a universal comment that all of these students have made to me in more than 10 years of doing this."

Beverly D. Ungerer and Sandra Fisher Swanson of Lakewood, coach the mock trial team at Southwestern Central School District. "These kids learn to think on their feet, and how to react," said Ungerer. "I think this is the greatest thing they learn, not just for a legal career but for everything they do in life. Anytime kids have to get up and perform like that in front of their peers and in front of an audience, it certainly improves their confidence. They learn to speak out, to look at the judge and make eye contact. They improve their confidence and their ability to make a good argument."

Although the principal beneficiaries are the students, the adults involved with the program reap rewards, as well.

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Local and State Organizations Play Key Role

The mock trial tournament thrives because of partnerships with more than 25 county bar associations that coordinate and run the tournaments in their counties.

Some counties such as Nassau and Erie have more than 40 high schools participating, while Westchester and Suffolk have 30 or more. Some county associations have staffs who assist in the process, but all tournaments are led by one or more local attorney and/or judge, and volunteer coordinators who often have served many years in this role.

In seven counties, the tournament is made possible through other entities—in the five boroughs of New York City, the city's Board of Education provides coordination through the Justice Resource Center for more than 100 teams; in Orange County the Orange-Ulster BOCES coordinates the tournament in partnership with the Orange County Bar Association; in Tompkins County, law students from Cornell University Law School run the tournament. These efforts all include advertising the tournament in the fall, holding an orientation session for teacher-coaches in December, recruiting an attorney-advisor for each team, arranging for the use of court facilities over the course of several weeks (or weekends), and arranging for attorneys and/or judges to judge each enactment, along with many other details.

The cooperation and support of the Unified Court System at the county and state levels provides real courtrooms for the hundreds of trial enactments. The state semifinals and finals are held at the Justice Building in Albany where the Court of Claims and Appellate Division, Third Department, yearly make available their facilities. A judge from the New York State Court of Appeals presides over the tournament finals; for the past four years the Honorable George Bundy Smith has graciously volunteered.

CONTINUED FROM PAGE 11

parolee, known to one of their older siblings, while the police were watching for potential "drug mules." When the driver was later stopped for a seat belt violation, the three passengers were surprised by the ensuing police search of their backpacks, and all claimed shock at the cocaine found in one backpack. The complications were designed to emulate the types of situations that many young adults encounter, often with no real sense of the potential ramifications of seemingly trivial, but sometimes life-altering decisions.

As an outgrowth of its link with the State Education Department, the Law, Youth and Citizenship Program has sought to "toughen" the mock trial experience in recent years to put a premium on analytical ability, including the need to interpret complex information and consider conflicting perspectives. Fact patterns have presented challenging, tightly interrelated facts, strongly divergent witness interpretations of events stemming from personal perspectives, and multiple levels of meaning. The changes have also been designed to complement new state Social Studies Standards, which include the one standard devoted specifically to civics and citizenship and generally emphasize the need for analytical and interpretive skills.

Through this process, the mock trial experience is intended to help students gain a more mature, balanced appreciation of the actual complexities faced by litigants, attorneys, judges, and jurors who together deal with an individual case within our justice system. The objective is to have the students finish the experience with a good understanding of the need to carefully consider "facts," the motivation of individual participants, the role of individual interpretations and perspectives, and the process through which the law works to foster justice.

Attorneys Making the Difference

The mock trial provides an ideal opportunity for attorneys to contribute to the education of students by sharing the knowledge and skills they use to make their living. The deepest and most effective learning takes place when students are actively engaged in their own education—through debates, moot court and mock trial, and other methods of law-related education, which allow students to personally experience and interactively pursue the subject at hand.

Attorneys who would be interested in participating, particularly from counties that do not sponsor the mock trial competition, may call the Law, Youth and Citizenship Program at 518-474-1460.

CONTINUED FROM PAGE 11

"It's the purity of the exercise," said Louis Klieger, of New York, a member of the NYSBA's Committee on Citizenship and Education and coach of the mock trial team at Edward R. Murrow High School in Brooklyn. "I find it energizing and fulfilling. These students are not jaded in any way. They don't have the obligations and the responsibilities that go with the day-to-day practice of law. They're in it for a semester without the distractions that we face in a practice. For those of us who went into law school with an ideal, I think this is a way of returning to that mode of thought."

Steven Levitsky of Rochester, an associate attorney with Handelman & Witkowicz, has been coaching the Brighton High School team since 1995. "The kids are very bright, devoted, and a joy to work with. I feel my time is well spent working with them," he said. "One thing we see in the media is the demise of the youth. When you work with these bright kids, it really restores your faith in the future of the country. My time commitment is greater than I expected because I enjoy it and the kids are so devoted," he continued. "I have been so surprised that the kids are so intelligent and learn so quickly. For them to grasp the legal concepts is amazing."

Erie County Coordinator Jeff Marion of Hamburg, an associate at Shaw & Shaw, P.C., said, "I think it's a different perspective for me. In high school, I was an athlete. This wasn't the type of activity I chose to be involved in. The hard work, seriousness and pride the kids have in the reputation of their schools—that's what I get out of it. The way they prepare sometimes even puts me to shame! I'm always amazed at the level of preparation the students put in. This is varsity sports for these students. They take it seriously. You can tell by the looks on their faces; it's like any football or basketball game."

"I tell attorney coaches that this is probably the first time these kids will get to meet a lawyer. In the future, whenever they think of lawyers, they'll think of you," he added. "Sometimes you feel like you're in a vacuum, being an attorney. This is a way to give back to community."

Emil Zullo, a teacher who coaches the Kingston High School mock trial team, said he takes from his coaching experience the knowledge that he has been part of a very valuable experience during the students' high school years. He told of a recent inter-school competition held to determine who the final members of the mock trial team would be. That competition was judged by an assistant district attorney who, eight years earlier, was a member of his mock trial team. "It was one of those moments that is rather rewarding for someone who's coaching this program," he said.

A teacher for 33 years, Zullo has been coaching the mock trial team since 1987. "There are a lot of genuine academic exercises that go on with the mock trial teams. The students are analyzing an issue, investigating written material and coming to an understanding of it. These academic skills are important. The students learn that the way the law is organized reflects the values of the society they live in and provides the means to try and reach fair conclusions about conflicting issues."

Motivation is not lacking for students on the mock trial teams. They enjoy the challenges involved, and devote many hours to preparation for competition.

Ricky Clausi, a sophomore, is on the Kingston team for his second year. "It's a really good experience. It's a lot of fun analyzing everything, and we're good friends. I just like getting up on the stand and trying to outsmart the other team." He said that being on the team has reinforced his aspiration to be a lawyer.

Clausi, who is serving as a witness for the defense in this year's competition, said of his experience thus far: "I've learned a lot about criminal law, and how opening and closing statements should be set up. It's pretty much about knowing the material in the packet, and taking on the responsibility of being the best you can be."

This is senior Alexandra Croswell's third year on the Kingston team. She spent the first two years as a witness, but this year has taken on the role of attorney. "I think it's hard to be a lawyer the first year because it takes a lot of experience, so I think being a witness the first two years really helped me. I have to say I really like being an attorney so far! I enjoy standing up and delivering the opening. However, I enjoyed being a witness and trying to come up with an answer that would totally throw a lawyer."

"I'm interested in law, so I think it's extremely interesting and exciting," said Croswell. "I enjoy trying to find ways to get my point across even though it might not be the popular view. What it has taught me the most is that if you work hard, and put a lot of time in it, you will succeed."

Success has many definitions, and coaches and students seem to agree that winning isn't the only measure

Tammy S. Korgie is a Staff Writer for the New York State Bar Association's Department of Media Services and Public Affairs. She is majoring in English at the State University at Albany.

of success. Overcoming intimidation and stage fright are two of the biggest rewards for the students.

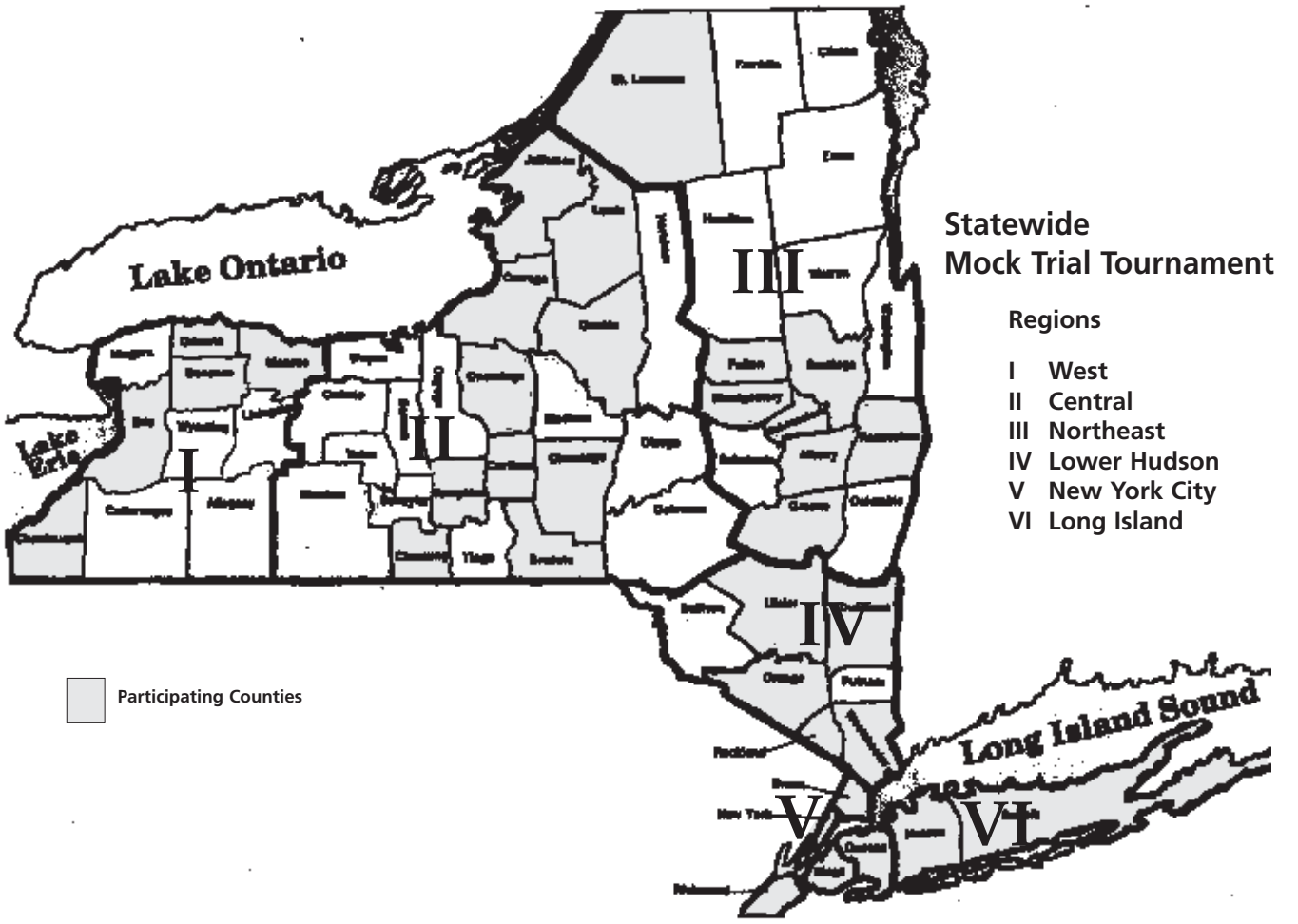
Croswell recalled an experience at a regional competition. "The other team had laptops on their desk and they actually looked like lawyers. It was really intimidating. But we found we were just as competitive as they were, even though we didn't have the sophisticated technology and all that."

Senior Sam McCoubrey, who has been on the Kingston team for three years, said that the experience has had a positive effect on his writing, speaking and analyzing skills. "It has helped me to write persuasively and really prove a point, and to speak more persuasively, as well. It's taught me a lot about reading through a packet, to analyze and pull out the relevant information. It's fun picking out what's important and what's not. I also like finding what can help you and finding ways to explain things that can hurt you. I love it. It's a great experience to get up there and learn a lot about the courtroom experience."

Marissa Shiels, a junior who is also on the team for a third year, said, "You have to be definitely prepared for everything the other side is going to do. You almost have to predict what they're going to do. It's a lot of brainstorming. You have to think up whole new theories and themes." Shiels, who spent her first year on the team as an alternate, recalled: "When I first tried out, I really didn't have a clue. I didn't know how much work it was and what all went into it. I really learned a lot from it."

The students also appreciate their coaches and all of the adults who volunteer their time. Croswell noted: "Mr. Zullo puts as much effort into it as we do, if not more. All the attorneys that come to advise us have been great, and it really does help because they give us different insight. They're really encouraging, and at the same time they don't do the work for us—they let us come to our own conclusions."

Although all of the students interviewed plan to go to law school, not all students participating have that interest. Either way, the skills learned in mock trial competition provide all with a better understanding of the legal system.



Appendix I

PART V
SUPREME COURT OF THE
STATE OF NEW YORK
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF NEW YORK	)	
v.	)	Case No. MT-00
MICKEY JACKSON, DEFENDANT	)	

STATEMENT OF STIPULATED FACTS*

Silas Cone High School of the East Bay School District has a widely recognized dedication to the procurement and application of cutting edge computer resources to support teaching innovations and student achievement. This community supported policy includes the creation of a faculty-directed student computer support group, Student Learning via Integrated Computer Services (known as SLICS) which has played a leading role in designing, implementing, and maintaining the district's computer network and related services. The faculty advisor, Val Watson, oversees the efforts of over 45 students. SLICS members researched computers to be purchased, installed hardware and software, partnered with community volunteers led by Randy Ruiz to wire the district's schools for Internet access during the summers of 1998 and 1999, and provided ongoing maintenance and technical assistance to users. SLICS was integrated into the district's technology education curriculum, which was broadly conceived and focused not only on the technical "how-to's", but the wider societal implications of technological innovation. SLICS students assisted as classroom tutors in the K-8 program and helped design and demonstrate lessons focused on computer use, the life implications of computer skills, and computer-in-duced economic and societal changes.

A significant dispute arose during the 1998-99 academic year between the high school administration and the faculty, supported by SLICS and other students, over the too restrictive nature of Internet filters in place on the school's Internet access. Biology teachers had complained that most of the human body, and associated diseases, were off limits; social studies teachers that current events, if at all violent, or constitutional but related to the president's impeachment trial were inaccessible; journalism classes couldn't access the pages of major news magazines or newspapers; and the list went on. Ultimately, in March, the school board agreed to allow individual high school teachers to set and rely on the filters available on individual machines, rather than on one restrictive filter set to control K-12 access. Principal Dean and Vice Principal Martinez had expressed displeasure to Val Watson concerning the aggressive lobbying efforts of some members of SLICS concerning the filter issue. Three students, including Mickey Jackson, were called into the vice principal's office after they carried picket signs, on school property, on the night of the high school's winter music concert, and were told that they would be disciplined for future such behavior.

During the spring of 1999 several violent incidents at schools across the nation affected the district's attitude toward its recent decision on student Internet access and filters. Concerned about safety and liability issues, Dr. Dean urged the superintendent, and the superintendent then urged the board, to revisit the recent filter decision and to update its Acceptable Use Policy (AUP) to predicate access rights on students' and parents' agreement to monitor student home pages for unacceptable violent, hate filled, or pornographic tendencies. While the board shared the safety concerns, they were unwilling to publicly reopen the filter debate. They did, however, create a technology subcommittee to further investigate the safety and liability issues that might arise if the district's "flexible" filter program proved ineffective. That subcommittee, which included Dr. Dean, re-

CONTINUED ON PAGE 18

* This case is hypothetical. Any resemblance between the ficticious persons, facts, and circumstances described in this mock trial and real persons, facts, and circumstances is coincidental. It is stipulated that any enactment of this case is conducted after the named dates in the fact pattern and witness statements.

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ported in June, 1999 that the district could best protect itself from potential liability and best monitor teacher-set filters and student adherence to the district's AUP by installing a special "buffer" computer, known as a proxy server, to audit and record all Internet usage. While not restricting access to proscribed sites—and thus being invisible to the normal user—its record keeping ability would allow the district to pinpoint misuse and intervene appropriately to maintain student discipline and safety. The board accepted this recommendation and voted to spend funds budgeted for ongoing computer upgrades to purchase and install the new buffer hardware server and software. A local computer vendor, D.R.I., was contracted to do the work, which was completed in mid-August, 1999.

In early September Mickey Jackson, known as "Speed" because of remarkably quick computer abilities, and a few other senior members of SLICS called their advisor, Val Watson, inquiring about when they could come in to install the ten new research computers scheduled to be purchased over the summer for use in the school library. Watson knew that the purchase of those machines had been delayed and told the students that the district spent those funds on other computing needs. Following this, Mickey Jackson posted a very critical essay on his personal computer's home page, questioning why and how the district could reappropriate computer funds away from a student-centered use and why Val Watson, and SLICS, had not been given any input into the decision or asked to assist with the unknown "other computing needs." Mickey and three other members of SLICS attended the next school board meeting and questioned the board's decision but received no detailed explanation.

At the same time that this was unfolding, Val Watson received a number of inquiries from teachers asking about possible changes in the Internet setup over the summer. A few noted that their classes that came later in the day didn't seem to have the same good results on basic searches as earlier classes—one journalism teacher specifically pointed out that the later class's news requests took them to the same pages that the first period class had accessed, not the later, current home pages. Watson promised that SLICS would look into it.

Watson asked Mickey Jackson to choose one younger student to help and to look into this problem. Jackson chose A. J. Gates, a sophomore, and the two stayed after school on September 20 and 21 to check out the system. Initially they sought to recreate the seeming anomaly by visiting various news sites from the affected classrooms. They also got the same unexpectedly "old" webpages the first afternoon. Jackson came in early the next day to again test the Internet results. At that time, the system worked as expected, allowing access to real time news postings, just as teachers had reported.

Jackson shared this information with Val Watson, who said that he would check with the administration about any potential changes to the system. Watson spoke to Principal Dean about Internet changes and was told that nothing had been done over the summer that would cause such a problem. Based on this, Watson told Jackson to proceed with the "hunt" for an answer. Jackson and Gates spent the second afternoon in a systems check of the school's Internet configuration, using the system administrator's password to gain access. They quickly realized that the system had been shifted through a new proxy server and accessed that computer's software and configurations, finding that the daily problems described by teachers were the result of the chosen default settings—the new server automatically checked to see if a site had been requested in the past 12 hours; if it had been then it provided that site from its cache file, not seeking the site from the Internet again.

While surprised by the existence of this server, Jackson and Gates were shocked by the "use records" folder, which maintained a record of all Internet usage, with coinciding user codes and computer identifying numbers. The user codes were confidential; the computer I.D. numbers were already in the possession of SLICS because of their installation and service duties. To demonstrate the setup, Jackson referenced the known computer I.D. numbers, searched for the usage records of the principal and vice principal, found these, and printed them out, all on September 21.

The students shared this information and the printouts with Watson the next day. Jackson, having had an evening to think about normally confidential usage records being kept in a not perfectly secure folder, determined to make a public issue of the school's actions. Val Watson was personally disappointed, given the significant teaching and volunteer work that had gone into making the district's students knowledgeable about technology and privacy issues, that such sensitive records were allowed to exist in a place with relatively easy access rather than behind a secure "fire-wall-like" barrier to preserve confidentiality, as was the case with other private records such as student grades.

Val Watson promised to pursue these issues with the administration and advised them not to visit the proxy server in the interim. "Speed" Jackson decided to bring the issue to a head by demonstrating the new system's threat to privacy. Jackson, having taken the copy of the user history printout home the night before, had begun checking on the sites visited by the administrators, making notes of what was found. The following evening

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Speed composed an essay about the school's Internet changes, entitling it "Hypocrisy.org and Incompetence.com", attacking the school for its secret changes and the contracted vendor for its "botched" setup. Jackson warned students that they should be aware that their every move was being recorded on an "unsecure system." Jackson also wrote a second story entitled, "Guess Who's Going Where?" that purported to describe a "frustrated administrator's" Internet visits, and posted both stories on a home webpage.

The next day, September 23, Speed told several members of SLICS to look at that home page, including A. J. Gates. Gates and the others were impressed with what they read and started making jokes about the administrator's choice of websites. Gates also, from home, sent an e-mail via several school listservs (set up by teachers to disseminate information and assist students with homework and research assignments) reaching students in A. J.'s classes, touting the postings on Speed's website.

On Friday, September 24, the school was abuzz with discussions about the district's Internet changes and with ridicule and jokes directed at the principal, the assumed target of the "Guess Who's Going Where?" posting. Several teachers informed the administration of students' comments, of having received the e-mail from A. J. Gates, and of numerous students refusing to take part in Internet assignments while their every move was open to scrutiny.

Dean called A. J. Gates to the office. Gates admitted sending the e-mail, but denied having "broken into" the school's computer system. The principal, warning Gates to be forthright or face suspension, asked if any changes had been made to the system. Gates responded that Jackson had made at least one, but was moving so fast that there might have been others. Gates vowed total cooperation, saying that "I didn't do anything wrong."

Dr. Dean then called the district's business manager, Terry Wagner, and expressed concern that the integrity of the new buffer computer might have been compromised, given student access and the negative reaction of the involved SLICS students. Dean suggested getting the computer vendor back to recheck the system. Wagner called D.R.I. and spoke to Pat Chang, who agreed to check out the system on the following Monday, September 27. After inspecting the Internet computer system, Chang reported that the default settings had indeed been changed, so that every Internet request now actually went out to retrieve a "new" file. Further, the Internet usage folder had been disabled as of 12:05 a.m on the 24th, so that no ongoing records were being created. Finally, the September records had been deleted, as of noon on Friday, September 24. Dean asked Chang if any of these acts were criminal and was told that they certainly were if unauthorized.

Based on this information Dr. Dean called the East Bay Police Department on the afternoon of September 27, reporting on the whole situation. That evening, Mickey Jackson was arrested and charged with three crimes: 1) unauthorized use of a computer, in violation of N.Y.P.L. § 156.05; 2) computer trespass, in violation of N.Y.P.L. § 156.10; and 3) computer tampering in the fourth degree, in violation of N.Y.P.L. § 156.20. The criminal information alleges that Mickey Jackson broke into the school's computer system, downloaded secure data on Internet usage, and then posted writings based on that information on a home website. The school principal further alleges that Jackson disabled the school's Internet proxy server, preventing it from recording individual usage and deleted existing usage records. The principal claims that these actions created a safety hazard for the district, were motivated by a desire to embarrass the principal and vice-principal, substantially disrupted the educational process and school discipline, and undermined a safe and effective learning environment.

Mickey Jackson disputes the factual basis of these charges. Jackson argues that the school district created the problem when it "secretly" installed a "buffer" computer to track all Internet usage, thereby acting in bad faith; that the district improperly failed to protect the reasonable privacy rights of Internet users within the school by not securing the usage data but in fact allowed easy access to it by many people; and that such arrest infringes upon a student's constitutionally protected right to free speech on a home-based website. Jackson further claims that the only actions taken with regard to school computers were authorized by SLICS advisor Val Watson and that the only changes to the school's computer settings were within the scope of Watson's directives.

WITNESSES

FOR THE PROSECUTION

Chris Dean, Ed.D., Principal; **Pat Chang,** Computer Consultant, D.R.I.; **A. J. Gates,** Student, Member of SLICS

FOR THE DEFENSE

Mickey Jackson, Student; **Val Watson,** Computer Science Teacher and Advisor for SLICS; **Randy Ruiz,** Computer Network Specialist, Parent Volunteer Coordinator for SLICS

Relevant Statutes

§ 156.00 Penal. Offenses involving computers; definition of terms.

§ 156.05 Penal. Unauthorized use of a computer.

§ 156.10 Penal. Computer trespass.

§ 156.20 Penal. Computer tampering in the fourth degree.

Appendix II

RELATED CASES

People v. O'Grady, A.D. Third Dept. Slip Opinion 695 NYS2d 140 (July 1999) — § 156.10. A woman walked into a bank and accosted one of its employees, saying, "Stay away from my husband!" It turned out that she was the employee's boyfriend's estranged spouse, whose sister worked at NY State Department of Taxation and Finance. That Dept.'s Inspector General learned, following investigation, that the defendant (spouse's sister) had accessed records on the bank employee's family without authorization, despite fact that family members had no outstanding tax issues at the time. Her log-in and employee ID were used to gain access. Records also showed that Defendant was working on the day in question. Held: Conviction for four counts of computer trespass AFFIRMED; ".... foregoing proof not only amply justifies the jury's inference that defendant was the individual who had unlawfully accessed the Department's computer records but, further, excludes to a moral certainty any possible hypothesis of innocence."

People v. Versaggi, 83 N.Y.2d 123, 608 N.Y.S.2d 155 (1994). Defendant convicted of two counts of computer tampering in the second degree under Penal Law § 156.20 for altering two computer programs designed to provide uninterrupted phone service to the Eastman Kodak Corporation. Defendant, a computer technician, was employed to maintain and oversee a different system. Co-employees testified that defendant issued commands to cause the Eastman Kodak program to shut down completely as he bypassed a security system designed to protect the program. By disconnecting the program and causing the computer to shut down he altered the program in some manner. "Whether the defendant used existing instructions to direct the phone system off-line or input new instructions accomplishing the same thing is legally irrelevant. He made the system 'different in some particular characteristic without changing [it] to something else....' The intended purpose of the computer program was sabotaged. Conviction affirmed."

People v. Lett, 187 A.D.2d 456, 589 NYS2d 528 (1992). Appeal of conviction for computer trespass AFFIRMED because Defendant's accomplice was observed entering overtime for Defendant into a computer terminal on three separate occasions. Entries that were verified by certain computer records but unsupported by sign-in sheets or other authenticating documentation are consistent with a conclusion of guilt.

People v. Angeles, 180 M. 2d 146 (March 1999) — § 156.05. Where defendant was charged with selling a customer list for money, the court decided there can be no unauthorized use of computer unless the computer has a device to prevent unauthorized use. Examining legislative history for the unauthorized use section, the Court opines: "The Legislature thus put computer owners on notice that in order to receive the protection of the criminal statute, they must equip their computers with some kind of protection mechanism, such as a password requirement or a lock... In the present case, to assume the existence of such a system would be pure conjecture. The mere allegation that an individual has obtained access to a computer without the owner's authority is insufficient to plead a violation of Penal Law § 156.05. This count of the information is therefore dismissed." Court also distinguishes §§ 156.30 and 156.35.

People v. Katakam, 172 Misc. 2d 943 (1997) §§ 156.10, 156.30, 156.35. Computer consultant left the employ of Goldman Sachs to take position with J.P. Morgan. At Goldman Sachs, he had authorized access to computer directories with utility files and script files. He put the script libraries in his personal file and two weeks after departing, had a colleague e-mail them to him at new job. Held: criminal liability under § 156.30(1) is predicated solely upon his duplication of the files, not whether they held commercial value for any other company. Testimony of Goldman Sachs V.P. established that Defendant had no right to possess these programs. But no culpability under either of two subsections of computer trespass statute, § 156.10, because there was no proof that he used the Goldman Sachs computers without authorization. Accessing, and even duplicating certain files, constituted neither a personal nor non business use nor disclosure to an outsider. His "actions do not smack of computer trespass." Since he was not acting in excess of authorization when he accessed these files, those counts were dismissed.

The following case is of interest because this year's Interstate Tournament is being conducted with Maryland. However, this case should not be used in the statewide tournament.

Terry Dewain Briggs v. State of Maryland 348 Md. 470, 704 A.2D 904 (1998).

Defendant Briggs, a computer programmer, was convicted of unauthorized access to computers in violation of Maryland Law Article 27 § 146 (c) (2).

Testimony adduced at trial showed Briggs was entrusted the management of entire computer system by his employer, which job required him to enter passwords in the system. Briggs placed passwords into separate file two days before resigning his position due to a contract dispute and refused to disclose it after his resignation. Briggs was sued civilly and charged separately with theft of computers and unauthorized access to computers. The jury acquitted Briggs of the theft charge.

In reversing the conviction, the Maryland Court of Appeals held that in order to sustain a conviction the State had to prove (1) that Briggs intentionally and willfully accessed a computer or computer system; (2) that the access was without authorization; and (3) the access was with the intent to interrupt the operation of the computer system. In failing to prove that the access was "without authorization" the second element of this three pronged test was not satisfied. Accordingly the State did not prove that Briggs' conduct came within the prohibition of the statute.

New York's Long Arm Statute Contains Provisions Suitable For Jurisdiction over Web Sites

BY JOSHUA S. BAUCHNER

Personal jurisdiction over Internet activity presents unique problems. Some commentators have called for the development of an entirely new jurisdictional paradigm as a result.[1] Until new rules are established, however, standard jurisdictional analysis can provide general guidelines on what online activities are sufficient to warrant jurisdiction.

Such an analysis necessarily includes consideration of due process and the state's long-arm statute. The first section of this article defines how New York's long-arm statute is interpreted and applied. The second reviews current case law, applying the statute to Internet-related activity to ascertain how jurisdiction is supported in different circumstances.

Personal Jurisdiction in New York

Personal jurisdiction in New York requires a two-tiered inquiry. First, jurisdiction must be appropriate pursuant to the state's long-arm statute. Second, the state's long-arm statute must fall within the limits of the Fourteenth Amendment's Due Process Clause.

Because New York's long-arm statute does not allow jurisdiction to the extent permitted by federal due process,[2] success in establishing jurisdiction usually will be found consistent under due process. Nevertheless, New York courts still often conduct an analysis under both tiers, most always finding due process has been satisfied once long-arm jurisdiction is found to be appropriate.

The nature of the defendant's activity dictates which portion of New York's long-arm statute to apply in establishing jurisdiction. The relevant portions are N.Y. Civil Practice Law Rules sections 301 and 302 (CPLR).

Jurisdiction Under CPLR 301 Section 301 of the CPLR provides that a "court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." This rather cryptic proclamation traditionally requires persons to be physically present within New York and corporations to be "'doing business' in New York, 'not occasionally or casually, but with a fair degree of permanence and continuity.'"[3]

At the outset, CPLR 301 seems to present greater barriers to Internet-related jurisdiction than CPLR 302(a), which covers acts by non-domiciliaries that can serve as the basis of jurisdiction. The physical presence requirement and "doing business" requirement of CPLR 301 both demand more significant contacts by a defendant under a personal jurisdiction analysis than does CPLR 302(a). As such, successful Internet-related jurisdiction is likely to result from CPLR 302.

Jurisdiction Under CPLR 302(a) Three of the four paragraphs in CPLR 302(a) are individually relevant toward establishing jurisdiction over Internet activity.[4] The specific nature of the defendant's conduct will determine which paragraph to apply. Interestingly, the courts have not consistently applied any of the paragraphs, even under similar fact patterns, often because the plaintiffs have mistakenly relied on the wrong one.

Section 302(a)(1) permits a court to exercise personal jurisdiction over any non-domiciliary who in person or through an agent "transacts any business within the state or contracts anywhere to supply goods or services in the state." This section is typically invoked against a defendant who breaches a contract or commits a commercial tort "in the course of transacting business or contracting to supply goods or services in New York."[5]

Application of this section is appropriate if two conditions are met: (1) the non-domiciliary "transacts business" within the state, and (2) the claim against the non-

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domiciliary arises out of that business activity.[6] Under the first condition, a "'nondomiciliary 'transacts business'. . . when he 'purposefully avails' [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.'"[7] In conducting this analysis, "[t]he court must look to the totality of the circumstances to determine the existence of purposeful activity."[8] The purpose of this is to ensure the defendant is not subject to jurisdiction for "random, fortuitous, or attenuated contacts."[9] However, proof of only one transaction within the state may permit jurisdiction "'so long as the defendant's activities [in New York] were purposeful and there is a substantial relationship between the transaction and the claim asserted.'"[10] In fact, CPLR 302(a)(1) has been characterized as a "single act statute" recognizing that it is well established that "it is the nature and quality, and not the amount, of New York contacts which determine the issue."[11]

Sections 302(a)(1) and 302(a)(3)(i) of the CPLR appear best suited to obtaining jurisdiction over defendants for their activities on the Internet.

The "substantial relationship" language emphasizes the need for a nexus between the cause of action and the defendant's activity within the state as required by the second condition. A plaintiff must show the cause of action is "'sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business, and to subject the defendants to suit in New York.'"[12] Courts have been fairly strict in finding this nexus and even a defendant's presence within New York may not be enough to establish jurisdiction if that presence is unrelated to the cause of action.[13]

Although courts have often interpreted the nexus language narrowly, the operative language in CPLR 302(a)(1) is "transacts any business" and, in contrast with the "doing business" requirement of CPLR 301, clearly permits broader application. Specifically, as illustrated, unlike CPLR 301, CPLR 302(a) does not require the defendant's physical presence within New York. Under CPLR 302(a), a court may look to the aggregation, nature and quality of a defendant's activities in lieu of physical presence within the state.[14]

The next paragraph, CPLR 302(a)(2), permits a court to exercise personal jurisdiction over any non-domiciliary who in person or through an agent "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act."

Unlike CPLR 302(a)(1), 302(a)(2) requires the defendant to be physically present within the state when committing the tortious act.[15] This requirement, established in *Feathers v. McLucas*,[16] "adopted the view that CPLR Section(s) 302(a)(2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act."[17] The statute has been strictly interpreted to the extent that the Practice Commentary to CPLR 302 explains that a person in New Jersey, shooting a bazooka across the Hudson, thereby causing injury in New York, would not be subject to jurisdiction.[18]

Accordingly, even if the plaintiff suffers injury in New York, a defendant who is not in New York when performing the act that causes the injury will not be subject to jurisdiction there.[19] Therefore, the *Calder v. Jones*[20] effects test is not likely to be applicable under CPLR 302(a)(2). Furthermore, "[t]he transmission of a communication from outside New York by mail or telephone is generally not considered an act committed within the state for purposes of" the statute.[21]

Section 302(a)(3) permits a court to exercise personal jurisdiction over any non-domiciliary who in person or through an agent "commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

An inquiry into the applicability of CPLR 302(a)(3) requires an analysis of each component of the sub-paragraph. First, unlike CPLR 302(a)(2), this portion of the statute permits jurisdiction over persons not physically present in New York when committing tortious acts.[22] Similar to the *Calder* effects test, it permits jurisdiction when the defendant's activity has the effect of causing injury within New York.[23]

Furthermore, the "single act" jurisdiction permitted by CPLR 302(a)(1) does not warrant jurisdiction under CPLR 302(a)(3).

> Though the contacts required by the paragraph are all in the alternative, they must be "regular," "persistent," or "substantial." "The 'one-shot' business transaction is

insufficient and a regular course of conduct in the state is required."[24]

However, unlike CPLR 302(a)(1), 302(a)(3) does not require a nexus between the defendant's activity in the state and the tortious act.[25] In lieu of a nexus, the defendant's conduct within the state must conform to the activity illustrated in subparagraphs (i) and (ii).

Subparagraph (i) permits jurisdiction over a broad range of conduct within the state. Although the language suggests that the defendant must be "doing business" in a manner similar to the requirement of CPLR 301, in fact, the defendant's "'activities amounting to [the] transacting of business or supplying goods or services'" similar to CPLR 302(a)(1) is contemplated as described above.[26] Accordingly, the broad reach of CPLR 302(a)(1) permitting jurisdiction over defendants transacting business within the state is available under CPLR 302(a)(3)(i) without the nexus requirement of CPLR 302(a)(1). This permissibility seems to indicate the drafters contemplated a balance between permitting jurisdiction resulting from a "single act" and, therefore, requiring a nexus as in CPLR 302(a)(1), and permitting jurisdiction based on "regular" contacts without the need for a nexus as in CPLR 302(a)(3)(i).

It is also noteworthy that CPLR 302(a)(3)(i) is drafted in the alternative, permitting jurisdiction over defendants whose activity within the state can be characterized as any *one* of the following: (1) transaction of business; (2) solicitation of business; (3) persistent course of conduct; or, (4) derivation of substantial revenue. Importantly, the second type of activity—the solicitation of business—permits jurisdiction based on a "combination of [the] regular advertisement of products in New York, plus a tortious injury in New York, . . . even if there is no causal relationship between the advertisement and the injury."[27]

Finally, subparagraph (ii) of CPLR 302(a)(3) contains a foreseeability requirement and a requirement that the defendant derive substantial revenue from commerce. The foreseeability requirement "'relates to forum consequences generally and not to the specific event which produced injury within the state.'"[28] Therefore, the defendant need only know, or have reason to know, that the tortious act committed without the state could have consequences within the state. While consequences need not arise directly out of the tortious act to permit jurisdiction, in *Martinez v. American Standard*,[29] the court ruled that the foreseeability requirement was not satisfied where there were no "tangible manifestations" to show that the defendant could have expected consequences to arise in New York.[30]

The second half of CPLR 302(a)(3)(ii) requires the derivation of "substantial revenue from interstate or international commerce." It is important to recognize that this requirement is necessary in conjunction with the foreseeability requirement—both must be satisfied to establish jurisdiction. However, the statutory language does not require that the defendant derive substantial revenue from the tortious act. The language simply requires the defendant to derive revenue from "interstate or international commerce," permitting jurisdiction over a defendant who derives such revenue even if it does not necessarily arise from the tortious act or from contacts within New York.

Summary Sections 302(a)(1) and 302(a)(3)(i) of the CPLR appear best suited to obtaining jurisdiction over defendants for their activities on the Internet.

Section 302(a)(1) permits jurisdiction based on a defendant's single act providing there is a substantial connection between that act and the cause of action. Additionally, CPLR 302(a)(3)(i) permits jurisdiction over defendants for regular contacts with the state, without the nexus requirement.

Application to Conduct on the Internet

New York's long-arm statute has not been consistently applied to Internet-related activity. However, based upon its prior use, the appropriateness of its future application may be devised.

Analysis Under 302(a)(1) In *K.C.P.L., Inc. v. Nash*,[31] the defendant Nash registered the domain name *reaction.com*. Kenneth Cole Productions (KCPL), which designs and sells clothing using the name, "Reaction," contacted Nash seeking to purchase the domain name, and Nash asked for $8,000.

After refusing to pay the $8,000, KCPL brought suit in the federal court for the Southern District of New York for state and federal trademark infringement and other claims. In addition, KCPL argued that Nash was a "cyberpirate" attempting to extort money for the domain name. Nash claimed that he intended to start an online system using the *reaction.com* name. Nash brought a motion for lack of personal jurisdiction, claiming that he had no offices in New York and solicited no business nor advertised or received money from anyone in New York.

Under a CPLR 302(a)(1) analysis, the court found that Nash had not "transacted business in New York."[32] Further, the court held that "in order to exercise personal jurisdiction over a non-resident defendant, 'something more' than the mere posting of information on a passive web site is required to indicate that the defendant purposefully directed his activities at the forum state."[33] In doing so, the court adhered to the "Sliding Scale" analysis for Internet jurisdiction currently being developed and subscribed to by the courts.

The Sliding Scale rests on a spectrum of Internet activity ranging from active to passive use. An active site is one where defendants "are actively conducting business over the Internet, so that it can be said that they 'intentionally reached beyond [their] own state to engage in business with residents of the forum state.'"[34] By contrast, a passive site is one where the defendant simply posts information to the site without the apparent intention of soliciting business or, in fact, having solicited business with residents of the forum.[35]

Perhaps the clearest explanation of the Sliding Scale may be found in *American Homecare Federation, Inc. v. Paragon Scientific Corp.*[36] where the court specifically defined three points on the spectrum. At the low end of the scale, where no personal jurisdiction may be found, is a Web site that just includes the posting of information.[37] In the middle of the scale is a site where information is exchanged between the site operator and, presumably, residents of the forum. Such exchange may include downloadable files or links to other Web sites.[38] At the high end of the scale, jurisdiction will most likely be found over defendants operating a site that most closely conforms with the traditional meaning of "transacting business." Such activity may include: (1) sales; (2) solicitations; (3) acceptance of orders; (4) links to other sites; (5) product lists; and/or, (6) the transmission of files.[39] In determining where on the Sliding Scale a site may fall, the foundational due process consideration concerning the nature and quality of the activity must be considered in combination with these six factors.[40]

The limitation on jurisdiction under CPLR 302(a)(1) stems from courts' fear of establishing national jurisdiction based solely on a Web site as illustrated in *Hearst Corp. v. Goldberger*.[41] There, the court held that the defendant's Web site was the equivalent of an advertisement in a national publication and his e-mails were the equivalent of letters or telephone calls, all insufficient to warrant jurisdiction under this section.[42] Therefore, the site simply constituted a national advertisement. However, the interpretation of CPLR 302(a)(1) by the *Hearst* court preceded the development of the Sliding Scale and, at the time of the lawsuit, the defendant was in only the initial stages of his business, and in fact, had no goods or services to sell.[43]

The courts have maintained that advertisements alone, even if targeted at New York, "are insufficient to constitute a business transaction under" CPLR 302(a)(1), again, fearing the submission of a defendant to national jurisdiction.[44] Further, as detailed above, this is because advertisements alone would not constitute the transaction of business requiring the defendant to "'purposefully avail[] [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.'"[45] It is important to note that CPLR 302(a)(1) is the "single act" statute permitting a court to look at the aggregation, nature and quality of a defendant's activities in lieu of his physical presence within the state.[46] Therefore, while advertisements alone may be insufficient, their combination with another single entry into the New York forum may warrant jurisdiction, so long as that entry is substantially related to the cause of action.

Analysis Under 302(a)(3)(i) *Hearst* appears to be the only case analyzing CPLR 302(a)(3)(i) for the purpose of obtaining jurisdiction based on Internet activities. The court was unable to find jurisdiction because the defendant's Web site was not a solicitation (at the time of the suit the defendant had no product) and his informational Web site represented his only contact with New York. However, if properly applied, CPLR 302(a)(3)(i) can serve as an effective means of obtaining jurisdiction over Internet activity.

Because the language of the statute is broadly crafted, any tortious act causing injury within the state warrants jurisdiction if the defendant is in regular contact with the state. An active Web site providing two-way interactive contact between the site operator and visitors should constitute sufficient conduct. The site operator need not be physically present within New

York as long as the visitors to the site are injured in New York. In satisfying the statute, an active Web site represents a transaction of business defined under CPLR 302(a)(3)(i) as when a defendant "'purposefully avails [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.'"[47] Further, in the alternative, an active Web site may serve as a solicitation or as a persistent course of conduct in the state; either one will satisfy the statute.

Finally, only subparagraph (ii) of CPLR 302(a)(3) requires that the site operator derive revenue. Subparagraph (i) provides for jurisdiction if revenue is generated in the alternative to the transaction or solicitation of business, or the persistent course of conduct. Therefore, even an illegal site that has not yet caused enough harm to generate substantial revenue may warrant jurisdiction.

Therefore, when applying CPLR 302(a)(3)(i), any Web site operator, regardless of location, who causes injury in New York will warrant jurisdiction if the site transacts business, or solicits business, or represents persistent contact, even if the Web site is not the cause of the injury.

As the Internet continues to evolve into an ever more functional tool for conducting business, it will merge with traditional streams of commerce. Therefore, stream of commerce jurisdictional theory,[48] in combination with CPLR 302(a)(3)(i), will more than serve to support personal jurisdiction claims. Routine online activity will become indistinguishable from offline activity. Users of the Internet will place themselves in the stream, thereby allowing jurisdiction over them under a simple stream of commerce analysis wherein jurisdiction is permitted over a defendant that delivers its products into the stream of commerce with the expectation that those products will be purchased or received by residents of the forum state.[49]

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1. David Willie, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 Ky. L.J. 95 (1998).
2. *Beacon Enters. Inc. v. Menzies*, 715 F.2d 757, 764 n.6 (2d Cir. 1983).
3. *Hearst Corp. v. Goldberger*, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *23 (S.D.N.Y. Feb. 26, 1997) (quoting McLaughlin, McKinney Practice Commentary, CPLR 301 (1990)).
4. CPLR 302(a)(3) has two subparagraphs, drafted in the alternative, and therefore, considered separately.
5. *Beacon Enters.*, 715 F.2d at 764; *see Hearst*, 1997 U.S. Dist. LEXIS 2065, at *29.
6. *K.C.P.L., Inc. v. Nash*, 98 Civ. 3773, 1998 U.S. Dist. LEXIS 18464, at *11 (S.D.N.Y. Nov. 24, 1998); *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1386 (Fed. Cir. 1998).
7. *K.C.P.L.*, 1998 U.S. Dist. LEXIS 18464, at *11 (quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34 (1967)).
8. *Id*. at *12.
9. *Id*.
10. *Id*. at *11-12 (quoting *PDK Labs., Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997)).
11. *Development Direction, Inc. v. Zachary*, 430 F. Supp. 783, 785 (S.D.N.Y. 1976).
12. *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1386 (Fed. Cir. 1998) (quoting *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 59 (2d Cir. 1985)).
13. *McGowan v. Smith*, 52 N.Y.2d 268, 270, 437 N.Y.S.2d 643 (1981) (holding defendant's visits to New York to conduct market research were unrelated to plaintiff's products liability suit arising from the purchase of defendant's product in New York).
14. *Hearst Corp. v. Goldberger*, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *29-30 (S.D.N.Y. Feb. 26, 1997) (quoting *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1050-51 (S.D.N.Y. 1987)).
15. *See Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 28 (2d Cir. 1997).
16. 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965).
17. *Bensusan*, 126 F.3d at 28.
18. *See* McLaughlin, McKinney Practice Commentary, CPLR 302, C302.17 (1990).
19. *See Bensusan*, 126 F.3d at 29.

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20. 465 U.S. 783, 787 (1984) (holding jurisdiction appropriate when defendant's activities caused "effects" in the forum state).
21. *Hearst Corp. v. Goldberger*, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *43 (S.D.N.Y. Feb. 26, 1997) (quoting 1 Michael C. Silberberg, Civil Practice in the Southern District of New York § 8.23, at 8-64 (1997)).
22. *See id*. at *44.
23. *See id*.
24. *Id*. at *45 (quoting 1 Weinstein, Korn & Miller, New York Civil Practice: CPLR § 302.14, at 3-156 to 3-157 (1996)).
25. *See id*.
26. *Id*. at *45-46 (quoting 1 Weinstein, Korn & Miller, New York Civil Practice: CPLR § 302.14, at 3-156 to 3-157 (1996)).
27. McLaughlin, McKinney Practice Commentary, CPLR 302, C302.21 (1990).
28. *American Network v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494, 497 (S.D.N.Y. 1997) (quoting *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326 n.4, 425 N.Y.S.2d 783 (1980)).
29. 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 873, 470 N.Y.S.2d 367 (1983).
30. *Id*. at 654.
31. 98 Civ. 3773, 1998 U.S. Dist. LEXIS 18464 (S.D.N.Y. Nov. 24, 1998).
32. *Id*. at *12-13.
33. *Id*. at *20.
34. *Id*. at *19 (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)); *see American Network v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997).
35. *K.C.P.L.*, 1998 U.S. Dist. LEXIS 18464, at *15.
36. 27 F. Supp. 2d 109 (D. Conn. 1998).
37. *See id*. at 113.
38. *See id*.
39. *Id*. at 114.
40. *See K.C.P.L.*, 1998 U.S. Dist. LEXIS 18464; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124-25 (W.D. Pa. 1997).
41. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997).
42. *See id*. at *31-35.
43. *See id*.
44. *K.C.P.L.*, 1998 U.S. Dist. LEXIS 18464, at *17.
45. *Id*. at *11 (quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34 (1967)).
46. *Hearst Corp.*, 1997 U.S. Dist. LEXIS 2065, at *29-30 (quoting *Rolls-Royce Motors, Inc. v. Charles Scmitt & Co.*, 657 F. Supp 1040, 1050-51 (S.D.N.Y. 1987)).
47. *KCPL*, 1998 U.S. Dist. LEXIS 18464, at *11.
48. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).
49. *See id*.

Taking Depositions in Tokyo Or: The Only Show in Town

BY ELIOT G. DISNER

Outside North America, Japan is the United States' largest trading partner. Naturally, there is plenty of litigation between Japanese and American businesses as a consequence. At least some of this litigation involves Japanese witnesses who, for whatever reason, refuse to travel to the United States to have their depositions taken. Some of those witnesses reside in the environs of Tokyo and may be deposed there on American soil, *i.e.*, within the U.S. Embassy compound.

How can this be accomplished? What pitfalls are likely to be encountered along the way? This article addresses these questions based on two extended visits to Tokyo in 1999.

The Paperwork

As a starting point, we were required to follow assiduously the provisions of the Consular Convention and Protocol Between the United States and Japan,[1] because Japan does not subscribe to the Hague Convention. Federal Rule of Civil Procedure 28(b) (FRCP) generally authorizes depositions to be taken in a foreign country. Subsection (4) of FRCP 28(b) specifically outlines the process for obtaining a "commission" to permit a person to have any necessary oaths administered and to take testimony there.

Accordingly, our office contacted the U.S. Consul in Japan and followed written procedures provided by the State Department that allow a deposition to be taken of a foreign person in the U.S. Embassy there. Under Japanese law, depositions may not be taken in Japan except on American soil. The consul requires that a so-called Order Appointing a Commission be issued and submitted to the embassy to further the scheduling process. The Order Appointing the Commission is also necessary for obtaining the proper Japanese travel documentation, *i.e.*, "deposition visa," needed to conduct this type of business in Japan at all.

The first step is to reserve a time slot from the U.S. Embassy in Tokyo (or other U.S. Consulates in Fukuoka, Naha, Osaka-Kobe and Sapporo, where depositions are also permitted). This can be accomplished by telephone or fax. A non-refundable $410 deposit (as of 1999) must accompany the reservation request. Once the available dates are obtained (in Tokyo, at least, typically many months into the future), the next step is to obtain the "Commission," which is issued by the court where the case has been filed.

The Commission advises the appropriate Japanese government officials in both Japan and the United States that the petitioner has the right, subject to its final blessing, to take the specified depositions at the time and place indicated. Once approved, the Commission serves as the marching orders under which the U.S. Consular Office in Japan operates. It lists the witnesses to be deposed, the schedule for each deposition, who shall conduct each deposition, as well as who shall defend. It also identifies the court reporter, if one is being brought from America (which, as explained below, is virtually required).

Once the Commission is issued, a certified copy must be sent to the deposition venue with a (refundable) payment of $140 for each day of scheduled deposition, plus a handling fee of $65 (also as of 1999). The original Commission is sent to the nearest Japanese Embassy or Consulate. It must be accompanied by the passport of each attendee at the depositions, so that the visa stamp may be applied. Once issued, this visa expressly permits each intended visitor to enter into Japan to undertake such business. This process takes approximately two weeks, because the actual visa application is processed in Japan, not by the Japanese Mission here. All the pa-

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The Hotel Scene

Although there are a number of fine hotels in Tokyo, just two are within walking distance of the U.S. Embassy. The Okura Hotel, across the street from the embassy, may be the Waldorf Astoria of Tokyo. It is among the most prestigious hotels there. Its other guests during one of our trips was a "Buy Minnesota" delegation headed by Governor Jesse Ventura. Notwithstanding its reputation, however, the Okura is physically nowhere near as elegant as the Waldorf Astoria. It has a slightly Danish modern look and feel, probably owing to its post-war construction.

In contrast, the ANA Hotel (like the airline, but pronounced "ahna" in Japan) is a bright, sparkling new edifice with a distinctly Marriott-type look and feel, about a 10-minute walk from the embassy. It was built as part of an urban renewal project that replaced short gray buildings with tall gray buildings. Like a Marriott, it draws a more business, rather than society, crowd. On the face of it, the ANA seems the better value, at a price normally some $100 less per day than the Okura.

Tipping is not permitted in either hotel, but at the Okura an additional 10% gratuity charge was added to the bill. The fact that there is no tipping, at least on a transaction-by-transaction basis, did somewhat emancipate us, however. We had bellmen hauling boxes, delivering messages between rooms, retrieving endless faxes and food, and following elaborate instructions to ship our boxes back to the United States and deliver our baggage to the airport limousine when we departed. The "limousine" we used to return to the airport both times was, in fact, nothing more than a bus. However, it did retrieve us right at the hotel, handled all our bags, and deposited us at the airport precisely where the taxicab would have.

perwork needed to clear the way for a deposition to be taken in Japan can be prepared and processed by a competent paralegal. The State Department has a web site which explains this process in some detail.[2] Although it disclaims responsibility for the accuracy of what it says, it is, at least, a good place to start.

Somewhat surprisingly, the Japanese government moves with genuine alacrity in processing such visa applications, notwithstanding an approval process that requires the application to be sent to Japan and back. Given that the witnesses in such proceedings are likely to be Japanese nationals, and the party seeking the depositions will frequently be seeking to redistribute wealth from Japan to the United States, the efficiency of the Japanese government in processing such visas somewhat took us aback. Perhaps this can be explained by the recent downturn in the Japanese economy. It may be more important now that the Japanese encourage foreign visitors of any stripe than to nominally protect companies already down in their luck.

Setting Up in Tokyo

Because we (my client's Japanese-American business consultant, the court reporter and me, the deposition taker) were loaded down with multiple copies of each intended deposition exhibit, all the reference materials and supplies we thought we might need, as well as laptop computers and several changes of clothes, compounded by our fatigue from 12 1/2 hours in the air, we were not about to seek out an airport bus. Instead, we hailed a taxicab to take us to our hotel.

Our taxi trip set us back more than $200, although it did offer a good overview of the gray commercial edifices that make up most of the city, along with ribbons of slow-moving, also gray, elevated freeways (most of the retail commerce occurs "underground" or in several fluorescent flare-ups). We did not need to tip the cab driver, however. Indeed, in Japan tipping is *verboten*. As we later learned, however, such graciousness does not always get in the way of economic self-interest![3]

The Deposition Venue

The morning of the deposition we learned that we would be the *only* persons taking a deposition in Tokyo that day. We realized this because the only American property *in Tokyo* earmarked for depositions is one large, Spartan room located in the "public" part of the sprawling U.S. Embassy. For some reason, U.S. consular offices scattered outside Tokyo seem to have more space for U.S. depositions. For example, the U.S. Consulate in Osaka has two rooms available, but Osaka and the available venues were too far from Tokyo to be practical or legal alternatives.

Because so much business between U.S. and Japanese companies necessarily flows through Tokyo, it seems a bit odd that there be just one single room where depositions can be taken. Late one afternoon, unable to finish my examination, I suggested that we move to the dining room table in Ambassador Tom Foley's house, a request that the consular officer summarily rejected.

Security at the U.S. Embassy is heavy, even for the "public" part. The multi-acre U.S. spread is surrounded by an eight-foot high concrete wall with sentries posted every several yards. The embassy itself is a mid-70s

structure with a distinctly Stalinist look and feel. If we had driven in, a barrier in the pavement would have sprung up while the security force, composed exclusively of Japanese nationals, would run super-large dental mirrors under our vehicle—looking for explosives or contraband.

The security checking varied on a daily basis from a great deal to almost nothing. After the first day, we were waved through the gate at the perimeter of the embassy merely by uttering the mantra "deposition."[4] Apparently, the sentries learned who we were. When we finally reached the building itself, security proved more interesting. On our first trip to Japan, in January, our bags were inspected by hand and we walked through a metal detector similar to those in airports. Our computers were pre-registered by serial number and inspected upon our entry. A heavy plate glass and metal door separated the cramped vestibule of the embassy from the visa application waiting room and deposition room.

On our second trip nine months later, things had changed a bit. By then, the embassy had received equipment that permitted our bags to be x-rayed, as they are in an airport. However, the equipment was new and, in fact, too big for the space. Thus, we had to cram our equipment through a very narrow area to feed it into the machine.

Because the x-ray equipment was installed during our second trip, there were occasional breakdowns and numerous observers and/or trainees on hand. One day I spotted two men wearing black CIA polo shirts studying the new security equipment. I know they were CIA polo shirts because they prominently displayed its insignia. I found it surprising that employees of a supposedly clandestine organization would identify themselves so casually. Emboldened by their apparent openness, I asked one of the agents if their shirts came in more flattering, brighter colors. They did not find my request amusing, nor did they answer it.

After the first day, most of the time our computers sailed right through. However, once in a while, their serial numbers were re-checked against a list that the guards always had some problem finding.

One curious aspect of security in this U.S. compound is that virtually everyone involved was Japanese, each clad in a bright blue uniform. The only exception we noticed was a lone U.S. Marine dressed in camouflage fatigues sitting in a booth, surrounded by one-inch thick plate glass, with just the barest slot through which he could speak and hear—not unlike a ticket-taker's booth at a subway station in the South Bronx. The principal task the Marine performed for us was to get the key to the room to admit us in the morning and afternoon.

The deposition room is available from 8 a.m. to 1 p.m. and 2 p.m. to 5 p.m. It was possible to remain in the room between 1 and 2, notwithstanding the part of the embassy we occupied is locked. If, however, we elected to go to lunch at 1 p.m., we could not get back into our venue until 2 p.m., necessitating a wait in line for it to reopen with 10 to 20 other people. Unfortunately, when the weather is cold or rainy, there is no alternative but to stand there and shiver, get wet, or both.

The room is on an isolated lower level of the embassy, near an office where visa applications are processed. The room itself is certainly large enough, approximately 25 by 15 feet. Other than a table and several government chairs, however, it did not include any amenities, except for a coat rack and windows. There were no paper cups for cold water, no stapler, no paper clips, no sticky notes,

Coping with Laundry

Because the hotels' laundry prices are prohibitive, one day I decided to set out on foot for a laundry near the hotel with an over-the-shoulder bag stuffed to the top with underwear and socks. Before I could get even a word out, the one employee there who spoke English said, "We do not wash underwear and socks."

I asked her if she had x-ray vision. Then, I confessed that was indeed what was in my bag. The woman told me it was *illegal* for Japanese laundries to wash underwear and socks, but apparently not *hotel* laundries (to wash underwear and socks). Be prepared to succumb to the hotel prices or plan to use the retractable clothes line in the shower and do your own. I confess I did. After seeing women washing clothes in Africa by beating on rocks, I figured it couldn't be too difficult to do it myself. At least I had hot water.

no rubber bands, no coffee, not even green tea. The only leftover item from previous depositions we found there was a substantial amount of unused court reporter paper, which could not be used elsewhere.

To reinforce the impression that we were under the gun during our depositions, every day at 5 p.m. we actually were. Then, the combat-ready Marine in the glass booth would emerge to tell us if we were not out of the building within five minutes, he would oust us. Given that we were swimming in strange waters and wrestling with a strange language, it should have been reassuring to see a young U.S. Marine. However, we actually felt more affinity with our Japanese hosts and the embassy's Japanese security force than we did with any of the Marines on duty, all of whom seemed to be from somewhere in the deep South. Still, these Marines probably fit into Japan better than we did because there remains a substantial American military presence there and GIs are sprinkled throughout the area.

The Deposition Process

Because the only reason to go to Japan was to bring back oral evidence of our adversary's misdeeds, it was important that it be recorded correctly. Competent court reporting is thus critical. Therefore, we brought our own reporter. Given how few depositions are taken in Tokyo, it is not too surprising that reporters there are in short supply. Also, not surprisingly, the price of a Tokyo-based reporter is high, set at some $5,000 per day. Given that we were in Japan for 10-day blocks of depositions, it was also cost beneficial then for us to bring our own. She agreed to work for a fraction of the going rate among Japanese reporters. With the use of real-time transcribing and indexing, this part of the deposition process went off just as if we were at home.

Because the depositions we took in Japan were booked nine months in advance, our time there was precious and we had little to waste. Naturally, the first strategy of our opponent then was to waste as much of our time as possible. On our first trip to Japan this was accomplished, in substantial part, by its so-called "check" interpreter. We were obliged to provide the *lead* interpreter who dutifully translated all the questions and answers, as well as all the objections. The check interpreter is there to do just that, *i.e.*, check the accuracy of the lead interpreter. However, defendants had the good fortune to select a check interpreter who was temperamentally more like an attack dog.

If the lead interpreter translated an answer with the word "need," the check interpreter would disrupt proceedings to claim the word should be "necessary." If the lead interpreter said the witness was the "assistant executive manager," the check interpreter would say he was the "executive assistant manager." Of course, I didn't much care what title the witness had, as long as he was a "managing agent" and could bind his employer by his prior actions and testimony. Nearly every interruption resulted in the question being re-asked and the sometimes different answer translated once again. We proceeded at a snail's pace on our first trip.

Even our lead translator slot was not filled too successfully. On our first trip, we were required to fly in an interpreter from the United States for our second week, as our local lead interpreter had withered against the check interpreter's repeated attacks. On our return to Japan in November, we were required to hire several different lead interpreters because none was willing to work an entire day. Indeed, lead interpreters in Japan tend to double- or triple-team depositions. That is, two or three interpreters work simultaneously (relieving each other every 15 to 30 minutes), at a cost in excess of $3,000 per day. For whatever reason, Japanese translators in Japan are said to have less energy than their American counterparts, who routinely translate full days of depositions without assistance. The best we could do was to hire interpreters, each of whom worked half a day, with no multiple-teaming.[5] Notwithstanding, we were told our interpreters could work only half a day because they would be burned out by any more work. It turned out all of them found other work for the halves of the days they did not work for us.

Japanese witnesses tend to have a natural "advantage" in such a time-sensitive setting because they seem to find it almost impossible to answer a "yes" or "no"

question "yes" or "no." The Japanese generally have a well-known reluctance to say the word "no." In fact, the substance of our case, put simply, related to the string of "yeses" we were *told* by our erstwhile Japanese partner (promising to do business with us), while it was all the while *doing* "no" (in fact, doing little or nothing to carry out its expressed promise).

Generally, Japanese witnesses can be quite inventive in how they avoid providing accurate testimony. One witness, the defendant's sales manager, was asked what percentage of a particular product his company made was purchased by a particular customer. The witness claimed not to understand the question. Seven or eight different versions of the same question were then posed. When the witness was finally cornered, he testified he did not know.

The failed relationship here was between an American manufacturer and a large Japanese company. If it had succeeded, the company would have marketed and sold various stone cleaning and maintenance products in Japan made by the U.S. manufacturer. An important issue then was just how much stone there was in Japan to maintain. Our claim was that the defendant underestimated the amount on hand as a pretext to withdraw from the claimed agreement. To accomplish this, the Japanese company took the position that *only* stone installed in Japan *after* 1987 was of significance. Because stone installed in Japan prior to 1987 is more likely to need maintaining, and is for that matter more plentiful, it seemed obvious that the Japanese company had overlooked a whole lot of stone that should have been part of the analysis.

When confronted with the question of whether there was more stone put into buildings in Japan *prior* to 1987 than *after* 1987, one executive of the defendant testified as follows (incessant objections omitted):

Q. Do you have some reason to believe that stone installed in Japan prior to 1987 is less in need of sealing and maintaining than stone installed after 1987?

A. I don't know that.

Q. Do you believe that there's been more stone installed from the beginning of the Japanese empire to 1987 than after 1987? In Japan.

A. The Japanese empire?

Q. 2,000 years ago, when it all started.

A. Stones basically do not change, and I really don't think that it is subject to change because of some certain periods.

Q. That's not really my question. My question is don't you agree that there's been much more stone installed in Japan throughout its history before 1987 than since 1987, a mere 12 years?

A. I don't know.

Q. Would you be willing to venture an opinion?

A. The so-called—during the period of 1987 to 1999, the so-called bubble economy era, probably stones were used at the maximum volume throughout the history. And those buildings built during that time a lot of stone—significant amount of stones were used.

So maybe—I am not sure, but maybe that time was period when stones were used at the most.

Q. Would you agree that the greatest building boom in the history of Japan was the post-World War II reconstruction of Japan?

A. Because I wasn't living during that era, I really don't know the situation. However, I believe that

the period so-called bubble—the bubble period is really the time when it was booming.

Q. You believe there was more construction in Japan between 1987 and 1999 than from 1945 to 1987? Is that your best estimate of the way Japan is?

A. Were you asking me when comparing the period from 1945 to '87 and the period starting from '87 to '99, which—in which period were more buildings being constructed?

Q. Yes.

A. That, I do not know.

Q. Do you have some reason to think that there was more construction in the 12 years after 1987 than in the 42 years before '87?

A. I have not being stating myself in that matter.

Q. I'm not certain what that means. Does that mean that you have no reason to believe that there's been more construction in the 12 years after 1987 than in the 42 years before '87?

A. So I may be repeating myself, but I do not know which period had more constructions.

Of course, these examples only serve to round out the usual means that witnesses in the United States use to avoid providing testimony, all of which were also in full swing with our deponents in Tokyo.

One important lesson we learned is that we could not count on the consular officer to help us overcome the obstructionism and evasion we encountered. We had thought that was possible, and indeed submitted one discovery dispute to said officer, who then decided he had no jurisdiction to resolve it after considering the matter overnight.[6] Because of the long lead time for scheduling depositions in Japan, discovery problems must be resolved quickly, if possible.

Because of the long lead time for scheduling depositions in Japan, discovery problems must be resolved quickly, if possible.

Since the consular officer could provide no support, that left the judge or magistrate judge back in the United States as the person to whom we were required to turn. Fortunately, because other discovery disputes had arisen earlier in the case, the assigned magistrate judge was quite familiar with our circumstances, including our difficulties taking depositions in Japan. He was gracious enough to offer to be available by telephone to resolve any discovery disputes that might arise. In fact, there were two such hearings held in the course of our visits which did serve to resolve disputes and permit the depositions to proceed. The time difference between Japan and the United States is substantial, so finding a common work hour for all concerned proved somewhat difficult, however.[7]

Getting by in Japan

The first obstacle is the language. But, much to our surprise, Japanese includes a lot of English. Although I was adding "u" or "o" endings to many English words to see if they would fly (for example, "suupu" is "soup"), it is still a good idea to purchase a good pocket dictionary. As it happens, there are many more such dictionaries available in Japan than in the United States. A few real Japanese words do go a long way, as most people in Japan speak little English (outside the hotels, that is).

Also, we found the food and accommodations in Tokyo to be excellent (see sidebar on p. 36). A few small points also made us smile. For example, despite the merger of cement, concrete, steel and stone that all but blanketed the city, here and there fissures such as 30-inch by 20-foot "setbacks," really gullies, between a building and the sidewalk are made to replicate nature. One such slot that I walked by every day contained a waterfall and babbling brook (with electrically recirculating water)—quite tranquil, given what its creator had to work with and the skyscrapers that surrounded it.

However, our mood was not at all lifted by the economic environment into which we were immersed. Japan's economy continues to slide, at least as of today. The same hardworking, industrious people that made it boom in the late 1980s and early 1990s seem to be working just as hard now, but have less to show for it. The average Japanese middle-management executive, or "salaryman," as he is unflatteringly labeled, catches the 5:45 a.m. train from his compact suburban residence to begin work at 8 a.m. He then labors all day until about 6 p.m., joins his fellow employees or clients for dinner, drinks, then more drinks. The executive then staggers home on the 11:30 p.m. train and finally hits the sack after 2 a.m.—only to arise less than three hours later for the new day to start again.

Inevitably the malaise of the Japanese proved infectious and we began to contract their collective depression. Perhaps to punctuate this all, one day in November the deposition began late because defendant's check interpreter was delayed. When he arrived, breathless, after we had waited for about 30 minutes, he apologized that a passenger had jumped to his death off his inbound train. That had delayed the train, he explained. When I expressed shock, the interpreter responded, "Oh, this is nothing new. I take the fastest commuter train into Tokyo and jumpers prefer it because it leads to their certain death. In fact, the trains have become quite

unreliable because we now see more of these jumpers than we used to."

I was more than ready to pack up and leave Japan when the depositions were over. Still, while walking to the last day of deposition, after it had rained the night before, leaves from the few trees overhanging the embassy wall were strewn onto the sidewalk. I had never taken any particular notice of these leaves before, but on this last day of depositions, I pondered them. They were *gingko* leaves, not maple, not oak, not sycamore, but gingko! Many of the few trees left in Tokyo drop delicate, fan-like gingko leaves. Suddenly, a rush came over me; I now clearly saw the subtle appeal of Japan. All the small things that the Japanese work so hard to get right came together and lifted me to a higher place, if only for an instant. When the deposition resumed that day, it only took a few evasive answers from a slippery witness to dump me back into the gritty world to which I had otherwise become accustomed. But that night, at least, I flew home.

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1. Mar. 22, 1963, U.S.-Japan, 15 U.S.T. 768.
2. *See Obtaining Evidence in Japan* (visited Mar. 2, 2000) <http://travel.state.gov/japan_obtaining_evidence.html>.
3. When negotiating with one translator about paying her $1,500 a day, instead of the $2,000 a day she demanded (both of which are substantially more than we pay in the United States, where there are substantially fewer Japanese-English translators than there are in Japan), a demure young translator with a velvet-soft voice asked, "Disner-san, if you are suing a big Japanese company for so much money, why can't you pay me more to translate?" While there may be a certain logic to this question, it is not one ever put to me in this country by a translator or anyone else who knows that, fair or not fair, one issue has nothing to do with the other.
4. "Deposition" is the word for deposition in Japanese. Such a borrowed word (from English to Japanese) is one example of a common occurrence in the Japanese language. However, only one consonant may end a Japanese word, the letter n. Therefore "deposition" moves from one language to the other unscathed—except in pronunciation.
5. Although we wanted to bring back our American interpreter on our second visit, in order to rid the defendants' former check interpreter from the proceedings, we were required to sacrifice that interpreter to make the deal.
6. It turns out that the consular officer's powers are switched on when the deposition is conducted based on written interrogatories. The affected officer then is effectively the deposition taker and has many of the rights and responsibilities of deposition takers generally. *See* 22 C.F.R. §§ 92.56, 92.57, 92.60. However, when it comes to oral depositions taken *by others*, all the consular officer does is swear in witnesses and interpreters, open the door for us in the morning and at 2 p.m., and remind us at 4:55 p.m. to vacate the building in five minutes, just before the Marines arrived to kick us out.
7. Of course, discovery disputes stateside are normally handled on a more routine basis. A transcript is prepared; the parties meet and confer, and any open issues are then submitted to the court for decision. The complication in Japan, of course, is that the court normally would have to order the deposition to continue on U.S. territory outside Japan, such as in Guam, Hawaii or Alaska, or even in the "lower 48" because of the long waiting period before a return to Tokyo would be possible.

   Courts, of course, have the authority to include in discovery orders a requirement that the witness show up at a particular place and time. But, when we were sitting in Japan clinging to our several days to take depositions that had been arranged months before, we could not safely assume that the court would enter such a sweeping order in our case — thus, our need to track down the magistrate judge and obtain his services on the spot if possible.

Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?

By Bennett L. Gershman

The power of police to detain persons for a brief period to investigate suspected criminal activity – commonly known as "stop-and-frisk" – has always been one of the most contentious issues in law enforcement.[1] Although there is general consensus that street stops are an important weapon in crime prevention, the belief has always existed that stop-and-frisk tactics are often used indiscriminately and abusively against minority groups.[2]

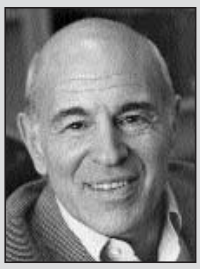
The extent to which race is used by police as a proxy for criminal behavior is difficult to measure. At one extreme, there is little question that a person's race may properly be considered when it is part of a description given by a victim of a suspect.[3] At the other extreme, the stereotypical belief that a person's race makes him more likely to engage in criminal conduct is an entirely different matter. Clearly, as one circuit court of appeals explained: "If law enforcement . . . takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."[4]

The perception by minority groups that police employ stop-and-frisk in a racially discriminatory manner is widespread. One study found that nearly half of all African-Americans "consider 'police brutality and harassment . . . a serious problem' in their own community."[5] In an informal survey of 100 young black and Hispanic men living in New York City, 81 reported having been stopped and frisked by police at least once; none of these stops resulted in arrests.[6] Even law enforcement officials concede the existence of substantial racial bias by police officers toward minority citizens. A recent survey of 650 officers in the Los Angeles Police Department found that 25% believed that racial bias on the part of officers toward minorities existed and contributed to the negative interaction between police and the community.[7]

This perception of racial bias is grounded in reality. Statistics on street stops in Pittsburgh and Philadelphia, Pennsylvania, and St. Petersburg, Florida, demonstrate a pattern of disproportionate stops of minorities.[8] And a New Jersey state court's 1996 finding of disproportionate traffic stops of minority motorists[9] led the U.S. Department of Justice to appoint a monitor to oversee the actions of the New Jersey State Police.[10] The American Bar Association has recommended mandatory data collection by law enforcement departments for the purpose of investigating the increasing incidence of police officers' "racial profiling."[11]

Most recently, an unprecedented investigation by the New York State attorney general's office documented the racially disparate stop-and-frisk practices of the New York City Police Department.[12] The attorney general's report was based on a quantitative analysis of approximately 175,000 police forms (UF-250s) that police officers are required to complete after "stop" encounters. The forms covered stops that occurred in 1998 and the first three months of 1999. The report found that blacks were more than six times more likely to be stopped than whites, and Hispanics were more than four times more likely to be stopped than whites.[13] Such disparities were most pronounced in precincts where the majority of the population was white.[14] The report also found that in many of these stops, the police lacked a sufficient factual basis to justify the action,[15] and that race apparently affected the decision to make the stop.[16]

The reported demographics of crime necessarily complicates the analysis of differential stop rates based



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on race.[17] It is commonly believed that a disproportionate number of violent crimes (*i.e.*, aggravated assault, robbery, rape, and murder) are committed by persons who are black.[18] It is therefore not surprising, although regrettable, that some law enforcement officials might use race as a statistical predictor of a person's likelihood to engage in criminal activity. Many courts addressing the claim of improper racial stereotyping allow this use of race as a factor in deciding whether to detain and question a person, so long as the officer's decision is reasonably related to efficient law enforcement and not undertaken for purposes of racial harassment.

The willingness of the courts to tolerate "reasonable" racially discriminatory conduct by the police is illustrated by *United States v. Martinez-Fuerte*,[19] where the U.S. Supreme Court upheld a vehicle stop, interrogation, and search at a highway checkpoint 30 miles north of the Mexico-U.S. border based in part on the motorist's apparent Mexican ancestry. The Court said that "to the extent that the Border Patrol relies on apparent Mexican ancestry, . . . that reliance clearly is relevant to the law enforcement need to be served."[20] Lower courts also have condoned police stops of persons who appear to be "out of place" given their race and the racial makeup of the neighborhood where they are found. A good example is *State v. Dean*,[21] where the Arizona Supreme Court stated: "[T]he fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful."[22]

To be sure, a person's race may appropriately be considered when it is relevant to the investigation. For example, singling out racial minorities for stops based on a victim's description does not suggest impermissible racial targeting, for in such cases a suspect's race is used in the same manner as any other descriptive detail such as height, weight, or distinctive clothing. Thus, in *Brown v. City of Oneonta*,[23] the Second Circuit Court of Appeals affirmed the dismissal of claims by minority residents who alleged that police investigating an attack on an elderly woman unlawfully singled out hundreds of black men for detention and questioning. The court noted that these individuals were not questioned solely on the basis of their race but on the permissible basis of a physical description given by the victim of the crime.[24] As the court stated: "The description is not a suspect classification, but rather a legitimate classification of suspects."[25] The court added that it was not unmindful of the impact of the investigation on police-community relations, nor was the court "blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation."[26]

Remedies When Race Is Used Impermissibly

Assuming, however, that police use race impermissibly as a signal of increased risk of criminality, what legal remedies are available, and how should courts analyze the claim?

Constitutional remedies include the Fourth Amendment's protection against unlawful seizures and searches and the Fourteenth Amendment's guarantee of Equal Protection. Both claims could be asserted in a criminal proceeding, typically by a motion to suppress evidence acquired following a stop that culminates in an arrest and search, or in a Civil Rights Action under 42 U.S.C. § 1983 for an injunction or monetary damages. The issues in both proceedings would be (1) whether the police officer detained the individual without a sufficient level of objective, factual suspicion, and (2) whether the police officer detained the individual, in part, because of his or her race.[27]

Under a Fourth Amendment claim, the petitioner must allege sufficient facts to show that he or she was detained by the police without reasonable suspicion. Detention constitutes a Fourth Amendment seizure when the police restrain someone by means of physical force or show of authority under circumstances that would convey to a reasonable person the belief that he was not free to leave.[28] Under an equal protection theory, the petitioner must allege sufficient facts demonstrating that the police intentionally stopped him because of his race in circumstances where race was not relevant to the investigation.[29]

A Fourth Amendment challenge would be difficult to sustain even in cases where police impermissibly used race as a factor in making the stop. The Supreme Court has held that in cases involving pretextual behavior by the police, such as stopping motorists for minor traffic violations in order to search the vehicle for drugs, the officer's subjective intent is irrelevant; the issue is whether the officer's conduct was objectively reasonable.[30] Thus, even assuming a stop predicated on the officer's subjective use of the suspect's race to indicate an increased risk of criminality, the Fourth Amendment issue would be whether facts existed apart from the suspect's race to demonstrate a reasonable suspicion that criminal activity was afoot.[31] Where, however, the police seek to justify arguably race-conscious conduct by offering race-neutral reasons, a court should be encouraged to take a hard look at the facts to determine whether the officer's justification is credible.[32]

Establishing an equal protection violation based on the selective use of race might prove more successful. A party can demonstrate purposeful racial discrimination by (1) alleging the existence of a law or policy that expressly classifies persons on the basis of race,[33] (2) pointing to a facially neutral law or policy that has been ap-

plied in a discriminatory manner,[34] and (3) showing that a facially neutral law or policy has a disproportionate racial impact, and that it was motivated by racial bias.[35]

Invoking equal protection to challenge racially motivated stops must allege facts reasonably showing that the police officer consciously considered the suspect's race in deciding to order the stop. A petitioner could allege that a law enforcement agency maintained a regular policy of stopping blacks and Hispanics more often than whites when investigating crimes of violence and weapons possession.[36] Such a claim could be based on statistical evidence of police stop rates correlated to the suspect's race, and adjusted for crime rate differentials and population composition.[37] For example, the documentation contained in the New York State attorney general's report might provide the necessary evidence to establish a *prima facie* case that the New York City Police Department maintains a racially discriminatory stop-and-frisk policy.[38] Although the report did not draw such a conclusion expressly, the inference was inescapable.

Once a party makes a *prima facie* showing that race was a motivating factor in the officer's decision, then under equal protection doctrine the government has the burden of rebutting the claim by showing the existence of neutral, non-racial reasons that motivated the action.[39] As with any equal protection claim supported by evidence that the government's conduct was motivated by racial considerations, a court must scrutinize the claim strictly.[40] Under this strict standard of review, the government faces a heavy burden to show that its conduct served a compelling interest and was narrowly tailored to accomplish that goal.[41]

Conclusion

There is an increasing awareness among courts, commentators, and the public that race plays a critical role in police stop-and-frisk decisions.[42] The report by the New York State attorney general's office presents compelling evidence that race has played a dominant role in the New York City Police Department's stop-and-frisk practices. The report documents what for many years New Yorkers have assumed: that too many police officers equate a person's race with criminal behavior and act on that belief. When presented with such a claim, courts should take a very hard look at the government's justification for its actions. There is no place in constitutional law or criminal justice for a theory of "reasonable" racial discrimination.

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1. In *Terry v. Ohio*, 392 U.S. 1 (1968), the landmark opinion legitimizing the practice, the Supreme Court ruled that the Fourth Amendment does not bar police from stopping a person for questioning, and frisking that person for weapons, when the officer has a reasonable, articulable suspicion that criminal activity is afoot, even though the officer lacks probable cause to make an arrest. New York courts apply a more stringent, multi-level approach to stop-and-frisk. The first, least intrusive level, allows police to request information about a person's identity and reason for being in a particular location where the request is supported by an objective, credible reason. The second level, referred to as the "common-law right to inquire," allows the officer to conduct more intensive questioning, although not detaining the individual, when the officer has a "founded suspicion" that criminal activity is afoot. The third level authorizes a stop and frisk when based on reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime. The fourth level allows the police to make an arrest based on probable cause. *See People v. De Bour*, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375 (1976).
2. *Terry*, 392 U.S. at 14 n.11 ("'[i]n many communities, field interrogations are a major source of friction between the police and minority groups.'") (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183-84 (1967), which documents the belief by minority groups that police stops are conducted "indiscriminately" and "abusively").
3. *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999).
4. *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997).
5. Jean Johnson, *American's Views on Crime and Law Enforcement: Survey Findings*, 233 Nat'l Inst. of Just. J. 9, 13 (Sept. 1997) (quoting an April 1996 study by the Joint Center for Political and Economic Studies).
6. Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, N.Y. Daily News, Mar. 26, 1999, at 34.
7. Report of the Independent Commission on the Los Angeles Police Department 69 (1991).
8. Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent, at 17-19, *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (No. 98-1036).
9. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).
10. David Kocieniewski, *U.S. Will Monitor New Jersey Police on Race Profiling*, N.Y. Times, Dec. 23, 1999, at B1.
11. Criminal Law Reporter (BNA), Vol. 65, No. 19, Aug. 18, 1999, at 535.
12. *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), *available at* <http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> (visited Feb. 23, 2000).
13. *Id*. at 95.
14. *Id*. at 106 ("[I]n the most strongly white neighborhoods in New York, the disparity between minority and white "stop" rates is most pronounced.").
15. *Id*. at 162 (noting that in more than one out of every seven stops, when the police officer filled out the mandated UF-250 form documenting the stop, the officer's rationale for the stop failed to meet the constitutional requirement of reasonable suspicion).
16. *Id*. at 166 ("race appears to have affected the rate of 'stops' in which the facts, as stated, did not articulate 'reasonable suspicion'").
17. Even when the statistics in the attorney general's report are adjusted to account for crime rates, minorities were still being stopped at a far higher rate than whites. *See id*. at 117-35.

18. Randall Kennedy, Race, Crime, and the Law 13, 15 (1997). It should also be noted that behind the high rates of blacks perpetrating violent crimes are equally high rates of black victimization. Black teenagers are nine times more likely to be murdered than white teenagers. One out of every twenty-one black men can expect to be murdered, a death rate double that of American servicemen in World War II. *See id*. at 19-20.
19. 428 U.S. 543 (1976).
20. *Id*. at 564 n.17. *See* Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. Times, Jan. 26, 2000, at A17 (innocent motorists claim they are pulled over for "driving while Mexican").
21. 543 P.2d 425 (Ariz. 1975).
22. *Id*. at 427. *See United States v. Weaver*, 966 F.2d 391, 394 (8th Cir. 1992) ("[F]acts [showing disparate racial criminal conduct] are not to be ignored simply because they may be unpleasant"). Such stereotypical views can have tragic consequences. *See* Tina Kelley, *Call for Calm After Shooting of Policeman by Colleagues*, N.Y. Times, Jan. 30, 2000, at 14 (reporting the killing of a young black off-duty police officer who was shot to death by two white police officers after coming to their aid when they were threatened by man with a gun and did not recognize their colleague).
23. 195 F.3d 111 (2d Cir. 1999).
24. *See id.* at 119; *see also People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986); *People v. Castro*, 115 A.D.2d 433, 497 N.Y.S.2d 1 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 850, 508 N.Y.S.2d 407 (1986).
25. *Brown*, 195 F.3d at 119.
26. *Id*. at 120.
27. Interviews by the author with attorneys and administrative officials in New York City's criminal courts indicate that litigation raising the claim of race-based stops, particularly in light of the attorney general's report, has not yet been fully developed.
28. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See People v. De Bour*, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375 (1976) (seizure occurs when police conduct results in "significant interruption [of the] individual's liberty of movement").
29. *National Congress for Puerto Rican Rights v. City of New York*, 1999 U.S. Dist. LEXIS 19244 (S.D.N.Y. Dec. 14, 1999) (reinstating equal protection claim based on allegation that plaintiffs were stopped and frisked by police officers believed to be members of the New York Police Department's Street Crime Unit without reasonable suspicion and on the basis of his race and national origin).
30. *Whren v. United States*, 517 U.S. 806 (1996).
31. Of course, if it could be proved that the police impermissibly used race as a factor in conducting a stop, this could be the basis for departmental disciplinary action against the officer.
32. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all governmental action based on race . . . should be subjected to detailed judicial inquiry").
33. *See id.* at 213, 227-29.
34. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
35. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242-44 (1976).
36. *National Congress for Puerto Rican Rights v. The City of New York*, 1999 U.S. Dist. LEXIS 19244 (S.D.N.Y. Dec. 14, 1999).
37. *But see United States v. Armstrong*, 517 U.S. 456 (1996) (statistical evidence that blacks more likely to be charged with drug crimes than whites insufficient to obtain discovery to prove claim of selective prosecution).
38. The statistical survey in the Attorney General's Report contains stop rates citywide, and also breaks down the figures by focusing on certain identifiable precincts, and also with respect to the Street Crimes Unit. *See The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), at 94-110, *available at* <http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> (visited Feb. 23, 2000). Thus, for example, a stop by a member of the Street Crime Unit in a precinct where minorities are already subject to far more stops than whites would raise a compelling inference of purposeful racial discrimination.
39. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 97 (1986); *Arlington Heights*, 429 U.S. at 270 n.21.
40. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").
41. *See id*.
42. *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (Stevens, J., concurring in part, dissenting in part) (discussing justifiable fears of minority citizens "that contact with the police can itself be dangerous" even when the person is entirely innocent of any wrongdoing).

Analyzing the Writer's Analysis: Will It Be Clear to the Reader?

By Diana Roberto Donahoe

Analysis is the cornerstone of lawyering. It is what we do every day. We are constantly asked to analyze a court decision, a legal issue, a client's problem. Yet, how often do we stop to analyze our own written analysis? Typically, we spend vast amounts of time analyzing an issue, but very little time thinking through the techniques we use to communicate that analysis to others.

All too often, we use certain methods merely because we have used them before—even though these comfortable techniques can be outdated, or worse, might never have been very effective. For some, it may be similar to continuing with the DOS system on a computer rather than changing to the Windows approach. To many Windows users, DOS appears to be Byzantine. Does your writing? Now may be the time to re-examine your analytical methods and try new techniques to present material clearly and logically.

Because it is difficult to change your personal approach to composition, the best method is to develop a critical editorial eye for rereading drafts. When reading the drafts, imagine you are the reader, not the writer. Step out of the worn-out "writer's" shoes and into the new shoes of the reader. This article provides 10 tips for creating a reader-based review of your documents.

#1: Create a "Roadmap"

Create an effective large-scale organization. You have lived with the issues for weeks, months, even years, but readers are encountering this information for the first time. In addition, they are impatient, busy, and have short attention spans. They are not impressed by flowery writing and, for the most part, do not care what you think; instead, they want to be informed of the law as quickly and effectively as possible.

Present the rule of law in the beginning of your analysis. "Fronting" the law or creating a "roadmap" to your document allows the reader to understand the structure of the issue. Your "roadmap" should be a concise statement of the overarching rule of law you are analyzing. For example, in a document analyzing a particular statute, provide the reader with an immediate breakdown of the key elements of that statute. In a common law problem, state the rule from a synthesis of the cases.

An example of a "roadmap" from a document analyzing intentional infliction of emotional distress:

To prove intentional infliction of emotional distress, the plaintiff must prove the defendant's conduct is (1) extreme and outrageous, (2) intentional or reckless, and (3) the cause of emotional distress.

This "roadmap" provides a clear breakdown of the legal elements of intentional infliction and implicitly tells the reader that the document will be organized around each of the three elements.

#2: Follow Your "Roadmap"

In most situations, the discussion of the law should parallel your analysis in lock-step. If you follow your "roadmap" in the rest of the document, the reader will understand not only the breakdown of the law but also the layout of your document. If your roadmap is a three-part test, for example, analyze each part in the order in which you presented it. If it is a balancing test, address the first part of the balance immediately. The quickest way to confuse a reader is to set out the elements of the law and then fail to address each in turn.

#3: Use Topic Sentences to Follow Your "Roadmap"

Topic sentences notify the reader of the contents of the paragraph. Because the contents of the paragraph usually focus on a particular legal element, your topic sentence should refer to that element specifically. The

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language should parallel the language in your "roadmap" so that terms are consistent within the language of the law.

Topic sentences are also extremely useful in helping a reader focus quickly on a particular piece of the analysis. Think of the occasions when you have tried to develop just one facet of your argument and have searched for the analysis on that point in a case or legal article. It is very frustrating to spend unnecessary time searching for something you know is there but cannot find easily. Topic sentences can cure that problem. A clear topic sentence that identifies the argument being made in the paragraph helps readers focus on the parts of the document they find most relevant.

#4: Create a Reader-Based Outline

After you have finished your draft, create a reader-based outline developed from the topic sentences in the document. Then step into the shoes of a reader who knows nothing about this area of the law and read the result.

If you as the reader find that you have a coherent understanding of the law based on this outline, then you know that the large-scale organization of your document has presented the analysis clearly and efficiently. Better yet, if your reader-based outline matches your writer-based outline (assuming that you wrote one in advance), then your reader should understand your arguments simply by reading your topic sentences.

If a "roadmap" is provided up front, the reader understands the structure of the law before the analysis begins and can appreciate the immediate comparison of prior holdings to present facts.

#5: Avoid a Simple Regurgitation of Cases

Too often, legal writers simply present a case-by-case method of analysis, methodically and thoroughly discussing applicable cases in sequence. Only then do they apply the law to the facts at hand. This technique is ineffective for at least three reasons.

First, it forces the reader to flip back and forth between the discussion of the cases and the later discussion of the facts. Second, it places the burden on the reader to perform the comparisons and to think through the analysis. Finally, it often results in unnecessary duplication as the writer is forced to discuss the case law twice—once in the case-by-case discussion and then again as the cases are applied to the facts at hand.

A more concise and effective technique involves applying the facts to each part of the law as it is presented. If a "roadmap" is provided up front, then the reader understands the structure of the law before the analysis begins and can appreciate the immediate comparison of prior holdings to present facts. If topic sentences effectively identify the legal proposition that will be discussed in the paragraph, the relevant facts of previous cases and their roles in your argument should fall into place within each paragraph. At times, the solution may be to begin with the anticipated bottom line of your analysis, followed by a presentation of cases that show how the facts and conclusions support the point you wish to make.

#6: Use Only Relevant Portions of the Law

When in doubt about how much of a prior case to discuss in a case comparison, lawyers often err on the side of using too much. This leaves the readers inundated with information that is not necessary to the analysis**.** Worse, the point the writer is trying to make is hidden in the interesting, but essentially irrelevant, facts of the other cases. Too many of these comparisons in a single document become a burden for readers as they struggle to discern the legal points being made.

Instead, the legal writer should strive for an approach to prior law that is well-balanced and effectively tied to the client's facts. The readers are not familiar with the relevant legal precedent, nor do they thoroughly understand the client's situation, even if presented earlier in a statement of the facts. Although readers might be exceptionally bright and well versed in the law, they cannot be expected to know all the intricacies of the issue. Therefore, the writer needs to distill the key elements from the previous cases and show how they serve as building blocks in the analysis for this case.

The following two-part analogy can illustrate how to balance the presentation of the law and the facts as you spell out your analysis. First, try to draw both sides of a penny from memory, and you will probably miss many intricacies of the coin that you thought you knew so well. Then look at a French two-franc piece and try to compare the franc to your drawing of the penny. The comparison is impossible; although you thought you knew the penny, you cannot compare an incomplete picture of a coin with a coin you have never seen (or saw years ago when visiting France).

In this analogy, the "penny" is the facts of your case. You think you know them just as you thought you knew the penny, but when you attempt to write about them, the picture is not clear to the readers, who cannot re-

member all the details from the statement of facts. Keep pulling the penny out of your pocket; be specific about each detail of your case. Do not let the statement of facts that appears earlier in your document substitute for a concise reminder of those facts during the course of your analysis.

The "two-franc piece" is the prior case. Assume your reader has never been to France. Explain in detail the intricacies of the coin. As you are discussing the prior case, ask yourself if you have told the reader the facts, holding, and reasoning of the prior case (again, without inundating the reader with irrelevant information). Then compare those points specifically to your facts, tying the analysis together.

Instead of resorting to block quotes or case-by-case comparisons, ask whether the reader, who has not researched and lived with the issue, has enough information about the facts, the prior law, and how they fit together to understand the logic behind the analysis. Finally, ask yourself if everything you have mentioned is essential to your point. Do you, for example, really need the plaintiff's full name in your discussion of a prior case? If you critically read all your analysis with the "penny-franc" analogy in mind, you will ask the right questions—the questions a reader will ask when critically reading.

#7: Do Not Rely on Parentheticals for Comparisons

Although parentheticals after a citation can be useful tools in presenting a concise legal analysis, they are meant to contain secondary information. Because a reader's eyes instinctively skip over them, the writer's meaning may be lost if an important piece of analysis is presented in a parenthetical. For example:

Dr. Appleby's customer contacts at the clinic amount to the clinic's predictable interest making the covenant enforceable. If an employer invests a substantial amount of time, effort, and advertising to generate customers for its physician, the interest is predictable. See Pollack, 458 N.W.2d 591, 599 (1990); Wausau, 514 N.W.2d 34, 39 (1994) (four months not enough time to develop significant customer contacts). Dr. Appleby's seven years at the clinic where she associated the clinic with HMOs have given her substantial contacts with her patients.

The preceding paragraph uses a parenthetical where a full comparison in text would have been more appropriate. The writer is trying to compare four months to seven years as part of the analysis. Yet, because the "four months" portion is in parenthesis (and after a string quote to further hide its importance), the comparison is lost on the reader. Moving the comparison of four months vs. seven years into the text would make it easier for the reader to grasp the importance of the *Wausau* case.

In short, save the parentheticals for cases that are tangentially related, but not worthy of a full discussion or comparison.

#8: Avoid Block Quotes

Because there is a tendency to think that something is more persuasive if someone important said it, we frequently quote others. When we write, therefore, the temptation is to mistakenly assume that the way to be persuasive is to use block quotes. Readers, however, are busy, often impatient and prone to short attention spans. They do not have time to read words that are offset and single-spaced. Such masses of words are uninviting; they cause the eyes to avert and the attention to wander. Block quotes and footnotes are often the last things that will persuade a reader. Don't use either unless absolutely necessary.

To make matters worse, writers often instinctively underline parts of the quotation as if to say, "if your eyes do skip over this lengthy writing, at least read this part." For example:

Under the "customer contact theory," a threat is posed by the employee if she has <u>enough control or influence</u> over the customers that she would be able to <u>take the customers away from the employer</u> in a situation where the employee has worked for the employer for a number of years and gained particular customers who relate to her, not the company, due to her as an individual and not with the company as a unit.

First, the writer who inserted this block quote should have realized that the reader will not want to spend time digesting the message. That is the writer's job. Second, the underlining helps identify important terms, but it does not provide the important context. Instead, the writer should use those important terms in the text to explain their meaning and importance:

Under the "customer contact theory" an employee is a threat if she has enough influence or control over customers to entice them from her employer.

The result is a concise statement of the law without the single-spaced distractions that can annoy and distract the reader.

#9: Take a Break From Your Document

Writing is personal; it becomes a part of you. You should take a step or two (in the form of days or weeks, if possible) away from your document to gain perspective and to depersonalize it. If you have not thought about your document for a while (the longer the better), upon your return, you will find the holes in your logic, the flaws in your reasoning, and the gaps in your large-scale organization that escaped your earlier review. In other words, by taking a step back from your document, you have, in a sense, become the reader who has not thought about these issues or the law at all. You will become an effective critical reader of your own writing.

#10: Read the Document Aloud

Another way to step into the reader's shoes is to read your document out loud. Better yet, have someone else read it to you. The goal here is to lose the writer's voice and hear the reader's voice. In doing so, you will gain a sense of the tone, purpose, and flow from the perspective of your audience as the reader, not the writer.

Although thinking like a lawyer is second nature for the experienced practitioner, problems arise when it is time to write these arguments down in a way that is logical, understandable and coherent. Too often the best arguments are lost in the transition from thoughts to words. Having someone else read your words out loud will help illuminate the communication gaps that inevitably develop when placing conceptual ideas on paper.

Conclusion

In sum, problems can be erased by taking the time to critically review your own writing. Step into the reader's shoes. Do not rely on old tricks and techniques that you understand; your reader might not. Weigh every word you write; your reader usually does. Question every legal proposition as if you were your opponent. You will then be ready to prove your points with an economical and precise analysis that no one will misunderstand or overlook.

The good news is that there is no need to change all your writing habits at once. Keep writing as you always have; if you try to write differently from the outset of a project, you can expect a case of writer's block and mounting frustration. The trick is to analyze your work after your first or second draft, during the rewrite stage. Use the techniques described here to ask yourself the right questions—the questions the reader asks. Analyze your own analysis just as you would analyze your opponent's arguments and supporting proof.

As you, the critical reader, begin to pinpoint problem areas, you, the writer, will be able to drop them from your repertoire and will eventually stop using ineffective techniques. As the new, effective ones you develop become second-nature, the methods you relied on for so long will appear to be as outdated as . . . DOS.

Lawyer's Bookshelf

Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism, by Mark Curriden and Leroy Phillips Jr., Faber and Faber, Inc., 394 pages, $30. Reviewed by James C. Moore

For lawyers who came of age and were educated in or after the 1950s, the concept of deliberately measured justice in criminal proceedings leavened with multiple procedural safeguards is accepted and unquestioned wisdom. Thus, for example, we no longer question the appropriateness of *Miranda* warnings, the need for reasonable cause before police may search an individual, venue changes when fair trials cannot be had, or the inappropriateness of *ex parte* communications between a judge and a prosecutor in anticipation of a trial. For many of us it is difficult, therefore, to imagine a time within the lives of our grandparents when Constitutional values of fairness and equality were nothing more than hollow promises and when the great civil rights movement of the 20th century was first stirring.

To remind our generation of just how far the American justice system has traveled during the past century, Leroy Phillips, Jr., a trial lawyer, and Mark Curriden, a journalist, have written a remarkably compelling narrative about the trial and death in Chattanooga, Tennessee, of a man who probably was innocent, entitled *Contempt of Court*.

On January 23, 1906, a 21-year-old white woman, Nevada Taylor, was assaulted and raped in Chattanooga as she returned home from work. Taylor was uncertain whether her attacker was black or white. Nevertheless news of the crime spread quickly throughout the city, and the local press fanned the flames of racial animosity by referring to her assailant as a "black brute" and a "Negro fiend." Two days later, Ed Johnson, an illiterate 23-year-old black man, was arrested for the Taylor rape based upon a tip given to the local sheriff, Joseph F. Shipp, by a man who had first called to ask whether the $375 reward would still be available.

Within 15 days of his arrest Johnson was indicted, tried, convicted of having raped Taylor and sentenced to death. During that interval, the trial judge, Samuel D. McReynolds, conferred with the sheriff and the district attorney general (but not with the defense counsel) about how the trial would be conducted. In addition, no African Americans were called to serve as jurors, motions to change the venue of the trial and for additional time to prepare were denied by Judge McReynolds, and two of the lawyers appointed by the court to defend Johnson on a *pro bono* basis had no experience in the defense of criminal cases. During the trial itself, although Taylor never categorically identified Johnson as her assailant, her testimony so moved one juror that he rose from the jury box and rushed towards the defendant yelling, "If I could get at him, I'd tear his heart out right now."

Throughout these events, Johnson maintained his innocence and indeed, during the trial, several witnesses placed him elsewhere at the time of the crime. Despite his protestations, Johnson was convicted at the end of a three-day trial. Then at the urging of his attorneys, he *waived* his right to appeal.

Fortunately, another lawyer, Noah Parden, was asked by Johnson's father to take over Johnson's defense. Parden was a rarity in those times and at that location — he was an African American. After unsuccessfully seeking to overturn the conviction in both state and federal courts, Parden traveled to Washington, D.C., and appealed directly to U.S. Supreme Court Justice John Marshall Harlan for a stay of execution so that Supreme Court might consider whether Johnson had been denied due process of law during his trial. Harlan's decision to grant the stay was remarkable but predictable. It was remarkable because it came a scant 10 years after the U.S. Supreme Court had upheld segregation of the races in *Plessy v. Ferguson*, but predictable because Harlan alone had dissented from that lamentable decision.

In 1906, Noah Parden was the first black lawyer to take an appeal to the Supreme Court of the United States. In his case, Parden convinced the justices for the first time in history to intervene in a state criminal trial in obtaining a stay of execution for his client.

Harlan's decision provoked outrage in Chattanooga and dumbfounded local officials. One newspaper editorially expressed its dismay and said that Johnson "should suffer the penalty of law [*i.e.*, death] as speedily as possible." One day later, on December 19, 1906, an unruly but unarmed mob attacked the Hamilton County jail in which Johnson was being held. Sheriff Shipp, a Confederate veteran, made virtually no move to oppose the mob and, indeed, appeared to acquiesce in its actions. Johnson was forcibly taken from the jail and, a few minutes later, hung from a crossbeam on the Walnut Street bridge and shot to death. His last words were: "God bless you all, I am innocent."

Although the blood lust of the people of Chattanooga had been satisfied, the conduct of their law enforcement officials and trial bar enraged both the Supreme Court and U.S. Attorney

General William Moody. As a result, contempt of court proceedings were brought against Sheriff Shipp and several other Chattanooga officials.

The story of Shipp's trial before Chief Justice Melville Fuller and the members of the Supreme Court (which in addition to Justice Harlan, included Oliver Wendell Holmes Jr.), together with the events that followed, would be compelling reading even in the hands of unskilled authors. But Phillips and Curriden are such capable writers that not only is their narrative clear and crisp, it makes it difficult for the reader to avoid becoming emotionally engaged in the retelling of those dramatic events.

C*ontempt of Court* is about more than the travesty of justice occasioned by the Johnson trial, however. It also thoughtfully addresses the appropriateness of federal intervention in state proceedings, an issue that has challenged our nation throughout its history. And, as the authors accurately note, in 1906 it was by no means clear that judges—state or federal—would endorse the notion that the 14th Amendment guaranteed any Constitutional rights to individuals in state criminal proceedings. While *United States v. Shipp* did not address 14th Amendment issues, it was, nevertheless, an early and unique example of the Supreme Court's intolerance for and willingness to punish local officials who ignored its orders. It would, however, be another 50 years before the Warren Court in *Mapp v. Ohio* would set out its understanding of 14th Amendment guarantees for criminal defendants.

Contempt of Court is both good reading and good history. Lawyers who seek a better understanding of some of our core concepts of justice and the difficulties with which they were achieved, are encouraged to read this excellent work.

James C. Moore is a trial lawyer with Harter, Secrest & Emery LLP in Rochester and a past president of the New York State Bar Association.

Handling Employment Disputes in New York, by Sharon P. Stiller, Hon. Denny Chin and Mindy Novick. West Group, 1996 with annual updates, one looseleaf volume, $195. Reviewed by Michael I. Bernstein.

Handling Employment Disputes in New York holds itself out as a one-volume, user-friendly resource for lawyers and lay people confronted with employment issues in New York.

To those who have had to scour the books and other less accessible materials to research these issues, the emphasis on "one-volume" is itself enticing, especially as claimants increasingly invoke the protections of New York State and local laws. A review of the volume's structure, contents, scope notes, practice tips, examples, views from the bench, statistics, indices, tables, charts, checklists and forms assures us that the authors have provided us with a most valuable addition to our libraries.

The range of perspectives reflects the authors' varied backgrounds. Sharon P. Stiller is a partner at Underberg & Kessler in Rochester. Before becoming a federal judge in the Southern District of New York in 1995, Denny Chin was a partner in Vladeck, Waldman, Elias & Engelhard, P.C. Mindy Novick, a litigator with Jackson, Lewis, Schnitzler & Krupman, was human resources counsel for Long Island Lighting Co. when the book was written.

As with any research tool, especially one that attempts to address so many aspects of the employment relationship on so many levels, no one volume can serve as the end-all resource. The publishers did not intend it as such. Nonetheless, a random research of specific issues confirms just how useful this volume can be.

The volume is divided, logically and practically, into nine chapters. It begins, in Chapter 1, with the "Overview of an Employment Dispute" and proceeds, in Chapter 2, to an analysis of employment policies, agreements, forums and approaches relative to "Avoiding Litigation and Settling Claims." Chapter 3 covers the "Categories of Persons Protected From Discrimination," while Chapters 4 and 5, respectively, outline "The Anti-Discrimination Statutes" (federal and state) and "Common Law Contract and Tort Claims" that so often arise. Chapter 6 is devoted to "Privacy, Health, Fitness to Work and Whistleblower Claims." Chapter 7 relates to "Wage and Benefit Claims." The volume concludes, in Chapters 8 and 9, with "Litigating an Employment Case" and the "Proof and Remedies in Discrimination Cases" associated with such litigation.

The preventive analysis of Chapter 2 covers a diversity of practice approaches, inclusive of the recruitment and hiring process, daily workplace and discipline concerns, issues that arise in communicating the reasons for termination, choice of law, tax planning and the structuring of employment and settlement agreements. It also covers both the structuring of demand letters and the possible responses an employer or its counsel might make, insurance liability and defense coverage issues, confidentiality questions that inevitably will arise in various contexts, attorneys' fees, unemployment and disability insurance issues, and even employee suggestion awards. Samples of a sexual harassment policy, a demand letter, release provisions and an age claim settlement agreement are provided as well.

The analysis in Chapter 4 not only addresses the various statutes that might be invoked, it also highlights the similarities and differences in the federal and state anti-discrimination statutes, how and when they can be used alternatively or in tandem by a plaintiff, and the interplay with other federal and state statutes that might impact upon a given issue. A prime example is its discussion of the interaction on certain issues that exists between and among the Family and Medical Leave Act, the Americans with Disabilities Act, the Rehabilitation Act, the Employee Retirement In-

come Security Act, the Fair Labor Standards Act, the Comprehensive Omnibus Budget Reconciliation Act, the Pregnancy Discrimination Act, Title VII, the Workers' Compensation Act, the New York State Human Rights Law and the New York State Labor Law. It does this, on these and other issues, in one cohesive chapter. Even absent a claim under state law, the volume is helpful in its analyses of federal law and procedure.

In addressing the ever-increasing contract and tort claims that are commonplace today, whether independently asserted or accompanied by claims of discrimination and harassment, Chapter 5 offers a number of especially helpful examples. The same is true of the privacy, health, fitness and whistleblower claims and issues discussed in Chapter 6.

In particular, practitioners will welcome Chapter 7. In one section it includes the varied and sundry (arcane and otherwise) wage and benefit statutes, regulations and issues that New York employers and employees face daily, then compares them with federal laws that overlap and/or preempt their application. These are the "bread and butter" matters that so often are inconvenient to research. Among the subjects discussed are overtime and its exemptions, meals, income executions, travel and waiting time, on-call time, hours worked, paycheck deductions, minimum wage, prevailing wage, compensatory time, assignment of income, payment schedules, notification, posting and record requirements, severance pay, vacation pay, commissions, child labor, immigration, unemployment insurance, penalties, jury duty, retirement, health insurance and other fringe benefits.

Not the least of the chapters are the last two, Chapters 8 and 9, and their analysis of litigation, proof and remedies, matters ranging from practitioners' concerns when first considering a claim to the investigation of a claim, the development of a theory, the spotting of issues, the avoidance of sanctions, dual representation, administrative agency requirements, time limitations, continuing violations, choice of forums, damages and jury trial availability. Also explored are joinder of claims, pendent jurisdiction, *res judicata* and collateral estoppel, ancillary proceedings, class actions, alternative dispute resolution, attorneys' fees, affirmative defenses, discovery, attorney-client and other privileges, third-party communications and motion and trial practice. Included, as well, are litigation checklists, samples of complaints, an answer, a stipulated protective order, an authorization for release of medical records and reports, interrogatories and a notice to produce.

Even where the "Practice Tips" and "Examples" include what many experienced practitioners already have learned, at the very least they offer reinforcement and serve as convenient reminders. In addition, they offer approaches adapted or accepted elsewhere, both tested and yet untested in New York courts.

Clearly, this volume is the product of much thought and effort. Equally so, the beneficiaries of that thought and effort will be its users.

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DWI Reference Guide, by Michael S. Taheri and James F. Orr, J&E Publishing, P.O. Box 1135, Williamsville, N.Y. 14231, 1999, 135 pages, $37.80. Reviewed by Glenn Edward Murray.

The *DWI Reference Guide* is a singular practice guide for practitioners who regularly defend clients accused of driving while intoxicated (DWI). If I were asked for advice about an essential library on a limited budget, I would recommend a single-volume copy of the Vehicle and Traffic Law (VTL), a treatise, and Taheri and Orr's *DWI Reference Guide.*

The *DWI Reference Guide* is not a substitute for the VTL or treatises such as *Handling the DWI Case in New York* by Albany-based Peter Gerstenzang and *New York Driving While Intoxicated* by Rochester-based Ed Fiandach, both now published by the West Group. Nevertheless, it fills a critical void in the practitioner's library because to some extent those wonderful publications, with their elaborate statutory and case citations, treat the VTL like the Tax Code.

Taheri and Orr's guide explains many tactical considerations not found in the VTL or any treatise. It is devoted to the most essential components of DWI defense: formulation of defense theory and proof of facts (especially elements of operation and proof of intoxication). Drawing on their years of experience, Taheri and Orr harvest concise explanations of the ingredients of the most effective DWI defenses. Their guide provides a uniquely practical methodology for evaluating and trying a DWI case. It is especially helpful in communicating with clients about case-specific evaluation.

The *DWI Reference Guide* explains tactics and strategy like no other publication I know of. Even after years of experience, as I read this publication I repeatedly say to myself, "Let me note this for my next DWI trial." The pointers the authors provide I had to learn myself through years of "trial and error." This handbook spotlights reminders for the experienced and pitfalls for the neophyte.

Their next edition should not strive to duplicate the treatises, but to expand on the practical tips that make it so valuable. It would best be expanded by elaborating on strategies concerning sentencing and relicensure of multiple offenders, which will become so prevalent in the next decade.

Glenn Edward Murray is a private practitioner in Buffalo who has dealt with DWI cases for 15 years.

Language Tips

By Gertrude Block*

Question: Although I am a regular reader of your column, I have never seen an answer to this question: Which is the correct salutation to use in correspondence to a law firm, a corporation, or a female judge? I used to use "Gentlemen," but in today's world, that seems to be the wrong choice.

Answer: As the reader realized, "Gentlemen" is no longer acceptable. Unfortunately no single honorific has emerged to replace that salutation, despite more than a decade of exploration.

Back in 1987, a Chicago reader of another journal for which I write asked what she could substitute for what she called "the sexist word Gentleman." I tentatively suggested "Dear Sir and Madam" for two persons or "Gentlemen and Ladies" for more than two.

Readers promptly rejected both salutations, however. One pointed out that "Dear Sir and Madam" carried the unfortunate connotations otherwise associated with "madam," and that "Gentlemen and Ladies" sounded like the opening remarks of a circus ringmaster. Another correspondent said that in this country we no longer made the class distinctions those titles implied.

Writing in her *Miss Manners* column, Judith Martin called for the single form "Ladies," without the "Gentlemen," reasoning that the traditional salutation had long ignored women, so it was time to turn the tables.

The usage manuals were sensibly silent on the subject, but I ventured where they had feared to tread. The answer seemed relatively easy if the individuals were known to be such as judges, lawyers, physicians, dentists, etc. Then you could use the appropriate honorific ("Dear Judges," "Dear Attorneys," "Dear Counselors," or "Dear Doctors"). When these were unsuitable, I suggested alternatives such as "Dear Addressees" or "Dear Recipients."

However, some readers strenuously disagreed with these choices, so I asked them to submit their own, thereby eliciting a flood of suggestions and disagreement. Some wrote that "dear" in any salutation made no sense when you did not know the person you are addressing, and might be even more of a problem when you did. Some readers opted for "Dear Readers," some for the chummier "Dear Folks." An attorney in Florida suggested that the best salutation for Southerners might be "Dear Y'All." (That was followed by mail arguing that "you-all" was the only correct spelling.)

The majority of readers seemed to prefer either "Gentle People" or "Gentle Persons." The best rationale for those greetings was stated by Judith Brechner, then deputy commissioner of the state Department of Labor and Employment in Florida, who wrote: "Gentle People" may be a misnomer, as the recipients may not be gentle at all, but the law often engages in fiction.

Her suggestion seemed to be a sensible conclusion, but it brought forth another avalanche of letters from readers who deplored the word "Gentle," bringing the issue back to square one. Perhaps opinions and/or readers have changed, so if you have thoughts on the subject, feel free to air them here.

From The Mailbag

Just as I thought the subject of negative words without an affirmative form had been exhausted, Eric Ploumis of New Rochelle sent an item I cannot omit. The item is from *How I Met My Wife*, by Hadley V. Baxendale, Esq. I would like to include the entire article, which is quite funny, but space allows only one paragraph:

> It had been a rough day so when I walked into the party I was very chalant, despite my efforts to appear gruntled and consolate. I was furling my wieldy umbrella for the coat check when I saw her standing alone in a corner. She was a descript person, a woman in a state of total array. Her hair was kempt, her clothing shevelled, and she moved in a gainly way.
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> —

Regarding my response to Paul Roman's question about the use of *is* in testamentary language in the context "to my son's then surviving descendants, *per stirpes*;" or "if there is none," Syracuse reader Gary H. Collison and a few others urge the use of the subjunctive form: "or if there be none." One reader, Mr. Barney Molldrem, argues for "if none there be."

As Mr. Collison notes, this usage is recommended in *Fowler's Modern English Usage*, second edition, but is not included in Burchfield's *The New Fowler's*, third edition, 1996. Today the phrases "if there be none" and "if none there be" seem archaic and stiff, the kind of legal language criticized by David Mellinkoff and other critics. Use it if you like, but your clients will probably consider the language "legal jargon."

Potpourri

A good example of the problems encountered when politically correct language is used was shown in a recent news item. An applicant for the position of chief of police was being interviewed in a city in which several upper-echelon police officers had been accused of illegal activity. The applicant was asked what changes he would make if he was appointed. He answered: "I don't have any retention plans for the majority of upper-rank personnel currently in the department. I don't mean that in a derogatory sense, but for a variety of reasons I would like to select people currently in the lieutenant levels and sergeant levels of the department. You don't need an infusion of outsiders, but in my considered estimation, you do need a newly structured upward command staff."

At this point, one member of the committee interviewing the applicant asked another member, "Could you tell me, in English, what he means?" That question was answered by a third committee member: "He means, first we fire all the captains."

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PRACTICE HINTS

Changes in Rules for Home Offices Provide New Possibilities for Deductions

BY JAMES OZELLO

Recent tax law changes have made it easier for a larger number of taxpayers to claim a deduction for a home office used for business. The law changes have clarified and, more importantly, expanded the definition of home office for deduction purposes. These changes are effective for tax years beginning January 1, 1999, and for fiscal tax years beginning after December 31, 1998.

This means that for tax season 2000 many taxpayers may be eligible for the home office deduction on their 1999 tax returns.

The new rule adds to the language of the governing code section, Internal Revenue Code § 280A(c)(1) (I.R.C.), the statement that a "principal place of business" includes a place of business (a) used by a taxpayer for the administrative or management activities of any trade or business of the taxpayer, (b) if there is no other fixed location of the trade or business where the taxpayer conducts substantial administrative or management activities of the business.

For the first part of the provision, the law currently provides no direct guidance on what are considered administrative or management activities. However, the prior landmark case in this area, *Commissioner v. Soliman*,[1] and in part the Committee Report on this provision,[2] suggest certain guidelines. *Soliman* implies that bookkeeping, correspondence, reading professional journals, and communicating with colleagues and clients are administrative or management activities. The Committee Report also mentions billing activities as appropriate activities.[3]

In addition, Internal Revenue Service Publication No. 587[4] provides the following examples of administrative or management activities: billing customers, clients or patients, keeping books and records, ordering supplies, setting up appointments, forwarding orders or writing reports.

For the second part of the provision, the absence of another fixed location for the activities, the Committee Report provides some guidelines, referring to four separate variations on this approach, all of which will still permit a taxpayer to deduct the home office expense even if:

(a) administrative or management activities are performed in connection with the taxpayer's trade or business by other persons, at locations other than the home office. However, the Committee Report does not comment on the extent of these extra activities.

(b) the taxpayer performs some administrative or management activities at sites that are not fixed locations, such as a hotel room or a car.

(c) the taxpayer personally performs some administrative or management activities at a fixed location other than the home office, as long as these activities are not substantial.

(d) the taxpayer performs non-administrative and non-management activities at a fixed location other than the home office.[5]

In order for the deduction to be allowed, however, the home office must meet all the general criteria under the rules. That is, the home office must be used exclusively on a regular basis as a place of business by the taxpayer.[6] If the taxpayer is an employee, rather than self-employed, the home office must be for the convenience of the employer.[7] Also, the limitations on the amounts that can be deducted, which generally limit the deduction to the taxpayer's income from the business, with the disallowed amount deductible in later years, continue to apply.[8] The question whether the employee chose not to use suitable space made available by the employer for administrative activities is relevant in determining whether the convenience of the employer test is satisfied.[9]

The changes in the home office rules can be applied to a number of professions, providing these taxpayers with a deduction where it was not otherwise available. Examples include:

- consultants, such as business planners and computer specialists, who work outside the home but manage their businesses from a home office.
- small business operators and sales representatives, who have no office space at their place of business and provide goods and services outside their home, a category that includes individuals who prefer to use their home office for administrative work.
- physicians and other medical personnel who work in a clinic, hospital or other location outside of the home, and use their home office for managerial purposes.
- performing artists, such as actors, musicians and singers, who manage their careers from a home office.
- attorneys who primarily meet their clients at the clients' homes or other locations, who use their home office for ad-

ministrative and management purposes.

In addition, the change in the home office deduction rules will have a direct impact on the practice of some attorneys and tax specialists. Independent practitioners who perform the bulk of their actual practice at the homes and offices of their clients, or at court, and perform administrative and management functions at a home office, were in many cases denied a deduction under the old rules. In some cases, these practitioners had no principal place of business at all, because their work was not performed at one fixed place, but instead at numerous places dictated by the location of their clients.

The new rules consider the home office these practitioners use for keeping the books of their own business, billing, correspondence, etc., as their principal place of business, and a deductible home office. Practitioners can use this new provision as an important tool in tax planning, both for persons who are currently self-employed and those who are beginning new businesses.

The amendment can also benefit service businesses that have employees. For the convenience of the employer, the employees can perform administrative and management activities at offices in their homes. This planning technique produces the double benefit of reducing office expense for the employer, and allowing the employee an additional business expense (subject to the 2% floor for miscellaneous business expenses as an itemized deduction).[10]

The changes also make it easier for taxpayers who have been using a home office to claim a deduction. In the past, taxpayers have believed that a claim for a home office deduction was a "red flag," prompting the IRS to audit their return. Because of the difficulty of successfully proving a deductible home office, and the burden of an IRS audit in general, many taxpayers who could rightfully claim a deduction did not.

Taxpayers claim the home office deduction on IRS Form 8829—Expenses for Business Use of Your Home. The form for tax year 1999 does not include a requirement to state under which provision of the rules a taxpayer is claiming the deduction, except in cases where a home is used as a day-care facility. However, this new provision is referred to in the instructions to the form.

These changes are a direct response to the *Soliman* decision, the landmark case for the prior rules. In *Soliman*, a self-employed anesthesiologist practiced at a number of hospitals, none of which provided office space. Soliman used a room in his home on an exclusive basis to spend a number of hours each day devoted to bookkeeping, writing and answering letters, reading medical journals, and communicating with his medical colleagues, patients and insurance companies.

The Supreme Court held that Soliman's home office was not his "principal place of business" under a two-part test that considered (1) the relative importance of the activities which were performed at each separate business location, and (2) the amount of time spent at each place. Under this test, the Court determined that the home office was not his "principal place of business" because Soliman performed the "essence of the professional service" at the hospitals, and not at his home office. Because Soliman's home office did not meet the requirements for any other uses for which a deduction was allowed, he could not deduct the expenses associated with the home office.

The new provisions accept the recent changes in the work place. The Committee Report specifically stated that "the Supreme Court's decision in Soliman unfairly denies a home office deduction to a growing number of taxpayers who manage their business activities from their homes."[11] In addition, the Committee Report described the amendment as "an appropriate response" to the advent of the information and computer age, which provides more flexibility for taxpayers to manage a trade or business from a home office. The Report also noted that this provision would enable taxpayers to work more efficiently at home, save on commuting time and expenses, and "spend additional time with their families."[12]

Below are examples illustrating various aspects of the revised home office provisions.

Example One: A self-employed insurance agent maintains a storefront office. At that office, he employs a small staff to answer phones, handle correspondence, and perform some billing functions. In addition, he maintains a home office where he performs activities similar to those done by the storefront office staff. The agent can claim a home office deduction because he conducts administrative and management activities at the home office, regardless of the fact that similar activities are conducted by others in connection with the agent's business at other locations.

Example Two: A self-employed taxpayer operates a home and office cleaning service. She maintains a home office, which is used for bookkeeping, communicating with clients, and billing. On occasion, she keeps track of billing in her vehicle. The taxpayer can claim a home office deduction, because the home office is used for administrative and management activities, regardless of the fact such activities are also carried out at a site that is not a fixed location, such as the vehicle.

Example Three: A self-employed dentist maintains an office at which patients are cared for. However, the dentist also maintains an office at home, at which he does bookkeeping and billing, handles correspondence and reads professional journals. The dentist can claim a deduction for the home office, because he conducts administrative and management activities there, even though he conducts

POINT OF VIEW

Televised Criminal Trials May Deny Defendant a Fair Trial

BY FRANCIS T. MURPHY

Reality, said Machiavelli, punishes those who ignore it. We in the law say that we look at things as they are.

Do we ignore reality, are we seeing things as they are, when we favor the televising of criminal trials?

I oppose the televising of criminal trials. I oppose it because it may deny the defendant a fair trial.

I am concerned about that defendant as he sits in the courtroom, accused and untried. His liberty may be taken from him. Indeed, we may kill him.

Those who favor televising criminal trials say they are confident that the defendant will not be prejudiced, even though they lack overwhelming empirical proof for that position. Although they may be in error about a matter so grave, they are convinced that the defendant, the judge, the attorneys, the witnesses, and the jurors will not be affected by television. Are they not ignoring the reality of human nature?

Excited by the use of television as an educational instrument, they speak of its use in the criminal process as if the eye of the television camera neutrally and uniformly reports the whole truth regardless of its subject, the circumstances in which the camera is used, the way it is used, or the length of its use. They do not consider the hand and mind of the newsman controlling the camera. They simply invoke the piety that the television camera will educate the public without endangering the defendant's right to a fair trial, notwithstanding that the public holds the media in contempt. Is it this media's camera that will educate the public without endangering the defendant's right to a fair trial? Or is it the camera that was barred from the courtroom in O.J. Simpson's wrongful death trial after the public was educated about the criminal law in Simpson's murder trial?

It is this that divides us, that even though there is no compelling necessity for televising criminal trials, the advocates of cameras are nevertheless willing to mandate them and risk foreseeable injustices, while I would bar them[1] until we can say with reasonable certainty that no defendant will be unjustly tried because his trial was televised.

If television does not increase the likelihood that the jury will lawfully and correctly find the facts, if it does not increase the likelihood that the judge will act correctly in admitting or excluding evidence, or in determining questions of law; if it does not make it more likely that witnesses will give truthful evidence, may it be said that the camera furthers the purpose of a criminal trial?

If it does not further the purpose of a criminal trial and if the defendant may be adversely affected by it, why should the camera be in the courtroom? Is it because it is believed that there is a public desire for it?

Do you believe that the public is primarily interested in the televising of a criminal trial in order to be educated about the criminal process, or is it because in the main the public wants a closer look at the stained garment of the victim and the drawn and drop-jawed face of the accused?

Does the media clamor to televise the case of the common robber, burglar, embezzler, drug seller, forger, or thief? Or will television select only those trials that are in some way unique because they involve a unique defendant or a unique case of greed, lust or anger?

Do you think that advertisers of underarm deodorants, beer, denture paste and cat food, for example, saw in the O.J. Simpson trial television audiences eager for instruction in the criminal law?

Surely it is one thing to place a camera in a courtroom out of a desire to educate the public about the criminal law, but it is an altogether different thing to ignore the reality of the nature of the public's interest in a criminal trial and that of the hand that controls the camera.

Ultimately, you must ask whether television is committed to assuring a fair trial to the accused. Here is the candid answer of a veteran newsman reported by the *New York Law Journal* of November 14, 1994:

> Jerry Nachman of CBS News said he would only too gladly print the worst "judicial nightmare." Assume, he said, that television crews had caught the police removing a bloody knife from O.J. Simpson's estate after conducting an illegal search. Would he air it? "Absolutely," Mr. Nachman said answering his own question. "The press is governed by different rules," he said "It is not our responsibility to guarantee anyone a fair trial." "All those extraneous facts that are inadmissible in court are absolutely admissible, delicious journalism," he said.[2]

And that is indeed the difference between a newsman and a judge. It is the business of the common newsman to feed the appetites of a mass audience, to stir conflict, to shock, to please the curious, to expose what is private, to imply what is unproved, to care little or nothing for the feel-

POINT OF VIEW
CONTINUED FROM PAGE 56
ings of people of whom they write, as long as something called a story can meet a bigger something called a deadline. It is not his business to educate. In the case of a reporter, his story is done and he forgets it. In the case of the judge, what he has done to defendants, he will never forget, more so in those cases in which he has sent them to their deaths.

So it is that in deciding the issue of cameras in courtrooms, your judgment will turn upon the call that you will answer, either the plea of the defendant for all of the fairness that society can reasonably assure him, or the plea of those who serve lesser interests.

Francis T. Murphy, former presiding justice of the Appellate Division, First Department, is now special counsel to Kelley Drye & Warren LLP in New York City.

1. *See* Francis T. Murphy, *Opposing Televising of Criminal Trials*, N.Y.L.J., Nov. 4, 1996, p. 2, col. 3.
2. Daniel Wise, *Pros and Cons of 'Spinning' a Case Debated by Judges, Lawyers, Press*, N.Y.L.J., Nov. 14, 1994, p. 1, col. 4.

PRACTICE HINTS
CONTINUED FROM PAGE 55
substantial non-administrative and non-management activities at another fixed location.

Example Four: A taxpayer is employed as a sales representative. The taxpayer maintains no inventory. She conducts the bulk of her business activities—meeting with clients, selling products, taking orders—at the clients' offices. Her employer does not provide office space to its sales representatives. For the convenience of the employer, the sales representative maintains an office at home, where she does billing, correspondence and record keeping. She can claim a deduction for a home office, because, for the convenience of the employer, she uses the home office for administrative and management activities and there is no other fixed location of the business at which she performs such activities on a substantial basis.

Regardless of the circumstances, when considering a home office under this provision, the taxpayer should keep records of the amount of time spent in the home office, and what activities are conducted there. Such records demonstrate that the home office was used for administrative and management activities. And, to qualify under this provision, a taxpayer must not only use the home office for such activities, the taxpayer must not substantially perform the activities at any other fixed location of the business.

James M. Ozello is the principal for Ozello Tax and Legal Consulting in Ringwood, N.J., and a consultant for the Research Institute of America. He is a graduate of Ohio State University, and received both a J.D. degree and a master's in taxation from the University of Akron.

1. 506 U.S. 168 (1993).
2. H.R. Rep. No. 105-148, at 407 (1997).
3. *See id.*
4. *See* IRS Publication No. 587, *Business Use of Your Home* (1999), at 3, *available at* <http://www.irs.treas.gov/plain/forms_pubs/pubs/p587toc.htm> (visited Mar. 2, 2000).
5. H.R. Rep. No. 105-148, at 407 (1997).
6. I.R.C. § 280A(c)(1).
7. *See id.*
8. I.R.C. § 280A(c)(5).
9. *See Commissioner v. Soliman*, 506 U.S. 168 (1993).
10. Treasury Regulations § 1.67-1T(a)(1)(i).
11. H.R. Rep. No. 105-148, at 407 (1997).
12. *Id.*

EDITOR'S MAILBOX

Project Labor Agreements

I recently read the letter in your January edition regarding Project Labor Agreements written by Jeffrey J. Zogg, managing director of the General Building Contractors of New York State, Inc., citing the South Glens Falls Central School District.

I am extremely dismayed and disappointed having the school district cited based on inaccurate information and editorialized comments regarding its current Capital Project. Yes, the initial engagement of the Project Labor Agreement did cause minimal concern legally. However, in the utilization of the expertise of the law firm of Hogan & Sarzynski of Binghamton, N.Y., the district prevailed in its desire to engage and implement a Project Labor Agreement.

To this date and time, the Project Labor Agreement partnership with the school district and Turner Construction Co. has been one of excellence and accountability in dealing with the trades and applicable contractors. The relationship has been harmonious and, more importantly, construction has been one of quality.

The South Glens Falls Central School District is pleased and proud to be a partner in the Project Labor Agreement. Should any questions arise, I will be glad to address them on an honest and accountable basis. Anyone who wishes to discuss the project should feel free to contact me at my office, 518-793-9617.

James P. McCarthy
Superintendent of Schools,
South Glens Falls Central School District

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