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NEW YORK STATE BAR ASSOCIATION

Journal

Judith S. Kaye

We take the opportunity to recognize Chief Judge Judith Kaye with a tribute to her many accomplishments and the imprint she leaves upon the Court.

by Skip Card

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NEW YORK STATE BAR ASSOCIATION
Journal

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DEPARTMENTS

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BERNICE K. LEBER

Honoring 25 Years of Devoted Public Service

Some jurists stand in a league of their own. That is why we are honoring Chief Judge Judith S. Kaye with this special issue of the *Journal*, in which we pay tribute to one of New York's most distinguished public servants. To celebrate her remarkable service as the top judge in New York, we take a look back at some of her landmark decisions.

With Judge Kaye having penned 533 majority decisions and 83 concurring or dissenting opinions over the course of her 25-year career on New York's Court of Appeals, you can be certain that singling out her most significant writings is no easy task. Given the breadth of her work – filling volume upon volume of New York Reports – we also do not have enough space in a single *Journal* issue possibly to highlight and pay tribute to all of the Judge's most prominent decisions. To help us narrow the field, we asked some of her former law clerks to select what are, in their opinion, some of Judge Kaye's most important decisions.

The decisions described in these articles reveal that Judge Kaye consistently found her voice in upholding the rule of law and fundamental fairness in the treatment of individual rights particularly with respect to principles of due process – along with a healthy dose of judicial restraint added for good measure.

Thus, in *People v. Santorelli*, which addressed a prosecutor's duty to turn over certain information to the defense, our Chief Judge reinforced the importance of fair play, emphasizing that prosecutorial responsibility demands that the search for truth trumps the pursuit of convictions.

In one of Judge Kaye's earliest decisions – that of *People v. Smith* – the Court considered whether a mandatory death penalty for killers already serving a life term of imprisonment was cruel and unusual punishment. Former clerks Gary Hoppe and Darren O'Connor relate how Judge Kaye methodically addressed every factual and legal issue in that case, ultimately penning a majority decision that without passion or an agenda applied the rule of law, holding that New York's mandatory death penalty was unconstitutional because it failed to account for individual circumstances. This decision demonstrates Judge Kaye's ability to decide a case based on the law and not on what is popular, the hallmark of a fair and impartial jurist.

In another article, former clerk Roberta Kaplan convincingly makes the argument that judges are often remembered most for their powerful dissents, which often over time become the majority view. Kaplan uses Judge Kaye's recent dissent in *Hernandez v. Robles*, in which she labeled as "an unfortunate misstep" the Court's plurality decision denying the right of same-sex couples to marry in New York, as a gateway to discuss another of Judge Kaye's most compassionate decisions, *In re Jacob*. In that landmark decision, the Court held that New York's Domestic Relations Law permitted the unmarried gay or lesbian partner of a biological parent to become the child's second parent by adoption. Judge Kaye has long been a strong advocate for children and children's rights and, in this regard, these two decisions reinforce the positive notion that a family means different things to different people, and should be defined more inclusively than jurisprudence recognized previously. In this regard, Judge Kaye has been a true visionary and her decisions timeless in their scope.

Judge Kaye also wrote an average of two opinions each month and reviewed countless civil and criminal motions for leave to appeal. She left an indelible mark on New York's law, while at the same time creating and implementing reforms which have caused us to re-think and re-work how we handle domestic violence, drug abuse, divorce and child custody among many other difficult problems. Many might not be aware that some years ago, Judge Kaye declined the opportunity to be considered for a position on the United States Supreme Court – a lifetime appointment – to continue in service as our Chief Judge, a post that she must now leave due to mandatory retirement.

Many who have sought to become judges are often asked why they desire the task. After all, the hours are long, the work somewhat solitary, and the compensation plainly not commensurate with the responsibility. We know that Judge Kaye leaves the Court of Appeals, after a quarter century of service due to mandatory retirement, knowing with certainty that her decisions have touched the lives of others, and will certainly continue to have a profound ripple effect on the law, the judicial system and our profession. ■

BERNICE K. LEBER can be reached at bleber@nysba.org.

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November 12 Albany

Handling DWI Cases in New York
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 3.0 skills; 3.0 professional practice
November 13 Albany

+Update on Landlord and Tenant Practice
(program: 9:00 am–12:30 pm)
Fulfills NY MCLE requirement (4.0): 1.0 ethics and professionalism; 3.0 skills and professional practice
November 13 New York City

+Update 2008 (video replays)
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 credit hours practice management and/or professional practice
November 13 Jamestown
November 14 Canton
November 18 Long Island; Suffern
November 21 Corning; Watertown; Tarrytown
December 3 Poughkeepsie
December 5 Loch Sheldrake

Ethics and Professionalism
(program: 9:00 am–12:45 pm)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism
November 13 Syracuse
November 14 Long Island
November 18 Buffalo
December 2 Rochester
December 5 Tarrytown
December 8 New York City
December 12 Albany

+Retirement Accounts in Elder Law Planning
Fufills NY MCLE requirement (7.5): 7.5 practice management and/or professional practice
November 13 Long Island
November 21 Albany

Alternative Dispute Resolution in the Employment Context
(program: 9:00 am–1:00 pm)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.5 skills; 2.0 professional practice
November 14 New York City

+Piercing the Corporate Veil and Secondary Liability in New York (telephone seminar)
(program: 12:00 pm–2:05 pm Eastern time)
Fufills NY MCLE requirement (2.5): 2.5 practice management and/or professional practice
November 14 All sites

+Hot Topics in Real Property Law and Practice
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November 14 Rochester; Tarrytown
November 17 Albany
November 18 Syracuse
December 4 Long Island
December 9 New York City

Construction Site Accidents
Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 professional practice/practice management
November 14 Buffalo
November 20 Albany
November 21 Syracuse
December 5 Long Island
December 12 New York City

+Business and Family Entities: What the Divorce Lawyer Must Know
(program: 9:00 am–12:45 pm)
Fulfills NY MCLE requirement (4.0): 4.0 practice management and/or professional practice
November 14 Tarrytown
November 21 Syracuse
December 5 Albany
December 12 New York City

Risk Management for the Solo/Small Firm
(registration: 12:30 pm; program: 1:00 pm–5:00 pm)
November 18 Westchester
November 20 New York City

+The Sale of Stock in a Closely-Held Business to an "ESOP" (Employee Stock Ownership Plan): A Diversification Strategy for Business Owners
(program: 9:00 am–1:00 pm)
Fulfills NY MCLE requirement (4.5): 4.5 practice management and/or professional practice
November 18 New York City

2008 Ethics and Lobbying in the Public Sector – Municipal Law Session
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November 19 Albany

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November 20 Westchester

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Accounting for Lawyers
November 21 Albany
December 3 New York City
December 8 Tarrytown
December 11 Rochester

2008 New York City Lobbying, Campaign Finance and Ethics Update
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December 4 New York City

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(program: 9:00 am–1:00 pm)
December 11 New York City

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We take the opportunity in this issue to recognize Chief Judge Judith Kaye's 25 years at the Court of Appeals (15 as its chief judge) with a tribute to her many accomplishments and the imprint she will leave upon her retirement from the bench. What better way, we thought, than to discuss her opinions in some of the major Court decisions in the past two-and-a-half decades? In the following pages, we present a series of articles on some of the more significant cases decided during Judge Kaye's tenure. We asked Judge Kaye's former law clerks, who worked with her on these cases, to write brief summaries of the issues involved and to discuss the future impact of those decisions.

Freelance writer **Skip Card** (skipcard@earthlink.net) is a copy editor for the *New York Post* and author of the hiking guidebook *Take a Hike: New York City*. He has written for the *Journal* on topics ranging from baseball to environmentalism.

Judith S. Kaye

By Skip Card

Chief Judge Judith S. Kaye paused while showing a visitor around her Park Avenue chambers, a warren of memorabilia-filled rooms that must be stripped of a quarter century of accumulated history when Kaye retires later this year. For a brief moment, the weight of the looming task seemed to visibly stoop her shoulders.

"Think about disassembling that," Kaye said as she stood before an office wall covered floor to ceiling by snapshots and souvenirs. Nearby walls are plastered with artwork, framed certificates, formal photographs and clever *New Yorker* cartoons. "This is sort of my life, you know? I can't imagine taking this apart."

The task is complicated not only by the length of Kaye's tenure – 25 years on the New York Court of Appeals, including 15 years as Chief Judge, the longest such tenure in state history – but also by her remarkable list of reforms and firsts. Governor David Paterson, in his inauguration speech, called Kaye "the Chief Judge who I believe will go down in history as one of the greatest Chief Judges this state has ever had."

Yet, amid the accolades and proud memories, Kaye is leaving her job amid a sense of failure. Her long quest to raise salaries of New York's judges remains stalled, and judges' pay has not increased since 1999. In April, a frustrated Kaye filed suit, charging that state politics has denied New York judges their constitutional right to an "adequate" salary.

Judith S. Kaye, 1970.

"I never thought, in my 25th year on the Court of Appeals, that I would be stuck in the mud on the salary issue. It kind of has changed everything else. Soured it," Kaye said. "It's devastating. Just devastating. It's just like, 'Other than that, Mrs. Lincoln, did you enjoy the show?' Really. To have the judges so deservedly upset, it's just unthinkable. Horrible."

Kaye's regret is understandable. Yet, any impartial review of her legal career finds far more successes than failures.

Kaye was a pioneering litigator whose skill and perseverance in a male-dominated profession blazed a trail for future generations of women. Her 1983 appointment to New York's Court of Appeals and, 10 years later, to the position of Chief Judge were historic firsts. Under her executive leadership, New York created groundbreaking community courts and reformed its exemption-plagued jury system.

Meanwhile, Kaye managed to stay fit, have three children, enjoy a long and happy marriage, and win the respect and admiration of countless colleagues.

"It's hard to imagine anyone doing much more," said Steven Krane, a partner at Proskauer Rose who served as Judge Kaye's law clerk in 1984–1985. "And she's not done. She's just retiring from this phase. She's got a lot left."

Kaye is "a wonderful, caring, warm person who is honest and straightforward," Krane said. "She's a remarkable human being in every respect."

Path to the Court

Judge Kaye, born Judith Ann Smith, was raised in the village of Monticello, N.Y., the first child born to Polish immigrants who opened a dry-goods store when Kaye was six. (Designer Ralph Lauren told Kaye he bought his first pair of jeans in the store.) Smart enough to skip two grades, Kaye entered Barnard College in 1954 at the age of 15. She majored in Latin American studies, but her aim was to be a newspaper reporter.

"I wanted to change the world as a reporter," Kaye recalled. "I wanted to do something great. I still do."

Dreams of high-profile journalism were dashed after graduation when no major East Coast newspaper would hire a woman.

"It was not just a dead end, it was an impossible beginning. It was very hard to get a foothold in the field." She finally scored a job at the *Hudson Dispatch* in Union City, N.J., but was unable to do anything more world-changing than cover weddings and teas for the newspaper's society page.

Sensing futility, Kaye began attending night classes at New York University School of Law, "never with the serious intention of being a lawyer, just being a news reporter," she said. However, her interest soon shifted from journalism to law.

"What I was doing at night was much more interesting than what I was doing in the daytime," Kaye recalled. She switched her career target to law and transferred to NYU's day program, but her journalism training proved valuable in her new path.

"Just the ability to write an English sentence clearly must have distinguished me, because I did well in law school," she said. "I learned to say things in English, to use semicolons sparingly, to state my thoughts simply . . . to put the who, what, when and why first instead of last."

Kaye graduated *cum laude* from NYU law school in 1962, one of 10 women in a class of roughly 300. She turned down her first job offer because the salary would have been lower than that of her male counterparts, and instead joined Sullivan & Cromwell as an associate earning equal pay. There she met Stephen Rackow Kaye, the attorney who would become her husband in 1964. (The two would remain happily together until his death on October 30, 2006.)

Both Kayes left Sullivan & Cromwell when their relationship blossomed. Judith Kaye went to work for IBM in Armonk, which "kicked me out in the seventh month of my pregnancy." She was hired temporarily to assist Russell Niles, dean of the NYU law school, update his real-property casebook. ("Yuck," she recalls.) But then Niles "got elected president of the city bar association, and we had three great years together, during which Stephen and I had three children."

Her family efficiently in place, Kaye returned to private law practice in 1969 with Olwine, Connelly, Chase, O'Donnell & Weyher and began building a reputation as a strong litigator, mostly in federal courts. She also involved herself in the bar association, the Legal Aid Society and pro bono matters. By today's standards, Kaye was networking – although that term had yet to be coined.

"It was all quite accidental," Kaye said. "I didn't plan any of this. It just evolved very nicely." In 1975, she became her firm's first female partner.

Timing also played a role in her success. By the early 1980s, when calls for appointment of more women to top judicial positions grew louder, Kaye was one of the few women attorneys with the broad experience and contacts to be a serious candidate for the bench.

"There was a moment in time when there was an interest in appointing women. Suddenly everyone woke up to the fact that we were around, too."

Kaye initially thought she might be appointed a federal judge, since most of her private legal work had been in federal court. Then, she returned one day to her office to find the application packet from New York's Commission on Judicial Nomination sitting on her desk.

"I had never thought of the State of New York. I completed the application, and suddenly I was a candidate," she said. "The governor wanted to appoint a woman. There weren't that many women who had been active in litigation."

Opportunity finally knocked in 1983, when the retirement of Judge Jacob J. Fuchsberg created a vacancy on New York's Court of Appeals. Kaye's name was put forth, but not without controversy; the Women's Bar Association of the State of New York rated Kaye "not qualified."

"I don't dwell on that," she said. "We've made friends." After a pause, she added, "They were wrong."

Governor Mario Cuomo made history when he nominated Kaye for New York's all-male Court of Appeals. The first woman to serve on the state's highest court was introduced at an afternoon press conference at the World Trade Center. Her husband hurriedly rounded up their young children to attend the announcement. (When he discovered one son wasn't wearing a tie, Mr. Kaye paid $20 to buy the tie worn by a stranger in an elevator.)

"When all the lights went down and the cameras were turned off and everybody went, I remember saying to my husband, 'I'm not cooking dinner tonight,'" Kaye said.

Apparently, one reporter was still listening.

"That was in the *Times*. My kids were angry. They said, 'You never cook dinner.'"

Cooking "doesn't give me a lot of pleasure," Kaye admitted. "We do a lot of takeout."

Court Service

Kaye joined the state's high Court in September 1983. The arrival of a woman forced a few changes, including the installation of locks on some bathroom doors. By 1986, mandatory retirement had pushed out four other associate justices, making Kaye the third most senior jurist on the court.

Kaye quickly earned a reputation as a jurist who let common sense and fairness guide her decisions, particularly in areas in which she believed evolving social norms had outpaced statute.

"You start inevitably as a judge with some human instinct about a set of facts, then you bring to it all your legal knowledge. And the last step has got to be your common sense," Kaye explained. "You do attempt to be sure that what you're deciding and what you're writing is sensible."

From those who disagreed with her opinions, Kaye also began earning labels such as "liberal" and "activist" – terms she feels have lost any real impact.

Chief Judge Kaye, at the Association's Annual Meeting, 2006.

"What does that mean any more, a 'conservative' judge or an 'activist' judge, other than a person you agree with or a person you disagree with? That really is all it means," she said. "I hate these labels. You have to be careful with these labels. They don't help the discussion."

In 1984, still in her first year on the bench, Kaye wrote the opinion for the four-judge majority in *People v. Smith*, which struck down as unconstitutional a mandatory death penalty for Lemuel Smith, an inmate already serving a life sentence who had murdered a prison guard.

Kaye's decision noted that mandatory death sentences could not take into account mitigating factors, and therefore did not follow guidelines imposed by the U.S. Supreme Court. "Thus," wrote Kaye, "any death penalty statute which did not provide for consideration by the sentencer of all relevant individual circumstances would be incompatible with the commands of the Eighth and Fourteenth Amendments." As a result, Smith avoided the electric chair.

Many years later, Kaye was on the losing side in *Alison D. v. Virginia M.*, a child-custody case involving a same-sex couple that had split up. The majority ruled the child's biological mother did not have to yield visitation rights to her former lesbian lover, even though both women had been raising the child together for years.

"I saw that as just hard on the child," Kaye said. "I thought it was wrong to deny visitation, that we should have been looking at the issue from the child's interest."

But four years later, in 1995, the effect of that ruling was softened by *In re Jacob*, in which the Court recognized adoption rights of homosexual couples. Kaye wrote the majority opinion in which she argued that prohibiting adoptions by same-sex couples "would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them."

"Sometimes when I'm in courthouses, that's the one decision people ever single out and come up and say what a wonderful opinion that was," Kaye said. The no-visitation ruling from *Alison D. v. Virginia M.* still stands, "but at least now there can be an adoption."

More recently, in 2006, Kaye wrote the minority opinion when a Court of Appeals plurality held New York's same-sex couples did not have the right to marry. Her dissent predicted that "future generations will look back on today's decision as an unfortunate misstep."

"I think I was right," Kaye said. "And I think ultimately that will be the law. I'm sad that it's a dissent."

If, in hindsight, Kaye regrets any of her rulings, she won't say.

"Can't go there," she explained. "When I pick up a decision of mine, I always want to reword something. I wish I could just fix it up a little more. But no, I don't feel uneasy about anything."

Reformer Chief Judge

In November 1992, New York's Court of Appeals was thrown into turmoil. Chief Judge Sol Wachtler was arrested by FBI agents on suspicion of having sent threatening letters to his former mistress and harassing her teenage daughter. Claiming mental incapacitation due to bipolar illness, Wachtler resigned his position as Chief Judge, pleaded guilty to a felony charge and spent 11 months in federal prison.

On February 22, 1993, Governor Cuomo nominated Kaye to replace Wachtler as Chief Judge. After unanimous state Senate approval, Kaye was sworn in a month later. Now, in addition to being a full-time jurist, she also shouldered the duties of chief executive officer for New York's courts.

She soon started to shake things up.

"I think it's part of my job to make the third branch of government work better," Kaye said. "And 'work better' means more effective. More efficient dispositions. How do we do a better job serving the public?"

She began by reforming New York's jury system, pushing to abolish automatic exemptions (Kaye herself has been called for jury duty three times) and reduce the length of jurors' service. Her success was encouraging.

"When you move the mountain a millimeter, it's very intoxicating," Kaye said. "You start to feel that maybe you can make things better."

Many of Kaye's colleagues believe she has been wildly successful.

"I have known most of her predecessors as Chief Judge and like them well. But I truly believe she has been the best Chief Judge. She attacked problems that had lain dormant with grace and with skill," said longtime attorney Henry G. Miller, past president of the New York State Bar Association and a senior partner at Clark, Gagliardi & Miller in White Plains.

In the matter of jury reform, "what she brought was sensitivity to the viewpoint of the jurors," Miller said. "She tried to make it more sensible and less intrusive to them."

Kaye next began instituting "problem-solving courts," beginning in 1993 with the Midtown Community Court. There, crimes such as prostitution, unlicensed vending, graffiti, shoplifting and vandalism are often punished with community service rather than jail time. The court also provides on-site services such as drug treatment, mental health counseling and job training.

That concept was expanded with the addition of drug courts and, later, domestic violence courts. All aim to deal with crime by attacking its root causes, typically through treatment and counseling rather than jail sentences.

Those courts aren't universally popular ("That is where people furrow their brow about treading on someone else's turf," Kaye said), but the concept has been copied by other states and hailed by many as models of judicial innovation.

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"I never think about what I'm doing as making policy. I think about it as looking at our dockets, figuring out how we can address problems and then bringing people together to do it. Is that making policy? I don't think so. I think it's administering the court system," she said.

"We have thousands – tens of thousands, hundreds of thousands – of, for example, low-level criminal cases with drug abusers who start when they're teenagers. We have foot-long rap sheets. What are we supposed to do? Are we just supposed to mill them through the system time after time? Why is that a good idea?"

Instead, Kaye said she wants "to see if we can do something to keep them from coming back all the time. Don't you think that makes sense? I don't think of that as policy-making. That's judicial leadership."

Recent statistics showing a record number of people in U.S. prisons left Kaye shaking her head in disbelief.

"My first reaction was how sad it is that we incarcerate probably more people than any other civilized nation. My reaction was to think of the young people, especially young families, who are broken up forever. Young people turned from a possibly constructive life to a life of crime, because that's what they learn in prison.

"That's exactly what I'm talking about with some of these initiatives. Maybe we can reach some people. We're spending so much time and money on prosecuting them. Maybe we can help to turn their lives around."

Kaye said she is not immune to her critics ("You shouldn't be a judge and have a thick skin. Judges need to feel things," she said), but she puts the naysayers in perspective.

"As soon as you touch anything, the critics come out from every place you can imagine. The critics are unbelievable. It's, 'Everything stinks. Don't change a thing.' That's the mantra. As soon as you touch anything, it's 'Oh, there she goes again,'" she said.

Today, as Kaye faces her 70th birthday and the accompanying mandatory retirement from the Court of Appeals, she feels both nervous and excited. She looks forward "to doing something constructive and inventing another life," she said.

"I never like to use the word 'retirement.' I prefer 'juncture,'" she said. "I'll stop being a judge, which I've been for 25 years. People will stop answering my calls."

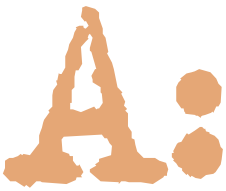
She said she plans to spend more time with her three grown children and "seven of the greatest grandchildren on Earth." Her health is excellent; she often begins her day with a 5 a.m. workout at Reebok Sports Club near her Upper West Side home or a three-mile run in Central Park. She has subscriber tickets to the Metropolitan Opera. She believes her greatest accomplishment is "yet to come."

"Some days I can't imagine leaving. Other days, considering my health and vigor, I think it's right to go on to something else and give somebody else a chance to lead the judiciary."

If only she didn't have to clean out those chambers. ■

Chief Judge Kaye, at the President's Dinner, 2008.

At 10 P.M., who do you want hanging out with you at the office?



Collier, Larson, Moore, Nichols and Weinstein. Oh, and a strong cup of coffee.

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Smith, 1984

By Gary Hoppe and Darren O'Connor

Within months of her appointment, then-Associate Judge Judith Kaye assumed a grave responsibility – announcing the Court's judgment on the life or death of a horrible man and casting the deciding vote as to the validity of a duly enacted and very narrow capital punishment statute.[1] Her approach to that task served as an invaluable lesson to her clerks and would answer the most entrenched skeptic of judicial objectivity.

Lemuel Smith left state prison in October 1976 on parole for a violent offense. Weeks later, on November 24, 1976, he stabbed and slit the throats of Robert Hedderman and Margaret Byron at a religious shop in Albany, killing both people.[2] Over the next nine months, he continued his rampage of rape, murder and mutilation. Police arrested him on August 20, 1977, after he kidnapped 18-year-old Marianne Maggio from a law office and raped her.[3]

During the prosecution for the Maggio attack, in the course of an insanity defense, Smith incriminated himself in the Hedderman-Byron murders and others.[4] Juries found Smith guilty of both the Maggio and Hedderman-Byron crimes, and the courts sentenced Smith to three consecutive sentences of 25 years to life imprisonment.[5] Though the sentences purported to be consecutive, they merged by operation of law at the time to a single term of 25 years to life in prison.[6]

Lemuel Smith's incarceration did not rehabilitate him. On May 15, 1981, Correction Officer Donna Payant was reported missing while attending to her normal duties at Green Haven Correctional Facility, a maximum security prison. Officers discovered her body the next morning among trash in a prison dumpster. She had been strangled. A massive investigation pointed to Smith as the killer, and a Dutchess County jury convicted him.[7]

The Penal Law at the time defined first-degree murder as an intentional murder committed by an adult while serving a life sentence or one with a maximum of life and a minimum of at least 15 years. On a conviction for first-degree murder, the court was obligated to impose a death sentence, and by 1981 the death penalty in New York was available in no other situation.[8] If one accepts the legitimacy of the death penalty, as had the state Legislature and the governor, it would be difficult to imagine a better candidate than Lemuel Smith. Judge Albert Rosenblatt sentenced Smith to death on June 10, 1983.[9] Less than three months later, Judith Kaye took her seat on the Court of Appeals.

Smith appealed directly to the Court of Appeals, which had the jurisdiction and obligation to review the facts as well as the law. Judge Kaye would leave nothing without detailed scrutiny. The voluminous trial transcript would be read, the exhibits would be examined; the evidentiary rulings would be reviewed; and the legal precedent would be thoroughly understood. Mindful of the gruesome nature of the crime, Judge Kaye took steps to assure that the natural emotional response against the killer would not negatively impact the factual and

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legal evaluation of the case. Of course, this close attention guarded against a wrongful execution. But also critical to Judge Kaye was avoiding a mistaken invalidation of a presumptively constitutional legislative enactment, particularly where the interests of Smith's many victims or their families, and of the public in general, ran so deep.

The factual review proved most time consuming. The circumstantial evidence demonstrated that Smith had the means and opportunity to strangle Officer Payant in the chaplain's office, place her body in a large drum, and empty it into a trash dumpster. But no witness had seen the murder, and fingerprint tests and forensic analysis of hair and other evidence were inconclusive. Significantly, though, medical experts detected human bite marks on Officer Payant's chest. They matched these marks to a model of Smith's teeth, and also to a bite wound Smith inflicted on another murder victim, Marilee Wilson, in August 1977. The defense attempt to rebut this strong evidence was unavailing, and there was no doubt that Lemuel Smith killed Donna Payant. The charges would not be dismissed.

Nor would a new trial be ordered. Judge Kaye carefully proceeded through each challenged evidentiary ruling and determined, among other conclusions, that the bite mark evidence was scientifically sound and admissible, and that the trial court properly rejected a post-verdict challenge to the testimony of another prison inmate about Smith's incriminating statements.[10]

Turning to the constitutional challenge, Judge Kaye studied the various opinions of the Supreme Court, from *Furman v. Georgia*[11] through *Eddings v. Oklahoma*,[12] to determine whether a mandatory death penalty was cruel and unusual even if imposed on a killer serving a life term of imprisonment. Those cases found that a sentence of death could not be imposed without allowing for the consideration of mitigating circumstances. However, the Supreme Court had often stated in these rulings that it was not deciding whether the Constitution forbade a mandatory death penalty for a murder committed by a life-term inmate; it had never been faced with such a case. The question, then, was whether the rationale of the Supreme Court in issuing these rulings applied in the life-term inmate situation.

If a person is in prison forever, what penalty other than death could deter him or her from killing? One problem with the argument suggested by this question was that Smith was not necessarily in prison forever. Because of the merger of the three sentences, he was eligible for parole in 2003. An additional sentence could lengthen his minimum prison term.

Further, while the question raised a cogent argument that a death penalty should be a *possible* sentence in such a case, it carried much less force when advanced to justify a *mandatory* death penalty. After all, even a mandatory death penalty, in the eyes of a murderer before the crime, can only be a possibility because, among other outcomes, the killer may not be apprehended.

Was a mandatory death penalty justified because the crime was so narrowly defined that no other circumstances could conceivably be offered in mitigation? This question was fair, but Judge Kaye answered that the statute could not and did not cover the wide variety of circumstances unique to each situation and person.[13]

Cognizant that mitigating circumstances, in the case of Lemuel Smith, were likely absent, the Attorney General asked the Court to treat the statute as calling for such a consideration and to remit for a mitigation hearing. Judge Kaye could not accept this argument because it would have required the Court to rewrite the statute.[14]

Three years after the decision, the Supreme Court agreed with Judge Kaye when it issued a six to three ruling in a case striking down Nevada's mandatory death penalty for lifers who kill.[15]

Lemuel Smith was allowed to live, not because he earned an ounce of sympathy, but because Judge Kaye and her colleagues dispassionately and without agenda applied the rule of law. According to information published by the Department of Correctional Services, Smith will not even be eligible for parole until February 19, 2029, at age 88.

In the aftermath of the decision, many unhappy New Yorkers harshly and personally criticized Judge Kaye, some in forms too vile to mention. But even in her first year, Judge Kaye was never deprived of the ability to have fun at work and, as her clerks well know, would face the most serious and weighty tasks with good humor. She enjoyed telling of one criticism of the *Smith* decision, by her hairdresser, who informed her that he was in favor of the death penalty, "especially in criminal cases." Whatever breadth the death penalty assumes in the future, it is unlikely to be applied with the frequency desired by that gentleman. ■

1. *People v. Smith*, 63 N.Y.2d 41, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985).
2. *People v. Smith*, 59 N.Y.2d 156, 464 N.Y.S.2d 399 (1983).
3. *People v. Smith*, 77 A.D.2d 712, 430 N.Y.S.2d 713 (3d Dep't 1980). Marianne Maggio later brought an action against New York State alleging negligent supervision of Lemuel Smith's parole. *See Maggio v. State of N.Y.*, 88 A.D.2d 1087, 452 N.Y.S.2d 719 (3d Dep't 1982).
4. *See Smith*, 77 A.D.2d 712; *Smith*, 59 N.Y.2d 156.
5. *Id.*
6. *Smith*, 63 N.Y.2d 41.
7. *People v. Smith*, 117 Misc. 2d 737, 459 N.Y.S.2d 528 (Sup. Ct., Dutchess Co. 1980).
8. 1974 N.Y. Laws ch. 367 § 2 (adding Penal Law § 60.06); *see also People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978).
9. *Smith*, 63 N.Y.2d 41.
10. *Id.* Smith's defense team submitted an interesting argument about the comparison of the Payant and Wilson bite marks. It claimed that the evidence demonstrated prior bad acts (the murder of Marilee Wilson) and could have been avoided if the prosecution applied for an order compelling Smith to bite into his own skin, thereby allowing a comparison without disclosing the prior bad act evidence. Had such an order been sought and issued, a challenge to it would doubtless have been leveled.
11. 408 U.S. 238 (1972).
12. 455 U.S. 104 (1982).
13. *See Smith*, 63 N.Y.2d 41.
14. *Id.*
15. *Sumner v. Shuman*, 483 U.S. 66 (1987).

Immuno AG., 1989–1991

By Laura Johnson

Immuno AG. v. Moor-Jankowski was not just a decision, it was a saga.[1] By the time this libel case first reached the New York Court of Appeals, a multinational corporation was pitted against a single remaining defendant, Dr. Jan Moor-Jankowski, the other seven defendants having settled with it earlier for "substantial sums."[2] Moor-Jankowski prevailed, but it took him over seven years, legal expenses of more than $1 million, and a second trip to the Court of Appeals after the United States Supreme Court vacated the original decision in his favor.[3]

Dr. Moor-Jankowski's determination was apparently characteristic of him. Internationally known for his work in primatology and hematology, he joined the Polish resistance as a teenager and was wounded in the Warsaw uprising; eventually he was imprisoned by the Germans and later the Soviets. He escaped to Switzerland, where he earned a medical degree. Moor-Jankowski headed a primate lab at New York University and served as the unpaid editor of a small, highly specialized scientific journal, the *Journal of Medical Primatology*.[4] It was a letter to the editor from an animal rights advocate, criticizing Immuno AG.'s plans to use wild chimpanzees for hepatitis research, that resulted in Immuno's libel suit.

Then-Judge Kaye, a former journalist herself, wrote for the Court in both of its decisions upholding the Appellate Division, First Department's dismissal of the complaint against Moor-Jankowski. In addition to raising issues concerning the proper scope of protection for journalistic freedom to publish letters to the editor, the case highlighted another area in which Judge Kaye has made her mark on the Court: adherence to the New York State Constitution when it accords greater protection than the federal Constitution to the citizens of New York.

Relying on the dictum in *Gertz v. Robert Welch, Inc.*[5] that "[u]nder the First Amendment there is no such thing as a false idea," which had been widely interpreted as creating categorical protection for "opinion," the Court initially held that the comments Immuno alleged to be defamatory were expressions of opinion, rather than of fact, and therefore absolutely protected under the First Amendment.[6] Judge Kaye's opinion specifically focused on letters to the editor as vehicles for members of the public to voice opinions and participate in debate on matters of concern to them. Given that function, she wrote, "the common expectation of a letter to the editor is . . . for the expression of individual opinion,"[7] and nothing in the allegedly defamatory letter would have led readers to view it as fact rather than protected opinion.

Just a few months later, however, the Supreme Court clarified in *Milkovich v. Lorain Journal Co.*[8] that there is no separate First Amendment privilege for opinion *per se*; even if labeled "opinion," allegedly defamatory statements must be analyzed to determine whether they contain or can reasonably be construed to imply an assertion of fact, which might be actionable if false. The Supreme Court vacated and remanded *Immuno I* to the Court for further consideration in light of *Milkovich*.[9]

The second go-round ("*Immuno II*")[10] produced a fragmented result. Once again, the Court was unanimous that Immuno's claims had properly

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been dismissed. It was the question of what role the free speech guarantee of Article I, § 8 of the New York State Constitution should now play in the Court's decision on remand that produced four separate opinions, representing almost every conceivable methodology for state review on remand.

Judge Simons and Judge Hancock, in separate concurrences, concluded that because the case had been remanded with directions that it be reconsidered in light of the newly clarified federal constitutional standard, and because members of the Court agreed that under *Milkovich* summary judgment for Moor-Jankowski was proper, any consideration of the state Constitution was inappropriate. Judge Simons in particular expressed strong general disagreement with a "dual" constitutional approach – that is, with rendering a decision under both the New York State and federal Constitutions – which in his view resulted in unnecessary pronouncements of federal law that were insulated from review by the parallel decision on independent state grounds.[11] Judge Titone, viewing the federal law as still unsettled after *Milkovich*, would have avoided pronouncing on any constitutional question, state or federal, by deciding the case solely by reference to New York's common law doctrine of "fair comment."[12]

Judge Kaye's opinion for the Court is notable (and typical of her) both for its practical approach and its insistence on the validity of the state constitutional analysis. After explaining that summary judgment was proper even under the Supreme Court's new explication of the federal constitutional standard, because to the extent that any statements in the letter might be interpreted as fact-based, Immuno had failed to prove their falsity,[13] Judge Kaye turned to Article I, § 8 of the New York State Constitution.

The state constitutional section is the heart of Judge Kaye's opinion in *Immuno II*. It is a ringing affirmation of New York's historical commitment, expressed in the unique, positive language of its state constitution, to protection for freedom of expression.

Judge Kaye concluded that under New York's more protective free speech clause, analysis of the context of an allegedly libelous statement – a factor that appeared to have been dramatically discounted in the *Milkovich* majority opinion – is key to determining whether it should be deemed to assert facts.[14] Resuscitating context as a critical factor under New York's constitution allowed Judge Kaye again in *Immuno II* to accord considerable breathing space for publication of letters to the editor, which are, she again noted, presumptively understood as "expression[s] of individual opinion."[15] Such an approach was more protective, also, in obviating the need for line-by-line dissection of the fact/opinion matrix under the still somewhat unclear *Milkovich* test – and, in turn, avoiding the protracted, expensive litigation of which the *Immuno* case was a flagrant instance, with its attendant chilling effect on publishers.[16] ■

1. *Immuno AG. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.Y.S.2d 938 (1989) ("*Immuno I*"); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 905 (1991) ("*Immuno II*").
2. *Immuno I*, 74 N.Y.2d at 553–55.
3. Anthony Lewis, *Abroad at Home; Abusing the Law*, N.Y. Times, May 10, 1991.
4. Douglas Martin, *Jan Moor-Jankowski Is Dead at 81; Used Chimps, Kindly, in Science*, N.Y. Times, Sept. 3, 2005.
5. 418 U.S. 323, 339–40 (1974).
6. *Immuno I*, 74 N.Y.2d 548.
7. *Id.* at 557–59.
8. 494 U.S. 1 (1990).
9. *Immuno AG. v. Moor-Jankowski*, 497 U.S. 1021 (1990).
10. 77 N.Y.2d 235.
11. *Id.* at 260–62 (Simons, J., concurring).
12. *Id.* at 263–67 (Titone, J., concurring).
13. *Id.* at 245–48.
14. *Id.* at 250, 254.
15. *Id.* at 253.
16. *Id.* at 256.



Jacob, 1995

By Roberta A. Kaplan

When I was fortunate enough to be asked to submit a short piece on one of Chief Judge Kaye's many landmark opinions for the New York Court of Appeals, the choice was easy. After all, Chief Judge Kaye recently set the bar (no pun intended) herself in her opinion dissenting from the Court of Appeals's plurality decision denying the state constitutional right of same-sex couples to marry in New York.[1] Chief Judge Kaye concluded her eloquent dissent in that case with this prescient observation: "I am confident that future generations will look back on today's decision as an unfortunate misstep."[2]

While it remains to be seen whether it will actually take a "generation" for New Yorkers to agree on the wisdom of Chief Judge Kaye's prediction in the context of marriage for same-sex couples,[3] as for her landmark opinion in *In re Jacob* permitting second-parent adoptions by gay men and lesbians,[4] it has taken far less than a generation for New Yorkers to come to the view that she, once again, had it right all along. Indeed, it is almost hard to imagine in 2008, with literally tens of thousands of gay and lesbian families raising children throughout the state, how fraught with controversy the Court of Appeals's decision in *In re Jacob* was in 1995.[5]

Unlike in the same-sex marriage cases where the constitutional issues were at the fore, the question in *Jacob* was statutory – whether, under the applicable adoption provisions of New York's Domestic Relations Law, "the unmarried partner of a child's biological mother . . . who is raising the child together with the biological parent, can become the child's second parent by means of adoption."[6] The Court, in another divided opinion, held that such persons could because, as Chief Judge Kaye reasoned, "[t]o rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them."[7]

How did the Court reach this result in the context of an adoption statute that Chief Judge Kaye candidly described as "a complex and not entirely reconcilable patchwork"?[8] By paying close and careful attention not only to the statutory language, but also to the underlying legislative purpose – "the humanitarian principle that adoption is a means of securing the best possible home for a child."[9] As Chief Judge Kaye noted: "[S]ince adoption in this State is 'solely the creature of . . . statute,' the adoption statute must be strictly construed. What is to be construed strictly and applied rigorously in this sensitive area of the law, however, is *legislative purpose as well as legislative language*."[10]

More specifically, the chief stumbling block to allowing such adoptions – the Domestic Relations Law, § 117 – arguably would have required the "termination of the biological mothers' [parental] rights upon adoption thereby placing appellants in the 'Catch-22' of having to choose one of two coparents as the child's only legal parent."[11] Chief Judge Kaye concluded that to permit such an incongruous result in the context of a provision intended to deal largely with intestate succession, "could have the discriminatory and unintended effect of making unwarranted, detrimental distinctions between" the children of straight, married couples and those

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of gay men and lesbians.[12] In other words, while "the legislature that last codified [the adoption statute] may never have envisioned families that 'include[ ] two adult lifetime partners whose relationship is . . . characterized by an emotional and financial commitment and interdependence,'"[13] it was clear that the statute "designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."[14]

Significantly, the Court of Appeals did not decide *Jacob* in a vacuum. Only four years earlier, in *In re Alison D.*, the Court had denied a lesbian co-parent, after the couple had split up, visitation rights with the child she had helped to raise since birth.[15] Chief Judge Kaye dissented from the Court's *per curiam* opinion in that case, noting that "[t]he Court's decision, fixing biology as the key to visitation rights, may affect a wide spectrum of relationships – including children who do not live with two biological parents, and . . . children [ ] born into families with gay or lesbian parent(s) . . . limiting their opportunity to maintain bonds that may be crucial to their development."[16]

So what explains this dramatic turnaround with respect to the nature of the rights of gay and lesbian parents, and in just four years?[17] First and foremost, *Jacob* reflects Chief Judge Kaye's keen awareness of the "durable, certain and predictable" yet not "static" common law as the "core element in state court decision making."[18] As Chief Judge Kaye has observed, "ascertaining the legislative intent is often no less difficult than drawing common-law or constitutional distinctions. . . . When the meaning of a statute is in dispute, there remains at the core the same common-law process of discerning and applying the purpose of the law. . . . Statutory interpretation is not a mechanical exercise."[19]

I would submit that the result in *Jacob* was also the product of Chief Judge Kaye's most remarkable gift as a jurist – her ability to see what is really at stake in the cases before her. In addition to her analysis of the relevant statutory language or case law, her decisions demonstrate an ever-present awareness that cases involve real human beings and that the role of the courts is to balance a respect for abstract principles with an understanding that the application of any abstract rule in any particular situation necessarily has an impact on the lives of flesh-and-blood people. Thus, when reading Chief Judge Kaye's opinions in the area of family law, opinions of which she is justifiably proud, one is always aware of her acute and altogether human sense of what it actually feels like to be a parent, a child, or a spouse.[20]

And that, of course, is why choosing *In re Jacob* was so easy and obvious. Of all of Chief Judge Kaye's thousands of decisions in her quarter century on the bench, it perhaps best encapsulates her methodology with respect to the difficult, often painstaking, process of judging. As Chief Judge Kaye explained in words that ring as true today as they did when they were written back in 1995:

> However much we might prefer in this age of anxiety about "legislating from the bench" and "judicial activism" for only our elected representatives to make all the sensitive decisions, so long as human language remains imprecise and the human capacity to predict the future limited, the cascade of cases that call upon judges to fill the gaps – and to do so by reference to social justice – will unquestionably continue.[21]

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1. *See Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006). The author served as lead counsel and argued for the appellants in *Samuels et al. v. N.Y. State*, 29 A.D.3d 9, 811 N.Y.S.2d 136 (3d Dep't 2006), one of the companion cases to *Hernandez*.
2. *Id.* at 396 (Kaye, C.J., dissenting).
3. Indeed, since the Court of Appeals's decision in *Hernandez*, the California Supreme Court upheld the right of same-sex couples to marry in that state in an opinion that is replete with citations to Chief Judge Kaye's language and analysis from her dissent in the marriage cases. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 430, 43 Cal. 4th 757 (Cal. 2008) ("In this regard, we agree with the view expressed by Chief Judge Kaye of the New York Court of Appeals in her dissenting opinion in *Hernandez* . . . '[f]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'") (citations omitted); *id.* at 451 ("As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez* . . . '[t]here are enough marriage licenses to go around for everyone.'") (citations omitted).
4. *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995).
5. Such controversy is apparent in the language used by the dissent in *In re Jacob* such as its description of the "at-will" nature of the relationships of gay and lesbian couples who, unlike straight, married couples, "cohabit[ ] only day-to-day." *In re Jacob*, 86 N.Y.2d at 669 (Bellacosa, J., dissenting).
6. *Id.* at 656.
7. *Id.*
8. *Id.* at 659.
9. *Id.* at 657–58.
10. *Id.* at 657 (citation omitted) (emphasis added).
11. *Id.* at 662.
12. *Id.* at 664.
13. *Id.* at 668–69 (citations omitted).
14. *Id.* at 669.
15. 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991).
16. *Id.* at 657–58.
17. As a practical matter, the Court's decision in *Jacob* resolved the dilemma posed by *In re Alison D.*:

> Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody. . . . Indeed, viewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *Matter of Alison D.*

In re Jacob, 86 N.Y.2d at 659 (Kaye, C.J.).

18. Judith S. Kaye, *State of Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 5, 6 (1995).
19. *Id.* at 25, 26.
20. One of the best examples of Judge Kaye's keen sensitivity to the situation of the litigants in the cases before her is this moving language from her dissent in the same-sex marriage cases:

> For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives. They, like plaintiffs, grew up hoping to find that one person with whom they [could] share their future, eager to express their mutual lifetime pledge through civil marriage. Solely because of their sexual orientation, however – that is, because of who they love – plaintiffs are denied the rights and responsibilities of civil marriage. This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.

Hernandez v. Robles, 7 N.Y.3d 338, 380, 821 86 N.Y.S.2d 770 (2006) (Kaye, C.J., dissenting).

21. Kaye, *supra* note 18 at 34.

Jamaica Public Service Co., 1998

By Jeremy R. Feinberg

Given that my current role in the New York State Unified Court System largely involves issues of ethics, it makes sense to call attention to a significant ethics-related opinion that Chief Judge Kaye authored during my clerkship: *Jamaica Public Service Co. v. AIU Insurance Co.*[1] The issue presented in that case – a motion to disqualify a law firm representing a party resulting from the possibility that one attorney at the firm possessed confidences and secrets of the other party – is the sort of question that gives even seasoned ethics practitioners pause, if not a need to reach for a bottle of aspirin. Yet the Chief Judge, writing for a unanimous Court of Appeals, resolved the issue in a way that not only disposed of the matter before the Court, but set forth and reinforced a clear and simple standard that has made addressing such issues easier going forward.

Jamaica Public Service involved an insurance dispute in the aftermath of a boiler explosion. The plaintiff-insured sought to recover the difference between what it alleged it had been promised in insurance coverage and what it had already been paid under its policy – $15.5 million. As the parties wrangled over the identities and roles of the various entities involved in insuring the plaintiff, the parties' corporate structure quickly became an issue. Having served a summons and complaint on what it thought was the proper defendant, the plaintiff "urged that service of process on [the initial defendant] should also be deemed service on [the allegedly proper parties]."[2]

To refute a claim that the plaintiff "should have known" and served the proper parties in the first instance, the plaintiff submitted a short affidavit from one of its outside counsel, who had once worked for one of the insurance companies in the same insurance group as the defendant. The affiant averred that the insurance companies involved had a confusing corporate structure that was neither well known nor understood in the industry.[3]

The defendant promptly moved to disqualify the law firm on the theory that the affiant's former employment as an in-house counsel for a related insurance company gave him access to confidences and secrets of both the current and potential defendants. Now that the affiant was working for its adversary, the defendant argued, there was a real and substantial danger that such confidences would be used in litigation. The affiant submitted a second affidavit, indicating he never worked for any of the entities involved in the current litigation, had not learned any confidential information, and had not used information of that kind in his first affidavit. The motion court nonetheless disqualified the firm, and the Appellate Division affirmed, certifying the question of whether its order was properly made to the Court of Appeals.[4]

The Court applied a three-part test (set forth in a prior decision the Chief Judge authored)[5] to determine whether disqualification was appropriate under DR 5-108(A)(1): (1) Was there an attorney-client relationship between the moving party and the opposing counsel? (2) Were the matters in both the current and former representations

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substantially related? And (3) were the interests of the present and former client materially adverse?[6]

In reversing the Appellate Division, the Court of Appeals focused on the second prong of this test. The Chief Judge wrote that the defendant "failed to show that [outside counsel's] prior representation was 'substantially related' to his current representation," noting that the outside counsel's affidavit stated that he had done no work with the entities or types of claims at issue in this case and, in fact, the defendant's own affidavits only confirmed these key facts.[7] Under the circumstances, the Court held that there could be no violation of DR 5-108(A)(1).

Interestingly, the Court of Appeals could have, but did not, squarely address the first prong of the test: whether or not there was a former attorney-client relationship between the moving party and opposing counsel. Instead, Chief Judge Kaye assumed that such a relationship existed and expressly left open "for another day" the question of whether "employment by one entity in a large corporate family was tantamount to an attorney-client relationship with other members of that family."[8] One possibility is that the allegedly complex corporate structure of the defendant – the key issue leading to the affidavits challenged on the disqualification motion – did not present the best facts for exploring this knotty issue.

As is normally the case in disqualification motions, the movant asserted multiple grounds for attempted disqualification. Thus, the defendant also argued that it was entitled to relief because outside counsel allegedly "violated DR 5-108(A)(2)'s bar against disclosure or use of a former client's confidences and secrets."[9] Again assuming, without deciding, that there was a past attorney-client relationship, the Court took the opportunity to define and apply the exception afforded in DR 5-108(A)(2): A former lawyer may divulge a former client's confidences and secrets without violating a disciplinary rule when they have become "generally known."[10] Here, the Court of Appeals concluded that because the information provided about the defendant's corporate structure and its member companies "was readily available in such public materials as trade periodicals and filings with State and Federal regulators," it was "generally known" and therefore including that information in an affidavit, as the affiant had done, could not support disqualification.[11]

Finally, the defendant argued that there was "a reasonable probability of disclosure" of a former client's confidences and secrets sufficient to justify disqualification. The defendant submitted statements of the affiant's former supervisors to the effect that he "had access to confidences and secrets" and that there was a "real and substantial danger" that the information would be used in litigation.[12]

Chief Judge Kaye rejected this argument as well. Recognizing that disqualification motions are often used as strategic weapons, the Court held:

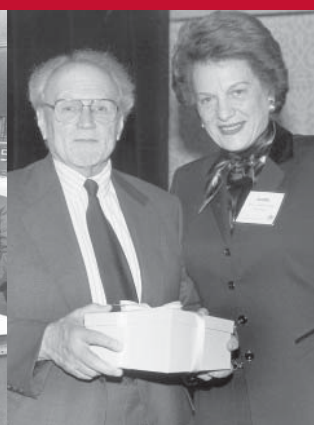
> Allowing a party seeking disqualification to meet its burden by generalized assertions of "access to confidences and secrets" would both make it difficult, if not impossible, to test those assertions and encourage the strategic use of such motions. In such instances, courts could not determine whether a former attorney's alleged information was in fact a "confidence" or "secret" as defined by the Code or whether it was generally known and therefore outside the scope of DR 5-108(A)(2).
>
> While a movant need not actually spell out the claimed secrets and confidences in order to prevail, it must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5-108(A)(2) would be violated.[13]

Thus, in rejecting the defendant's attempt to disqualify the plaintiff's counsel on the facts before it, the Court of Appeals, through Chief Judge Kaye, set some bright lines for the lower courts to follow in assessing similar motions under DR 5-108(A)(1) and (2) in the future. More than 50 cases have cited *Jamaica Public Service* since its issuance, largely to address these very issues.

The *Jamaica Public Service* decision is in truth only a small part of Chief Judge Kaye's ethics legacy. She has authored many opinions for the Court that touch on attorney ethics, and in so doing has helped define the role and impact of the Disciplinary Rules in ordinary civil and criminal litigation. But even the entire body of ethics decisions issued by the Court of Appeals during her tenure does not constitute the extent of her influence in this area. It really is her character and example – not just her reported decisions or even the rules, policies and programs she has established as Chief Judge – that have inspired so many attorneys to strive to do what is *right* rather than what is merely expedient. I do not and cannot claim to be perfect, but to the extent that I have any genuine understanding of what it means to be an ethical lawyer, she rightfully deserves much of the credit. She has my warmest admiration as an ethical role model, and my affection, always. ■

1. 92 N.Y.2d 631, 684 N.Y.S.2d 459 (1998) (Kaye, C.J.).
2. *Id.* at 634.
3. *Id.*
4. *Id.* at 635–36.
5. *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996) (Kaye, C.J).
6. *Jamaica Pub. Serv.*, 92 N.Y.2d at 636.
7. *Id.* at 636–37.
8. *Id.* at 636.
9. *Id.* at 637.
10. *Id.*
11. *Id.* at 637–38.
12. *Id.* at 638.
13. *Id.*





Kihl, 1999, and Its Progeny

By Jennifer G. Schecter

"Membership in the Bar Is a Privilege Burdened With Conditions"[1]

No recent decision underscores the importance of following court orders and adhering to deadlines more than *Kihl v. Pfeffer*.[2]

In *Kihl v. Pfeffer*, the plaintiff appeared for a preliminary conference and consented to an order requiring her to respond to the defendant's interrogatories "within 30 days following receipt of same."[3] Five months beyond the prescribed deadline, urging that it was unable to prepare its defense without the requested disclosure, the defendant moved to strike the complaint or alternatively to compel the plaintiff to respond to its interrogatory demands within 10 days. The plaintiff opposed the motion and, approximately eight months after they were due, served responses. The defendant nonetheless pursued dismissal, arguing that the plaintiff's answers were "'woefully inadequate and totally unresponsive.'"

Agreeing with the defendant, the supreme court granted dismissal unless the plaintiff served more comprehensive answers to 14 specified interrogatories within 20 days after service of a copy of the court's order on counsel. The trial court, in all, afforded the plaintiff over a year to provide meaningful responses to the defendant's interrogatory demands.

The defendant served the order on all parties by mail. Despite two reminders of the court order from defense counsel, the plaintiff's attorney insisted that service had not been effected and failed to further respond.

Several months later, wary of dismissing a case without addressing its merits, the supreme court reserved issuing a final dismissal order pending review of the service issue. Each side submitted opposing affidavits.[4]

Almost two years after the parties' preliminary conference, the court dismissed the complaint. A divided Appellate Division affirmed, with two justices dissenting because they would have required a hearing related to service of the conditional-dismissal order.

Writing for the unanimous Court of Appeals, Chief Judge Kaye succinctly explained that service of the initial order was complete when defense counsel mailed it and that the properly executed affidavit of service raised an unrebutted presumption of proper mailing.

More significant, Chief Judge Kaye drew attention to the problem of noncompliance with court orders, explaining that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint."[5] Chief Judge Kaye emphasized that if "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity," and made clear that "compliance with a disclosure order requires both a timely response and one that evidences a good-faith effort to address the requests meaningfully."[6]

To legal scholars, *Kihl v. Pfeffer* may not have seemed monumental. To practitioners and the courts, however, the decision would have enormous impact as reflected by its citation in

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hundreds of decisions and orders. *Kihl* affirms the importance of following procedural rules, which ultimately bear on the ability to have cases heard on their merits.

Indeed, five years later, expanding on *Kihl*, Chief Judge Kaye reaffirmed the importance of meeting deadlines, this time, in the context of late summary-judgment motions. In *Brill v. City of New York*, the Brills sued New York City after Ona Brill tripped and fell on a sidewalk.[7] The city moved for summary judgment almost a year after the plaintiffs filed their note of issue and certificate of readiness, which had signaled that the case was ready for trial.[8] Despite CPLR 3212(a)'s requirement that unless a court sets a different date or time frame, "such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown," the city offered no explanation for its lateness in moving, and instead focused on the motion's undeniable merit.[9] Supreme court granted the untimely motion, thereby dismissing the action, and the Appellate Division affirmed.

Exalting the benefits of summary-judgment motions, which avoid "needless litigation cost and delay" and benefit both the parties and "the overburdened New York State trial courts,"[10] Chief Judge Kaye recounted that the Legislature enacted the summary-judgment deadline in response to problematic, eve-of-trial motions that prejudiced litigants who had already prepared for trial. The practice of filing late summary-judgment motions, Chief Judge Kaye wrote, persisted even after the statutory time limit was imposed and courts disagreed on whether the merit of a motion was sufficient to satisfy the "good cause" requirement for excusing untimeliness or whether the movant had to establish a satisfactory reason for its lateness to proceed. Writing for a majority of the Court,[11] Chief Judge Kaye made clear that "CPLR 3212(a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy."[12]

Chief Judge Kaye next turned to the "more vexing issue": What to do when there is no good cause for the delay but the motion has merit and, if timely made, would have obviated the need for a trial?[13] Citing *Kihl v. Pfeffer*, Chief Judge Kaye declared that the scenario presented "another example of sloppy practice threatening the integrity of our judicial system." Chief Judge Kaye emphasized that

> [i]f this practice is tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated. If, on the other hand, the statute is applied as written and intended, an anomaly may result, in that a meritorious summary judgment motion may be denied, burdening the litigants and trial calendar with a case that in fact leaves nothing to try. Indeed, the statute should not "provide a safe haven for frivolous or meritless lawsuits," which is precisely why practitioners should move for summary judgment within the prescribed time period or offer a legitimate reason for the delay.

* * *

What is to happen in this case is that summary judgment will be reversed and the case returned to the trial calendar, where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial. Hopefully, as a result of the courts' refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that "good cause" means good cause for the delay, and because movants will develop a habit of compliance

with the statutory deadlines for summary judgment motions rather than delay until trial looms.[14]

Kihl's and *Brill*'s message to a "delay-oriented culture": "honor the deadlines, whether statutory or court-ordered."[15]

Safeguarding Fairness

Other decisions Chief Judge Kaye wrote also highlight the important role that lawyers and jurists play in safeguarding fairness. In *People v. Santorelli*,[16] for example, the Court of Appeals reviewed prosecutors' duties to turn over certain information to the defense. Chief Judge Kaye called attention to the fact that

> [p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities – constitutional, statutory, ethical, personal – to safeguard the integrity of criminal proceedings and fairness in criminal process.[17]

Additionally, in *People v. Johnson*,[18] addressing the importance of fair and impartial jurors to the integrity of trials, Chief Judge Kaye, writing for a majority of the Court,[19] gave useful guidance to judges and articulated a clear rule prohibiting use of equivocal jurors absent a clear statement that any prejudice or predisposition could be put aside. Chief Judge Kaye wrote:

> When potential jurors themselves say they question or doubt they can be fair in the case, Trial Judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate.[20]

In sum, judicial opinions authored by Chief Judge Kaye demonstrate her deep concern for how law is practiced – with integrity and respect for proper procedure – and how judges safeguard the fairness of proceedings.

"Method Is Much, Technique Is Much, But Inspiration Is Even More"[21]

My lessons from Chief Judge Kaye are more personal. Chief Judge Kaye's commitment to the courts – including judges, non-judicial employees and, of course, members of the public – has had a tremendous impact on my life, inspiring me to pursue a career in the courts and encourage others to do the same. Chief Judge Kaye has worked tirelessly, often arriving in chambers before sunrise and leaving long after sunset, to make the courts more efficient and more responsive. She thinks out of the box and was instrumental in establishing innovative problem-solving courts so that justice could be more accessible and its goals better achieved. Chief Judge Kaye taught me to write right (always use plain language, double dashes are very useful), dress right (every woman should own red shoes), and eat right (there's no such thing as too much chocolate); and she continues to teach me, by example, to be right by always striving to improve, contributing to society and working hard to bring about positive change. Her opinions shed light on how to be a good lawyer and a good judge. Her actions demonstrate how to be a great leader and a great person.

Chief Judge Kaye will leave very big red shoes to fill. ■

1. *In re Rouss*, 221 N.Y. 81, 81, 116 N.E. 782 (1917) (Cardozo, J.).
2. 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
3. *Id.* at 120.
4. *Id.* at 122.
5. *Id.* (citation omitted).
6. *Id.* at 123 (citation omitted).
7. *Brill v. City of N.Y.*, 2 N.Y.3d 648, 650, 781 N.Y.S.2d 261 (2004).
8. *Id.*
9. *Id.* at 654.
10. *Id.* at 651.
11. Judge George Bundy Smith dissented.
12. *Brill*, 2 N.Y.3d at 652.
13. *Id.*
14. *Id.* at 653 (citations omitted).
15. "Postscript by Chief Judge Judith Kaye" *in* Patrick M. Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions on* Brill*'s Stroll Through Brooklyn and the Dramatic Effect It Has on New York State's Civil Practice*, 71 Brook. L. Rev. 1529, 1531 (2006); *see also Andrea v. Arnone*, 5 N.Y.3d, 514, 521, 806 N.Y.S.2d 453 (2005) (R.S. Smith, J.) (citing *Kihl* and *Brill* and concluding that litigation "cannot be conducted efficiently if deadlines are not taken seriously . . . disregard of deadlines should not and will not be tolerated").
16. *People v. Santorelli*, 95 N.Y.2d 412, 718 N.Y.S.2d 696 (2000), *aff'd*, 4 Fed. Appx. 78 (2d Cir. 2001).
17. *Id.* at 420–21.
18. *People v. Johnson*, 94 N.Y.2d 600, 709 N.Y.S.2d 134 (2000).
19. Judges Bellacosa and Wesley dissented.
20. *Johnson*, 94 N.Y.2d at 616.
21. Benjamin Cardozo, *The Game of the Law in* Law Literature and Other Essays and Addresses 163 (1931).

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Campaign for Fiscal Equity, 2003

By Matthew J. Morris

In *Campaign for Fiscal Equity, Inc. v. State of New York* ("*CFE II*"),[1] the Court of Appeals held that the state of New York had violated the Education Article of the New York State Constitution[2] by failing to provide a sound basic education to the schoolchildren of New York City, and directed the state to undertake measures to remedy that failure. The decision elicited comments from government leaders in Albany and New York City, and from educators, scholars and journalists. These reactions, in many instances, focused on the political impact of the decision and the perceived "bottom line" question of how much more money the state would have to appropriate to meet its constitutional mandate. As law clerk to Chief Judge Kaye, I had the privilege of assisting her in preparing the majority opinion, and I would like to take this occasion to discuss the place of *CFE II* in the Court's jurisprudence during her tenure.

CFE II opens with a quotation of the constitutional language under which the plaintiffs sued and a review of previous education funding litigation in New York,[3] including the Court's previous decision in the *CFE* case. That decision – *CFE I* – requires some attention if *CFE II* is to be understood.[4] In the first generation of state constitutional school funding litigation, the Court of Appeals had rejected the claim that inequalities in funding between school districts alone could render a funding system unconstitutional, but left open the possibility of a claim that the state failed to provide a sound basic education.[5]

In a state with some excellent public schools, this meant that, thereafter, any viable Education Article claim would inevitably focus on local rather than systemwide failings. That constraint would later be overlooked by advocates of a statewide remedy, beginning with Judge Smith in his *CFE II* concurrence.[6] By beginning with an overview of the law, the *CFE II* majority made clear what the Education Article mandates and what approaches are available to the judiciary when called upon to adjudicate a case involving that mandate. I think the aspiration to start from common ground and with clarity is characteristic of Chief Judge Kaye's jurisprudence.

Perhaps because they knew that they could not prevail by demonstrating systemwide inequalities, the *CFE* plaintiffs focused on the adequacy of public schooling in New York City, which, as the *CFE II* majority noted, presented a unique combination of high student need, high local costs, low funding, and poor results.[7] In *CFE I*, deciding a motion to dismiss, the majority concluded that the plaintiffs had stated a claim for relief under the Education Article, and it set forth guidelines for the parties to follow when proving their cases.[8] The *CFE I* dissent and concurrence both set forth weighty criticisms of the framework under which the Court directed the parties to proceed, but after that directive had been issued and the case had

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been tried, the courts were obligated to adjudicate it under the ground rules the *CFE I* court had outlined.[9] That obligation remains steadily in view in the majority opinion in *CFE II*.[10]

After *CFE I*, the parties did exactly what the Court instructed them to do. They built a trial record consisting of tens of thousands of pages of exhibits and testimony on the educational "inputs" the state delivered to city schoolchildren (such as class size and teacher pay); the "outputs" (such as test results and graduation rates); and the causal relationship (or lack thereof) between funding levels and outputs.[11] After a bench trial, supreme court held for the plaintiffs.[12] The Appellate Division reversed on the law and the facts.[13]

The Appellate Division held that the constitutional requirement to deliver a sound basic education is met when schoolchildren receive the skills that are imparted between eighth and ninth grade.[14] Reversing this holding, the Court of Appeals concluded that a sound basic education meant a "meaningful high school education" that afforded children the essentials identified in *CFE I* and the opportunity to function as civic participants.[15] The Court thus rejected both the startlingly low standard espoused by the state and the Appellate Division, on the one hand, and the argument of some *amici*, on the other, that the standard should be the Learning Standards adopted by the State Board of Regents in 1996 – which are essentially a college preparatory curriculum. Although some commentators would later suggest that the Court should have stated a more specific standard, the Court was expounding a constitution under which the law would have to continue to evolve.

Having addressed the standard, the Court turned to the application. Because the Appellate Division had substituted its own findings of fact for those of the trial court, the Court of Appeals was required to determine which lower court's findings more nearly comported with the credible evidence.[16] This was a rare situation, for the Court is normally limited to the review of questions of law. The Court concluded that the educational inputs were inadequate and the outputs unsatisfactory.[17] The Court further concluded that these results were causally connected to poor funding – and not, as the state argued, ascribable to the educational disadvantages of city schoolchildren or the failings of city government.[18] As the Court said, it could not "accept the premise that children come to the New York City schools ineducable, unfit to learn."[19] All of the Court's conclusions were grounded in the exhaustive record under review, and I believe that anyone who studies that record in earnest would be hard pressed to disagree with them.

The Court gave the Legislature a year in which to begin to implement a remedy, beginning with a determination of what it would cost to deliver a sound basic education to city schoolchildren.[20] Here again, some would have preferred a more specific directive, but the Court's remedial discussion was guided by the conviction that the Court had "neither the authority, nor the ability, nor the will to micromanage education funding," yet equally that it could not abdicate its duty to "define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."[21] The Court had a specific controversy before it, which it resolved with as much restraint and deference to the political branches as the record and the state constitution allowed.

Only five judges formed the *CFE II* court: Chief Judge Kaye, and Judges Smith, Ciparick, Rosenblatt and Read.[22] The Court of Appeals, unlike the United States Supreme Court, cannot decide a case on a mere plurality. It must have a four-vote majority, and if, due to recusals and disagreements, it had split 3-2, one or two judges from the Appellate Division would have had to be impaneled to ensure a majority. The five judges who decided *CFE II* included three Cuomo appointees who live in New York City and two Pataki appointees who live upstate. Anyone who thinks that judges' votes can be predicted based on partisan affiliation or similar factors would have expected the *CFE II* court to split badly and require the addition of judges from the Appellate Division. The potential for sharp divisions of opinion in constitutional education funding cases is apparent from the trail of dissents and concurrences mentioned in the footnotes hereto. Nevertheless, Chief Judge Kaye assembled a four-judge majority for this difficult case, which is a tribute to her own leadership as well as to the characters of the other judges involved. ■

1. 100 N.Y.2d 893, 769 N.Y.S.2d 106 (2003).
2. N.Y. Const. art. XI, § 1.
3. *CFE II*, 100 N.Y.2d at 901–902.
4. *Campaign for Fiscal Equity, Inc. v. State of N.Y.*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995) ("*CFE I*"). Chief Judge Kaye recused herself from *CFE I*.
5. *See CFE II*, 100 N.Y.2d at 902 (discussing previous cases); *CFE I*, 86 N.Y.2d at 315–16; *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643 (1982).
6. *CFE II*, 100 N.Y.2d at 932 (Smith, J., concurring).
7. *Id.* (majority opinion).
8. *CFE I*, 86 N.Y.2d at 314–19.
9. *Id.* at 324–32 (Levine, J., concurring in the result); *id.* at 332–44 (Simons, J., dissenting in part).
10. *See, e.g.*, *CFE II*, 100 N.Y.2d at 905–908, 918–21, 924–25. By contrast, the dissent reads in places like a motion to reargue *CFE I*. *See id.* at 950–51 & n.4 (Read, J., dissenting).
11. *Id.* at 902–903.
12. *Campaign for Fiscal Equity, Inc. v. State of N.Y.*, 187 Misc. 2d 1, 719 N.Y.S.2d 475 (Sup. Ct., N.Y. Co. 2001).
13. *Campaign for Fiscal Equity, Inc. v. State of N.Y.*, 295 A.D.2d 1, 744 N.Y.S.2d 130 (1st Dep't 2002).
14. *See CFE II*, 100 N.Y.2d at 906 (citing *Campaign for Fiscal Equity, Inc.*, 295 A.D.2d at 8).
15. *Id.* at 907–908.
16. *Id.* at 903; CPLR 5501(b).
17. *CFE II*, 100 N.Y.2d at 908–19.
18. *Id.* at 919–25.
19. *Id.* at 921.
20. *Id.* at 925–31.
21. *Id.* at 925.
22. Judge Graffeo recused herself and Judge Wesley, who participated at oral argument, became a judge on the United States Court of Appeals for the Second Circuit before the case was decided.

BY DAVID PAUL HOROWITZ

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Some Deposition Nuts & Bolts

To close out 2008, I return to a topic that has been covered often in this column,[1] as well as other legal publications too many to count: depositions.

First, let's all agree to stop calling Part 221 of the Uniform Rules[2] the "new" deposition rules. When I was 12, I moved to a different neighborhood in the Bronx. For the next two years or so, until another kid moved into the neighborhood, I was the "new" kid. I thought that was ridiculous, and because the deposition rules have been around for over two years now, it is time to retire the prefix "new." Doing so should curb the plea for mercy by a deposition scoundrel: "The rules are 'new,' I didn't know."

Practitioners, with little prodding, will acknowledge there are still members of the bar who are not complying with the rules. This revelation is as shocking to active litigators as was the "discovery" by Captain Renault that there was gambling going on at "Rick's American Café."[3]

In light of this sad fact, it is best to be prepared. Prepare yourself for an encounter with an old dog wielding old tricks. Once bitten, twice shy, is not the solution for attorneys battered by an obstreperous[4] opponent. If you have been abused in the past, you can arm yourself to avoid a repeat "beat down" at your next deposition. Just as every [deposition] dog has his [or her] day, so too, beleaguered, battered, and bothered deposing attorneys can have their day as well, and send that old dog packing.

I do not advocate using every technique at every deposition, and I advocate, whenever possible, working out differences and misunderstandings with your adversary. I also have no problem with a reasonable, mutual, relaxation of the rules, so long as it is relaxed for both sides. On occasion I have even been known to enjoy a bit of collegial deposition colloquy, bantering, and colorful objections, even when I have been on the receiving end. For example, when my adversary and good friend from Richmond, Virginia, Tom Wolf,[5] voiced objection to a question I posed to his client in a federal class action deposition, I asked him for the basis of his objection. "Stupid question," he replied. Upon reflection, I realized he was right and re-phrased my question.[6]

No, these techniques are reserved for those times when an adversary flouts the rules, disparages and denigrates you, your witness, or your case, or otherwise causes the return of the facial tic you last experienced during the bar exam.

Like the multitude of tools I have sitting in my garage, unused and, over time, misplaced, these deposition techniques will only have a positive impact on your deposition practice if you actually use them.

Now, some tips on how to defang your adversary.

Make the Motion

Countless times, in countless depositions, attorneys, stymied by their adversary, snap at the unoffending court reporter: "Mark that for a ruling." Why? They are signaling their intention to take the issue, whatever it is, up with the court. Is your tormentor worried? Not likely, since nine times out of 10, or 99 times out of 100, the threat of making a motion is a toothless one, because the vast majority of attorneys never make the motion.

Alternatively, and all too often, an attorney misbehaves at a deposition and the well-intentioned adversary grimly soldiers on, or "grins and bears it." Newsflash: you don't need to grin and bear it, and doing so simply permits the misbehaving attorney to avoid any adverse consequence for bad behavior. This encourages the offender to re-offend.

Discussing this tactic first may seem like putting the cart before the horse. However, making the deposition motion is the ultimate tool to accomplish your goal of obtaining all necessary disclosure to which you are entitled from a deposition where your efforts have been thwarted. Besides, making the motion, and prevailing, offers some measure of validation and vindication.

I do not advocate motion practice for each and every infraction or slight. Instead, be prepared to follow up on the "mark it for a ruling" threat and actually make a motion when your adversary crosses the line (like pornography, you will know it when you see it). The "line" is what separates a professional deposition that, while adversarial, enables you to obtain the information you are seeking, from a nightmarish one, replete with witness coaching, *ad hominem* attacks, and

long-winded comments where you are unable to accomplish your goals.

Don't Go Off the Record

We all know that depositions are designed to preserve testimony. What some of us forget is that the mechanism that makes this possible, the court reporter carefully transcribing that testimony, can also be utilized to preserve bad behavior for review. In order for this to happen, the court reporter must be transcribing. Hence, when dealing with an obnoxious, obstreperous,[7] or otherwise repellent adversary, make certain that the court reporter continues to transcribe everything that is said in the deposition room. The way to do this is to instruct the court reporter that you do not, and will not, consent to go off the record until the deposition is completed or adjourned.[8]

Now, in the face of this instruction, your adversary may entreat you to go off the record so that "everything can be worked out." Think about it. The person who has been tormenting you for [fill in the blank] hours now, all of a sudden, is proposing to have a civil discussion, off the record. Acquiescence to such a proposal is akin to getting married after a divorce: the triumph of hope over experience.

Don't be naïve. Politely inform your adversary that you, too, want to work things out so that the remainder of the deposition proceeds smoothly and without rancor. State your willingness to work together towards this goal, but only "on the record."

Ask What the Objection Is

It was always my position before the implementation of Part 221 that if I asked an attorney to state the form or other objection to a question I posed, and the objector declined to explain the objection, the objection was waived.

While Part 221 does not explicitly say the objection is waived if an explanation is not given, the rules do require that, upon the request of the questioning attorney, and only upon request, the objecting attorney "shall include a clear statement as to any defect in form or other basis of error or irregularity."[9] Imposing the requirement of explaining the objection, without the corresponding penalty of waiving the objection for failing to do so, would render the requirement meaningless. The drafters of Part 221 cannot possibly have intended such a result.

Don't be afraid to ask the basis for the objection, particularly if the question you have posed is an important one, and you are less than 100% certain that your question is totally unobjectionable. Often, the objecting attorney will be unable to articulate an objection, having reflexively stated "objection" without thought or reflection. You may then leave your question as is, confident that with no explanation for the objection, the objection is waived. Just as often, the objecting attorney will articulate a meaningful objection, and, if you are like me, you will find, from time to time, that your question was, in fact, problematic in some way. Carefully considering the explanation your adversary offers for an objection will help you conduct a better deposition.

My favorite scenario is where the objector objects, I ask what is wrong with the question, the objector suggests an alternative question, I ask the alternative question, and the objector objects again. Oh well. . . .

Limit Loquacity

The strongest impetus for the enactment of Part 221 was, undoubtedly, the widespread abuse of the "speaking objection." The rules now require that any objection be stated succinctly and so as not to suggest an answer to the question to the witness.

The first time your adversary's objection spills beyond a reasonable word count, politely remind the objecting attorney that the rules require that objections be stated succinctly and so as not to suggest the answer. Your opponent will either: (a) deny vehemently that an answer was being suggested; (b) state that he or she will make every damn objection he or she sees fit, and in the manner he or she sees fit; or (c) will state, in spite of a stenographic word count in triple digits, that the objection was succinct. Notice that "(d)" – will recognize the error of his or her ways and object in accordance with the rules thereafter – is not a choice.

From then on in, remind your opponent of the rule, the nature of the violation of the rule, and the penalty you will seek if the conduct continues. Wait, patiently, until there is an objection so clearly suggestive of an answer, or otherwise so "over the top," and then call the court for a ruling or adjourn the deposition to make a motion.

Conclusion

New York State's deposition rules, in both letter and spirit, provide a framework for depositions to be conducted in an effective manner in a civil setting. You deserve nothing less, and these tools are there to ensure you get what you deserve. ■

1. As well as being the subject of one of my first-ever CLE programs, "Dynamic Depositions," in March of 1996 for the NYCLA Chapter of the American Inns of Court. Upon re-reading these 12-year-old materials, I was reminded how little, in deposition practice as well as so many other aspects of practice and life, things change.

2. 22 N.Y.C.R.R. §§ 221.1–221.3.

3. *Casablanca*.

4. "Obstreperous" appeared on my "Word A Day" calendar, and I was determined to use it in a sentence.

5. No, not the *Bonfire of the Vanities* author; that's Tom Wolfe.

6. I did the same when, once again asked by me for the basis of his objection to my question, Tom stated on the record "too many words."

7. *See supra* note 4.

8. However, even this can be carried to an extreme, and put the court reporter in a difficult position performing unnecessary work. Once, during the same federal class action litigation referred to above, co-plaintiff's counsel, a teacher at an area law school's constitutional law clinic, after the parties requested a conference with the magistrate for a ruling in a deposition being conducted in the courthouse, insisted that the court reporter keep transcribing everything that was said by counsel during the half hour or so until the magistrate took the bench. The result: page after page of discussions between the witnesses concerning the weather, sports, upcoming vacations, etc. Needless to say, the magistrate did not look kindly upon this direction.

9. 22 N.Y.C.R.R. § 221.1(b).

A Whole Different Ballgame . . . Or Is It?

Medical Malpractice and the Modern-Day Athlete

By Tara R. Di Luca

A 28-year-old marathon runner collapses and dies five-and-a-half miles into the U.S. Olympic men's marathon trials in New York City. A college football player in Tennessee receives two blows to the head, which result in brain injury. A professional boxer suffers a fatal head injury during a boxing match in New York City. A 21-year-old college lacrosse player in Pennsylvania suffers a fatal cardiac arrhythmia during practice. These all-too-familiar tragedies occur nationwide to athletes competing at all different levels, and who are from different ethnicities and different backgrounds. They are young, healthy and active individuals, promising stars, role models and mentors. These are stalwart athletes suffering sudden death. What happened? How did this happen? Why did this happen? Is anyone responsible? These seemingly simple questions become legal and medical anomalies, as families, friends, teammates and fans are left to piece together the medical and legal puzzle.

A topic of broadening interest in the legal realm of medical malpractice involves the standard of medical care given to an athlete by team physicians and athletic trainers in the setting of high school, collegiate and professional athletics. Ironically, given the amazing amount of public interest in sports, this area of law is very new, with many unresolved legal issues; it lacks any overwhelming legal precedence regarding physicians' potential malpractice in treating athletes.[1] For the cases that eventually did reach the courtroom, courts have applied general medical malpractice principles in actions brought against physicians and athletic trainers for alleged negligent medical treatment of athletic injuries.[2]

The Team Physician

Sports medicine is a relatively newly recognized subspecialty of medicine. Without confusing "newly" with "recognized," the origins of sports medicine date as far back as ancient Greece and Rome. However, it was not until the 1972 Summer Olympics in Munich that a true medical team accompanied a nation's athletes. Subsequently, other countries followed this Canadian "phenomenon" and assigned medical teams to their own Olympic athletes.

Sports medicine is a unique facet of the medical field, focusing on the prevention, diagnosis, and treatment of injuries in athletes. This field encompasses vast medical specialties. Team physicians are often specialists in areas such as family practice, internal medicine, ortho-

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pedic medicine, cardiovascular medicine or neurological medicine.[3]

Standard of Care

Before a defendant can be found liable for negligence, a duty must be found to exist between the tortfeasor and the plaintiff and a breach of that duty must occur, which breach proximately causes the plaintiff's injuries.[4] When a case presents allegations of medical malpractice against a team physician, a physician-patient relationship must be established first before the physician can be held liable for negligence. In *Scottland v. Duva Boxing*,[5] the court found that a physician-patient relationship was created where the defendants were retained as ringside physicians during a boxing match. In this capacity, they were charged with the duty to exercise reasonable medical care and to provide an ongoing medical diagnosis of the athlete's physical condition throughout the match. The court found that a boxer could reasonably expect that a ringside physician would call the match if necessary to protect his or her well-being and attend to any injuries the boxer sustained during the match. The physician's duty extended to monitoring the physical conditions of the boxing participants and practicing in accordance with good and accepted standards of medical care.

In *Kleinknecht v. Gettysburg College*,[6] the court found that a special relationship existed between the college and the athlete simply by the fact that the college had actively recruited the athlete to play lacrosse. The court found that this relationship created a duty to provide *prompt* emergency medical services to a lacrosse player who suffered a fatal arrhythmia.

Since an athlete's participation in college or professional athletics is relatively short, a team physician's main purpose should be to protect the health and safety of each individual athlete without the unnecessary restriction of athletic activity.[7] It is imperative that the interests of the individual athlete are balanced with the interests of the team as a whole. This balancing act requires that physicians be competent in preventing and treating injuries and in assessing whether and when an athlete is medically capable of returning to play. Specific duties of a team physician may include providing pre-season physical examinations, diagnosing, treating and rehabilitating athletic injuries, referring athletes to appropriate specialists if needed, providing medical clearance to athletes to play the sport and informing athletes of the risks involved when returning to play. Team physicians are subject to unique external pressures that may affect their ability to properly assess a particular athlete's condition. A physician's medical judgment must not be clouded by pressure from coaches, the team, school administration and even the injured athlete in assessing whether the athlete should be cleared to return to play.

In medical malpractice suits involving team physicians, the recent trend is to apply a national standard of medical care.[8] Courts have been hesitant to apply the traditional locality rule in favor of a more uniform national standard, reasoning that appropriate treatment should not vary with the geographic location of where the treatment is rendered. Athletic teams travel to different geographical locations, and it would be irrational to vary the standard of care an athlete receives as the team travels from state to state and from urban to suburban or rural areas.

Virtually instant universal access to technology and information sharing ensures that physicians have access to new and emerging medical developments. It is also important to acknowledge that some medical facilities in suburban or rural areas may not have the benefit of the latest, most sophisticated medical equipment or available specialists. However, a health care provider's lack of the latest equipment must be distinguished from a provider's failure to provide appropriate medical care by utilizing outdated treatment methods.[9]

Pre-Participation Physical Examinations

Team physicians are required by law to perform medical examinations of athletes to determine whether they are medically able to participate in a sport. An athlete's level of athletic experience could be a relevant factor in establishing whether a pre-participation physical examination is appropriate and reasonable. Professional and collegiate

athletes can expect to receive a more comprehensive exam than a high school athlete, given the strenuous physical demands on athletes at elite levels. There is no specific standard for pre-participation examinations and physical procedures.

Athletes alleging medical malpractice against sports medicine physicians often proceed on the theory that the physician was negligent in failing to discover latent injuries or physical defects.[10] In *Rosensweig v. State*,[11] the heirs of a boxing athlete who died after suffering a fatal head injury during a match claimed that the examining physicians were negligent in failing to discover the boxer's pre-existing brain injury.

The Appellate Division found that the pre-participation standard examination was appropriate and found no evidence of a brain injury or concussion.[12] In further support, the decedent's past medical history indicated no sign or symptom of any concussion or brain injury warranting any further evaluation. The examining physicians were not negligent because the decedent was provided with the customary pre-fight examination.

The court's decision in *Classen v. State*[15] was consistent with the appellate court's decision in *Rosensweig*. In *Classen*, the court similarly found that a physician who examined the athlete prior to his fight was not liable for malpractice because he had conducted an acceptable pre-participation physical and neurological examination of the boxer before clearing him to fight. The examination was deemed in accordance with standard accepted medical practices. However, in *Classen* the court held that the ringside physician could be held liable for failing to stop the boxing match where the boxer received several head blows leading to his death. The ringside physician had a duty to practice in accordance with good and accepted standards of medical care in determining whether the athlete should continue fighting.

Duty to Properly Diagnose and Treat

As with any medical care provider, team physicians have a duty to appropriately diagnose and treat an injured athlete. Expert testimony regarding the appropriate standard of sports medicine care is generally required to prove that the physician deviated from the appropriate standard. Included is the team physician's duty to conduct appropriate tests to determine the nature and severity of an athlete's particular condition. In *Gardner v. Holifield*,[16] a deceased athlete's cardiologist was held liable for failing to properly interpret two echocardiograms (ECGs) ordered to confirm an initial diagnosis of Marfan syndrome, which was made during a routine physical examination of that player.[17] The athlete died six months after the examination. The court in *Gardner* relied on expert testimony to prove medical malpractice.[18] Medical experts testified that a proper confirming diagnosis and treatment would have prevented the athlete's death and given him a normal life expectancy.

A physician's duty extends to the responsibility to refuse clearance if there is a belief that there is a significant risk of harm from participation.

The customary standard applied by the appellate court is in contrast to the alternative approach of defining the standard in terms of acceptable practice under the circumstances, given the nature of the sport of boxing and the associated risks. Evidently, this was the standard the trial court had applied.

The trial court in *Rosensweig* found the physicians had acted negligently because giving the athlete an electroencephalogram[13] and a standard pre-fight physical exam were negligent under the circumstances. (This author believes that the trial court probably took into consideration the innate nature of the sport, and the facts that the athlete was competing at an elite level and had received several blows to the head in previous fights.) Of course, expert medical testimony is essential in proving the acceptable standard of medical care. In *Rosensweig*, the appellate court refused to rely on expert medical testimony that, even though a standard examination found no evidence of a brain injury, good medical practice under these circumstances required the boxer to be withheld from fighting for two to six months due to the severe head beating he had received in a prior fight.[14] It appears that when a physician is presented with treating an athlete with a particular injury, what is considered customary may be an antiquated or outdated treatment and therefore the accepted practice standard seems to be more amenable to the current state of medicine.

Duty to Provide Proper Medical Clearance

A team physician has a duty to medically clear an athlete to return to play. This duty extends to the responsibility to refuse clearance of an athlete if there is a belief that there is a significant medical risk of harm from participation. A physician must keep the best interests of the athlete in mind in determining whether the athlete is capable of returning to play without succumbing to pressures from coaches, the administration, teammates and the injured athlete, because of the athlete's own desire to get back in the game. Athletes, by nature, are competitive and driven to succeed and most would rather play injured than "be

benched" or "red shirted" for fear of becoming the next Wally Pipp.[19]

Along with the duty to provide medical clearance, the team physician is required to inform the athlete of any material risks of playing a sport in light if his or her physical condition. In *Krueger v. San Francisco Forty Niners*,[20] a California intermediate appellate court held that a professional football team's conscious failure to inform a player that he risked a permanent knee injury by continuing to play was fraudulent concealment. The court found that the plaintiff was not informed by team physicians of the true nature and extent of his knee injuries, the consequences of steroid injection treatment or the long-term dangers associated with playing professional football with his medical condition. The purpose of this nondisclosure was to induce the athlete to continue playing football despite his injuries, thereby constituting fraud.

The Athletic Trainer

Athletic trainers have a duty to exercise reasonable care for the health and safety of student athletes.[21] An athletic trainer, as "gatekeeper," is perhaps the individual in the best position to assess an athlete's condition and report to the team physician, because the trainer is in constant contact with athletes on a daily basis. While recognizing that an athletic trainer is not a licensed physician, trainers nonetheless share many of the same duties as the team physician and may be found liable for the negligent care and treatment of an athlete. Athletic trainers are licensed in their respective states and hold themselves out to be professionals. Their legal duties may include properly assessing an athlete's condition, providing or obtaining proper medical treatment, providing medical clearance to participate and informing the athlete of the risks of athletic participation given a particular medical condition. Establishing the standard of care for athletic trainers in their treatment of athletes ordinarily requires expert testimony.[22]

An athletic trainer can be held liable for failing to refer an athlete to the proper specialist in a timely manner. In *Jarreau v. Orleans Parish School Board*,[23] a team trainer was found liable for failing to refer a football player to an orthopedist for his wrist injury until after the football season was over. The athletic trainer's failure to timely refer the athlete proximately caused permanent injury to the player's wrist.

Pinson v. State[24] is undoubtedly the leading case in setting legal precedence in sports medicine malpractice pertaining to the treatment of athletic injuries. The court recognized that a duty existed between an athletic trainer and an athlete, akin to that of a physician and athlete; the athletic trainer had a duty to report the plaintiff's neurological symptoms to the team physician and treating physician, and failure to do so proximately caused the plaintiff's injuries.

The plaintiff in *Pinson* was kicked in the head during football practice and collapsed unconscious. The athletic trainer failed to inform the emergency room physician about the neurological signs he had observed, including that the plaintiff had remained unconscious for about 10 minutes, had suffered palsy on the left side of his face and had no control of the left side of his body. Therefore, no CT scan was ordered. The plaintiff continued to complain of severe headaches in the days following his discharge. Additionally, the athletic trainer failed to inform the team physician of the plaintiff's continued headaches. The plaintiff was medically cleared by the team physician to return to play.[25] Soon after and during another practice, the plaintiff was kicked in the head a second time and collapsed unconscious. He underwent brain surgery, which revealed that he had sustained a chronic subdural hematoma of three to four weeks' duration as a result of the first blow. As a result of his injuries, the plaintiff remained hemiparetic and suffered from severe cognitive problems and frequent seizures; a shunt was placed to relieve fluid build-up in his brain.

The court found that the athletic trainer had a duty to report to the emergency room physician the neurological symptoms that the plaintiff had exhibited at the time of the first blow and to report the plaintiff's subsequent headaches to the team physician and treating physician. The failure to do so was the proximate cause of the plaintiff's injuries, the court found. *Pinson* expanded on the ruling in *Kleinknecht* that, as a college athlete, Pinson

not only enjoyed a special relationship with his college giving rise to a duty to provide prompt medical care, but the school also had a duty to provide *appropriate* medical treatment to athletes injured during regularly scheduled games or practices.

The New Rage

With the aid of physicians, trainers and coaches, news of steroid use has flooded recent headlines,[26] and brought to light many medical and legal consequences. But steroid use among athletes is not a new phenomenon. A few decades ago, in the 1976 Summer Olympic Games in Montreal, the world looked on in amazement as the East German women's swim team, otherwise known as "Wonder Girls," swept gold medal after gold medal in each of their respective events. Years later after investigations were commenced and lawsuits were filed, a former East German sports doctor admitted in a Berlin court that he had handed out anabolic steroids to coaches "as an official carrying out an order," suggesting that the order came from the doctors' commission in the national swimming association. He further testified that one of the association's doctors decided which athletes received the steroids. The coaches were then charged with administering the "little blue pills" to young female athletes as part of an East Germany state-sponsored campaign to attain athletic excellence.

Further testimony revealed that the girls were given the steroid, known as Oral-Turinabol, without their consent; they were told that the pills were vitamins. The fall of the Berlin Wall ushered in the end of the old system, and Stasi secret-police files were opened and confirmed the worst of suspicions, including details that some women were ordered to abort fetuses that might have been deformed by the drugs.[27] Years later, the women who were victims of the state-administered steroids came forward, testifying that they suffered from a host of illnesses, including ovarian cysts and other gynecological problems, cardiovascular difficulties, enlarged hearts, miscarriages, liver tumors and birth defects in their children.

A physician's duty to an athlete is to use due care not to increase the risks to a participant over and above those inherent in the sport.[28] The physicians who administered the steroids to these athletes knew or should have known that the use of steroids could cause severe injury. Legally speaking, at least under U.S. law, such conduct was clearly the proximate cause of the athletes' injuries. Morally speaking, such conduct went far beyond the bounds of illegality and was an ethical atrocity.

Quick Fixes

This leads to discussion of the use of cortisone injections and COX-2 non-steroidal anti-inflammatory medications (NSAIDs), such as Celebrex, for "quick fix, band-aid" treatments of athletic injuries.[29] There are few cases discussing athletic trainers' or physicians' improper dispersion of medications to athletes, but this does not mean it does not occur. Anyone who watched the movie *Varsity Blues* probably recalls the scene where the team's quarterback is manipulated by his coach and trainer into taking cortisone shots into an injured knee, which finally gives out. This scenario is all too real. In the case of *Krueger v. San Francisco Forty Niners*, discussed previously, the team physicians failed to inform the plaintiff of the effects of cortisone injections in his knee. The plaintiff suffered a permanent, career-ending injury.

For some athletes, these treatments become their security blanket and main source of pain relief. While cortisone works to reduce inflammation, repeated injections have the potential to produce deleterious effects. Cortisone injections can weaken tendons and break down cartilage, causing long-term, further damage.[30]

Physicians and athletic trainers should inform athletes of the risks associated with taking these medications and should not approve of these treatments without further evaluating or assessing the athlete's condition. In some situations, these treatments mask the seriousness of an injury, which can lead to further and permanent damage.

Dying to Win

Eating disorders among female athletes are very serious, potentially deadly and are estimated to afflict as high as 62% of collegiate female athletes.[31] A more accurate estimate is not readily made, as this silent epidemic is all-too-often undiagnosed, untreated and underreported. The most common eating disorders in female athletes are anorexia nervosa, bulimia and compulsive exercise. Eating disorders affect an athlete's body in devastating ways, leading to a host of consequences, including bone-density loss leading to osteoporosis, severe weight loss, potassium imbalance, stress fractures, cardiac arrest, and even death. There is virtually no case law addressing the issue of what duty, if any, a team physician has in identifying and treating an athlete presenting with an eating disorder. Simply because of their positions, athletic trainers and team physicians should be cognizant of the warning signs and symptoms of eating disorders, and should respond appropriately by referring the athletes for proper medical and mental health treatment.

Should the legal duty of a team physician and athletic trainer extend to recognizing the symptoms of eating disorders in athletes under their supervision? Do they have the duty to refer an athlete to a mental health provider for treatment? Do they have the duty to pull an athlete from competition or refuse to medically clear the athlete to participate to protect the athlete from further harming his or her health? These are legal questions that remain unanswered and elicit different responses from coaches, physicians and athletes themselves. Individuals with

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eating disorders are often embarrassed and ashamed of their illnesses and take careful measures to hide their disorders from coaches, parents, teammates and health-care providers. Many deny that they have a disorder and therefore refuse to seek help.

The case of *Wattenbarger v. Cincinnati Reds*[32] might possibly shed some light on the legal duty of coaches, team physicians and athletic trainers to identify and treat athletes presenting with eating disorders. In *Wattenbarger*, the court held that the defendants had a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. This duty extended to restricting participation by an injured player to avoid aggravating an injury, which included pre-existing injuries. Whether this general duty of care extended to restricting participation by an injured player to avoid aggravation of an injury became a question of foreseeability.

> There is a huge financial and personal incentive in rehabilitating athletes.

The court in *Wattenbarger* relied on *Palsgraf v. Long Island R.R. Co.*,[33] and the elucidations of the Court that "[t]he risk reasonably to be perceived defines the duty to be obeyed."[34] The *Wattenbarger* court deemed it foreseeable that allowing the plaintiff to continue to pitch after he had informed the powers that be that his shoulder had "popped" would lead to further injury. In applying *Wattenbarger*'s extension of the duty of care, the argument can be made that a coach, physician, and athletic trainer each has a duty to protect an athlete with an eating disorder against further aggravation of the condition and against further aggravation of injuries associated with eating disorders such as heart problems, stress fractures, bone loss and even death. Aggravating these injuries is reasonably foreseeable when an athlete's body is severely weakened and deprived of nutrition as a result of the eating disorder.

Classen v. State was previously noted for its proposition that, in determining whether an athlete should continue participation, physicians have a duty to practice in accordance with good and accepted standards of medical care. Applying this standard to the duty owed to athletes with eating disorders, one could argue that team physicians have the duty to determine whether athletes with eating disorders should continue to participate or be pulled from competition.

The first step in establishing a duty is to train team physicians, athletic trainers and coaches to recognize the warning signs and symptoms of eating disorders. This duty should extend to referring athletes to appropriate health care providers and evaluating athletes' health before medically clearing them to participate in sports. Hopefully, this will raise the bar in setting a national standard of care regarding this issue.

The Future of Sports Medicine

Sports medicine is fast becoming a specialized area. There is a huge financial and personal incentive in rehabilitating athletes. An athlete's career is relatively short, financial stakes are high and fans eagerly await an athlete's return. While claims of medical malpractice brought by injured athletes only recently hit the litigation spotlight, medical recommendations published by the Bethesda Medical Conference[35] have been recognized in some cases as appropriate cardiovascular guidelines to be relied on by physicians when determining the fitness of an athlete for participation in a particular sport. Perhaps these guidelines will continue to be useful in resolving the legal issues regarding the standard of care in the area of sports medicine. Two examples follow.

In the case of *Knapp v. Northwestern University*,[36] a federal appellate court recognized the appropriateness of a physician's reliance on current consensus medical guidelines when making a recommendation for an athlete with a cardiovascular abnormality. The court upheld the university's legal right to accept the team physician's recommendation to medically disqualify a student-athlete from playing college basketball, which was consistent with the then-current 26th Bethesda Medical Conference guidelines. This case perhaps sets the legal precedent that a physician may justifiably rely upon the now-current 36th Bethesda Conference recommendations in determining the medical fitness of an athlete to participate in a sport, given the athlete's cardiovascular condition. The guidelines provide American Heart Association Panel recommendations for pre-participation athletic screening, including family history, personal history and physical examination.[37]

As discussed above in the case of *Gardner v. Holifield*,[38] a deceased athlete's cardiologist was held liable for failing to properly interpret two echocardiograms that were ordered during a routine physical examination to confirm an initial diagnosis of Marfan syndrome. According to the recommendations provided by the 36th Bethesda Conference, athletes with Marfan syndrome can participate in low and moderate static/low dynamic competitive sports if they do not have certain accompanying symptoms, as detailed in the guidelines. It would be worth investigating whether the physicians in *Gardner* considered the recommendations set forth by the Bethesda Conference and whether they determined that the plaintiff fell into the category of athletes that can compete despite Marfan syndrome.

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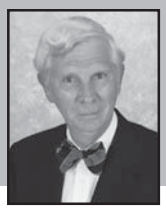
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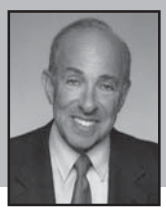
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In November 2007, 28-year-old distance runner Ryan Shay collapsed and died five-and-a-half miles into the U.S. Olympic men's marathon trials held in New York City. He had been diagnosed with an enlarged heart at age 14, but had been medically cleared to continue running. As the cause of Ryan's death still remains inconclusive, it will be interesting to establish what factors, criteria, and guidelines, if any, Shay's physicians considered in recommending that he be medically cleared to continue running, despite his condition. Hopefully, the recommendations provided by the Bethesda Conference will assist in creating judicial precedent and lead to the development of national standards of care regarding preparticipation screening for cardiovascular abnormalities in high school, collegiate and professional athletes.[39]

Conclusion

As the specialty of sports medicine continues to develop and become nationally recognized, team physicians, athletic trainers, and coaches should work together by sharing information with the goal of appropriately and timely diagnosing and treating injuries in their athletes. The best interests of their athletes should be at the forefront of any decision. ■

1. Matthew J. Mitten, *Emerging Legal Issues: A Synthesis, Summary, and Analysis*, 76 St. John's L. Rev. 5 (2002).

2. Many cases involving the alleged negligent care and treatment of an athlete either settle or are governed by collective bargaining agreements or workers' compensation statutes, and therefore never reach the courtroom.

3. Sports medicine has been recognized as a subspecialty of the American Board of Medical Specialties since 1989.

4. William L. Prosser, Prosser and Keeton on Torts (5th ed. 1984).

5. *Scottland v. Duva Boxing LLC*, 2005 N.Y. Misc. LEXIS 3513 (2005).

6. 989 F.2d 1360 (3d Cir. 1993) (student-athlete with no prior medical history of heart problems suffered cardiac arrest during lacrosse practice after developing cardiac arrhythmia).

7. Mathew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. Pitt. L. Rev. 129 (1993).

8. Mitten, *supra* note 1, at 11.

9. *Nowatske v. Osterloh*, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), *overruled on other grounds by Nommensen v. Am. Cont'l Ins. Co.*, 246 Wis. 2d 132, 629 N.W.2d 301 (2001) (physician held liable where the treatment methods utilized were outdated).

10. Mitten, *supra*, note 1.

11. *Rosensweig v. State*, 5 N.Y.2d 404, 185 N.Y.S.2d 521 (1959).

12. *Rosensweig v. State*, 5 A.D.2d 293, 295, 171 N.Y.S.2d 912 (3d Dep't 1958).

13. An electroencephalogram, or EEG, is a test that measures and records the electrical activity of the brain.

14. *Rosensweig*, 5 A.D.2d at 295.

15. 137 Misc. 2d 489, 520 N.Y.S.2d 999 (Sup. Ct., N.Y. Co. 1987).

16. 639 So. 2d 652 (Fla. Dist. Ct. App. 1994).

17. Marfan syndrome is a connective tissue disorder, externally characterized by disproportionately long extremities, and internally characterized by weakened walls of the major arteries. This syndrome is among the most common congenital heart lesions that have been associated with sudden death during sports participation.

18. *Gardner*, 639 So. 2d at 656.

19. The legend is that Wally Pipp, who played first base for the Yankees, was replaced by Lou Gehrig when he sat out a game with a headache.

20. 234 Cal. Rptr. 579 (Cal. Ct. App. 1987).

21. *Searles v. Tr. of St. Joseph's Coll.*, 1997 Me. 128, 695 A.2d 1206 (1997) (existence of a duty involved the question of whether the defendant was under any obligation for the benefit of the particular plaintiff. The court found that the athletic trainer has the duty to conform to the standard of care required of an ordinary careful trainer).

22. *Id.*

23. 600 So. 2d 1389 (La. Ct. App. 1992).

24. No. 02A01-9409-BC-00210, 1995 WL 739820 (La. Ct. App. Dec. 12, 1995).

25. An interesting legal inquiry is whether the team physician should have physically examined the plaintiff himself before clearing him to return to play, rather than simply relying on what the athletic trainer told him.

26. Recent television and news headlines report allegations of steroid use by baseball's Barry Bonds, Jason Giambi, Roger Clemens, and Andy Pettitte, among others, and track and field athletes including Marion Jones and Tim Montgomery. In December 2007, the Mitchell Report was published, which was the result of an intensive independent investigation into the use of anabolic steroids and other performance-enhancing substances by major league baseball players. In total, 89 current and former major league players are named in the report and many are expected to testify before the House Committee on Oversight and Government Reform.

27. Steve Kettmann, *E. German Olympic Dopers Guilty* (July 18, 2000), *available at* http://www.wired.com/politics/law/news/2000/07/37631.

28. *Wattenbarger v. Cincinnati Reds, Inc.*, 28 Cal. App. 4th 746, 33 Cal. Rptr. 2d 732 (Cal. Ct. App. 1994) (the defendants were held liable where they allowed the plaintiff to continue to pitch and they knew or should have known that to continue would cause irreparable harm, and such conduct was the cause of the plaintiff's injuries. The defendants owed a duty to the participants not to increase the risks inherent in the sport).

29. COX-2 inhibiters selectively block COX-2 enzyme, which impedes the production of the prostaglandins that cause the pain and swelling of arthritis inflammation. Unlike the most common anti-inflammatory drugs like aspirin, ibuprofen, and naproxen, which act to block both COX-1 and COX-2 enzymes, COX-2 inhibitors act to selectively block only COX-2 enzyme. Cardiovascular risks have been shown in COX-2-specific inhibitors as prostaglandins are involved in regulation of blood pressure by the kidneys.

30. Tricia Stuart, *Long Road Ahead for Those With Knee Problems* (Mar. 30, 2005), *available at* http://www.uchc.edu/ocomm/newsarchive/news05/mar05/knee.html.

31. Simmons College Press Release, *Eating Disorders Among Female Athletes: Big Problem, Little Knowledge* (Mar. 12, 2002), *available at* http://www.simmons.edu/about/news/releases/2003/3_12_03_eatdisorders.shtml.

32. 28 Cal. App. 4th 746.

33. 248 N.Y. 339, 162 N.E. 99 (1928).

34. *Id.* at 344.

35. The Bethesda Conference is a medical conference that was created for the specific purpose of establishing consensus recommendations among cardiologists and sports medicine physicians regarding the eligibility of athletes with cardiovascular abnormalities to participate in sports. The now-current 36th Bethesda Conference was held on November 6, 2004.

36. 101 F.3d 473 (7th Cir. 1996).

37. The consensus recommends a physical examination consisting of evaluating athletes for heart murmurs, assessing femoral arterial pulses, identifying any stigmata of Marfan syndrome, and taking brachial blood pressure measurements. The guidelines also outline various cardiovascular abnormalities and provide recommendations regarding athletic participation in athletes with these conditions.

38. 639 So. 2d 652 (Fla. Dist. Ct. App. 1994).

39. Italy has a formal national pre-participation screening and medical clearance program in place, which mandates that young, competitive athletes in organized sports programs have annual examinations that include a 12-lead electrocardiogram, history and physical examination.

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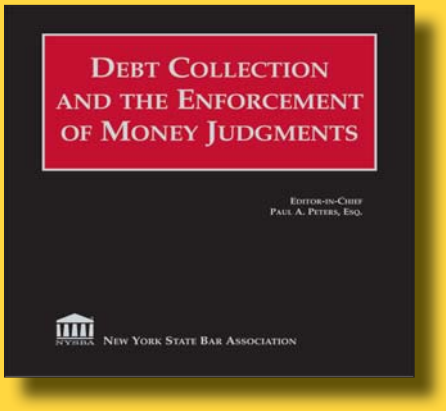

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BY ALBERT ROSENBLATT

Henry Miller's *More*

(Cogent Publishing, 2007)

Henry Miller is a man of all seasons but there are scarcely enough of them to accommodate his irrepressible creativity: A renowned trial lawyer, Miller turned his sights to the theatre, as an actor and writer. Audiences will remember his portraying Clarence Darrow in his epic *All Too Human*; he also wrote stage works about Alger Hiss and James Joyce. And now, a novel.

Some lawyers may confess that the closest they get to reading novels is a novel decision from an influential court. But fiction can sometimes yield truths more compelling than recorded fact or legal exegesis of the kind most often reviewed on these pages.

Lawyers who read only the advance sheets would do well to put aside 10 N.Y.3d and for a few hours learn what Henry Miller, through his skillfully drawn characters, has to say about temptation, virtue, compromise, law, greed, sex, power, betrayal, ambition, justice, love, parenthood, and even the art of cross-examination. Not necessarily in that order, and not in equal measure, but all well represented in a dramatic novel that deals with the lives and foibles of lawyers on the fast track.

10 N.Y.3d may offer occasional glimpses into those subjects, but to come away with anything satisfying, readers would have to get by too many case citations and a great deal of talk about collateral estoppel and partial summary judgment. Miller, artistic chef that he is, deftly mixes and matches his ingredients. Temptation, as we know, is sometimes born of avarice, sometimes not; justice and law often go together but not necessarily; and compromise may be valued when it comes to settlement, but not when values themselves are being settled upon. It takes a good yarn, as this one is, to sort out the boundary lines, and Miller, veteran dramatist and trial lawyer, recognizes that in human interactions those lines have a way of getting blurry.

Take one of the book's major themes – ambition. The most memorable graduation speech I ever heard dealt with ambition. The orator, president of a small, elite college, argued that ambition was not a dirty word or a quality to be deplored. He equated the trait with initiative, motivation, and accomplishment.

Miller would affirm that the enemy of ambition can be indolence. An ambitious, lazy person will conquer nothing. But through his protagonist, Michael Harvey, Miller asks a vexing question: Ambition, sure, but at what price? And in what realm? Someone may have an ambition to control the spread of Lyme disease, or on a more modest scale perhaps, the calorie or cholesterol level in hot fudge sundaes. Go for it, we would say.

But there are other brands of ambition we abhor. Ambition to dominate or subjugate others: as in Hitler, Stalin, Saddam Hussein. So, it depends. People like T. Lawrence Bombly – the tycoon whom Miller detonates off the pages of the novel – present complications, and that is what makes Miller's exploration so cogent.

We can, of course, visit these issues in an essay or in Ethics 101, but the novel, in the hands of a writer like Miller, gives the reader much more. In a classroom we might describe T. Lawrence Bombly as a captain of industry or, as Bombly would have it, a four-star general or commander in chief, who flourishes in a laissez-faire capitalist world. The regulatory state is for him an impediment to production; success is market dominance; utter success is utter market dominance. But those descriptions of Bombly are conclusory. Miller brings Bombly to life, painting him bigger than the pages of the novel, and through rich dialogue, presenting him in full-blooded relief: masterful, sly, corrupt, and by the way, not entirely unlikable. At times, you even feel a bit of affection for the bastard. This takes a writer's art, because one suspects that people like Bombly are not utterly without socially redeeming value. A lesser writer could not paint with the subtle hues that Miller uses to present Bombly in living color. It is easier to paint all warts than to present convincingly a dimple or two among them.

Huge and fascinating as he is, Bombly is not the book's central character. Miller creates the dramatic tension by introducing Michael Harvey into Bombly's world. Michael has all the attributes for success in that environment. Handsome, bright, and engaging, Michael is the son of Mary Harvey, who arrived from Ireland on these shores widowed and pregnant with Michael.

Mary is not today's version of the struggling single mom everybody admires. She lives through Michael; her ambition for him is boundless. Mary is a cross between Lady Macbeth and a stage mother who would actu-

Judge Albert Rosenblatt (arosenblatt@mccm.com), who now teaches at NYU Law School and does arbitrations and mediations at the law firm of McCabe and Mack in Poughkeepsie, served on the New York Court of Appeals from 2000 to 2007, capping a 32-year tenure on the bench. A graduate of the University of Pennsylvania and Harvard Law School, he has produced legal and popular works including a biographical history of the New York Court of Appeals, reviewed in the *Journal*'s March/April 2008 issue.

ally seek out the casting couch. For her, Michael as merely the country's vice president would be a crushing disappointment.

The stage is set early when Michael meets Bombly, who sees Michael as a young Wall Street-Harvard Law School superstar, a perfect candidate to serve as one of Bombly's lieutenants. But not so fast. There is a top lieutenant already in the picture – Luke Steele, a scheming, two-faced operator who sizes up Michael and immediately measures him for the casket. Steele wants no rivals, surely not one of Michael's caliber and charm.

Miller uses Steele, an Iago of greed, as a counterpoint to the more impressionable Michael. The author anchors Steele as the standard bearer of the darkest side of wealth and power: acquisition for its own sake, more and more and more, pathological in its insatiability. Against this we witness Michael's bout with temptation.

The bout is held in corporate offices and even in sexual encounters. We meet the two young women in Michael's life: Gladys, ravishing in red and black; and Emmy (Is she up to it? Will she hold me back on the achievement elevator?).

On the way up there is trouble, as the Bombly organization runs afoul of the law. There are some transgressions that even the dependably corrupt senator ("Who should I help, my enemies?") cannot protect against.

In practice, when officials are considering criminal charges, there often are poker-game conversations (threats, bluffs, offers, deals) between prosecutors and their targets. Capturing the dialogue in a priceless nugget, Miller treats us to just such a joust between the prosecutor and a renowned corporate lawyer, himself a potential target:

> "Irving, you wouldn't indict an old schoolmate, would you?"
>
> "Only if he committed a crime."

Miller uses the same corporate lawyer, perched atop the legal hierarchy, to ask a question, common in a profession sometimes judged by the metes and bounds of attainment:

> [The lawyer] saw two longshoremen moving toward the docks as he jogged past Atlantic Avenue. They'll work hard today or soft if the shop steward favors them. No worries to bring home. No ball and chain briefcase to carry. They'll eat good, drink beer, watch T.V., have sex, sleep well. Who's got the better life, anyway?

That question is central to the book, and Miller addresses it with keen insight, weaving a gripping plot, framed in a fast-moving drama that would make a great film.

How would Miller answer the question? As an astute lawyer and philosopher, he would likely say: "Well, . . . it depends." ■

Editor's Note:

In the article titled "Update Did the Appellate Odds Change in 2007?", by Bentley Kassal (*Journal*, October 2008), the second chart on page 40 was mislabeled. The heading should have read "Criminal Cases," not "Civil Cases." We regret the error.

Civil Cases					
	2007	2006	2005	2004	2003
Affirmed	56	66	55	58	51
Reversed	27	25	35	37	39
Modified	17	9	10	5	10

Criminal Cases					
	2007	2006	2005	2004	2003
Affirmed	66	71	70	81	70
Reversed	30	17	25	15	21
Modified	4	12	5	4	9

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A word-searchable index to the *Journal*, for years 2000–2008, is available online at www.nysba.org. Click on "publications," then Bar Journal. Scroll down, and on the right-hand side click on "Searchable Index by Category (2000-present)."

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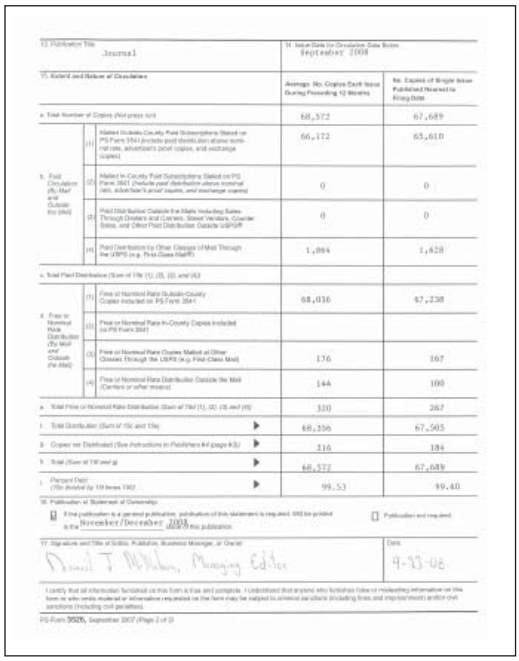

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The verb *to curate* sets my teeth on edge. Perhaps even worse is the "verb phrase *to four-lane*. I wince when I am "verbed." Your comment about these monstrosities?

Answer: Many readers "wince" when words that were only adjectives are used as verbs (as in *to four-lane*) and when people coin verbs (like *to curate*) from nouns like *curator*.

The reader's comment may refer to Humpty Dumpty's response in *Through the Looking Glass*: "I love verbing; verbing weirds words." Most people would disagree with Humpty Dumpty. Every time a new word arrives, readers send e-mails in protest, but if the word becomes popular, the e-mails stop coming.

How do you feel, for example, about the word *remote*, which used to be only an adjective, but is now also a noun, as in "Where's the remote?" No doubt the verb *to contract* seems standard to you, but when Benjamin Franklin first heard it, he objected. And as recently as 30 years ago one elderly law professor would not allow his students to use that "neologism" in class, insisting that *contract* was only a noun. Today the literal meaning of the verb *to contract* remains "to compress, shrink, or reduce," but the figurative meaning: "to enter into an agreement" is probably more common.

The word *party* began as a noun. But now it can also be a verb (*to party*), and a verb phrase, *to hard-party*. But if you *party,* you'd better not *hard-party*, for newspapers tell us that tendency almost lost a Miss U.S.A. contest-winner her crown. She may have been having too much *fun*, which started as a noun, but is now also an adjective (*a fun time*) and even a verb: "They *funned* it up."

At first *impact* was only a noun, meaning "collision." Then the noun became a verb, the past participle of which meant "firmly fixed." It was defined in *The Oxford English Dictionary* with its literal meaning in the context, "A stone-like mass which had become impacted in the ilium." Currently, the verb *impact* has added the figurative sense, "to have a substantial effect upon," a meaning too recent to be included in *The Oxford English Dictionary*. In the 1985 edition of *The American Heritage Dictionary*, the influential Usage Panel pronounced that sense of the verb *impact* "unacceptable." But journalists could hardly do without it.

Candidate John McCain announced recently that he would "pause the battle" for the presidency by taking a short vacation. The noun *pause* has been a respectable verb *to pause* for many years, but only an intransitive verb (a verb that does not take an object). In current usage, he would have had to say, "pause in the battle for the presidency." Instead, Senator McCain used *pause* as a transitive verb (a verb that takes an object), so at first that usage looks strange. But if it becomes common, we will get used to it.

A recent newspaper headline proclaimed, "Voters rebuffed the proposal to raise taxes."

The verb *rebuff* comes from the Old French verb "to reprimand." Dictionaries currently define *rebuff* as "to refuse bluntly, to snub." So currently, it makes no sense to rebuff "things" like taxes – you can only rebuff the persons who propose them.

Neologisms amuse some people and irritate others. Whether they become acceptable depends not on an edict by some authority but on public acceptance. Back in 1776, George Campbell wrote in his *Philosophy of Rhetoric* that to be "correct," language must be "national, reputable, and present." Campbell meant by "national," language that is widely used throughout the country; by "reputable," the language of educated, literate persons; and by "present," language in current use, a definition so reasonable that it is still accepted today.

But words, newly created or newly used, amuse some people, irritate others, and are ignored by many. We inherit our language from the generations that preceded us, and we learn it at our mother's knee. As we use that language we change it, and some of those changes are handed down to subsequent generations, who will make their own changes.

Potpourri

Overheard in New York City and reported in the *New York Times*:

> A group of construction workers were sitting on a terrace wall on 52nd Street, outside the CBS building. One man pulled a cell phone from his pants pocket. Another said, "Hey, you shouldn't carry that in your pocket; it could make you impudent."

That's a new meaning that probably will not last. ■

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate at a major law firm working on a pro bono matter. Our client, who is currently serving a lengthy prison sentence, is seeking to vacate his conviction and to obtain a new trial.

In accord with firm guidelines, and with the assistance of the pro bono committee, I had completed certain required forms that had to be submitted before the firm would approve taking on the case. The firm approved the request and allotted 200 hours for which attorneys working on the matter will get billable hour credit. The firm, however, specified that the approval covered only the client's appeal. Thus, if we are successful in our motion for a new trial, our client is obliged to seek separate representation to handle that new trial.

I have been working on the matter for several months, and I expect to exceed the firm's 200-hour limit. Although I can request firm approval for additional hours to be credited towards my billable hour total, I am concerned that the firm will not view the request favorably. However, if I do not request firm approval for additional hours and continue to work on the appeal, there is a potential conflict between time that I spend working on the appeal and time that I spend working for paying, billable clients. Finally, even though our client is fully aware that our representation will not extend to a new trial, he has said on more than one occasion that he wants us to continue our representation if the new trial is granted.

Is it appropriate for me to continue handling this matter in light of the potential conflicts of interest raised by the firm's billable hour limit? Was it appropriate for us to limit the scope of our client's representation to handle only his appeal?

Sincerely,

Committed to Pro Bono

Dear Committed to Pro Bono:

As an initial matter, you and your firm should be commended for your commitment to the pro bono matter you have described.

Although the provision of pro bono services is a "basic tenet of the professional responsibility of lawyers," EC 1-1, many lawyers feel constrained by the demands of billable-hour requirements. There is, therefore, an inherent tension between the professional goals to serve the community and a lawyer's status within a firm or organization. Your question aptly describes that tension.

Specifically, you have asked if your related concerns regarding your status in the firm, and getting credit for future pro bono work for your client, present a conflict of interest in light of the 200-hour limit. As I am sure you are aware, you are obligated to represent your client's interests zealously. *See* DR 7-101(A). Moreover, DR 5-101(A) prohibits a lawyer from continued representation of a client if that lawyer's own financial, business, property, or personal interests will impair the lawyer's independent professional judgment in the lawyer's representation of the client. DR 5-101(A).

If you do not seek and obtain approval for additional hours to be credited toward your billable hour requirements, your judgment in representing your client likely will be impaired given your concern about your standing in the firm. Indeed, as one commentator noted, "most lawyers do not enhance their status within the firm by handling high-profile pro bono cases and therefore must weigh the costs of spending time away from billable work against the personal and professional benefits that it confers." Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1, 136 (2004). Your reputation within the firm and your commitment to billable work is an understandable concern, particularly in difficult economic times. Thus, your continued representation of the client likely presents an impermissible conflict of interest. However, before you take steps to end your representation, please consider the following.

Both the New York Lawyer's Code of Professional Responsibility and the American Bar Association encourage lawyers to dedicate a certain amount of time, 20 and 50 hours respectively, to providing pro bono services to individuals of limited financial means. *See* EC 2-34; ABA Model Rule 6.1. You may want to consider dedicating 20 to 50 hours outside of the billable hour framework, provided, of course, that you confirm that your representation in this capacity is covered by the firm's relevant malpractice policies. Additionally, you might consider adding other attorneys to your team who have not yet met their 200-hour limit. The additional staffing would allow you to stay involved, but also permit you to focus more of your time toward billable work.

You have also asked whether the firm's substantive and temporal limitations on the representation are proper. Provided that full disclosure was made to the client, preferably in the written

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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retainer letter, the substantive limitation is ethical. *See, e.g.*, NYSBA Comm. on Professional Ethics, 604 (1989) (NYSBA Op.) (holding that it is "not unethical for a lawyer to limit the scope of representation in a criminal matter to the grand jury stage"). However, please note that EC 2-40 encourages lawyers who accept representation to "complete the work involved" and further encourages trial counsel to continue to represent the client throughout the appeals process "unless new counsel is substituted or withdrawal is permitted by the appropriate court." EC 2-40. Although not factually on point, EC 2-40 suggests that your client has a right to full representation during the appeal and at a new trial. If the firm is not on board with representing your client at a new trial, it is recommended that you take the steps necessary to locate new and competent counsel to represent your client post-appeal.

Finally, based on the facts as you have presented them, the firm's temporal limitation does not apply to the client's representation as a whole but only to each individual lawyer's contribution. As such, there are no ethical or professionalism concerns raised by the 200-hour limit. If, however, the firm limited representation of your client in the appeal to a firmwide total of 200 hours, there may be questions about the firm's ability to competently represent your client. *See, e.g.*, ABA Model Rule 1.2 cmt. 7 (stating that "an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation").

In conclusion, in deciding whether or not you should continue handling this matter you must weigh the facts and the options at your disposal, seek the counsel of trusted attorneys at your firm, and determine the course of action that will best serve your client's interests.

The Forum

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am partner in a general practice firm that has been representing, successfully, a particular client in litigation and transactional matters for several years. The representation has been generally known by members of our local county bar association.

Our relationship with the client has been good. In addition, we have participated with the client in several high-profile community projects, and so have become identified as the attorneys for that client in the community at large.

Recently, it has come to my attention that one of my bar association colleagues (with whom I have no present cases) has been pursuing my client. I became aware that the client has been entertained by this colleague with trips to the theatre, and has been invited, as my colleague's guest, to golf, tennis and basketball games, as well as to community fund-raisers. Indeed, my client has indicated that she has become quite friendly with this colleague, whom she now considers to be a "golfing buddy and a good friend." Recently, my client indicated that when she complained about a business problem during a round of golf my colleague had suggested that her firm might better represent my client's business interests. I resent this obvious "poaching" attempt to take my client as her own.

My firm and I have been most loyal to our client during our many years of service, and I wonder – do any ethical or professionalism grounds exist that might preclude this "theft of client" effort by my competitive colleague?

Sincerely,

Feeling Victimized

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New Regular Members
1/1/08 - 9/22/08 _____ **7,537**

New Law Student Members
1/1/08 - 9/22/08 _____ **808**

Total Regular Members
as of 9/22/08 _____ **69,304**

Total Law Student Members
as of 9/22/08 _____ **2,242**

Total Membership as of
9/22/08 _____ **71,546**

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Many techniques exist to write in plain English. They range from organization, to word choice, to sentence structure. What follows are some tools — suggestions to help writing be effective, readable, and succinct.

Keep organization tight.[18] Use headings to break documents into manageable bits. Put related issues together, in logical order. Say it once, all in one place. Put the most important information first. State the general before the specific. Introduce things before you discuss them. Introduce people before you write about them. Minimize cross-referencing. Use thesis paragraphs and topic sentences. State what relief you seek before you say why you want it. Give a full citation before you give a short-form citation. Organize by issues and arguments, not by cases and statutes.

Admire the active voice. The active is less vague than the passive. The active is also shorter and easier to read. In the passive, the sentence's subject is used as the verb's receiver. *Incorrect:* "The respondent was interrupted by the petitioner." *Becomes:* "The petitioner interrupted the respondent." Double passives don't identify the subject or the actor. *Example:* "The passive voice is avoided."[19] Use single passives to connect sentences or end sentences with emphasis.[20] Use double passives if the actor is known or identification is unnecessary.

Cut compound constructions. A compound construction uses several words when only one or two are needed. *Incorrect:* "*At that point in time* the petitioner moved for summary judgment *for the reason that* no factual issues remained." Eliminating compound phrases will shorten the sentence. *Becomes:* "The petitioner moved for summary judgment *because* no factual issues remained."

Reject redundant phrases.[21] Redundancies include "null and void." Use "void" instead. If you can say it in one word, don't use two or three. Other redundancies: "made and entered into" ("made"), "rest, residue, and remainder" ("rest"), "force and effect" ("force"), "last will and testament" ("will"), and "give, devise, and bequeath" ("give").

Don't nominalize verbs. Nominalized verbs turn into nouns because of an added suffix. Nominalizations make phrases and sentences long and complicated. They also make action abstract; they don't describe action forcefully.[22] Nominalized verbs end in "al," "ance," "ancy," "ant," "ence," "ency," "ent," "ion," "ity," and "ment." Examples with auxiliary verbs: "is waiting," "was reading," and "were." They result in phrases like "made the argument that" instead of "argued" and "engaged in a discussion about" instead of "discussed."

Use "of" sparingly. *Incorrect:* "At issue is the duty *of* a lawyer to preserve the confidences *of* a client." The sentence is more effective without the excess. *Becomes:* "At issue is a lawyer's duty to preserve client confidences."

Delete lead-ins, called metadiscourse, like "it is well settled that," "it is hornbook law that," "it is important to add that," and "it is interesting to note that." Noteworthy points speak for themselves.[23]

Vitiate vague antecedents. Let the following refer to one person or thing only: "he," "she," "his," her," "their," and "its." To avoid confusion, repeat the word.

Eliminate elegant variation. Use the same word to refer to the same thing. Different words have different meanings. Variations will be understood as an intent to distinguish.[24] *Incorrect:* "The first *case* was *adjourned*, and the second *piece of litigation* was *put over to a new date*." *Becomes:* "The first *case* and the second *case* were *adjourned*."[25]

Match modifiers. Dangling, misplaced, and squinting modifiers confuse.[26] Dangling modifiers modify no word or the wrong word. *Example modifying no word:* "As someone who teaches at St. John's Law School, it's easy to assume that all law students are uber smart." *Becomes:* "As someone who teaches at St. John's Law School, I easily assume that all law students are uber smart." "*Example modifying the wrong word:* "Although nearly finished, we left the trial because of our client."*Becomes:* "Although the trial was nearly finished, we left because of our client." To place modifiers correctly, keep them next to the word they modify. *Misplaced word example:* "We almost ate the entire Inn of Court dinner." *Becomes:* "We ate almost the entire Inn of Court dinner." *Misplaced clause or phrase example:* "I threw the baby down the stairs some candy." *Becomes:* I threw some candy down the stairs to the baby." Squints can modify

> Quitting legalese is harder than quitting smoking.

the word before or after. *Example:* "To practice New York landlord-tenant law, I *only* had to re-learn the doctrines of subinfeudation and petty serjeanty." *Becomes:* "To practice New York landlord-tenant law, I had to re-learn *only* the doctrines of subinfeudation and petty serjeanty." Be careful with the word "with." *Incorrect:* "I robbed a bank with money." *Becomes:* "I used a gun to rob a bank." *Or:* "I robbed a bank because it had money."

Nix negatives. People speak and think in the positive. *Incorrect:* "We have *not yet received* permission . . . ." *Becomes:* "Our application *is under* review." Also, avoid negative words like "*except*," "*disallowed*" ("*dis-*" words), "*fail to*," "*notwithstanding*," "*other than*," and "*unless*" and "*unlawful*" ("*un-*" words). And don't place these words after "*not*."[27]

Seek shorter paragraphs. Save one-sentence paragraphs for emphasis, but long paragraphs bore readers. A good average for paragraph length is three to five sentences. Paragraphs shouldn't exceed 250 words, two-thirds of a double-spaced page, or one large thought.

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Limit long sentences. Shorter sentences increase understanding. The best sentences have one thought only and 25 words or fewer, ideally between 15 and 18. But vary sentences length to make writing interesting.

Simplify sentence structure. Prefer simple declarative sentences to complex constructions. Put the subject near the beginning in most sentences. But vary sentence structure, like long sentences, to make writing interesting.[28] Avoid connecting sentences with weighty conjunctive adverbs like "however," "moreover," and "therefore."

Don't separate subject from predicate. Every complete sentence contains two parts: a subject and a predicate. The subject is what (or whom) the sentence is about. The predicate tells something about the subject. Inserting lengthy qualifiers between subject and predicate frustrates readers. *Incorrect:* "The judge made the decision after consulting with colleagues to recuse himself." *Becomes:* "After consulting with colleagues, the judge recused himself." *Or:* "The judge recused himself after consulting with colleagues."

Omit unnecessary detail. People, places, and dates are clutter unless they're relate to the theme of your document.

Avoid over-long or too many quotations. They substitute for analysis.

Avoid acronyms. Acronyms appear to simplify or shorten your documents. But "alphabet soup" forces readers to retrace their steps to find definitions.

Axe archaic legalisms. Archaic legalisms include "aforementioned," "hereinafter," and "wherefore." The veil of legalese is made of words like "hereto," "in witness whereof," "now comes," and "whereas." They mystify readers, lack substance, and are wordy. *Incorrect:* "Enclosed *herewith* please find . . . ." This common formula serves no purpose. *Becomes:* "I enclose . . . ."[29] *Or:* "Enclosed please find . . . .'

Forgo formalisms. Unwanted formalisms include "and/or," "the instant" case," and "such" and "said" as adjectives.

Advocate for Anglo-Saxon words. Latinisms and romance-language words are proper when they're terms of art. Otherwise, use foreign words only if an English equivalent is unavailable. *Examples to avoid:* "ad infinitum" ("forever"), "arguendo" ("for the sake of argument"), "inter alia" ("among others"), "pro rata" ("proportional"), and "to wit" ("namely").

Toss technical terms. Use them only when writing about a field-specific topic. *Example:* "holdover" when referring to landlord-tenant proceedings. If you must use technical terms, include a short definition so that your reader knows what you're discussing. The amount of explanation will vary with your audience and the purpose of your document. If helpful, give examples to illustrate your point.

> The legal community tolerates gobbledygook less and less.

Disparage dictionary words. Simple words appeal to readers. Plain verbs communicate directly and effectively. *Examples:* "ascend" ("rise"), "comprehend" ("understand"), "delegate" ("assign"), "elaborate" ("explain"), and "morph" ("change").

Mutilate multi-syllabic words. Prefer shorter words with fewer syllables. Shorter words are familiar to readers. They're read quickly and grasped easily. *Examples:* "consequently" ("as a result"), "notwithstanding" ("despite").

Simplify. *Incorrect:* "Sixty days *prior to* the expiration of the license . . . ." "Prior to" is clunky. Use the shorter and simpler "before." *Becomes:* "Sixty days before the license expires . . . ."[30] Instead of "subsequent," use "following" or "after." *Incorrect:* "Subsequent to the defendant's appearance, the plaintiff moved for leave to amend." *Becomes:* "After the defendant appeared, the plaintiff moved for leave to amend."

Cherish concision. *Examples:* "In order to" *becomes* "to," "at that point in time" *becomes* "then," "for the reason that" *becomes* "because."[31]

Write as you say it — and don't write it if you wouldn't say it. *Example:* "*Pursuant to* the terms of the covenant, a payment of $100 must be remitted by you." "Pursuant to" is less precise than "under," and "the terms of" adds nothing. *Becomes:* "Under the covenant, you must pay $100."[32] Use the same unaffected tone you'd use while speaking.

Verify vocabulary. *Example:* "His bad faith in the failure to investigate is *exacerbated* by the ease with which violations can be avoided." "Exacerbate" means "to increase in severity of or to aggravate, to make worse."[33] One can't exacerbate bad faith or do so easily.[34]

Stress content, not style. Legal writing succeeds when the reader doesn't notice word choice or sentence structure.[35]

Present properly. Appearances count, in legal writing as in everything else. Add plenty of white space around text. No excessive capitals, italics, bold, underlining, or strange font styles.

Revise regularly. Editing produces plain English. There's no "good writing, only good rewriting."[36]

Get Involved With Plain English

Several organizations further plain English. Scribes, an organization of legal writers, was founded in 1953 to honor legal writers and encourage a "clear, succinct, and forceful style in legal writing."[37] Scribes has developed into a nonprofit, ABA-affiliated organization that publishes a newsletter, *The Scrivener*, and a law journal, *Scribes Journal of Legal Writing*. Clarity promotes clear language in the legal profession. It publishes *Clarity*, which explores the use of plain English internationally.[38]

The Plain English Campaign, the organization that awards the Golden Bull, is an editing service that publishes *Plain English* magazine and books. It has more than 10,000 supporters in 80 countries.[39]

Here's some food for thought to chew on: To eschew legalese, write in plain English. If you write in plain English, you won't escheat your reader. ■

1. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 Geo. J. Legal Ethics 237, 259–61 (2008); Judith D. Fischer, *Why George Orwell's Ideas About Language Still Matter for Lawyers*, 68 Mont. L. Rev. 129, 140 (2007) ("Jargon is the specialized language of a particular field. Unnecessary legal jargon is often called legalese — that is, the inflated language some lawyers use instead of simpler, more familiar phrasing.").

2. George Hathaway, Plain English, *An Overview of the Plain English Movement for Lawyers . . . Ten Years Later*, 73 Mich. B.J. 26, 29 (Jan. 1994).

3. Robert D. Eagleson, *Plain Language: Changing the Lawyer's Image and Goals*, 7 Scribes J. Legal Writing 119, 134 (2000).

4. Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. Rev. L. & Soc. Change 519, 531 (1984–85).

5. Carol M. Bast, *Lawyers Should Use Plain Language*, 69 Fla. B.J. 30, 30 (Oct. 1995).

6. Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1, 1 (1997).

7. *See, e.g.*, Joseph Kimble, Plain Language, *You Be the Judge (Again)*, 84 Mich. B.J. 56 (Jan. 2005); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loyola L.A. L. Rev. 301 (1987); *but see, e.g.*, Howard Darmstadter, Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting (2002).

8. Mark Duckworth & Christopher Balmford, *Convincing Business That Clarity Pays*, 82 Ill. B.J. 573, 573 (Oct. 1994) ("The ultimate success of the plain language movement depends on business recognizing that clear communications improve efficiency, effectiveness, and competitiveness.").

9. George H. Hathaway, *The Plain English Movement in the Law — A 1994 Update*, 50 J. Mo. B. 19, 19 (Jan./Feb. 1994).

10. Michael G. Byers, *Eschew Obfuscation — The Merits of the SEC's Plain English Doctrine*, 31 U. Mem. L. Rev. 135, 138 (2000) (citing Rudolph Flesch, The Art of Plain Talk (1946)). *See also* Rudolf Flesch, How to Write Plain English: A Book for Lawyers and Consumers (1979); Rudolf Flesch, The Art of Readable Writing (rev. ed. 1974).

11. *See* Office of Investor Educ. & Assist., U.S. Sec. & Exch. Comm'n, *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* 25 (1998), *available at* http://www.sec.gov/pdf/handbook.pdf. (last visited Aug. 13, 2008).

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Plain English: Eschew Legalese

Don't escheat your reader.

Good legal documents are free of legalese. Legalese is pettifog: the foreign and formulaic way many lawyers write. Legalese drowns the reader and hides gaps in analysis. Legalese is lawyers' dull and turgid jargon.[1] It makes lawyers the butt of jokes.[2] It's a pseudo symbol of prestige lawyers use to indulge their egos, dominate others, and distance themselves from their lay readership. Legalese leads to interpretations that stray from the author's intended meaning: Legalese masks meaning.[3] Legalese favors form over content: It forces readers to dig for content. Legalese alienates.[4] Legalese is lazy. Although the best writing is planned, formal speech, legalese deviates from how people speak: Legalese is obscure and wordy.

Lawyers need to filter legalese to create readable documents.[5] Good lawyering means writing in accessible, clear, and efficient language.

The opposite of legalese is plain English. The plain-English movement calls on lawyers to write comprehensibly and succinctly. The movement aims to keep legal documents precise and simple. The word "plain" is deceiving. Plain English isn't "plain" in the aesthetic sense. Nor does plain English dumb down writing.[6] "Plain" denotes logically organized, concise documents that are to the point and visually inviting to the audience. Documents in plain English are understandable on their first read.

To write in plain English, writers must visualize their audience's interests and needs. This visualization moves writers to give readers only the information they require. Ignoring the audience leads to documents no one wants to read and which don't inform or persuade. To break bad habits, writers must become reader-oriented. Writers should write for their readers, not themselves. Writers must treat readers like busy professionals. Writers shouldn't waste their readers' time or insult them.

Most judges, law professors, lawyers, and clients prefer legalese-free documents.[7] This preference is motivated by the need to read documents without verbiage. Verbiage leads to ambiguity, not only slow reading. With the growing volume of legal work, plain English is critical in today's environment for both writer and reader.[8]

The Plain-English Movement

The movement to use plain English is traced to the profession's earliest days. While practitioners have always used legalese, the public has always urged lawyers to write plainly.[9] The movement's recent wave gathered pace in the 1940s, when Rudolf Flesch published *The Art of Plain Talk*.[10] The plain-English movement grew in 1960s. In 1963, David Mellinkoff wrote *The Language of the Law*, a magisterial work in which he tracked language development and its weaknesses. By the 1970s, federal agencies began redrafting regulations into plain English.[11] This resulted in documents that are easier to understand.[12] New York also mandates plain English in commercial transactions.[13]

Plain English became popular in the legal community in the 1980s. In May 1984, the *Michigan Bar Journal* began publishing a regular column on plain English. The movement has expanded, but the popularity of plain English has come slowly and painfully. As George Hathaway noted in 1994, "plain English in the law is like safe sex: you never used to hear about it; now you hear about it all the time, but not enough people actually practice it."[14] Quitting legalese is harder than quitting smoking.

Numerous articles, books, and organizations extol plain English's virtues.[15] One group of scholars presents annual awards for excellent plain English as well as the Golden Bull Award, "given for the year's worst examples of gobbledygook."[16] The legal community tolerates gobbledygook less and less.

Putting Plain English Into Practice

Many lawyers don't know how to write in plain English. They never unlearned the bad habits they gleaned from the poor role models they read in law school. Although knowledgeable in the law, lawyers — society's best-paid writers — need to learn more about communication.[17] Plain English requires the writer to take each sentence and ask: "Will this be misunderstood?" "Is this the clearest, most efficient way to write it?" "Is this word necessary?" These questions demand focus on message, respect for audience, and intent to be coherent. Good legal writers "write the document in a way that best serves the reader. They convey ideas with the greatest possible clarity."

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