MAY 2005
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NEW YORK STATE BAR ASSOCIATION
Journal

The New York State Judicial Institute

Transforming the Educational World of the Judiciary

by Robert G.M. Keating

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Adoption Law: Practice and Procedure in the 21st Century with Forms on CD-ROM

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PN: 40204C / **Member $165** / List $200 / includes 942-page book

REAL ESTATE

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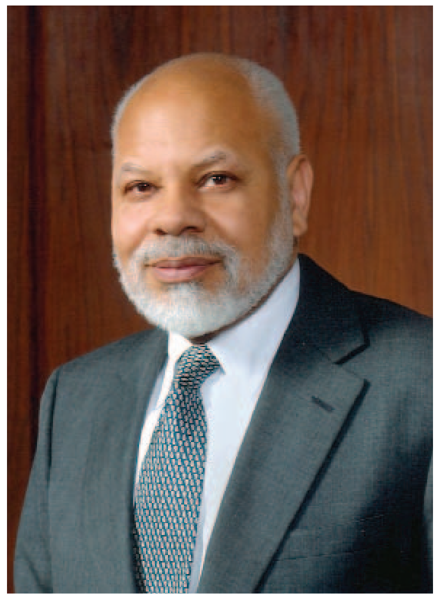
KENNETH G. STANDARD



Seizing Every Opportunity

In my first message to you in this space last June, I spoke of the abiding strengths of this organization, including our membership's extraordinary experience and expertise and commitment to the rule of law and working for justice. I talked about seizing every opportunity to share and apply those strengths for the public good in the broadest sense and in our being a forum of diversity, a place to hear new and old voices with new ideas and to provide for a collegial but candid exchange of perspectives. As my service as president is drawing to a close, it is a time of reckoning. Did we put our strengths to maximum use? Did we make progress?

I considered these questions as I drove home from this past weekend's meetings of the House of Delegates and the Executive Committee, the latter of which included a special strategic planning session. The issues addressed in each of these meetings were challenging and complex, and involved not only examining concerns of today but working to ensure that our Association remains vital in the years and generations ahead.

You may recall that Lorraine Power Tharp, during her presidency in 2002, convened the Executive Committee in a strategic planning retreat that led to a report with objectives and action steps to promote membership development and service, advance diversity, and strengthen our advocacy with lawmakers, in the media and the general public. On March 31st, we revisited that report.

We reviewed our achievements during Lorraine's presidency, Tom Levin's and mine and made plans to continue and build upon that work. Clearly, we have made tremendous strides in getting our message heard in legislative halls and in the media, but we have more to do in coordination with sections and committees and in sharing agendas and building alliances with groups when we have mutual interests. We also have more to do to build our network of members assisting us in grassroots advocacy for our positions. We have more avenues of communication to pursue with the public. We reviewed our efforts to increase member involvement and member services, and we charted additional means of meeting the needs of both new and experienced members, both private practitioners and those in public service, in the corporate world and in education, and those from large and small offices. We assessed our diversity initiatives, including the very recent addition of new members to the Executive Committee and House of Delegates, noted our progress but also that we have more work to do to open further our profession and our Association.

Our review also noted that in the two-and-a-half years since the development of the strategic plan, we have increased our use of technology in delivering publications, courses and other resources and we have introduced ways for you to share your thoughts, knowledge and views with us and with your colleagues in the Association. We have added programs on practice and procedure. We will be expanding these initiatives, law office management guidance and other services to help meet your needs in these demanding times. As to all these endeavors, we want to hear what you think, and what more we can do to help you and the profession.

In our day-long strategic review and planning session, President-Elect Vince Buzard talked about some of his planned initiatives. That illustrates another strength of the Association – a continuity of leadership that allows a project begun in one term to be completed in a subsequent presidential term on an equal footing with that president's initiatives. We have seen this continuity at work in our efforts to improve and modernize our

governance and to foster diversity, which have transcended several presidencies and seem likely to continue as a work in progress because of our Association's commitment to these efforts.

Our role as a forum for thoughtful discussion of the issues and for a diversity of voices was demonstrated as delegates rose to speak at the House meeting, two days after our Executive Committee planning session, where we discussed matters ranging from the standards that should be maintained by offices defending the indigent; to the definition and nature of pro bono services – and recognition of the extensive volunteer service rendered by attorneys; to issues affecting same-sex couples and what is the proper role for our Association in that regard. Delegates spoke passionately about their perspectives and I believe all who were present agreed that whatever the outcome of the vote on each issue, we could take pride in the debates.

In my initial message, I called upon us to seize opportunities to advocate for the rule of law, for our members and for the profession, and I urged that we be proactive in educating the public, encouraging "legal check-ups," and overcoming misperceptions about the roles of the profession and the judicial branch of government. The events of the past weeks surrounding the Terri Schiavo situation in Florida created a tragic opportunity to inform the public about the value of planning and making wishes known in advance of an illness or accident that may come at any age or any time to any of us and to explain the documents that can be used to accomplish this planning.

Our Association has long been involved in this educational effort. For the past 11 years, through the Elder Law Section's award-winning Decisionmaking Day Project, volunteer attorneys from across the state have educated thousands of New Yorkers about living wills, health care proxies and other advance directives, in presentations at libraries, senior centers, schools and community halls. These forms and related information also can be accessed on our Web site and as we publicized the availability of these resources in the past month, more than 100,000 individuals visited these pages. In addition, hundreds of thousands more received our documents in their copies of the *New York Post*.

Beyond the personal question of "who should speak for me" and what each of us can do about that, the Schiavo case raised another concern about which we spoke out – the need to preserve and perpetuate respect for the rule of law and the proper roles of our three co-equal but independent branches of government. As I said in my recent statements to the media, threats against judges, elected officials, the various lawyers or members of the two families that have been devastated by this tragedy are not appropriate, are not to be tolerated, and must stop immediately. I spoke of the right to go to Congress or state legislatures to voice views and seek amendment of laws, but that it is the responsibility of our courts to interpret and apply the laws, as well as determine if they pass constitutional muster.

In our collective role in this Association and as individual members of the legal profession, we must continue to confront the difficult issues, we must continue to educate, to share our knowledge, and to work for the public good. This past year we, as an Association, again have demonstrated that we make a difference. We have advanced the cause of justice, and we have put into effect procedures that will be building blocks for us – and for our successors – to make further progress to champion the rule of law and the cause of justice. It has been a privilege and honor to be your president for the last 12 months. Thank you. ■

KENNETH G. STANDARD can be reached by e-mail at president@nysbar.com.

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Schedule of Spring Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Practical Skills: Basic Elder Law Practice

Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 0.5 in skills; and 5.0 in practice management and/or professional practice

May 16 — Melville, LI; Rochester; Syracuse; Westchester
May 18 — Albany; New York City

Three Hot Topics in Criminal Law
(half-day program)

Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 in ethics and professionalism; .5 in skills; and 1.5 in practice management and professional practice

May 19 — Uniondale, LI
May 20 — New York City

Estate Planning and Will Drafting

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 6.5 in practice management and/or professional practice

May 19 — Tarrytown
May 25 — Albany; Melville, LI
June 1 — Binghamton
June 2 — Buffalo
June 7 — Syracuse
June 8 — New York City; Rochester

Successfully Handling an Equitable Distribution Case from Start to Settlement

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.0 in skills; 4.0 in practice management and/or professional practice

May 20 — New York City
June 3 — Rochester; Westchester

Proving and Defending Damages at Trial: Effective Trial Techniques for Plaintiff's and Defendant's Counsel

Fulfills NY MCLE requirement for all attorneys (6.5): 3.5 in skills; and 3.0 in practice management and/or professional practice

May 20 — Syracuse

Labor and Employment Law for the General Practitioner and Corporate Counselor

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 6.5 in practice management and/or professional practice

May 20 — Rochester
June 10 — New York City

† Closing or Selling a Law Practice
(half-day program)

Fulfills NY MCLE requirement (4.0): 1.0 in ethics and professionalism; 3.0 in practice management and/or areas of professional practice

May 20 — Melville, LI
June 17 — Rochester

† Real Estate Titles and Transfers

Fulfills NY MCLE requirement (7.5): 1.0 in ethics and professionalism; 6.5 in practice management and/or areas of professional practice

May 23 — New York City
June 7 — Melville, LI; Rochester
June 10 — Albany
June 16 — Tarrytown

Practical Skills: How to Commence a Civil Lawsuit

Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 2.0 in skills; and 3.5 in practice management and/or professional practice

May 24 — Albany; Buffalo; New York City; Rochester; Syracuse; Uniondale, LI; Westchester

Attorney Trust Accounts: Handling Clients' Funds in New York (half-day program)

Live Presentations:

Fulfills NY MCLE requirement for all attorneys (4.5): 4.5 in ethics and professionalism

May 26 — New York City
June 2 — Albany

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Attorney Trust Accounts: Handling Clients' Funds in New York (half-day program) *Cont.*

† Live Video Conference Presentations:

Fulfills NY MCLE requirement (4.5): 4.5 in ethics and professionalism

June 2 Buffalo; Syracuse

† Emerging Environmental Topics for Corporate Lawyers

Fulfills NY MCLE requirement (6.5): 6.5 in practice management and/or areas of professional practice

June 1 New York City
June 8 Melville, LI
June 10 Rochester; Tarrytown
June 13 Albany

Women on the Move III: Successful Women in the Know (half-day program; reception to follow)

June 2 New York City

The Heart of the Case w/ James McElhaney

Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in skills

Note: CLE Seminar coupons and complimentary passes cannot be used for this program

June 2 Syracuse
June 3 New York City

† Advanced Document Drafting for the Elder Law Practitioner

Fulfills NY MCLE requirement (7.5): 7.5 in practice management and/or areas of professional practice

June 2 Tarrytown
June 7 Buffalo
June 9 New York City
June 13 Syracuse
June 14 Uniondale, LI
June 15 Albany

Ethics and Professionalism

Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

June 3 Syracuse
June 7 New York City
June 8 Ithaca
June 9 White Plains
June 10 Buffalo
June 16 Melville, LI; Rochester
June 17 Albany

The Nuts and Bolts of the Administration and Enforcement of Land Use Laws and Regulations

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 6.0 in practice management and/or professional practice

June 3 Albany; Buffalo; Tarrytown
June 9 Uniondale, LI

Practical Skills: Collections and the Enforcement of Money Judgments

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 1.5 in skills and 5.0 in practice management and/or professional practice

June 6 Albany; Buffalo; Melville, LI; New York City; Syracuse; Westchester

Recent Developments in Shareholder Litigation and Related Government Enforcement Initiatives

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June 10 New York City

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The New York State Judicial Institute

Transforming the Educational World of the Judiciary

Robert G.M. Keating is the Dean of the New York State Judicial Institute. Before joining the Institute he was the Director of the Center for Judicial Studies at Pace University Law School. Dean Keating has served as the Administrative Judge for the Supreme Court in Brooklyn and Staten Island and as Administrative Judge of the New York City Criminal Court. He is a graduate of Georgetown University and Duke University Law School.

By Robert G.M. Keating

Even before its official inauguration on May 5, 2003, the New York State Judicial Institute had made history as the first judicial research and training center built by and for a state court system. A collaborative effort among the Unified Court System and the state's executive and legislative branches, the Judicial Institute promised to become a comprehensive year-round college for state judges and staff, providing a high-tech focus for the judiciary's training programs. In just over a year and a half since its opening, the Judicial Institute has grown into a model for judicial education, leading in the exploration of emerging legal and social trends, and drawing jurists from around the world.

It is difficult to define a typical week at the Judicial Institute. The following snapshots of recent offerings, however, illustrate the Institute's widening role and its influence not only on New York's judicial and legal community but on national and international judicial education as well.

On December 6, 2004, Chief Judge Judith Kaye opened an international convocation on environmental law – the first ever convened in North America – a three-day pro-

gram co-sponsored by the United Nations Environment Program, the World Conservation Union, and Pace University School of Law. Among the distinguished participants were Sir Robert Carnwath, Lord Justice of Appeal for England and Wales, and Mamdouh Marie, Chief Justice of the Egyptian Supreme Constitutional Court. Judges and practitioners from New York and around the world discussed cutting-edge issues in the adjudication of environmental disputes, including the increasing use of international norms in local environmental cases.

The very day the convocation opened, the Institute also hosted a meeting of the Family Violence Task Force, chaired by Third Department Presiding Justice Anthony V. Cardona and Second Department Appellate Division Justice Sondra Miller. The Task Force plans and coordinates statewide education for the Unified Court System concerning another modern-day societal problem increasingly in the courts: domestic violence and family dysfunction. The Judicial Institute also had just completed a five-day orientation program for the 77 judges who began service in January of 2005, where in addition to seminars on judicial ethics and courtroom management, newly elected and appointed judges received in-depth training on legal issues specific to the courts to which they were assigned.

Public confidence in the judiciary turns also – perhaps principally – on the less frequently examined issue of maintaining the day-to-day professionalism of judges and court staff.

Assuring Competence in a Changing World

Public discourse about the vitality and independence of state judiciaries has typically centered on judicial selection, judicial ethics, court structure, and adequate funding. These issues will always be critical to our courts, but public confidence in the judiciary turns also – perhaps principally – on the less frequently examined issue of maintaining the day-to-day professionalism of judges and court staff. With experience and common sense as guides, the bench and bar know that the bedrock of judicial professionalism is uncompromised competence in the law. Courts simply cannot dispense justice effectively unless judges are fluent in the procedural and substantive issues that come before them. Judicial expertise is so obviously essential to public confidence in the courts and the effective administration of justice that the American Bar Association's Model Code of Judicial Conduct and its state counterparts are virtually unanimous in commanding, first and foremost, that judges "maintain professional competence" in the law.

Of course, the nation's court administrators know that maintaining judicial competence in the law is no simple matter. Like society itself, the law is complex and ever changing. Changes in technology, the global economy, and social patterns touch every area of state court jurisdiction, from finance and commercial law to family justice to basic rules of evidence. However fast and far the law may evolve, courts must stay atop the learning curve. Moreover, with changes in the law come constant changes in our communities' justice needs. Finally, as if this expanding education curriculum were not demanding enough, judges must pursue their career-long learning from court facilities scattered across the state, even as the exigencies of rising caseloads and administrative responsibilities compete for their attention.

The strategic demands of continuing state judicial education – maintaining expertise in existing law and developing familiarity with emerging issues, building cutting-edge problem-solving techniques, and reaching out efficiently to every corner of the state court system – motivated the creation of the Judicial Institute. And on each of these critical challenges, the Institute is surpassing our high expectations.

Maintaining Expertise

In its first 15 months, the Judicial Institute hosted over 200 programs for New York judges, court attorneys, and staff, spanning every major area of law as well as cutting-edge issues in judicial administration and public policy. A snapshot of the Judicial Institute's calendar of events illustrates its vibrant blend of academics and practical training under the auspices of nationally renowned faculty drawn from the bench, the bar, and the academy. As noted above, in December 2004 New York's newly selected judges spent a week in residence at the Institute before commencing their service on the bench. During the months of September and November of 2004 and January, February, and March of 2005, over 1,700 court attorneys and law secretaries attended two-day Legal Update Programs to complete compulsory ethics training and review the prior year's major developments in the areas of law germane to their courts. Nearly 1,000 veteran judges have attended the Judicial Institute's two-day

seminars, conducted throughout the year, to comply with New York's mandatory continuing professional education requirements.

In addition to general training programs, the Institute offers issue-specific programs; once again, a snapshot reveals the diversity of its programming. In the fall of 2004, the Institute hosted over 40 programs, including a four-day program on the newly created New York Integrated Domestic Violence Court, a program for matrimonial judges and training for referees in family court, a two-day program on family treatment court, and a criminal court seminar exploring the use of drug courts in traditional courtroom settings. November featured a week-long training program for new judges and a "Lunch and Learn" program on the adequacy of accusatory instruments. The Eighteenth Annual Appellate Terms Judicial Educational Seminar was another of last fall's highlights, with distinguished speakers presenting updates on the law of evidence, search and seizure, real estate law, and current issues in the law of ethics.

Interdisciplinary Issues

As important as keeping current with existing law is allowing judges and staff to explore emerging and complex interdisciplinary issues before they arise in the courtroom. For that reason, the Judicial Institute has hosted programs on bioethics, DNA evidence, and same-sex unions. At the same time, mindful that the free exchange of ideas is essential to innovation and the effective administration of justice, the Institute has hosted roundtables on child welfare, re-entry and recidivism, prison reform, domestic violence, and wrongful convictions, bringing together policymakers from inside and outside of government to collectively examine problems and search for solutions.

Chief Judge Judith Kaye's ongoing initiative to improve the jury system has used the Judicial Institute as an incubator to explore reforms and design pilot projects for implementation throughout the state. The Judicial Institute's interdisciplinary focus has also attracted global symposia on commercial law, the aforementioned world symposium on environmental law, and a host of international visitors from European, Central and South American, African, and Asian judiciaries. Upcoming programs on emerging issues include day-long seminars on eyewitness testimony, Native American tribal law, jurisdiction, and a national symposium on state judicial selection – ranking New York's Judicial Institute as the country's busiest state judicial training and research center.

Building Skills

The Judicial Institute has also become the focal point of the Unified Court System's skills-building initiatives. Judicial Institute faculty have trained judges and attorneys on efficient case-conferencing techniques, court managers on

employing new computer software, and court interpreters on ethical issues unique to their role as the voice of witnesses at trial. Combining academic training with hands-on exercises and simulations, these skills programs are essential to complement the substantive education that judges and court staff receive on an ongoing basis.

While some training is relatively routine – necessary to the effective functioning of any court – the statewide proliferation of drug treatment courts, community courts, mental health courts, domestic violence courts, and other tribunals that bridge traditional divisions between jurisdictions, agencies, and disciplines require even further skills. By building networks among judges, court attorneys, staff and service providers, the Judicial Institute has become integral to the success of New York's innovative courts.

The effectiveness of New York's groundbreaking Integrated Domestic Violence courts – a collaboration among three different tribunals: prosecution and defense agencies, victim advocates, and social service providers – relies on new case-management protocols and social service methods that must be developed and taught, court by court and community by community. New York's dozens of drug treatment courts, so effective in reducing recidivism and healing drug-ravaged communities, depend on a non-adversarial legal approach, intensive judicial monitoring, and data-management techniques that likewise

Several Judicial Institute curricula have been archived online and are available to judges and court staff at the click of a mouse.

must be taught to interdisciplinary teams cutting across the justice system. It is no exaggeration to say that the expansion of New York's leadership in problem-solving justice will depend on the teaching and training that continue every day at the Judicial Institute.

Building a Statewide Judicial College

Beyond supporting such a wide array of education and training programs, perhaps the Judicial Institute's greatest strategic contribution to maintaining New York judges' professional competence in the law lies in bridging the state's geographical expanse. The New York State judiciary includes 1,200 judges and thousands of nonjudicial staff working in over 360 court facilities statewide, some in rural areas far from the state's major population centers. The central location of the Judicial Institute, situated between New York City and Albany on the White Plains campus of the Pace University School of Law, maximizes the availability of on-campus programs to New York's judges in a downtown setting. Still, the exigencies of day-to-day caseloads sometimes make it impracticable for judges and staff to take advantage of all that the White Plains campus has to offer.

For that reason, the Judicial Institute has taken New York's year-round judicial college on the road, convening training programs at central locations and using technology to reach beyond the population centers to every corner of the state. Court employees can participate in courthouse "Lunch and Learn" programs either directly or through statewide webcasting. Several Judicial Institute curricula have been archived online and are available to judges and court staff at the click of a mouse. In time, as the costs of data compression and transmission continue to decline, nearly all Judicial Institute programs will be stored on the Internet and available through on-demand webcasting, thus providing a complete library of legal update programs as close as a home or work computer.

In the coming years, as the law and the role of the courts change with increasing speed, the challenge to judges, court administrators, and staff to stay current and innovate will only expand. The academic calendar of the Judicial Institute will grow along with these challenges, helping New York and its courts to stay at the cutting edge, both here at home and around the world. ■

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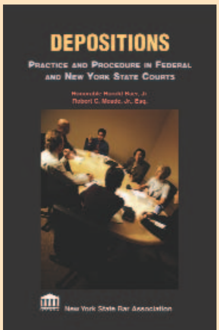

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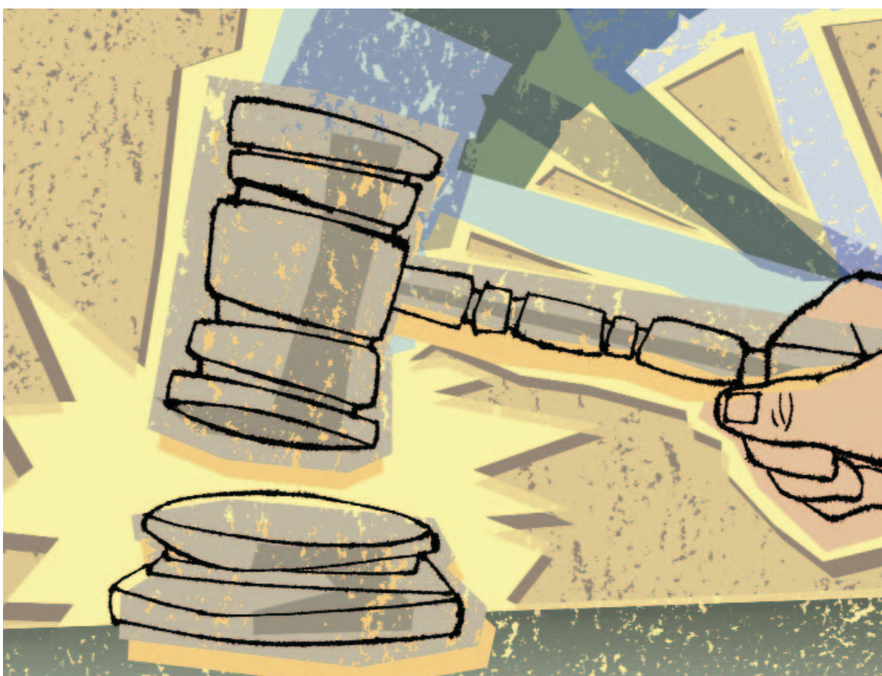
BY DAVID PAUL HOROWITZ



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In the Beginning . . . Motions *In Limine*

A motion *in limine* ("on or at the threshold," or "in the beginning") is a request that a court rule on an evidentiary issue before a trial objection is typically interposed when the evidence is offered during a trial. A motion *in limine* may be made to admit,[1] exclude[2] or limit evidence. The court's inherent power to admit or exclude evidence provides the basis for the motion, although there is no specific statutory basis for a motion *in limine*.[3]

Motions *in limine* are often made before the start of the trial, although they may also be made at any point during the trial before the evidence is offered. The denial of a pre-trial motion *in limine* does not bar the making of the same application during the trial, when the proffered evidence can be evaluated "in context" with other trial evidence,[4] and specific leave to renew may be granted by the court denying a motion *in limine*.[5] The motion may be made up to the point where the court has had an opportunity to rule on the admissibility of the evidence.[6] Motions *in limine* are often the best means of airing an evidentiary issue and ensuring a meaningful review by the trial court. The Court of Appeals has recently reiterated the importance and effectiveness of the motion *in limine* to raise evidentiary issues, and criticized defense counsel in a criminal prosecution for failing to utilize the device.[7]

A motion *in limine* may not be made before the commencement of an action. In a case where the ownership and operation of a sidewalk was in dispute, the municipality sought an evidentiary ruling before commencement of an action, but after the service of a notice of claim upon the municipality, by means of a motion for a protective order. The motion sought a ruling that any repairs to the subject sidewalk undertaken by the municipality would not constitute an admission as to ownership, and that the fact of any such repairs should be inadmissible at trial. The appellate court held that, absent specific statutory authority for instituting a motion prior to commencement of an action, the court was without jurisdiction to entertain the motion.[8]

In limine rulings are considered preliminary rulings, advisory in nature, and the decision of one judge is not binding on the trial judge.[9] This type of preliminary ruling is generally not appealable,[10] and it does not matter whether appeal is sought by permission or as of right.[11] This is because "[a]ppellate review of such a ruling must be deferred until after trial when the relevance of the proffered evidence, and the effect of Supreme Court's ruling with respect thereto, can be assessed in the context of the record

as a whole."[12] Accordingly, a court's *in limine* ruling may be reviewed following a final judgment.[13] The court may reserve decision on a motion *in limine* and, thereafter, rule on the motion following a verdict, and as part of post-trial motions.[14]

The practical effect of a motion *in limine* may be to limit issues at trial.[15] One exception to the non-appealability of a ruling on a motion *in limine* is where the decision on the motion is the functional equivalent of deciding summary judgment. The Second Department has explained that where "an order deciding such a motion clearly involves the merits of the controversy and affects a substantial right . . . [it] is appealable."[16] However, using a motion *in limine* to resolve the merits of a case is frowned upon. The Second Department has held that "a motion *in limine* [is] an inappropriate device to obtain relief in the nature of partial summary judgment," and the same court has held it to be an abuse of discretion for a trial court to entertain a late motion for summary judgment (converted from a motion *in limine*) where the moving party failed to demonstrate good cause for the delay and there was prejudice to the opposing party.[17] A motion *in limine* may also be treated by the court as a motion to dismiss.[18] Motions *in limine* may be directed to both liability issues and damages issues.[19]

One opportunity for raising evidentiary issues in advance of trial is at the pre-trial conference held by the court, although judges presiding at pre-trial conference who will not preside over the trial will generally defer a decision to the trial judge.[20] On occasion, the judge presiding over the jury coordinating part will decide part of a motion *in limine*, and defer the remainder of the motion to the trial judge.[21] The trial court has discretion to set a time limit for the making of a motion *in limine*, and practitioners risk losing the ability to so move unless conversant with the rules of the individual trial judge and of the judicial district in which the judge sits.[22] One example of a time limitation is contained in the Rules of the Justices of the Commercial Division, Supreme Court, New York County, where Rule 29 specifies that "[a]t least five days prior to trial, the parties shall make all motions in limine that require rulings prior to trial, except for those not reasonably anticipated in advance."[23]

The major strategic risk in making a motion *in limine* is tipping an opponent off to an evidentiary issue of which the opponent was unaware. Examples include:

- moving *in limine* to bar testimony concerning the conviction of a witness;
- flagging for opposing counsel the importance placed by the moving party on the particular evidence in question;
- calling attention to the moving party's uncertainty concerning the ultimate ruling on admissibility.

Additionally, making the motion in advance, thereby allowing the party opposing the motion the opportunity to carefully research the issue, allows the party opposing the motion a concomitant opportunity to more thoroughly prepare to oppose the evidentiary position advanced in the motion *in limine*. As a practical matter, a trial court will generally permit counsel confronted with a motion *in limine* during trial an opportunity to research and oppose the issue.

A major advantage of a motion *in limine* is the opportunity given to the court to carefully weigh the evidentiary issue, thus avoiding an "off the cuff" ruling on a matter with which the

court may be unfamiliar. The advantages in moving *in limine* increase in proportion to the potential prejudice of the evidence to be offered and the complexity of the evidentiary issue presented to the court.

When a motion *in limine* is made in advance of jury selection and a ruling is obtained, attorneys selecting the jury may tailor their presentation to, and questioning of, the prospective jurors, secure in the knowledge that certain evidence has already been excluded and will not come out at time of trial, or that certain evidence will be admitted. Additionally, the opening statements and questioning of witnesses called earlier in the trial than the witness whose testimony is subject to the motion may be prepared with the knowledge that certain evidence will, or will not, be excluded.

Motions *in limine* offer several advantages over an objection when the evidence is offered or the question posed at trial. First, trial planning and strategy is greatly enhanced when evidentiary points are resolved in advance, and the trial may be streamlined accordingly. Second, the need to object at the time evidence is offered, and risk appearing to the jury to have something to hide, even if the objection is sustained, is eliminated. Third, there is no need, in the event the question is answered before the objection is sustained, for a curative instruction asking the jury to forget what they have just heard, after "the cat is out of the bag."

An example of a useful motion *in limine* is where the witness has a privilege to assert, and the attorney representing the witness is concerned that opposing counsel will ask the question, knowing the information is privileged and need not be disclosed, simply in order to have the privilege asserted in front of the jury, giving the appearance that a witness has something to hide. Moving *in limine* well in advance of trial also allows a shift in trial strategy and tactics, depending on the ruling of the court, and may allow sufficient time for additional witnesses, both expert and lay, to be noticed if a ruling is adverse and a gap in proof is created.

Motions *in limine* may be made, on paper, in the course of regular pre-trial motion practice, bearing in mind the timing requirements set forth in CPLR 2214, or may be made orally on the eve of or at time of trial without the need of a writing or pursuant to CPLR 2214's timing requirements.[24] If the request is made orally and is complex, the court may allow an opportunity for the opponent to research the issue, which may delay the trial. Written submissions to the court at the time of trial should be marked as court exhibits so as to be made part of the record. However, if the motion is made orally, make certain to have a court reporter present so that there is a record of the arguments made and, most important, so that there is a record of the decision of the judge, which may contain specific limitations or instructions with regard to the proposed evidence. The motion may be renewed or reargued at trial.

Motions *in limine* are often made regarding expert testimony. Although New York State court judges do not perform the *Daubert* gate-keeping function that their federal brethren do, novel expert issues may be addressed in a motion *in limine* to make a challenge under *Frye*'s general acceptance standard. Applying *Frye*, an expert's testimony has been precluded where the party offering the expert failed to establish support for the theory "even in general terms."[25] Motions *in limine* have been used to challenge the expertise of a rape trauma specialist,[26] the science of spinoscopy,[27] and the validity of hypnotically-enhanced testimony,[28] to name but a few. A motion *in limine* may also be used to establish parameters for the foundation materials an expert may base trial testimony upon, to avoid "unnecessary disputation, and inadvertent prejudicial testimony, in the presence of the jury,"[29] or to limit the scope of the expert's testimony.[30]

In criminal actions, motions *in limine* have been made to exclude prior consistent statements,[31] to file a late notice of alibi,[32] to test the reliability of automobile "black boxes,"[33] or to introduce background testimony on the organization of street level drug operations[34] or battered woman's syndrome.[35]

In civil actions, motions *in limine* have been made to exclude the history portion of a hospital record,[36] to bar a party from submitting proof relating to a new liability theory,[37] to prevent eliciting testimony concerning a witness's past use of heroin and current participation in a methadone program,[38] to preclude testimony concerning wage loss by an illegal alien,[39] to preclude the admission of a surveillance video,[40] and to limit certain damages evidence in an eminent domain proceeding.[41]

Motions *in limine* can be a potent weapon when used properly and at the appropriate stage of litigation. Deciding when to use this weapon is more of an art than a science, and consultation with other attorneys is often a good method for deciding whether to make the motion. ■

Motions *in limine* offer several advantages over an objection when the evidence is offered or the question posed at trial.

1. *People v. Oguendo*, 305 A.D.2d 140, 759 N.Y.S.2d 457 (1st Dep't), *appeal denied*, 100 N.Y.2d 597, 766 N.Y.S.2d 173 (2003).

2. *Passino v. DeRosa*, 199 A.D.2d 1017, 606 N.Y.S.2d 107 (4th Dep't 1993).

3. *See, e.g.*, *People v. Michael M.*, 162 Misc. 2d 803, 618 N.Y.S.2d 171 (Sup. Ct., Kings Co. 1994).

4. *Grant v. Richard*, 222 A.D.2d 1014, 636 N.Y.S.2d 676 (4th Dep't 1995).

5. *Collins v. Willcox, Inc.*, 158 Misc. 2d 54, 600 N.Y.S.2d 884 (Sup. Ct., N.Y. Co. 1992).

6. *See, e.g.*, *Coopersmith v. Gold*, 223 A.D.2d 572, 636 N.Y.S.2d 399 (2d Dep't 1996), *aff'd*, 89 N.Y.2d 957, 655 N.Y.S.2d 857 (1997).

7. *People v. Rodriguez*, 3 N.Y.3d 462, 787 N.Y.S.2d 697 (2004) (criticizing the defense for not having made a motion *in limine* where defense realized mistake in alibi notice. "Had the defense acted properly and aired the issue *in limine*, the court could have heard both sides and exercised its discretion appropriately.").

8. *Belmar v. City of Syracuse*, 100 A.D.2d 745, 473 N.Y.S.2d 624 (4th Dep't 1984).

9. *See, e.g.*, *Cotgreave v. Pub. Adm'r of Imperial County*, 91 A.D.2d 600, 456 N.Y.S.2d 432 (2d Dep't 1982).

10. *See, e.g.*, *Strait v. Arnot Ogden Med. Ctr.*, 246 A.D.2d 12, 675 N.Y.S.2d 457 (3d Dep't 1998).

11. *Hargrave v. Presher*, 221 A.D.2d 677, 632 N.Y.S.2d 886 (3d Dep't 1995).

12. *Brennan v. Mabey's Moving & Storage Inc.*, 226 A.D.2d 938, 640 N.Y.S.2d 686 (3d Dep't 1996).

13. *Breen v. Laric Entm't Corp.*, 2 A.D.3d 298, 769 N.Y.S.2d 270 (1st Dep't 2003).

14. *Hassett v. Long Island R.R. Co.*, 6 Misc. 3d 168, 787 N.Y.S.2d 837 (Sup. Ct., Kings Co. 2004) (Belen, J.).

15. *Siewert v. Loudonville Elementary Sch.*, 210 A.D.2d 568, 620 N.Y.S.2d 149 (3d Dep't 1994).

16. *City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 783 N.Y.S.2d 75 (2d Dep't 2004) (citations omitted).

17. *Clermont v. Hillsdale Indus., Inc.*, 6 A.D.3d 376, 773 N.Y.S.2d 901 (2d Dep't 2004) (quoting *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 648 N.Y.S.2d 101 (1st Dep't 1996) (alteration in original)).

18. *Henrickson v. City of New York*, 285 A.D.2d 529, 727 N.Y.S.2d 659 (2d Dep't 2001).

19. *State v. Exxon Corp.*, 7 A.D.3d 926, 777 N.Y.S.2d 539 (3d Dep't 2004) (holding that it was error for the trial court to have granted state's *in limine* motion to cap claimant's damage to the amount set forth in the *ad damnum* clause).

20. *See, e.g.*, *M. v. N.Y. City Transit Auth.*, 4 Misc. 3d 829, 781 N.Y.S.2d 865 (Sup. Ct., Richmond Co. 2004) (Vitaliano, J.).

21. *Id*.

22. *Mendola v. Richmond OB/Gyn Assocs.*, 191 Misc. 2d 699, 744 N.Y.S.2d 637 (Sup. Ct., Richmond Co. 2002) (refusing to hear motion *in limine* for failing to make the motion within the time set by the local rules); *see also Hotaling v. CSX Transp.*, 5 A.D.3d 964, 773 N.Y.S.2d 755 (3d Dep't 2004).

23. (Sup. Ct., N.Y. Co.) Rule 29.

24. *See, e.g.*, *Wilkinson v. British Airways*, 292 A.D.2d 263, 740 N.Y.S.2d 294 (1st Dep't 2002) (citing *State v. Metz*, 241 A.D.2d 192, 671 N.Y.S.2d 79 (1st Dep't 1998)).

25. *Lara v. N.Y. City Health & Hosps. Corp.*, 305 A.D.2d 106, 757 N.Y.S.2d 740 (1st Dep't 2003).

26. *Gutierrez v. Iulo*, 156 Misc. 2d 79, 591 N.Y.S.2d 711 (Sup. Ct., N.Y. Co. 1992).

27. *Castrichini v. Rivera*, 175 Misc. 2d 530, 669 N.Y.S.2d 140 (Sup. Ct., Monroe Co. 1997).

28. *Bennett v. Saeger Hotels, Inc.*, 209 A.D.2d 946, 619 N.Y.S.2d 424 (4th Dep't 1994).

29. *Hornbrook v. Peak Resorts, Inc.*, 194 Misc. 2d 273, 754 N.Y.S.2d 132 (Sup. Ct., Tompkins Co. 2002).

30. *Mariano v. Schuylerville Cent. Sch. Dist.*, 309 A.D.2d 1116, 766 N.Y.S.2d 388 (3d Dep't 2003).

31. *People v. Levandowski*, 8 A.D.3d 898, 780 N.Y.S.2d 384 (3d Dep't 2004).

32. *People v. Wright*, 1 A.D.3d 707, 766 N.Y.S.2d 730 (3d Dep't 2003).

33. *People v. Hopkins*, No. 2004-0338, 2004 N.Y. Misc. LEXIS 2902 (County Ct., Monroe Co.) (Geraci, J.).

34. *People v. Oguendo*, 305 A.D.2d 140, 759 N.Y.S.2d 457 (1st Dep't), *appeal denied*, 100 N.Y.2d 597, 766 N.Y.S.2d 173 (2003).

35. *Compare People v. Ellis*, 170 Misc. 2d 945, 650 N.Y.S.2d 503 (Sup. Ct., N.Y. Co. 1996) (granting the People's motion to include expert testimony about battered woman syndrome in an attempt to explain an alleged assault victim's post-assault conduct) *with People v. White*, 4 Misc. 3d 797, 780 N.Y.S.2d 727 (Dist. Ct., Nassau Co. 2004) (denying the People's motion to include expert testimony about battered woman syndrome because the issue was not "inherently confusing to the jury").

36. *Passino v. DeRosa*, 199 A.D.2d 1017, 606 N.Y.S.2d 107 (4th Dep't 1993).

37. *Barksdale v. N.Y. City Transit Auth.*, 294 A.D.2d 210, 741 N.Y.S.2d 697 (1st Dep't 2002).

38. *M. v. N.Y. City Transit Auth.*, 4 Misc. 3d 829, 781 N.Y.S.2d 865 (Sup. Ct., Richmond Co. 2004) (Vitaliano, J.).

39. *Sanango v. 200 E. 16th St. Hous. Corp.*, ___ A.D.3d ___, 788 N.Y.S.2d 314 (1st Dep't 2004).

40. *Hairston v. Metro-North Commuter R.R.*, 6 Misc. 3d 399, 786 N.Y.S.2d 890 (Sup. Ct., N.Y. Co. 2004) (Braun, J.).

41. *City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 783 N.Y.S.2d 75 (2d Dep't 2004).

2005:
A Banner Year for Juries

By Judith S. Kaye

For all the phenomenal years it has been my privilege to serve as Chief Judge, jury reform has been a dominant interest. Why?

Juries are not only part of our history and heritage, they are also at the very heart of our justice system, essential to effective resolution of the disputes brought to court. Then too, juries are our direct line of communication with the public – one of the few opportunities we have to show the public, firsthand, that our justice system works well and deserves trust and confidence. Finally, throughout the past decade, an enormous amount of research and innovation, nationwide, has focused on jury improvement. We cannot, and should not, ignore the lessons learned.

And for all the activity over the past dozen years, 2005 promises to be a stand-out.

One highlight of the year is our Law Day celebration. Traditionally, the American Bar Association selects a theme that unifies Law Day celebrations all across the country. This year the ABA not only chose "The American Jury: We the People in Action" as the Law Day theme but also suggested that the entire ensuing week be declared Juror Appreciation Week. We happily took up that suggestion. It's a time to say thank you to people who have served, and a time to reach out to the public generally – to high school students, civic groups, potential jurors, employers – to encourage positive attitudes about our prized jury system.

Any chance to work with our fabulous Jury Commissioners and jury personnel is one I enjoy, and this has been an especially gratifying one. I thank as well New York City attorney Mark Zauderer (Chair of the Jury Commission) for inspiring dialogues on the jury all across the state, and Debbie Shayo (Executive Director of the Law, Youth & Citizenship Program) for developing materials that students and other Law Day celebrants could take home to their families to spread the word about jury service.

The ABA's designation of the 2005 Law Day theme came as no surprise to me. When Virginia attorney Robert Grey assumed the presidency of the American Bar Association, he identified the jury as his signature initiative, and he named me Co-Chair of the ABA's American Jury Commission. Throughout his presidential year (August to August), we have been hard at work on ways to promote, and improve, the jury system.

Chief among Robert Grey's efforts has been the formulation of a single set of principles reflecting the lessons

Judith S. Kaye is Chief Judge of the New York State Court of Appeals.

learned through jury research and experience over recent decades. When we began our jury reform effort here in New York back in 1993, we used the American Bar Association jury standards – then 10 years old – as the centerpiece around which to shape our own thinking about what would work best for New York. President Grey's idea was that an updated set of ABA standards, similarly, would serve as a catalyst for state-by-state improvements long into the future.

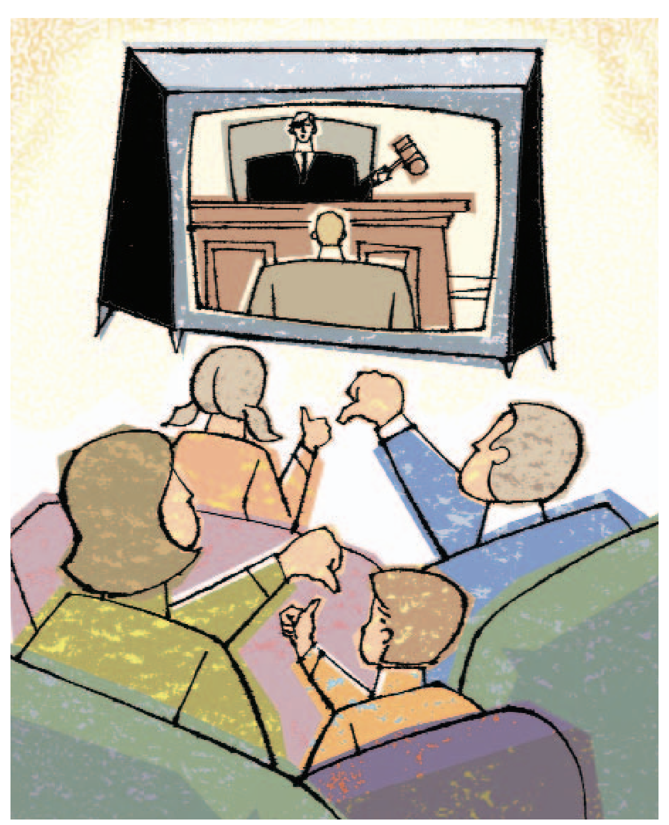
And indeed, on February 14, 2005, the American Bar Association House of Delegates approved the ABA Principles for Juries and Jury Trials – a set of 19 principles, from soup to nuts. Topics covered include the right to trial by jury, assembling a jury, conducting trials and promoting juror comprehension, jury deliberations and post-verdict matters.

Important as the ABA Principles are, as Chief Judge I am even more enthused by the work of the Jury Trial Project, described in the accompanying article by Elissa Krauss. The Jury Trial Project centered on 50 of our own superb New York trial judges who stepped forward to try some of the jury innovations in wide use around the country, with close monitoring of the actual experience for judges, attorneys and jurors. Fascinating! I hope you find her report as interesting, and exciting, as I do.

Change, I recognize, is never easy. We grow accustomed to doing things one way, and then are reluctant to try something new and different. With respect to jury trials in particular, old ways have the significant virtue of reducing the risk of reversal and other unhappy surprises. But resistance to change also can be stagnating, and in the area of juries, regressive and self-defeating. We have learned so much about new methods, new technology, new expectations. Why turn our backs when we can all benefit from one another's experience?

And here is where *two* features of this edition of the New York State Bar Association *Journal* are so especially welcome to the Chief Judge. First is the report on the Jury Trial Project – hard evidence from the front lines of the efficacy of several of the by-now-established jury innovations. Second is Dean Robert Keating's report on the Judicial Institute, a first-rate facility available to judges, court staff and the Bar to train and prepare for the challenges, and opportunities, of the 21st century.

Regretfully, I acknowledge the validity of Elissa Krauss's conclusion: New York led the way in so many respects in bringing the jury system up to date, but we have lately fallen behind in areas of juror utilization and comprehension. I end this article where I began: 2005 promises to be a stand-out year. ■



Jury Trial Innovations in New York State

Improving Jury Trials by Improving Jurors' Comprehension and Participation

By Elissa Krauss

In January of this year, 51 New York State civil and criminal trial judges completed a field experiment using innovative jury trial practices. Members of the Unified Court System's Jury Trial Project, these judges, representing 16 counties, participated in a hands-on effort aimed at improving the trial process. The judges tested practices designed to treat jurors as active trial participants, thereby enhancing juror comprehension in the interests of enhancing justice.[1]

The Jury Trial Project judges identified 10 innovative practices for use in trials.[2] Some, such as note-taking by jurors, have long been approved.[3] Others, such as allowing jurors to submit written questions to witnesses may be within the trial court's discretion but are controversial.[4] Others, including providing the deliberating jury with the judge's final charge in writing are widely accepted elsewhere but remain controversial in New York.[5]

Each judge was asked to try any or all of the 10 practices. Judges were urged to consult with counsel and to seek counsel's consent as appropriate. In each trial where the innovative practices were used, questionnaires were to be completed by the judge, attorneys and jurors.

The Report and Recommendations of the Jury Trial Project Committees have recently been released.[6] The recommendations are based on data gathered in 112 trials involving 926 jurors and 210 attorneys in which one or more of the practices were used, as well as past experience in New York and elsewhere.[7] This article focuses on five of the innovative practices studied in the Project and recommended for wider use in New York trials:

1. Permitting jurors to take notes.
2. Allowing jurors to submit written questions for witnesses.
3. Giving substantive instruction on elements of claims or charges at the outset of trial.
4. Providing final instructions in writing to the deliberating jury.
5. Voir dire openings by counsel to the entire panel at the outset of voir dire.

In addition to providing insight into the efficacy and impact of specific trial practices, this effort produced findings of general interest to the bench and the bar. Of greatest interest is the finding that while many jurors viewed trials as very complex, most judges thought the same trials were not at all complex. Attorneys are more likely than judges but less likely than jurors to say that a

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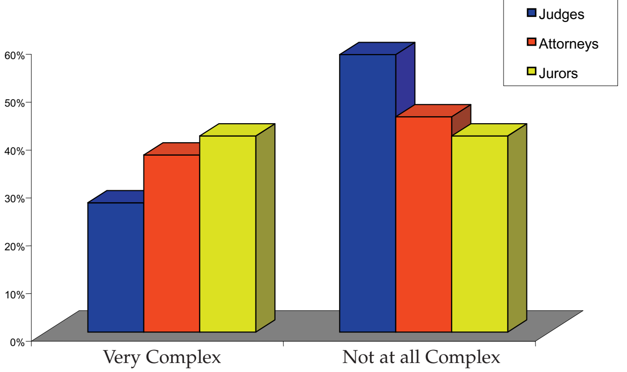
trial was complex. This difference in perspective highlights the importance of efforts to enhance juror comprehension.

How Complex Was this Case? (Civil and Criminal Trials)



Recommendations and Findings

Note-taking

Juror note-taking is approved by all federal circuit courts, has become routine in most federal courts, and is permitted in all states.[8] Though long permitted in New York State, the practice of allowing jurors to take notes is by no means universal. Based on data from 91 New York trials where jurors took notes, the Jury Trial Project's Committee on Note-Taking is recommending that all judges exercise their discretion to permit jurors to take notes. Jurors should routinely be provided with note-taking materials. They should neither be urged to take notes nor discouraged from taking notes. They should be cautioned against trying to transcribe the trial as a court reporter fills that function. Jurors should also be cautioned against allowing note-taking to distract attention from the witnesses.[9] This recommendation is consistent with current Trial Court Rules and also with the American Bar Association Principles on Juries and Jury Trials.[10]

Eleven criminal trial judges, 14 civil trial judges, 167 attorneys, and 757 jurors participated in the 91 trials where note-taking was permitted.[11] Most judges who permitted note-taking thought it helped jurors understand the evidence and that, rather than distracting jurors, note-taking seemed to help them in paying attention.

New York attorneys are skeptical of juror note-taking. Less than one-quarter of those in trials where juror note-taking was not permitted approved of the practice. However, where juror note-taking was permitted nearly half of the attorneys approved. Attorneys' most common concerns are that note-taking might be distracting and that note-takers might gain an unfair advantage in deliberations.

These fears appear to be unfounded. Anecdotal reports from Jury Trial Project judges confirm that jurors who take notes appear to pay closer attention. For example, Bronx Civil Court Judge Wilma Guzman said:

> Before I joined the Jury Trial Project, I thought allowing jurors to take notes was a bad idea, thinking it would distract the jurors. Once I took the risk and tried it, I found that the jurors wanted to take notes and that they remained attentive to witnesses.

Others commented that note-takers appear to be judicious in their note-taking. No judge or attorney thought the procedure interfered with the trial. Several thought note-taking aided the jury in formulating questions during deliberations. For example, Acting Supreme Court Justice Margaret Clancy, a member of the Project's Jury Instructions Committee, allowed note-taking for the first time in an attempted murder case tried shortly after she joined the Jury Trial Project:

> I always believed that note-taking would be a distraction to jurors. To the contrary, it seemed to aid them in following the testimony. About half the jurors started out taking notes. Some continued to take notes throughout while others abandoned it along the way. My point is that the jurors appeared to be self-regulating meaning that those who find it useful do it and those who would be distracted do not. A welcome surprise on that first case was that the jurors seemed to be using the notes as tools during deliberations. Read back requests were much more specific than usual – including the date and approximate time of the testimony.

Kings County Supreme Court Justice Cheryl Chambers agrees. A member of the Project's Committee on Voir Dire, she has allowed jurors to take notes in complex criminal cases for five years. She says that:

> Note-taking appears to improve juror attention to the testimony. Moreover, during deliberations jurors are able to pinpoint the portions of the testimony they want read back. The bottom line is active and focused jurors are more likely to produce a just verdict.

The Jury Trial Project research did not explore note-takers' roles in deliberations. Research elsewhere has examined the impact of note-taking on deliberations and found that note-takers do not have an undue influence on non-note-takers and do not emphasize evidence they noted over other evidence. Jurors' notes have also been found to be accurate and not to favor one side.[12] Mock jury research has found that rather than being distracted, note-takers remember more case facts than do non-note-takers.[13]

In Jury Trial Project trials, New York jurors were enthusiastic about note-taking. Clear majorities found note-taking very helpful in recalling evidence, understanding the

law, and reaching a decision. Moreover, 60% of jurors who were not permitted to take notes would like to do so in future trials.

Juror Questions

Allowing jurors to submit written questions for witnesses is the most controversial Jury Trial Project practice. The Committee on Juror Questions is recommending a Trial Court Rule clarifying the trial judge's discretion to permit jurors to submit written questions for witnesses. The rule would allow jurors to submit written questions. The questions would be reviewed by the court and counsel. And, where a question is proper, the court would address the juror's question to the witness and permit counsel the opportunity to follow up. This recommendation is based on the following: the positive experience of judges, jurors and attorneys in 74 Jury Trial Project trials where jurors were permitted to ask questions; the lack of authority prohibiting the practice; and, widespread experience and research about juror questions in other jurisdictions.

Judges and jurors in the trials where jurors were permitted to submit written questions were overwhelmingly positive. Attorneys remained skeptical, fearing that jurors might become advocates, derail attorneys' trial strategy, or provide information (through the questions) to opponents. There is no evidence that this occurred in the New York trials where juror questioning was permitted or elsewhere.[14] Moreover, attorneys who participated in trials where juror questions were permitted were twice as likely to approve the practice as those in trials where juror questions were not permitted.

Among the 130 attorneys who participated in a trial where juror questions were permitted, majorities agreed that the questions provided information about jurors' comprehension; gave insight into how well jurors understood evidence; or alerted the court and counsel to missing information. Two-thirds said that no improper questions were submitted. Notably, among 347 questions submitted by jurors only 41 were objected to and only four of the objected-to questions were asked. Finally, only a few questions were typically asked. Most jurors who submitted questions said they submitted one or two. In civil trials an average of 2.5 questions were submitted and in criminal trials an average of 4.7 questions were submitted.

Jurors are permitted to submit written questions at the trial court's discretion in 31 states. Only five states prohibit the practice.[15] No federal circuit prohibits the practice. The ABA Principles Relating to Juries and Jury Trials recommend that jurors in civil cases "should, ordinarily, be permitted to submit written questions."[16]

In New York State, the First Department has long held that permitting jurors to submit questions is a matter within the trial judge's discretion.[17] The Second Circuit agrees, though it discourages the practice.[18] On the civil side there is virtually no reported case law in New York State on the issue.[19]

Judges who allow jurors to submit questions are pleasantly surprised by the ease of the procedure and the quality of the questions. For example, Erie County Supreme Court Justice Donna Siwek says:

> Permitting juror questions was an extremely positive experience for the court, the lawyers and the jurors. Despite their initial skepticism, the lawyers were pleasantly surprised at how smoothly the process worked and how insightful most of the questions were. The jurors universally appreciated the opportunity to ask a question that helped clarify or that was not covered on direct or cross. My initial concern that permitting questions would bog down the trial was completely allayed. Very often, when I read the submitted question with the attorneys at side-bar, we all agreed, "Good question."

The 16 judges generally agreed that permitting juror questions was helpful to jurors in paying attention, understanding the evidence and reaching a decision. Most also felt that juror questions had a positive effect on the fairness of the trial. Some Jury Trial Project participants had been permitting jurors to submit questions before the project began. For example, New York County Supreme Court Justice Stanley Sklar explains:

> I began allowing jurors to ask questions after attending the Jury Summit in 2001. But only for the last 18 months, have I instructed jurors that they may ask questions. The lawyers in all of my medical malpractice trials have agreed to the procedure. The maximum number of juror questions I've had in a trial is four. Only one lawyer objected to one question, and I sustained the objection. After the trials the lawyers, with one exception, felt that juror questions were "No big deal." A few commented that some of the questions were excellent.

Despite their disapproval of the practice, most attorneys participating in trials where questions were allowed thought the questions contributed to jurors' paying atten-

"Despite their initial skepticism, the lawyers were pleasantly surprised at how smoothly the process worked and how insightful most of the questions were."

tion and provided attorneys with useful information about the jurors' thought processes and concerns. And more than 80% of the jurors who were permitted to ask questions found the opportunity very helpful in providing relevant information, helping them understand the evidence, and clarifying witness testimony.

An extensive body of research has examined the impact of juror questions.[20] A key finding is that jurors permitted to ask questions *do not* become advocates or embark on hypothesis-confirming searches. This finding was confirmed in New York, where three-quarters of those who submitted questions submitted only one or two. Moreover, jurors do not react negatively when their questions are not asked.[21] This was also true in New York where the vast majority of jurors in trials where questioning was permitted found the practice helpful to understanding or clarifying evidence whether they submitted questions themselves and whether questions they submitted were asked. Field experiments in Massachusetts, Colorado and New Jersey also confirm that juror questions are limited and take little time.[22]

Jury Instructions and Order of Trial

Substantive Preliminary Instructions The Project's Jury Instructions Committee concluded that there are times when both parties and the jurors can benefit from pre-instruction of jurors on elements of the charges or claims, penal law definitions, or complex legal concepts. This hypothesis was supported by data collected from 35 trials where judges gave such preliminary instructions. Judges and attorneys thought pre-instruction was helpful to jurors' understanding of the law and had a positive impact on trial fairness. Erie County Supreme Court Justice John P. Lane, a member of the Committee on Juror Questions commented:

> Jurors appreciate receiving preliminary instructions on the principles of substantive law. They find the evidence easier to understand when they know the underlying principles of the case. Things that we take for granted are new to jurors. For example, we may assume that jurors know what negligence is. The fact is that most do not. Similarly, early explanations of the burden of proof and the no-fault threshold are also effective. Of course, instructions are repeated in more detail at the end of the case.

Most attorneys also felt that substantive preliminary instructions had a positive effect. Criminal trial attorneys were more positive than were civil trial attorneys. Attorneys commented that "it helps the jurors put the proof into context" and "the more times they hear what the law is the better chance they will understand the law."

These findings are supported by research elsewhere.[23] In New York, the Second Department has held that giving preliminary instructions that define the elements of a crime was a "mode of proceedings error."[24] The Third Department upheld preliminary instructions where they did not outline the elements of a crime, but "merely quoted verbatim from the Penal Law" and the court admonished the jury to wait until it heard all the evidence before forming an opinion.[25] The ABA Principles for Juries and Jury Trials recommend that preliminary instructions include the elements of the charges and claims.[26]

Jurors permitted to ask questions *do not* become advocates or embark on hypothesis-confirming searches.

Written Final Instructions Based on data from 39 Jury Trial Project trials, and near universal acceptance elsewhere, the Committee on Jury Instructions is recommending that judges routinely supply deliberating jurors with a written copy of the final charge. Though permitted in civil trials by Trial Court Rule, this procedure requires consent of the parties in criminal cases.[27] While jurors are permitted to take their own possibly inaccurate notes about the charge into the jury room, they are prevented from receiving the correct charge in writing.

The Office of Court Administration is pursuing legislation permitting judges in criminal trials to provide deliberating jurors with written copy of the charge. This procedure is endorsed in the ABA Principles for Juries and Jury Trials[28] and has long been endorsed by the New York State Bar Association's House of Delegates.[29] The practice is recognized as increasing jurors' confidence in their verdicts and saving valuable court time. At least 29 states permit or require instructions to be supplied to jurors in writing. All of the federal circuits have approved the practice, as did the U.S. Supreme Court.[30]

Extensive research elsewhere has examined jurors' and judges' reactions to providing final instructions in writing to deliberating juries. Jurors experience less confusion

about the instructions and more confidence in their verdict when they have a written copy of the charge in deliberations. They report that written instructions are helpful in resolving disputes about what the instructions mean or how to apply them and that they looked at the written copy an average of five times in deliberations, spending an average of 25 minutes (or 16% of their deliberation time) discussing the written copy. Total deliberation time is about the same with or without written instructions but fewer questions about the content of instructions are asked by deliberating juries who have instructions in writing.[31]

In 39 Jury Trial Project trials, the deliberating jury was given the final charge in writing. Judges felt that the written instructions had a positive impact on fairness and were very helpful to jurors. For example, Erie County Supreme Court Justice John P. Lane commented:

> Jurors say that having a copy of the final charge facilitates their deliberations. When I supply jurors with written copies of the charge, there are no requests for read backs of the charge.

Though barely a majority of attorneys approve of providing jurors with instructions in writing, nearly two-thirds of those who actually used the practice in a trial approved it. An overwhelming majority of the 286 jurors who sat on these trials believed that the written instructions were very helpful for understanding the law, understanding the evidence, and in reaching a decision.

Majorities of jurors sitting on both civil and criminal trials who did not have written instructions said they would like to have such instructions in the future. The more complex a juror thought the trial was, the more likely the juror was to want written instructions.

There is debate about the most effective and efficient way to provide the jury with the charge in writing.[32] Steuben County Surrogate Marianne Furfure distributes copies of her charge to all jurors, with counsel's consent, in both criminal and civil trials over which she presides. The Steuben County District Attorney consented to the procedure. Judge Furfure notes: "Jurors take their responsibility seriously. Judges should be allowed to give them the tools they need to make decisions in accordance with the law." In Judge Furfure's experience:

> Giving the jurors the charge in writing to review while I'm reading makes them more attentive. They tell me post-trial that they use the charge throughout their deliberations. It saves time during deliberations by avoiding multiple requests from jurors to repeat the elements of a crime or cause of action. It's well worth the extra time it takes to prepare the charge for distribution.

Voir Dire

The Committee on Voir Dire is recommending use of "voir dire openings." With this procedure, sometimes called a "mini-opening," the attorneys are each allowed a brief period – an average of five minutes – to speak to potential jurors about the case at the outset of voir dire.

Although questionnaires were completed for only 22 trials in which voir dire openings were used, the practice was enormously successful. Attorneys and judges agreed that voir dire openings improve juror candor, increase jurors' willingness to serve, and improve jurors' understanding of why voir dire questions are asked. Jurors who heard voir dire openings were more likely than those who did not hear them to understand what the trial was about. The use of voir dire openings has been applauded by representatives of the Public Defense Bar and the District Attorneys' Association, who were invited to comment on the innovations.[33] Most attorneys responding to questionnaires agreed. As one attorney said about voir dire openings:

> It let the jury understand where voir dire was going and it helped them in responding more openly. It also helped eliminate jurors who should not be on the panel.

Nassau County District Justice William O'Brien, a member of the Project's Voir Dire Committee says:

> At first, I was skeptical. After using voir dire openings in several criminal trials and then sitting on a trial where they were not used, I can't envision a case in which I would not like the attorneys to give brief voir dire openings. Jury selection is clearly improved by letting attorneys tell the venire a little bit about the case before questioning begins. Jurors who understand what the case is about pay closer attention to the questions and give more complete answers. Best of all, it seems to help jurors be more forthcoming about bias and at the same time reduce the number of jurors looking for reasons to avoid jury service.

For civil trials, Fourth Judicial District Supreme Court Justice Joseph Sise reported that though he leaves the courtroom once the questioning begins, he remains on the bench during the voir dire openings. He notes that:

> The practice is enthusiastically embraced by the trial bar. The attorneys find that after delivering a voir dire opening before they question the panel, the prospective jurors understand the theory of the case and thus are more fully engaged in the voir dire.

The committee recommends that the time for voir dire openings be added to the allotted voir dire time and that in criminal matters *Rosario* material[34] be given to the defense before voir dire openings.

Conclusion

For many years New York State has been in the forefront of jury reform. Years ago we took steps to improve the composition of juror pools and enhance juror satisfaction

with reforms that have since become routine nationwide. By limiting the term of service required of jurors, increasing juror pay, requiring employers of more than 10 to pay the jury service fee for three days, and eliminating all exemptions from jury service, New York State led the way in jury composition reform. But when it came to providing jurors with modern tools to enhance their effectiveness, New York had fallen behind. Now, through the Jury Trial Project recommendations, New York is joining other states in adopting tried and true innovative practices that improve juror comprehension, satisfaction, and, most important, enhance justice.

Many New York judges and lawyers remain skeptical about these trial practices – as is demonstrated by the Jury Trial Project research. However, a key finding of the research was that among attorneys, those who participated in a trial in which an innovative practice was used were much more likely to approve of it than attorneys in trials where the innovation was not used. Thus, implementation of the Jury Trial Project recommendations requires more than court rules or statutes. Ongoing judicial and bar education are key. The Jury Trial Project recommendations will be highlighted in judicial training. In addition, staff and judges of the Jury Trial Project are making themselves available to local bar associations to make CLE presentations on the role of innovative trial practices in New York State jury trials. ■

1. See Munsterman et al., *Jury Trial Innovations* (1997), for advantages and disadvantages of more than 50 innovations. See also Dann, *'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229 (1993) for a discussion of jurors as active trial participants.

2. The Project's Committee on Alternatives to Trial examined an 11th practice, Summary Jury Trials, which has been used in Chautauqua County for several years. *See* Sharon Townsend, Summary Jury Trial Project Introduction, *at* <http://nycourts.gov/8jd/internet/html/sjt.html> (last visited Mar. 28, 2005). Because Summary Jury Trials require cooperation on many levels of the court system, the Jury Trial Project could not systematically evaluate them. However, the Committee is recommending that summary jury trials be among the routinely recommended alternative dispute resolution methods.

3. *People v. Hues*, 92 N.Y.2d 413, 681 N.Y.S.2d 779 (1998); Uniform Rules – Trial Courts, 22 N.Y.C.R.R. § 220.10, Note-taking by Jurors.

4. *People v. Miller*, 8 A.D.3d 176, 779 N.Y.S.2d 187 (1st Dep't 2004).

5. Uniform Rules – Trial Courts N.Y.C.R.R. § 220.11 Copy of Judge's Charge to Jury (permitted at discretion of court in civil cases); *People v. Owens*, 69 N.Y.2d 585, 516 N.Y.S.2d 619 (1987) (consent of counsel required in criminal cases).

6. Available at <http://www.nyjuryinnovations.org>.

7. Some judges used some recommended practices in trials without participating in the data gathering aspect of the project.

8. The American Judicature Society maintains a list of federal decisions and all state court statutes and rules concerning note-taking <http://www.ajs.org/jc/juries/jc_improvements_notetaking_statutes.asp> (last visited Mar. 28, 2005). Apparently, every state permits juror note-taking, although Pennsylvania is still experimenting with the practice.

9. Procedures outlined in Uniform Rules – Trial Courts, 22 N.Y.C.R.R. § 220.10, CJI instruction on note-taking *available at* <http://www.nycourts.gov/cji/1-General/cjigc/html> (last visited Mar. 28, 2005).

10. Principle 13-A recommends that "[j]urors are allowed to take notes during the trial" and that they are supplied with note-taking materials. The full Principles, adopted in February 2005, can be viewed at <http:// www.abanet.org/juryprojectstandards/principles.pdf> (last visited Mar. 28, 2005).

11. Several Jury Trial Project judges who routinely permit jurors to take notes did not participate in the data collection phase of the project. Many of the 25 judges who permitted note-taking had not allowed it in the past.

12. Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 Psychol., Pub. Pol'y & L. 259 (1997).

13. Forster Lee & Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 Judicature 184 (Jan.–Feb. 2003).

14. *See* Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask: That is the Question*," 768 Chic.-Kent L. Rev. 1099 (2003).

15. Georgia, Minnesota, Mississippi, Nebraska, and Texas prohibit submission of questions.

16. Principle 13-C. In criminal cases the court should take into consideration reasons why some courts have discouraged the practice and the experience in jurisdictions that have allowed it. *Id.*

17. *See, e.g.*, *People v. Miller*, 8 A.D.3d 176, 779 N.Y.S.2d 187 (1st Dep't 2004); *People v. Knapper*, 230 A.D. 487, 245 N.Y.S.2d 245 (1st Dep't 1930).

18. *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995).

19. *Sitrin Bros., Inc. v. Deluxe Lines,* 35 Misc. 2d 1041, 1042–43, 231 N.Y.S.2d 943 (County Ct., Oneida Co. 1962) (holding that jurors' questioning of expert witness was not prejudicial).

20. *See, e.g.*, Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 Psychol., Pub. Pol'y & L. 259 (1997).

21. A recent study of Arizona jurors found that when questions were rejected the most common reaction from jurors was "no reaction at all." Diamond et al., *Jurors' Unanswered Questions*, 41 Ct. Rev. 20, 25 (Spring 2004).

22. *See* Final Report of the Massachusetts Project on Innovative Jury Trial Practices (Jan. 30, 2001); Dodge, "Should Jurors Ask Questions in Criminal Cases? A Report Submitted to the Colorado Supreme Court's Jury System Committee" *available at* <www.courts.state.co.us/supct/committees/juryreformdocs/dodgereport.pdf> (last visited Mar. 28, 2005); New Jersey Pilot Project on Allowing Juror Questions, Final Report of Jury Sub-Committee of the Civil Practices Committee (2001). Colorado has since adopted rules permitting jurors to submit written questions in criminal and civil cases. Colo. R. Civ. P. 47(u), Colo. R. Crim. P. 24(g). New Jersey now permits juror questions in civil trials. N.J. Ct. Rules R. 1:8-8c.

23. Heuer & Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Hum. Behav. 409 (1989); *see also* Forster Lee & Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials,* 86 Judicature 184 (Jan.–Feb. 2003).

24. *People v. Davis*, 12 A.D.3d 456, 783 N.Y.S.2d 850 (2d Dep't 2004).

25. *People v. Morris*, 153 A.D.2d 984, 545 N.Y.S.2d 427 (3d Dep't 1989), *appeal denied*, 75 N.Y.2d 922, 555 N.Y.S.2d 40 (1990).

26. Principle 6-C.1.

27. Uniform Rules – Trial Courts 22 N.Y.C.R.R. § 220.11, Copy of Judge's Charge to Jury; *People v. Owens*, 69 N.Y.2d 585, 516 N.Y.S.2d 619 (1987).

28. Principle 14-B.

29. NYSBA Committee on the Jury System, Report to the House of Delegates approved on April 3, 2004 at 6.

30. *Haupt v. United States*, 330 U.S. 631, 643 (1947).

31. Heuer & Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Hum. Behav. 4009 (1989); *see* Dann, *'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229 (1993); Final Report of the Massachusetts Project on Innovated Jury Trial Practices.

32. Some judges project their charge onto a screen so that jurors can follow along while the charge is being read. The Fourth Department held that no potential for prejudice arises from the simultaneous projection of the charge while it is being read. *People v. Williams*, 8 A.D.3d 963, 778 N.Y.S.2d 244 (4th Dep't 2004). Other approaches to providing the charge in writing include: providing copies to the jurors to follow along while the judge reads; and, providing one or more copies of the transcribed charge to the jury after deliberations begin.

33. These comments available from the author at <ekrauss@courts.state.ny.us>.

34. *People v. Rosario*, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1961) (prosecution at trial must turn over to the defense all statements of a prosecution witness relating to the witness's trial testimony).

Don't Tell Anyone

(Our Confidentiality Rules Are Changing)

By Steven C. Krane

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Being a lawyer isn't always easy. Sometimes, through no fault of our own, our professional obligations put us in difficult situations. It may be because a client did something, or failed to do something. Or it could be because a client told us something we wish we hadn't heard. Ethical and moral quandaries can be thrust upon us through events beyond our control.

We owe a broad range of professional responsibilities to our clients. Foremost among these is the duty of confidentiality, a core value of the profession that is intrinsic to the attorney-client relationship. We can assure our clients that they can tell us anything and everything because we will carry their secrets with us to the grave. Our clients can be completely candid with us. They can rely on the stability of their relationship with us. This construct sets us apart from other professions, enabling us to provide our clients with dispassionate legal advice based on the fullest possible understanding of the facts.

Sometimes lawyers wish they didn't have to maintain complete silence. Sometimes professional obligations put lawyers in distasteful positions. They are obligations nonetheless, and simply part of the territory that one enters when taking the oath as an attorney and counselor at law. And so it has long been for lawyers whose clients tell them that people are about to get hurt, or that people have been hurt in the past and that more people may well be hurt in the future. Unsettling as it sometimes may be to keep that information in confidence, it is the price we pay for the ability to give our clients the full benefit of the attorney-client privilege and the ethical duty of confidentiality.

However, once a decade or so, some unfortunate event sparks the renewal of an ever-smoldering movement toward diluting our fundamental confidentiality obligation to our clients. In the 1970s, the National Student Marketing and Watergate scandals, in both of which lawyers played prominent roles, provoked the American Bar Association on a course that scuttled the then-new Model Code of Professional Responsibility and replaced it with a more austere set of ethical precepts, the Model Rules of Professional Conduct. The Model Rules focused more attention on the discomfort often felt by lawyers when they learn that their clients have committed, or plan to commit, some wrongful act. The confidentiality rule survived the 1970s, only to be assaulted once again in the 1980s after the OPM Leasing scandal raised questions regarding the lawyers for the offending enterprise. Another effort to scuttle confidentiality was prompted by the savings and loan crisis of the 1990s. Lawyers were there, too. And now, Enron, WorldCom and other recent financial debacles have again thrown the organized bar into a full-blown debate over the inviolability of our ethical obligation to keep our mouths shut.

"Where were the lawyers?" "Why didn't the lawyers speak up?" In editorial pages, in congressional hearings, on late-night talk shows, these questions were repeatedly raised. How could lawyers have remained silent in the face of such reprehensible acts by their clients? Without considering the damage that would be caused to the attorney-client relationship, or the implications of any relaxation of this critical underpinning of our government by the rule of law, the cry was raised for a change to "allow" lawyers to reveal their clients' secrets if they felt like it.

The Sarbanes-Oxley Act of 2002[1] opened the door to this diminution in client protection, followed by an overly aggressive set of proposed regulations issued by the Securities and Exchange Commission, ostensibly pursuant to the directives enacted by Congress. Still under consideration by the SEC at this moment is a rule that would require, not just permit, lawyers representing public companies to make affirmative disclosure to governmental authorities of violations of law by their clients.[2] The lawyer would effectively be converted from trusted confidant to government watchdog, or perhaps as more accurately described, cast in the role of rat.

Swept up in this frenzy, in 2002 and 2003 the American Bar Association House of Delegates added two new exceptions to the key confidentiality provision, Rule 1.6, of the Model Rules of Professional Conduct. One exception, in the words of the ABA Commentary, "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably

certain death or substantial bodily harm."[3] This exception would permit disclosure of otherwise confidential information to prevent any serious injury – criminal or not. For example, the information may be the client's knowledge of a natural force that will cause loss of life or a threat to life made by a third person. In another, more far-reaching amendment, the ABA House of Delegates added exceptions to permit a lawyer to disclose confidential information to "prevent, mitigate or rectify" a client's crime or fraud that is "reasonably certain" to result in, or has resulted in, "substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[4]

These were the same suggestions that had been advocated in prior decades. Only now the cadre of legal ethicists that has been pressing this agenda was able to point to its incorporation in Section 66 of the American Law Institute's "Restatement of the Law Governing Lawyers," released in 2000. The Restatement commentary castigated lawyers who defend manufacturers of defective products, or who represent industries that send toxic substances into our water or air. They vilified personal injury lawyers who declined to disclose information suggesting a pattern of failures of Firestone tires because it could have prejudiced their clients' cases, terming their behavior "outrageous."[5]

Of course, whatever the American Bar Association or American Law Institute may say about lawyer ethics, their statements lack one essential element: the force of law. It is up to the individual states to decide whether to relax the confidentiality rules for lawyers subject to their disciplinary jurisdiction. The New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC) is now considering whether to recommend the adoption of the Model Rules of Professional Conduct in New York, which is one of only four states (along with Ohio, Nebraska, and Iowa) to adhere to the Model Code format. As part of that process, COSAC will consider the ABA's recent amendments to confidentiality.[6]

New York's rules of ethics, specifically Disciplinary Rule 4-101(C)(3), currently provide that if a client states an intent to commit a crime – any crime – the lawyer may reveal information necessary to prevent its commission. Ethical Consideration 4-7 of the New York Code cautions lawyers considering the exercise of this right to take into account:

> [S]uch factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances.[7]

In other words, whatever may be said about the over-inclusiveness or underinclusiveness of the current New York rule, we already allow lawyers to bring their personal conscience and morality to bear in deciding whether to breach confidentiality and attempt to prevent criminal activity by a client. The starkest example is the client who brandishes a gun at her lawyer's office, declares her intention to shoot her husband that day, and rushes off to find him. In such an extreme case, the lawyer is not precluded from calling the police (but is not required to do so, either).

To be sure, lawyers who receive confidential information from their clients are in uncomfortable situations. Under present New York rules, however, unless client activity is prospective and criminal, the answer is clear: Lawyers must preserve the confidentiality of what they know. Were we to allow disclosures of client confidences in these circumstances, telling lawyers that they may disclose, how long will it be before a court reviewing lawyer conduct in the stark light of hindsight concludes that the lawyer should have disclosed?

We accept almost without thinking that the most reprehensible of our society, no matter how unpopular, are entitled to the benefit of effective legal services. The mass murderer, the child molester and the racist hatemonger are all entitled to legal representation. So are those who generate toxic waste or injurious products, or who have published false or misleading financial statements. As a profession, we have always put the interests of our clients first, except in the most extreme of circumstances. We exist as a profession chiefly to serve those clients, and to provide them with legal counsel and representation. Secondarily, we are "officers of the court," a lofty concept that nonetheless does not convert us into private attorneys general or public snitches.

The result isn't always pretty. We cannot always feel all warm and fuzzy inside about what we do. Nevertheless, we should not walk away from our professional obligations because they sometimes are difficult to bear, even in the face of the latest headline-grabbing scandal. ■

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

2. Press Release, U.S. Securities and Exchange Commission, SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys (Nov. 6, 2002), at http://www.sec.gov/news/press/2002-158.htmn (last modified Nov. 6, 2002).

3. Model Rules of Prof'l Conduct R. 1.6 cmt. n.6 (2002) (discussing disclosure adverse to client under rule 1.6(b)(1)).

4. Model Rules of Prof'l Conduct R. 1.6 (b)(2), (3) (2003).

5. *See* Restatement (Third) of Law Governing Lawyers § 66 (2000); Proceedings of the American Law Institute's 1997 Annual Meeting: The author participated in the proceedings.

6. COSAC issued a discussion draft of a proposed New York version of Rule 1.6 in early 2004. It can be found at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Proposed_Rule_1_6.htm. A final report is expected in June 2005.

7. N.Y. State Bar Ass'n Lawyer's Code of Prof'l Responsibility EC 4–7 (1970) (amended 2002).

BY SANFORD J. SCHLESINGER

Why Your Clients, and Their Lawyer, Should Have A Will

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Any practicing attorney should be alert to his or her clients' need for a will. Trusts and estates specialists will, naturally, identify and explore this need with their clients as a matter of course. However, lawyers in other fields should also be able to easily explain to their clients the basic importance, purpose, and function of a will and related aspects of estate planning. Moreover, lawyers in all fields, including those who are trusts and estates attorneys, should be mindful of their own needs in this regard.

Ironically, but perhaps not surprisingly given the pressures and professional demands of dealing with other people's problems, lawyers often fail to address their own personal estate planning. Like the proverbial cobbler's children who have no shoes, a surprising number of lawyers have no wills. They, like their clients, would be well served to address this shortcoming. Of course, the goal should be a comprehensive estate plan involving more than a will but consideration of the need for a will offers an excellent starting point for the estate planning process.

Many arrangements can be made with respect to the disposition of wealth at death. Property held jointly with right of survivorship, or as tenants by the entirety, will pass at the death of the first to die of the joint tenants to the surviving joint tenant by operation of law (although such property will subsequently pass under the survivor's will if the survivor owns such property at his or her later death). Property held in so-called "Totten trust" accounts, "POD" (payable on death) accounts or in similar accounts providing for a beneficiary designation will pass in accord with such a designation. Life insurance proceeds, annuities (other than single life annuities), pension benefits and interests in profit sharing and similar plans will also typically pass "by contract" in accord with a beneficiary designation.

In the absence of a valid beneficiary designation, the plan or other contract governing such assets may specify that the insured or plan participant's spouse or estate is deemed to be the beneficiary. Subject to such exceptions, property owned by an individual at death, or payable at death to his or her estate, will pass as provided in a will. If there is no will, such property will pass as provided by state intestacy law.

One or more of these arrangements will accomplish the disposition of an individual's property at death. Thus, in one sense, everyone owning wealth by definition has an estate plan. The problem is that such plan, if not consciously developed and implemented, may be the result of happenstance, may not reflect an individual's desires with respect to who should receive his or her wealth at death, may not include appropriate trust arrangements and may be highly tax inefficient. Such a haphazard approach may also leave the management of a decedent's estate in the hands of a person who is not best suited for this role. Important related questions such as the designation of a guardian for minor children may also be neglected by clients and their attorneys who fail to develop and implement a conscious estate plan.

Of fundamental importance is the fact that having a will avoids intestacy. Intestacy laws applicable to the disposition of testamentary property (property that can be disposed of by will if there is one) are rigid and mechanical. Under the New York Estates, Powers and Trusts Law (EPTL) intestacy statute,[1] if an intestate decedent is survived by a spouse and issue (children or more remote descendants) the spouse will receive the first $50,000 of the estate plus one-half of the balance with the remainder of the estate going to the issue by representation.[2] If a New York intestate decedent is survived by a spouse but no issue, such spouse will be entitled to the entire intestate estate. Conversely, if there are surviving issue, but no surviving spouse, the intestate estate will pass in its entirety to the issue by representation. In the case of an intestate decedent in New York who leaves no spouse or issue but one or both of whose parents are living, the intestate estate will pass to the surviving parent or parents. If none of such intestate

heirs are living, the intestate estate will pass to the issue of the parents by representation, or failing such issue, to more distant relatives, all as prescribed in the statute.

One need not be a trusts and estates specialist to see that the dispositions provided in the intestacy law may not be in accord with an individual's wishes. For instance, a disposition of one-half of one's estate to children when there is a surviving spouse may seem extremely inappropriate. Moreover, such a disposition could result in substantial and unnecessary estate tax liability because the amount passing to the children may exceed the amount which can pass free of federal and state estate taxes by reason of the so-called estate tax "unified credit."[3] Estate tax can be minimized or at least deferred by increasing the portion of the estate passing to the spouse so as to take advantage of federal and state marital deductions which exempt from estate tax property passing to a spouse. Similarly, an intestate disposition to parents of an intestate decedent (*i.e.*, where there is no surviving spouse or children), may unnecessarily increase estate taxes payable at the parents' level when they die (to the detriment of their beneficiaries who may be brothers or sisters, for example, of the intestate decedent). Moreover, many people would much prefer to designate specific individuals, who may or may not be relatives, to benefit from their wealth at death if there are no surviving spouse and children. Others would prefer to designate charitable beneficiaries and in some cases would wish a portion of their wealth to pass to charities whether or not there is a surviving spouse and children.

The plan of disposition dictated by the intestacy statute may be altered after death through the use of state law disclaimer statutes which, in conjunction with corresponding relevant provisions of federal and state estate tax law, can remedy some of the substantive and tax inefficiencies of intestacy. However, such "post-mortem" estate planning may be of limited use and involve expense and difficulty that could be avoided with advance planning reflected in a well-drawn will. The intestacy statutes also fail to take into account the complexity of many modern family arrangements that can involve a surviving spouse who is not a parent of the surviving children or domestic partners who are not married.

In general, an individual is free to dispose of his or her wealth at death by will as he or she wishes. There are some limited exceptions. Typically, state law provides a surviving spouse with a "right of election" (or in some states community property rights). For example, New York's right of election statute[4] allows a surviving spouse to claim basically a one-third share (or $50,000 if such one-third share is less than $50,000) of a deceased spouse's estate, determined in accord with special statutory rules, even if the decedent has attempted to disinherit such spouse. Such an elective share right may be waived, for example, by a so-called waiver of right of election in a prenuptial agreement. Conversely, prenuptial agreements may impose an obligation to leave property to a surviving spouse, to children or to others. But subject to these limitations, use of a will can allow an individual broad freedom to choose his or her beneficiaries and to thus avoid the mandatory dispositions of the intestacy statute.

A will also allows for conscious planning and flexibility with respect to how inherited property is to be distributed to, or held for the benefit of, a decedent's beneficiaries. For example, if a minor child (one who is under age 18) inherits a share of a New York decedent's intestate estate, a court will have to appoint a guardian court (without the court having the benefit of knowing the decedent's intended designation of a guardian in a will) to manage such property until the child attains the age of 18. Furthermore, the guardian may have to post a bond and will be required to account to the court annually. If there is a will, the decedent can grant authority to the executor to distribute property inherited by a beneficiary to a custodian pursuant to the Uniform Gifts (or Transfers) to Minors Act (UGMA or UTMA). The custodian can administer the property for the beneficiary until he or she attains age 18 or 21, depending on the terms of the will and of the relevant UGMA or UTMA statute.

Allowing distribution to an UGMA or UTMA custodian, as can be accomplished in a will, is typically preferable and less expensive than requiring distribution to a court appointed guardian. However, even an UGMA or UTMA custodian will be required to give possession of the custodianship property to the beneficiary at age 18 or 21. Many people regard these as the worst possible ages to bestow unfettered control of wealth on a child or a more remote descendant. In a well-drawn will, provision can be made for a trust to last until a more appropriate age for a young beneficiary.

Of course, the advantages of trusts are not limited to circumstances involving young beneficiaries. A trust may also provide a mechanism to allow a decedent to provide for the economic benefit of his or her surviving spouse while still controlling the disposition of the property remaining in the trust at the spouse's death. In this manner, for example, the needs of a second spouse can be accommodated while preserving the ultimate benefit of a decedent's property for the children of his or her first marriage. Such a trust can be made to qualify for the federal and state estate tax marital deductions and can be an excellent planning tool.

Similarly, a trust for a surviving spouse can be used in conjunction with the unified credit as noted above to maximize the utility of the credit, so as to save estate taxes at both the decedent's death and at the death of his or her surviving spouse. Typically, a portion of the estate equal to the available unified credit equivalent is given to a so-called "by-pass trust," which can allow the surviving spouse to have the economic benefit of such property without being treated as the

owner thereof for estate tax purposes at his or her subsequent death. As a result, estate tax on this property, and its proceeds, is avoided not only at the decedent's death but also at the death of the surviving spouse.

This simple approach is a centerpiece of many sound estate plans and is not available under the intestacy statute. Trusts may also be desirable for substantive purposes such as to provide for the special needs of particular beneficiaries where management and control may be an issue. In addition, trusts can be deployed to achieve more sophisticated tax planning goals. An attorney need not be conversant with the full intricacies of the estate tax, gift tax, and related generation-skipping transfer tax system in order to recognize that trusts have both practical and tax benefits.

Typically, a state intestacy statute will also dictate the identity of the persons entitled to act as the administrator (the equivalent of an executor) of an intestate estate. For example, section 1001 of the New York Surrogate's Court Procedure Act (SCPA) gives first priority in this regard to a surviving spouse, followed by children, grandchildren, parents, and then brothers and sisters. By contrast, an individual may designate in his or her will any qualified individual or bank or trust company to act as executor (and also as trustee or trustees in the case of trusts). A will may also contain a direction dispensing with state law requirements that there be a bond or surety in connection with the estate's administration, which can be an expensive and arguably unnecessary burden. A will can also include special powers and provisions relating to particular assets including business assets which may require particular attention and management.

One more critical feature of an estate plan can be the designation of a guardian for minor children. Ultimately, the appointment of a guardian, if there is no surviving parent, will be made by a court. However, often great weight will be given by the court to an appointment designated by a parent. Such designation can generally only be made in a will (but see SCPA 1710 and 1726 for limited exceptions), and failure to do so might result in expense, delay and confusion at a time when there should be certainty and continuity in a child's life. Note that if there is no surviving parent there should be both a guardian of the child's property and a guardian of the child's person, with the guardian of the child's person being given custody of the child during his or her minority. The guardian of the property and the guardian of the person can be, but need not be, the same individual.

It should also be noted that a will can serve as the coordinating instrument in an overall estate plan. A will can provide trusts to act as receptacles in certain circumstances for property passing by beneficiary designation. For example, a pension designation may specify that property passing to a child shall be distributed to that child's trust under a will. A will also provides an opportunity to make direction as to the payment of estate taxes and to coordinate planning in that regard with other property arrangements including inter-vivos trusts.

Finally, the use of so-called "revocable living trusts" is quite common in states such as Florida and California. Such trusts are often suggested as alternatives to wills as means of avoiding the probate process. The probate process in New York is not onerous. Nevertheless, revocable living trusts can be a useful tool for New Yorkers who, for example, may desire a vehicle to provide for continuity in the management of assets in the event of disability due to ill health or advanced years. Such a revocable living trust can have advantages over a power of attorney and certainly may be preferable to having to have a guardian judicially appointed. Nevertheless, a revocable living trust should not be regarded as a complete substitute for a will. It is a rare client who manages to transfer all of his or her assets to a revocable living trust prior to death. At a minimum, there should be a "pour over" will providing that the assets of the estate shall be added to the revocable trust at death in the event that the revocable trust is intended as the primary dispositive instrument.

Drawing a will is not a substitute for a complete review of one's estate planning needs and the development and implementation of a coordinated estate plan that accounts for the various forms of property that pass in different ways at death. However, it is a rare client, and a rare attorney, who does not need a will as part of a well-conceived plan. A will allows an individual the freedom, subject to very limited exceptions, to dispose of his or her assets as he or she wishes, utilizing dispositions in trust or outright as appropriate. A will can be essential to achieve tax planning goals and allows choice of fiduciaries and guardians for minor children. The process of having a will drawn by a qualified attorney can serve as a focal point for a broader review of an individual's estate planning needs and is an excellent starting point for this process. ■

1. EPTL 4-1.1–4-1.6.

2. In other words, the portion of the estate going to the issue will be divided among the decedent's surviving children or descendants of deceased children according to the pattern of distribution, similar but in some circumstances not exactly equivalent to a per stirpital distribution, set forth in the definition of "representation" in EPTL 1-2.16.

3. The federal estate tax unified credit is the amount that can pass free of federal estate tax (without taking into account any other available deductions such as the marital and charitable deduction). That amount is currently $1,500,000 and is scheduled to increase to $2,000,000 next year and $3,500,000 in the year 2009. In the year 2010, the estate tax is repealed, but without future legislative action will come back into effect in 2011, at which time the federal estate tax unified credit will return to $1,000,000. Note that although the above-referenced federal estate tax unified credit amounts will pass free of federal estate taxes, under current New York law the following New York estate tax would be due for a New York resident decedent dying in those years with an estate equal to the federal estate tax unified credit: $64,400 for a decedent who dies in 2005, $99,600 for a decedent who dies in 2006, 2007 or 2008, and $229,200 for a decedent who dies in 2009. New York's estate tax unified credit under current law is only $1,000,000 and is not scheduled to increase.

4. EPTL 5-1.1-A.

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Cancelling a Private Passenger Automobile Policy

A Comprehensive Guide

By Mitchell S. Lustig and Jill Lakin Schatz

Insurance litigation attorneys frequently encounter cases in which the primary dispute concerns the validity of an insurer's purported cancellation of a private passenger automobile policy. The issue often arises in the context of Article 75 proceedings to stay uninsured motorist arbitration. This article will familiarize the insurance practitioner with the statutes, case law, and regulations of the Commissioner of Motor Vehicles governing the cancellation of a private passenger automobile policy.

Mailing a Cancellation Notice

Pursuant to section 313(1)(a) of the Vehicle and Traffic Law (VTL), the insurer must mail a Notice of Cancellation to the insured at the address shown on the policy, at least 20 days before the cancellation date. If, however, the cancellation is for non-payment of premium, the requirement is only 15 days' notice to the insured. The Notice of Cancellation need only be sent by regular mail. Notably, the insurer is required to obtain a certificate of mailing.

Section 313 of the VTL does not define the term certificate of mailing. There is no requirement that the certificate of mailing be on an official form of the U.S. Postal Service. However, if the insurer uses its own form it must, at a minimum, bear the stamp of the post office and contain the name and address of each insured to whom cancellation notices were actually mailed.[1] A certificate of "bulk mailing" that merely recites the total piece count mailed by the insurer for that day but does not indicate the individual names and addresses of the insureds to whom cancellation notices were mailed is defective.[2]

The failure of the insurer to obtain or produce a certificate of mailing is not always fatal. In the absence of a certificate of mailing, the insurer may rely on common law proof of timely and proper mailing of the Notice of Cancellation. Common law proof of mailing requires the insurer to present proof of an office practice or procedure "geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed."[3]

Given the difficulty and uncertainty of satisfying this common law standard of proof, the insurer should make a practice of retaining copies of Notices of Cancellation and Certificates of Mailing. VTL § 313(1)(b) provides that "[a] copy of a notice of termination and the certificate of mailing, when kept in the regular course of the insurer's business, shall constitute conclusive proof of compliance with the mailing requirements of this chapter."[4] Copies of

The filing requirement is applicable regardless of whether the insurer or the insured requests the cancellation.

cancellation notices generated by the insurer from microfiche and computer records will suffice to sustain a valid cancellation.[5] If the insurer complies with the mailing requirements of the statute, it is not necessary for the insurer to prove that the insured actually received the Notice of Cancellation.[6]

Statutory Statement, Regulatory Notice

The Notice of Cancellation must also include a Statutory Statement that proof of financial security (insurance) is required to be continuously maintained throughout the registration period for the vehicle, as well as a Regulatory Notice prescribed by the Commissioner of Motor Vehicles indicating the punitive effects of failure to maintain continuous proof of financial security, and actions that may be taken by the insured to avoid the punitive effects.[7] Both the Statutory Statement and Regulatory Notice must be in "type of which the face shall not be smaller than twelve point."

It has been noted by one observer that the purpose of the 12-point typeface requirement "is to bring the potential consequences of allowing the insurance to lapse to the attention of the insured so as to encourage compliance with the law."[8] The question of whether the "warning notices" (statutory statement and regulatory notice) comply with the 12-point type requirement is determined by measuring the size of the characters as they appear on the printed page, not by considering the size of the hardware used by the printer.[9] If either one or both of the warning notices are missing from the Notice of Cancellation or are not printed in 12-point type, the cancellation is defective.[10] Effective January 8, 1998, the civil penalty for not having insurance in effect was increased from $6 per day to $8 per day. A Notice of Cancellation that fails to include the correct dollar amount in the Regulatory Notice is invalid.[11]

Assigned Risk Plan Special Rules

If the policy is obtained through the New York Automobile Insurance Plan ("Plan"),[12] the insurer must comply with the special rules of the Plan in addition to the requirements of the VTL. For example, section 19 of the Plan requires that the Notice of Cancellation include a statement that the insured has the right to have the cancellation reviewed by a committee of the Plan. The cancellation is invalid if this statement is omitted.[13]

Many of the special rules of the Plan are applicable where the cancellation is for non-payment of premium. Section 14(E)(2) of the Plan provides that the insurer shall bill the insured for the amount of each remaining installment at least 15 days prior to the due date. Pursuant to the latter section, it is mandatory that the bill disclose the amount of premium being billed, the due date and the balance due. The bill must also advise the insured of the option of remitting payment to the producer or directly to the insurer. If the insurer fails to comply with the aforementioned rules, the cancellation is void.[14]

Consequently, when an Assigned Risk insurer cancels a policy for non-payment of premium, it is not sufficient for the insurer to simply produce the Notice of Cancellation and Certificate of Mailing. The insurer must also prove that it mailed a separate billing statement ("final bill") to the insured in compliance with section 14(E)(2), at least 15 days prior to the mailing of the Notice of Cancellation.[15]

Two other categories of cancellation are often encountered under the Plan: (1) a cancellation pursuant to section 14(B) for non-payment of the renewal premium and (2) a cancellation pursuant to section 18(2)(9)(B) for the insured's failure to provide pertinent underwriting information that would have a direct bearing on the rating of the policy.

Pursuant to section 13 of the Plan, an insured is assigned to a particular insurer for three years. Section 14(B) of the Plan provides that at least 45 but no more than 60 days prior to the inception dates of the first and second renewal policies, the insurer is required to send the insured a renewal quotation and premium bill. The renewal quote and bill must advise the insured that if she pays either the full renewal premium or minimum amount due prior to the inception of the renewal, the insurer will issue a renewal policy.

Typically, the Assigned Risk insurer requests that the insured pay either the full premium or minimum due by the 21st day prior to the inception of the renewal policy. Pursuant to note 1 to section 14(B) of the Plan rules, if either the minimum amount due or the full premium is not received by the insurer by the 20th day prior to renewal,[16] the insurer is authorized to issue a Notice of Cancellation for non-payment of the renewal premium in compliance with VTL § 313.

Because the cancellation is for non-payment of the renewal premium, the insurer need only provide the insured with 15 days' notice of termination. If the insured pays either the minimum amount due or the full premium within the grace period afforded by the Notice of Cancellation, the Assigned Risk insurer must issue the renewal policy.

In addition to advising the insured that she may pay either the full premium or the minimum amount due prior to the inception of the renewal, the renewal quote and bill must also comply with the billing requirements set forth in section 14(E)(2) of the rules of the Plan. Accordingly, the renewal quote and bill must provide the

insured with the entire payment schedule for the renewal policy, including the amounts due and due dates. It must also advise the insured of the right to remit payment directly to the insurer or the producer. Failure to include the foregoing in the renewal quote and bill will render the cancellation void.[17] If the insured does not pay either the minimum amount due or the full premium by the due date, the policy will be cancelled as of the renewal date. The insurer is not required to wait until the inception of the renewal and then issue a 15-day Notice of Cancellation for non-payment of premium.

Section 18(2)(9)(B) of the rules of the Plan provides that an insurer that has issued a policy under the Plan has the right to cancel the policy if the insured "fails to respond to at least two written requests for pertinent underwriting information which would have a direct bearing on the rating of the policy." Consider the following: An insured submits an application to the Plan that lists the insured as the only driver. During an underwriting review, the insurer discovers that there is another relative in the household that also operates the insured's vehicle. Based upon the underwriting review, the insurer sends a letter to the insured requesting the name, date of birth and driver's license number of the other relative in the household.

If the insured fails to respond, the insurer must wait a minimum of 10 days before sending a second letter requesting the same information. The insurer must wait a minimum of 10 days for a response to the second letter. If there is no response to the second letter within the 10-day period, the insurer is authorized to issue a Notice of Cancellation in accordance with VTL § 313. The Notice of Cancellation should clearly and explicitly set forth the reason for cancellation. For example, a Notice of Cancellation issued by an Assigned Risk insurer under the above scenario should read as follows: "AS PER SECTION 18.2.9(B) NO REPLY TO REQUESTS FOR PERTINENT UNDERWRITING INFORMATION, NEED FULL NAME, DATE OF BIRTH AND COPY OF DRIVER'S LICENSE FOR [IDENTIFIED HOUSEHOLD RELATIVE]." Because a cancellation under Section 18(2)(9)(B) is not a non-payment cancellation, the Notice of Cancellation must provide the insured with a minimum of 20 days' notice. If the insured provides the requested information within this 20-day period, the insurer must rescind the cancellation and the policy will remain in effect.

Section 18(2)(9)(B) can also be utilized to cancel a policy where the insured refuses the insurer's request for an underwriting interview or the insured does not respond to a written questionnaire sent by the insurer. As long as the insurer sends two written requests for underwriting information and waits the requisite number of days, the resulting cancellation will be valid.

Filing the Notice

Pursuant to VTL § 313(2)(a) and part 34 of the Regulations of the Commissioner of Motor Vehicles, the insurer is required to file the cancellation with the Commissioner of Motor Vehicles ("Commissioner") within 30 days after the effective date of the cancellation. The filing requirement is applicable regardless of whether the insurer or the insured requests the cancellation. If the insurer fails to file the cancellation with the Commissioner, the cancellation is void as against third parties injured in the underlying automobile accident.[18] The cancellation is, however, effective as against the insured and members of the insured's household as a bar to the payment of first-party claims such as no-fault benefits and physical damage coverage.

There are, however, certain exceptions to the 30-day filing rule. Case law has interpreted the wording of VTL § 313(3) to sustain the validity of a filing made after 30 days so long as the filing occurred prior to the date of the accident.[19] Of course, if the insurer filed within the mandated 30 days, the cancellation would be effective as against third parties regardless of when the accident occurred.[20]

One other major exception to the filing requirement contained in a former version of section 313(2)(a) provided that an insurer did not have to file a cancellation for the non-renewal of a policy that had been in effect for six months or more.[21] This exception typically applied to cancellations in which an individual insured under the Assigned Risk Plan failed to pay for either the first or second renewal policy or the three-year assignment under the Plan terminated.[22]

This long-standing exception was eliminated effective July 1, 1998, when VTL § 313(2)(a) was amended. As noted in a letter dated July 7, 1998, from William Florence, Deputy Commissioner of Motor Vehicles, to James M. McGuire, counsel to the Governor: "[The amendment] closes a long standing loophole in current law by eliminating the provision which excludes the non-renewal of

If either one or both of the warning notices are missing from the Notice of Cancellation or are not printed in 12-point type, the cancellation is defective.

policies which have been in effect for 6 months or more from the definition of cancellations or terminations." Accordingly, effective July 1, 1998, all non-renewal cancellations were required to be filed with the Commissioner.

Section 313(3) of the VTL provides one final exception to the filing requirement. If the insurer fails to file or fails to file within 30 days, the cancellation is still effective as against third parties if the insured obtained a superseding policy covering the same vehicle as of the date the prior policy was cancelled.[23]

New Filing Regulation

A new regulation regarding the filing of notices of cancellation, found in 15 N.Y.C.R.R. part 34, adopts a new filing system known as the Insurance Information and Enforcement System (IIES). Under the IIES, the insurer is required to electronically file cancellation notices with the Commissioner. This was a major departure from the earlier system, known as the Financial Security Certification Program (FSCP), pursuant to which insurers reported cancellations to the Commissioner by magnetic tapes.

Under the FSCP system, the insurer would process the cancellation internally, input the information on magnetic tapes and mail the tapes to the Commissioner. The Commissioner would then input the tapes into the Department of Motor Vehicles (DMV) computer system and return the processed tapes to the insurer. This process was both time-consuming and cumbersome. Electronic filing utilizes the latest technology and offers the best hope of tracking uninsured drivers and avoiding errors in communication between the insurer and the Commissioner.

In addition to mandating electronic filing, the new regulation required insurers to transmit or download their entire book of auto business for all insured vehicles registered in New York State to the DMV. The downloading of this policy information was to occur between June 12, 2000, and September 12, 2000.[24] In order to successfully implement this plan, the Commissioner contacted each individual insurer writing automobile business in the State of New York to arrange for a specific date when that insurer would be required to download its book of business.

In order to provide for an orderly transition from the FSCP tape method to the IIES electronic filing system, section 34.7 of the regulation, entitled "System Conversion," provided that the Commissioner would no longer accept old FSCP tapes after noon on May 19, 2000. The regulation then imposed a "black-out period" during which filing with the Commissioner was not permitted. Specifically, the regulation provided as follows:

> There will be a period between FSCP tape cut-off and initial loading where electronic transactions, including cancellations, cannot be submitted by an insurance company or servicing agent to DMV. IIES shall begin as a new system with individual insurance companies notifying DMV of those vehicles registered in NYS that are insured (reporting the NYS books of business) as of a designated point in time. After successful loading, cancellations and other required notices that occur on or after such point in time that the initial load tape is created shall be submitted to DMV on a day-forward-basis. . . . Since IIES begins with the reporting of insured policyholders and vehicles, cancellations that may have occurred during the period between the creation date of the last FSCP tape and the creation date of the successful IIES initial load tape shall not be reported to DMV. Submission of such cancellation notices are detrimental to the success and viability of IIES.

Accordingly, the new regulation created a period of time (between the creation date of the last FSCP tape and the successful loading of a company's book of business) when an insurer was unable to file cancellations with the DMV. For example, if a company had processed its last FSCP tape on May 20, 2000, and successfully downloaded its book of business to the DMV on July 24, 2000, it could not file cancellations that occurred between May 20, 2000, and July 24, 2000.[25]

Supervening Insurance

Even if an insurer admittedly failed to comply with one specific or, for that matter, all the mandates imposed by VTL § 313, the insurer could still conceivably be relieved of its obligation to provide coverage under the policy.

Section 313(1)(a) provides that regardless of the propriety of a cancellation, the cancellation will be effective if another insurance contract is obtained by the insured, covering the vehicle as of the date of the purported cancellation. As noted by the Court of Appeals in *Employers Commercial Union Ins. Co. v. Firemen's Fund Ins. Co.*, "[a] supervening policy of liability insurance terminates a prior insurer's obligation to indemnify irrespective of the prior insurer's noncompliance with the notice requirements of Section 313 of the Vehicle and Traffic Law."[26] However, in order for the second policy to be considered a supervening policy within the meaning of the statute and relieve the first insurer of its obligation to provide coverage, there must be proof that the insured intended to replace coverage.[27]

Finally, it should be noted that many of the requirements imposed by VTL § 313 referred to above are not applicable when it is the insured, as opposed to the insurer, that requests the cancellation. For example, when the insured requests the cancellation, the insurer is not required to send a Notice of Cancellation.[28] ■

1. *Lumbermen's Mut. Cas. Co. v. Medina*, 114 A.D.2d 959, 495 N.Y.S.2d 224 (2d Dep't 1985); *Diaz v. Great Am. Ins. Co.*, 109 A.D.2d 775, 486 N.Y.S.2d 289 (2d Dep't 1985).

2. *Ficarro v. AARP Inc.*, 205 A.D.2d 955, 613 N.Y.S.2d 771 (3d Dep't 1994).

3. *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 830, 414 N.Y.S.2d 117 (1978).

4. *See Holmes v. Utica Mut. Ins. Co.*, 92 A.D.2d 1045, 461 N.Y.S.2d 549 (3d Dep't 1983).

5. *Bullock v. Hanover Ins. Co.*, 144 A.D.2d 416, 534 N.Y.S.2d 197 (2d Dep't 1988).

6. *Hughson v. Nat'l Grange Mut. Ins. Co.*, 110 A.D.2d 1072, 488 N.Y.S.2d 930 (1985); *Olesky v. Travelers Ins. Co.*, 72 A.D.2d 924, 422 N.Y.S.2d 201 (4th Dep't 1979).

7. The regulatory notice prescribed in part 34, section 34.11 of the Regulations of the Commissioner of Motor Vehicles provides as follows:

> If you have a lapse in insurance coverage of 90 days or less, the law permits you to avoid a suspension of your registration by the payment of a civil penalty of $8.00 for each day or any portion thereof up to 90 days for which your insurance was not in effect. This grace period provision applies only once during any 36-month period.

8. Skip Short & Michael Billy, *Regulation of Automobile Insurance Rates and Policy Forms in* New York Insurance Law 49–62 (Matthew Bender).

9. *Allstate Ins. Co. v. Altschuler*, 166 A.D.2d 160, 564 N.Y.S.2d 73 (1st Dep't 1990); *Cohn v. Royal Globe Ins. Co.*, 67 A.D.2d 993, 414 N.Y.S.2d 19 (2d Dep't 1979), *aff'd*, 49 N.Y.2d 942, 428 N.Y.S.2d 881 (1980).

10. *See Barile v. Kavanaugh*, 67 N.Y.2d 392, 502 N.Y.S.2d 977 (1986); *Kaplan v. Travelers Ins. Co.*, 205 A.D.2d 501, 612 N.Y.S.2d 658 (2d Dep't 1994); *Empire Mut. Ins. Co. v. Malagoli*, 133 A.D.2d 29, 518 N.Y.S.2d 803 (1st Dep't 1987); *Travelers Indem. Co. v. Shepard*, 125 A.D.2d 681, 509 N.Y.S.2d 867 (2d Dep't 1986).

11. *Am. Home Assurance Co. v. Chin*, 269 A.D.2d 24, 708 N.Y.S.2d 453 (2d Dep't 2000); *Dunn v. Passmore*, 228 A.D.2d 472, 644 N.Y.S.2d 283 (2d Dep't 1996).

12. The New York Automobile Insurance Plan, *available at* <http://www.aipso.com/PDFs/Manuals/NY/NY-AIP-Manaul-2004-08-15-Distribution.pdf> (last visited Mar. 14, 2005).

13. *Daniel v. Rivera*, 93 A.D.2d 877, 461 N.Y.S.2d 425 (2d Dep't), *aff'd*, 60 N.Y.2d 662, 468 N.Y.S.2d 104 (1983).

14. *Home Indem. Co. v. Scricca*, 147 A.D.2d 697, 538 N.Y.S.2d 304 (2d Dep't 1989); *Eveready Ins. Co. v. Mitchell*, 133 A.D.2d 210, 519 N.Y.S.2d 19 (2d Dep't 1987).

15. *Paramount Ins. Co. v. Moctezuma*, 201 A.D.2d 652, 608 N.Y.S.2d 276 (2d Dep't 1994); *see State Farm Mut. Auto. Ins. Co. v. Mclean*, 228 A.D.2d 510, 643 N.Y.S.2d 680 (2d Dep't 1996). In *Eagle Ins. Co. v. Colby Gervais*, 242 A.D.2d 572, 662 N.Y.S.2d 524 (2d Dep't 1997), the Second Department appeared to backtrack from the requirement that an Assigned Risk insurer must prove that it mailed a separate bill to the insured in addition to the Notice of Cancellation. The court, in a decision squarely at odds with its own well-established precedents, held that the Notice of Cancellation could itself serve as the final bill. However, the decision in *Colby Gervais* has proven to have little practical impact upon the cancellation procedures of Assigned Risk insurers. Assigned Risk insurers routinely bill their insureds on an installment basis and generally have little trouble producing a copy of the final billing statement when their cancellations are challenged.

16. Note 1 to section 14(B) of the rules of the Plan provides as follows: "If the renewal premium stipulated above is not received by the 20th day prior to the expiration date of the policy, the insurer shall issue a notice of termination in compliance with the Vehicle and Traffic Law."

17. *Home Indem. Ins. Co. v. Brugnatelli*, 138 Misc. 2d 366, 524 N.Y.S.2d 332 (Sup Ct., Nassau Co. 1987).

18. *State Farm Mut. Auto. Ins. Co. v. Kanter*, 217 A.D.2d 633, 629 N.Y.S.2d 786 (2d Dep't 1995); *Liberty Ins. Co. v. Vidale*, 207 A.D.2d 489, 615 N.Y.S.2d 922 (2d Dep't 1994).

19. *Allcity Ins. Co. v. Rodriguez*, 212 A.D.2d 405, 622 N.Y.S.2d 43 (1st Dep't 1995); *Meutsch v. Travelers Ins. Co.*, 206 A.D.2d 953, 612 N.Y.S.2d 710 (4th Dep't 1994). However, if the cancellation was initiated by a premium finance company under Banking Law § 576, a filing by an insurer beyond the 30-day period voids the cancellation even if the filing is made prior to the date of accident. *See Theodore v. Hartford Accident & Indem. Co.*, 60 Misc. 2d 991, 304 N.Y.S.2d 688 (Sup. Ct., Albany Co. 1969).

20. *Hild v. Allstate Ins. Co.*, 37 A.D.2d 1041, 326 N.Y.S.2d 155 (3d Dep't 1971).

21. VTL § 313(2)(a) specifically provided as follows:

> For purposes of this subdivision, [mandating filing within 30 days], the non-renewal of a policy which has been in force for less than six months shall be considered a cancellation or termination. The non-renewal of a policy which has been in force for at least six months shall not be considered a cancellation or termination.

22. *See Hanover Ins. Co. v. Velez*, 207 A.D.2d 663, 616 N.Y.S.2d 354 (1st Dep't 1994).

23. *See also Employers Commercial Union Ins. Co. v. Firemen's Fund Ins. Co.*, 45 N.Y.2d 608, 412 N.Y.S.2d 121 (1978).

24. 15 N.Y.C.R.R. § 34.5(c).

25. Assuming that an insurer complied with the other provisions of VTL § 313, the fact that there was no filing with the Commissioner during the "black-out period" did not invalidate the cancellation.

26. *Employers Commercial Union Ins. Co.*, 45 N.Y.2d at 611.

27. *AIU Ins. Co. v. Marciante*, 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004); *Providence Washington Ins. Co. v. Sec. Mut. Ins. Co.*, 35 N.Y.2d 583, 364 N.Y.S.2d 479 (1974); *Boston Old Colony v. Lumberman's Mut. Cas. Co.*, 710 F. Supp. 913 (S.D.N.Y.), *aff'd*, 889 F.2d 1245 (2d Cir. 1989).

28. *Zulferino v. State Farm Auto. Ins. Co.*, 123 A.D.2d 432, 506 N.Y.S.2d 736 (2d Dep't 1986); *Country-Wide Ins. Co. v. Wagoner*, 57 A.D.2d 498, 395 N.Y.S.2d 300 (4th Dep't 1977), *rev'd on other grounds*, 45 N.Y.2d 581, 412 N.Y.S.2d 106 (1978).

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2004 Case Update – Part I

Uninsured, Underinsured, Supplementary Uninsured Motorist Law

By Jonathan A. Dachs

I am once again pleased to report, for the 12th consecutive year,[1] on developments in the area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the last calendar year. The year 2004 was another busy and significant period in this ever-changing, highly complex area of the law. Indeed, as a result of the increased volume of cases in 2004, this material is presented in two sections. This month's installment addresses general issues pertinent to both uninsured and underinsured motorist claims. Part II, which will appear in an upcoming issue of the *Journal*, will discuss several additional general issues, and will also address issues more specific to these separate categories of coverage.

Insured Persons – "Insureds"

The term "named insured" applies only to those persons or entities listed on the declarations page of the policy. It is not always easy to determine others who are covered by the term "insured."

In *Atlantic Mutual Cos. v. Ceserano*,[2] the policy included an endorsement that provided liability coverage for an automobile not owned by the insured corporation while being used by an executive officer, except for an automobile owned by that individual. The endorsement defined an "insured" to include an executive officer using a covered automobile. Because the claimant was an executive officer, but owned the vehicle involved in the accident, she was not deemed an "insured" under the policy. Thus, the SUM arbitration demanded by the claimant was permanently stayed.

In *Jacofsky v. Travelers Ins. Co.*,[3] the umbrella policy issued by Travelers explicitly stated that to be an "insured" under the policy, a "family member" of the named insured also had to be insured under one or more primary insurance policies for not less than the applicable deductible amount for an occurrence. Here, the named insured's son was a "family member" but was not an "insured" because he maintained an automobile insurance policy with liability limits below the umbrella policy's applicable deductible.

Occupant vs. Pedestrian

The claimant must be an "occupant" of a particular vehicle to qualify for coverage under that vehicle's policy. As defined in the mandatory UM endorsement, the term "occupying" means "in or upon or entering into or alighting from" a vehicle. Similarly, the Regulation 35-D SUM endorsement defines "occupying" as "in, upon, entering into, or exiting from a motor vehicle."[4]

In *Coregis Ins. Co. v. McQuade*,[5] the claimant was a sanitation worker who was struck by an underinsured vehicle while he was waiting near the curb for his sanitation truck to return and pick up the garbage he had collected. In reversing the determination of the Supreme Court, and granting the Petition to Stay Arbitration, the Appellate Division held that while the claimant

> intended to return to the truck, his departure from it was not "incident to some temporary interruption in the journey of the vehicle" such that his original occupancy of the truck could be deemed continuing in nature. Moreover, at the time of the accident [the claimant] was not in the immediate vicinity of the truck which was between one and four blocks away. Nor can [the claimant] be deemed to have been entering the truck at the time he was injured merely because he was waiting for it to arrive.[6]

Jonathan A. Dachs, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola, New York, is the author of "Uninsured and Underinsured Motorist Protection," 4 *New York Insurance Law*, Chapter 51 (LexisNexis/Matthew Bender), and of a chapter on UM/UIM and SUM (pre- and post-Regulation 35-D), in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). A graduate of Columbia University, he received his law degree from New York University Law School.

Thus, since the claimant was not "occupying" the insured vehicle, he did not qualify as an insured for purposes of the SUM endorsement.

In *Travelers Ins. Co. v. Youdas*,[7] where the claimant had just exited his vehicle and was in the process of unloading it to make a delivery, the court held that he was still occupying the vehicle since he "had not yet severed his connection" with it and was still "vehicle oriented" at the time he was struck by another car. His conduct in unloading the vehicle was "not part of a new or separate course of conduct unrelated to the vehicle"; he had not yet completed exiting the vehicle.[8]

Resident

The definition of an "insured" under the SUM endorsement includes a relative of the named insured and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

In *Palazzo v. Hartford Ins. Co. of the Midwest*,[9] and *State Farm Mutual Automobile Ins. Co. v. Nicoletti*,[10] the courts noted that the concept of residence has two components: physical presence and intent to remain.

In *New York Casualty Ins. Co. v. Enzinna*,[11] the court noted that there is a common expectation that a child away from home attending school remains a member of the household. Thus, the insured's 21-year-old daughter, who lived off-campus while she attended college, was held to be a resident of the insured's household and covered by the insured's auto policy, even though she had moved from place to place after living in a dormitory. The court held that her mere physical presence elsewhere was not sufficient to establish an intent to abandon her mother's residence. The evidence did not support a finding that the daughter desired or intended to cease being a resident of her mother's home or that her absence from home was anything other than transient in nature.

In *Allstate Ins. Co. v. Rapp*,[12] the 11-year-old claimant attempted to make a claim for UM benefits under a policy issued to his maternal grandfather. In moving to stay arbitration, Allstate contended that the claimant did not reside with his grandfather, but, rather, with his mother, at a different address. In opposition to the petition, the grandfather submitted an affidavit stating that at the time of the accident and for six years before that, the claimant lived with him and his wife in their apartment and was listed, along with his siblings, on the apartment lease. He also stated that at the time of the accident, the claimant attended a school within the apartment complex, and that the school's records would confirm that the address listed for the claimant was the grandfather's address.

The claimant's mother submitted her own affidavit confirming those allegations, and testified at the framed issue hearing that because she, a single mother, worked long hours, her children stayed with her parents during the week, spending the weekends with her at her own apartment. At the hospital, the mother gave the claimant's address as hers, and in 2000 she claimed him as a dependent on her income tax returns. During July and August, the claimant stayed with his mother, but his grandparents would take care of him during the days. Based on this evidence, the hearing court granted the petition, finding that the claimant was not a "resident relative" of his grandfather's at the time of the accident.

On appeal, the First Department reversed, finding that the documentary evidence, specifically the grandfather's rent recertification, and the uncontroverted testimony offered in the claimant's behalf, established his residency at his grandfather's home Mondays through Fridays, from September through June for the six years prior to the accident, an arrangement by which the claimant spent more time with his grandparents than he did with his mother. As the court stated, "Thus, it is readily apparent that while his mother had legal custody, [the claimant] had a significant tie to his grandfather's household, reflective of that degree of permanency and the intent to continue to reside there indefinitely required of a resident," and that the claimant could, "for insurance purposes, be a resident of more than one household."[13]

The term "named insured" applies only to those persons or entities listed on the declarations page of the policy.

In *State Farm Mutual Auto. Ins. Co. v. Nicoletti*,[14] the claimant's father testified that she last lived with him three years prior to the accident and was not living with him at the time of the accident. The claimant testified that she lived in her parents' house "on and off" for two years, and that during the three years prior to the accident, when she had a serious drug problem, she lived in the houses of various friends and her sister. At an examination under oath (EUO), she testified that she lived at an address other than her parents' house. Thus, the claimant was held not to be a resident of her father's household because the record was "devoid of evidence to demonstrate that [she] stayed at her parents' house with any degree of permanency with an intention to remain there."[15] Evidence that she received mail at her parents'

address, had the key to the house and kept some belongings there was insufficient to establish her residence at her parents' house.

In *Palazzo v. Hartford Ins. Co. of the Midwest*, mentioned above, the court held that an erroneous statement by a claims representative that the defendant was an insured under his grandparent's policy did not raise an issue of fact as to the defendant's residence and could not create coverage where none existed.

"Use or Operation"/Accidents

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle.

In *Progressive County Mutual Ins. Co. v. McNeil*,[16] the court found that the subject collision was one of two accidents that occurred over a short period of time (two weeks) that were deliberately caused to fraudulently obtain insurance benefits. Thus, the court held that because the injuries sustained by the claimants, who were occupants of another vehicle struck by the alleged perpetrators of the fraud, were caused by "an intentional collision," they could not recover uninsured motorist benefits. Notably, the court recognized the unfair result of its decision, which it was bound by *stare decisis* to make, but which removed protection for innocent victims. As stated by the court, "Legislative action is necessary in order to remedy this glaring void where innocent victims of intentional collisions are left without recourse for compensation for their injuries by the insurance industry."[17]

Claimant/Insured's Duty to Provide Timely Notice of Claim

UM, UIM, and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give notice timely to the insurer of an intention to make a claim. Although the new mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and, under current New York law, the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions.

In *St. Charles Hospital and Rehabilitation Center v. Royal Globe Ins. Co. of America*,[18] then-supreme court Justice James M. Catterson offered an interesting opinion on the subject of the "no prejudice" rule. He wrote:

> This Court is well aware that New York is one of a minority of states that still maintain a "no prejudice" standard in insurance law. The "no prejudice" rule means that failure of timely notice by an insured allows an insurer to disclaim coverage without showing prejudice. The "no prejudice rule is an exception to the well-established principle of general contract law that one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice." The Court of Appeals has made it clear that this exception is tolerated because of "the insurer's need to protect itself from fraud by investigating claims soon after the underlying events; to set reserves and to take an active early role in settlement discussions." In *Brandon*, Chief Judge Kaye established that the "no prejudice" exception is a limited one.[19]

Justice Catterson went on to note that there has been a "turning of the tide" and that the Court of Appeals demonstrated its "aversion" to the "no-prejudice" rule, which allows insurers to "avoid their obligations to premium-paying clients." Indeed, he wrote that

> [t]he *Brandon* decision is the clearest signal yet, of the Court's acknowledgment that the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected. In *Brandon*, the Court, while noting the late notice of claim was not the issue before it, appeared, albeit in a footnote, to consider the possibility of adopting a "prejudice" standard for late notice of claims. In particular, Chief Judge Kaye pointed to recent decisions in two other jurisdictions, observing that the shift to a prejudice standard often starts in contexts like the uninsured motorist context in *Brandon* where three public policy concerns are implicated. The Court enumerated these as [1] the adhesive nature of insurance contracts; [2] the public policy objective of compensating tort victims and [3] the inequity of the insurer receiving a windfall due to a technicality.[20]

He added that "New York's Court of Appeals has not newly arrived at this juncture. The Court signaled its inclination toward the majority view almost a decade prior to *Brandon* when it refused to extend the no-prejudice exception to late notices of claim submitted to reinsurers."[21]

Continued on Page 42

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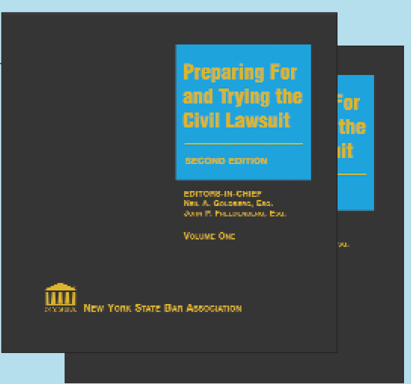

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Applying these ideas to the facts of the case before him, which involved an underlying medical malpractice action pertaining to alleged negligence that had occurred 21 years earlier, Justice Catterson held that the defendant hospital's insurer was required to demonstrate prejudice before its disclaimer of coverage for late notice could be upheld. In the opinion of the court, "no sound reasons exist for extending the 'no-prejudice' exception to a situation where notice of legal action served also as notice of claim, and where an investigation of the underlying claim could not have been launched any sooner than twenty-one years after the occurrence." Mindful of the fact that "there is a need to balance . . . [the] 'prejudice' standard with the historical reluctance in this jurisdiction to inhibit the freedom of contract by finding insurance policy clauses violative of public policy," Justice Catterson nevertheless found that the facts of this case implicated precisely the public policy concerns raised by *Brandon*. Finally, Justice Catterson noted that while "even in jurisdictions that have struck down the no-prejudice exception, the insurer may still prevail by showing that it was prejudiced by late notice," the insurer in this case made no such showing of prejudice. "An insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct."

In *Blue Ridge Ins. Co. v. Jiminez*,[22] the defendants' contention that "New York should abandon the rule that an insured's failure to provide timely notice of an occurrence vitiates the insurance policy and relieves the insurer of its obligations *even in the absence of prejudice*" was rejected by the court because "whether such precedent should be overruled is a matter for the Court of Appeals."[23]

More recently, in *Great Canal Realty Corp. v. Seneca Ins. Co.*,[24] Justice Catterson, now an Appellate Division justice, writing for a 3-2 plurality, again confronted the issue of "the validity of the no-prejudice exception in New York whereby an insurer can disclaim coverage without demonstrating prejudice when its disclaimer is based on late notice of an occurrence." Justice Catterson noted that "[i]n adhering to the 'no-prejudice' exception, New York now finds itself in the minority of jurisdictions justifying their positions by holding that the right to timely notice is fundamental because of the insurer's need 'to protect itself from fraud by investigating claims soon after the underlying events; to set reserves; and to take an active, early role in settlement discussions.' In other words, the insurer has been granted, wholly through judicial largess, the benefit of a conclusive presumption of prejudice."[25]

In Justice Catterson's opinion, this conclusive presumption is "in derogation of fundamental principles of the law of contracts," and creates an inherent inequity. After noting that insurance contracts are "contracts of adhesion," Justice Catterson wrote that the Court of Appeals has already made clear that the "no-prejudice" exception "is to be applied narrowly and only in circumstances which support its raison d'etre." He then stated that the *Brandon* court's conclusion that the no-prejudice exception should not apply to disclaimers of late service of legal papers "militates equally toward moving to a 'prejudice' standard as to the initial notice requirements," and that *Brandon* "is the clearest signal yet of the Court's acknowledgment of the soundness of the principle followed by the majority of other states, namely, that the egregious imbalance between insurer and insured needs to be corrected." Justice Catterson thus concluded that "we see no reason to extend the 'no-prejudice' exception

As We Go To Press . . .

On April 5, 2005, the Court of Appeals, in *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2005 WL 756620 (2005), held that the "no-prejudice" rule should be relaxed in SUM cases and, thus, "where an insured previously gives timely notice of the accident, the [SUM] carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage."

By contrast, on the same day, the Court of Appeals, in *Argo Corp. v. Greater New York Mutual Ins. Co.*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2005 WL 756613 (2005), held that the "no-prejudice" rule was not abrogated by *Brandon v. Nationwide Mutual Ins. Co.*, 97 N.Y.2d 491 (2002), which held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM context, and that *Brandon* should not be extended to cases where the carrier received unreasonably late notice of the claim. Insofar as the "rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy," the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

to allow insurers to disclaim coverage on the basis of late notice of claim where 'lateness' is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer."[26]

In view of the two dissenting opinions that expressed the view, among other things, that the Appellate Division was without authority to change the long-standing no-prejudice rule, it is likely that this case, and this significant issue, will be decided by the Court of Appeals in the near future.

The interpretation of the phrase "as soon as practicable" continues, as always, to be a hot topic.

In *State Farm Mutual Automobile Ins. Co. v. Dowling*,[27] the claimant notified the SUM carrier of the accident immediately after it occurred in connection with a no-fault claim, but could not at that time, or at any time prior to the grant of summary judgment in the personal injury action she had brought, know that the only defendant in that action with significant insurance coverage (the driver of the car in which she was a passenger) would be absolved of liability, and that she, therefore, had a valid underinsured claim. The claimant's subsequent notice was deemed timely because "it was the grant of summary judgment to defendant's insured in the personal injury action that marked the commencement of respondent's obligation to give written notice of claim 'as soon as practicable.'"[28]

In *New York Central Mutual Ins. Co. v. Guarino*,[29] a 19-month delay in giving notice of an SUM claim was held to be reasonable, and the claimant was found to have acted with "due diligence" in ascertaining the material facts underlying her SUM claim under the following circumstances: The claimant was injured in a rear-end collision on March 8, 1997. Although she immediately consulted with various medical providers for treatment of back and neck injuries, all initial indications were that she did not sustain a "serious injury." An MRI report in October 1999 indicated a "minimal right C5-6 disc bulge causing no apparent compromise" to the nerve, and that the claimant's spine was "otherwise normal." The defendant's independent medical examination (IME) physician concluded in March 1998 that the claimant had sustained only cervical and lumbar strains, which were expected to heal within a few weeks or months. On the basis of the IME report, the petitioner denied no-fault benefits.

The court held that it would be "both inconsistent and inequitable" in light of the March 1998 no-fault denial for the petitioner to contend that the claimant was then on notice that she had a viable SUM claim. The court found that it was not until July 1998, at the earliest, when the claimant received the report of her orthopedic surgeon indicating that the March 1997 MRI may have been misread and might, indeed, have shown a disc herniation at C5-6, that the claimant was on notice that she sustained a "serious injury." Within six weeks of receipt of a second MRI report confirming the presence of a herniation, the claimant gave the petitioner written notice of her SUM claim.

The interpretation of the phrase "as soon as practicable" continues to be a hot topic.

In *State Farm Mutual Automobile Ins. Co. v. Linero*,[30] the court held that the claimant exercised due diligence by investigating and pursuing the prospect of insurance for the tortfeasor immediately after the accident and continuing until that potential source of recovery was exhausted by the other carrier's disclaimer, and then promptly notifying the SUM carrier of the claim.[31]

By contrast, in *State Farm Mutual Automobile Ins. Co. v. Mears*[32] and *State Farm Mutual Automobile Ins. Co. v. Bombace*,[33] the courts held that the insureds failed to provide the petitioner insurance company with notice of their uninsured motorist claims "as soon as practicable."

In *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*,[34] notice of an underinsured motorist claim given after a delay of one year was held to be untimely where the claimant commenced a lawsuit in April 1999 seeking $1 million in damages, which in and of itself evidenced the perceived serious nature of her injuries, asserted as early as July 1999 that she was suffering from severe and permanent injuries to her left arm and cervical spine, including a "herniated paracentral disc 'causing severe neck, left shoulder and arm pain with weakness and loss of mobility,'" and the claimant knew as early as September 1999 that the tortfeasor's policy provided less bodily injury coverage than her own policy and, therefore, that the tortfeasor was "underinsured," yet waited an additional six months before providing notice of intent to make an underinsured motorist claim.

In *Brown v. Travelers Ins. Co.*,[35] the court held that the insured did not provide her insurer with notice of her SUM claim "as soon as practicable" where she failed to provide notice of claim until 16 months after "proclaim[ing] [her] injuries as 'serious'" and eight months after she ascertained the amount of the tortfeasor's coverage limits. The court rejected the insured's contention that her delay should be excused because she was not "reasonably certain" that she sustained a serious injury until shortly before she gave notice in view of the testimony of her doctor that her injury was "totally disabling" from the first date of his treatment, almost two years previously, and the fact that the insured commenced an action alleging that she sustained a "serious injury" almost a year and a half previously.

In *State Farm Mutual Automobile Ins. Co. v. Jackson*,[36] the insured's 15-month delay in notifying her SUM carrier of

her claim for uninsured motorist benefits was held to be unreasonable; although she was pregnant at the time of the accident, and later suffered a miscarriage, she was found to be totally disabled because of her injuries within one month of the accident, and was actively engaged in physical therapy following the miscarriage.

In *Continental Ins. Co. v. Marshall*,[37] the court held that notice was untimely as a matter of law where the claimant failed to ascertain the insurance status of the alleged tortfeasor and to notify the SUM carrier of her claim until approximately 22 months after the accident, and more than one year after she was diagnosed with multiple disc herniations and a pinched nerve, among other things.

In *State Farm Mutual v. Kathehis*,[38] the court held that the claimant's failure to notify the SUM carrier of a potential uninsured motorist claim for two years only because of a lack of a police report with the offending vehicle's license number represents a lack of diligence and "forecloses a finding that notice had been filed as soon as practicable."

In *State Farm Mutual Automobile Ins. Co. v. Celebucki*,[39] the court rejected the claimant's contention that she provided notice to the insurer approximately three months after the accident, in view of the insurer's presentation of affidavits of a claims representative stating that no such letter was located in the file and the fact that there was no evidence in the record, other than "the unsubstantiated assertion of [the claimant's] counsel that he 'did cause to execute and forward' said letter," to validate this claim. The court specifically noted the absence of any proof of "regular mailing procedures and office practices 'geared to ensure the proper addressing or mailing of this letter'" which would have entitled the claimant to a rebuttable presumption of receipt by the insurer.

In *Ambrosio v. Newburgh Enlarged City School District*,[40] the court noted that the insured and additional insured have independent duties to provide timely notice of an occurrence to the insurer.

In *First Central Ins. Co. v. Malave*,[41] the court reminded that notice provided to the insured's insurance broker was not notice to the insurer.

In *American Transit Ins. Co. v. Sartor*,[42] the claimant was injured when a vehicle he was driving was involved in an accident with a taxicab. American Transit insured the taxicab in the name of the registered owner. Although a taxi operator was required under Vehicle and Traffic Law § 370 (VTL) to provide notice to its insurer within five days of an accident or face a misdemeanor criminal charge, the driver, the registered owner, and the taxicab company each failed to inform American Transit of the collision.

Seven months later, the claimant's attorney notified American Transit of the accident, and requested information regarding the name of its claim adjuster and the policy's limits. American Transit never responded to this inquiry. The claimant then initiated a personal injury action against the driver, registered owner, and taxicab company. None of the defendants answered the complaint or informed American Transit of the suit. Nor did the claimant, whose attorney had contacted American Transit three months earlier, sending the insurer notice that he had filed a lawsuit. After obtaining a default judgment and an award of damages, the claimant served a copy of the judgment on American Transit, which disclaimed coverage on the basis that it had not been timely notified by any party of the commencement of the litigation. In this declaratory judgment action for coverage under the policy, the Court held that VTL § 370(4) does not "alter long-standing insurance industry practice with regard to notice or the right that Insurance Law section 3420(a)(3) grants to injured claimants" to provide independent notice. The purpose of the statute is to "establish an incentive to the operator of a vehicle for hire to supply its insurer with immediate notice that an accident has occurred in order to avoid criminal liability for noncompliance" – it does not undermine an insurer's right to receive notice of litigation. Thus, VTL § 370 does not negate the notice condition precedent required by the policy, and the insurer was entitled to disclaim coverage under these circumstances.

Discovery

The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *State Farm Mutual Automobile Ins. Co. v. Bautista*,[43] the court held that it was a provident exercise of discretion to direct the claimant to provide pre-arbitration discovery.

In *Rodriguez v. Metropolitan Property & Casualty Ins. Co.*,[44] the court held that where the claimants failed to meet the conditions precedent to arbitration pertaining to the provision of documentation and submission to medical examinations, their action against the insurer for SUM benefits was properly dismissed. ■

1. *See* Jonathan A. Dachs, *2003 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J., May 2004, at 38; *2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J., June 2003, at 32; *A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001*, N.Y. St. B.J., July/Aug. 2002, at 20; *Actions by Courts and Legislature in 2000 Addressed Issues Affecting Uninsured and Underinsured Drivers*, N.Y. St. B.J., Sept. 2001, at 26; *Summing Up 1999 'SUM' Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*, N.Y. St. B.J., July/Aug. 2000, at 18; *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, N.Y. St. B.J., May/June 1999, at 8; *Legislative and Case Law Developments in UM/UIM/SUM Law – 1997*, N.Y. St. B.J., Sept./Oct. 1998, at 46; *Developments in Uninsured and Underinsured Motorist Coverage*, N.Y. St. B.J., Sept./Oct. 1997, at 18; *The Parts of the "SUM": Uninsured and Underinsured Motorist Coverage Cases in 1995*, N.Y. St. B.J., July/Aug. 1996, at 42; *Uninsured and Underinsured Motorist Coverage in*

1994, N.Y. St. B.J., Nov. 1995, at 24; *Uninsured and Underinsured . . . But Not Underlitigated – 1993: An Important Year for UM/UIM Coverage*, N.Y. St. B.J., Sept./Oct. 1994, at 13.

2. 5 A.D.3d 382, 773 N.Y.S.2d 80 (2d Dep't 2004).

3. 5 A.D.3d 557, 773 N.Y.S.2d 446 (2d Dep't 2004).

4. 11 N.Y.C.R.R. § 60-2.3(f) (prescribed SUM endorsement).

5. 7 A.D.3d 794, 779 N.Y.S.2d 497 (2d Dep't 2004).

6. *Id.* at 795 (citations omitted).

7. 13 A.D.3d 1044, 787 N.Y.S.2d 475 (3d Dep't 2004).

8. *See* N. Dachs & J. Dachs, *"Occupancy" and Uninsured Motorist Coverage*, N.Y.L.J., July 13, 2004, p. 3, col. 1.

9. 10 A.D.3d 711, 782 N.Y.S.2d 124 (2d Dep't 2004).

10. 11 A.D.3d 702, 784 N.Y.S.2d 128 (2d Dep't 2004).

11. 6 Misc. 3d 199, 784 N.Y.S.2d 819 (Sup. Ct., Erie Co. 2004).

12. 7 A.D.3d 302, 776 N.Y.S.2d 285 (1st Dep't 2004).

13. *Id.* at 303–04.

14. 11 A.D.3d 702, 784 N.Y.S.2d 128 (2d Dep't 2004).

15. *Id.* at 703.

16. No. 6715/03, 2004 N.Y. Misc. LEXIS 1501 (Sup. Ct., Nassau Co. 2004).

17. *Id.*; *see also State Farm Mut. Auto. Ins. Co. v. Bryant*, Index No. 1401/02 (Sup. Ct. Nassau Co. Jan. 29, 2004) (not officially reported).

18. N.Y.L.J., May 25, 2004, p. 20 (Sup. Ct., Suffolk Co.).

19. *Id.* (citations omitted).

20. *Id.* (citing *Brandon v. Nationwide Mut. Ins. Co.*, 97 N.Y.2d 491, 496, n.3, 743 N.Y.S.2d 53 (2002) (Kaye, C.J.)).

21. *Id.*; *see Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992).

22. 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004).

23. *Id.* at 654 (emphasis added); *see Garay v. Nat'l Grange Mut. Ins. Co.*, No. 04-0453-CV, 2004 U.S. App. LEXIS 24086 (2d Cir. 2004) ("While the propriety of expanding New York's no-prejudice rule has been questioned, it remains the law of this state") (citations omitted)); *see also* Dennis M. Wade & David F. Tarella, *No Prejudice Rule Lives (Apparently)*, N.Y.L.J., Dec. 15, 2004, p. 3, col. 1; Louis G. Adolfsen & Ignatius John Melito, *New York Insurance Law's Late Notice Is Alive and Well*, N.Y.L.J., Oct. 28, 2004, p. 1, col. 1; John H. Gross, *A Case for Changing New York's "No-Prejudice" Exception*, N.Y.L.J., Aug. 5, 2002, p. 3, col. 1.

24. 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004), *appeal granted*, 2005 N.Y. App. Div. LEXIS 1509 (1st Dep't 2005).

25. *Id.* at __, 787 N.Y.S.2d at 25 (citations omitted).

26. *Id.* at __, 787 N.Y.S.2d at 29.

27. 5 A.D.3d 277, 774 N.Y.S.2d 679 (1st Dep't 2004).

28. *Id.* at 278.

29. 11 A.D.3d 909, 784 N.Y.S.2d 268 (4th Dep't 2004).

30. 13 A.D.3d 546, 786 N.Y.S.2d 580 (2d Dep't 2004).

31. *See also Fenske v. State Farm Mut. Auto. Ins. Co.*, 8 A.D.3d 1005, 778 N.Y.S.2d 363 (4th Dep't 2004) (issue of fact whether plaintiff had a reasonable excuse for delay of nearly one year in providing notice of SUM claim).

32. 7 A.D.3d 533, 775 N.Y.S.2d 581 (2d Dep't 2004).

33. 5 A.D.3d 782, 773 N.Y.S.2d 575 (2d Dep't 2004).

34. 7 A.D.3d 955, 777 N.Y.S.2d 551 (3d Dep't), *modified*, ___ N.Y.3d___, ___ N.Y.S.2d ___, 2005 WL 756620 (2005) (notice of SUM claim was untimely as a matter of law, but insurer must demonstrate prejudice in order to disclaim where insured gave timely notice of the accident).

35. 4 A.D.3d 835, 772 N.Y.S.2d 434 (4th Dep't 2004).

36. 6 A.D.3d 1029, 776 N.Y.S.2d 615 (3d Dep't 2004).

37. 12 A.D.3d 508, 784 N.Y.S.2d 608 (2d Dep't 2004).

38. No. 0015302/04, 2004 N.Y. Misc. LEXIS 1211 (Sup. Ct., Bronx Co. 2004).

39. 13 A.D.3d 1023, 787 N.Y.S.2d 454 (3d Dep't 2004).

40. 5 A.D.3d 410, 774 N.Y.S.2d 153 (2d Dep't), *appeal denied*, 2 N.Y.3d 704, 780 N.Y.S.2d 310 (2004).

41. 3 A.D.3d 494, 771 N.Y.S.2d 141 (2d Dep't 2004).

42. 3 N.Y.3d 71, 781 N.Y.S.2d 630 (2004).

43. 11 A.D.3d 471, 782 N.Y.S.2d 372 (2d Dep't 2004).

44. 7 A.D.3d 775, 776N.Y.S.2d 868 (2d Dep't 2004).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent the estate of a 17-year-old boy. Sam was a passenger in a motor vehicle when the driver lost control at high speed, and struck a telephone pole. The accident happened in the middle of the day, and there was only one car involved. As is often the case, the driver survived but the passenger did not.

Although the case is arguably worth two to three times as much, the maximum insurance coverage available is $100,000. I contacted the claims person, who indicated that she was prepared to offer the full amount of the policy, but just wanted to see the autopsy report first to make sure that the boy had no underlying diseases which would affect his life expectancy. I told her I would send the report when I received it.

A few days later I got the autopsy report, and to my surprise (and dismay) the attached toxicology results indicated that Sam had a fair amount of alcohol in his system at the time of death. My sense from talking to the claims adjuster is that she, as I, had not considered drug or alcohol use on Sam's part. The problem I perceive is that once the carrier learns about the alcohol finding it may seize on it as an opportunity to delay resolution of the case, or to negotiate down from full policy coverage, even though Sam's intoxication did not cause the accident. The parents are devastated by their son's death. I would like to spare them having to be deposed and being questioned about their son's drinking.

My question is this: What should I send to the claims adjuster? I've asked three lawyers I respect for their advice, and have gotten three different opinions: (a) don't send anything, except an authorization allowing the carrier to get the autopsy report only; (b) send the entire report, with the toxicology results; or (c) send the report, without the toxicology results. A variation of (c) would be to alert the claims person that I was only sending part of the report.

Is one of those options more "professional" than the others?

Sincerely,
Unsure

Dear Unsure:

Your question raises an interesting example of the tension which can exist between representing a client zealously (DR 7-101) and representing a client within the bounds of the law (DR 7-102). Obviously, you don't want to send the toxicology report to the insurance carrier if you don't have to. The question is: Have you given your word or are you otherwise obligated to send it?

Disciplinary Rule 7-102 states: "In the representation of a client, a lawyer shall not . . . conceal or knowingly fail to disclose that which the lawyer is required by law to reveal." DR 7-102(A); 22 N.Y.C.R.R. § 1200.33. Here you are not "required by law" to send anything to the claims adjuster. This is not a situation where you are providing documents in response to a discovery demand.

Also to be considered, however, is DR 7-102 (A)(5), which prohibits a lawyer from knowingly making a false statement of law or fact. By faxing a copy of the autopsy report to the claims person without the toxicology report you are implying that the autopsy report, to your knowledge, is complete. Are you being accurate? In this case, because of a technicality, I would say yes.

From my experience it would appear that, strictly speaking, the autopsy report and the toxicology report are two different documents. The report of the autopsy contains physical findings and ends with the signature of the pathologist. That report may or may not reference other findings, including the toxicology results, which are contained on a separate sheet headed "Toxicology Report." When you send away for the autopsy report you may receive the toxicology report also, or you might have to pay a separate fee, depending on the particular medical examiner's office. The fact that you received the autopsy report and the toxicology report together does not make them a single document.

The larger issue is whether, in general, relying on a technicality is "professional." The answer, it seems to me, ranges from yes to no. Sometimes it is the highest form of zealous advocacy to identify a distinction which allows your client a legal safe haven. And sometimes you can conjure a distinction without a difference that is tantamount to a complete misrepresentation or concealment. Even in the land of nuances, there are obvious black letter commandments. Thou shall not alter. Thou shall not destroy. Beyond those I'd suggest the general principle that if you have to torture the English language to achieve a desired result, you are on the edge of the slippery slope.

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

Which brings us to the specifics of your dilemma. You volunteered to send the autopsy report after the claims adjuster said she wanted to be sure the young man had no underlying disease. It seems you both had in mind the physical findings of the autopsy. Because you have no obligation to educate the other side as to the deficiencies in your client's case, and in light of the obligation to your client to not voluntarily prolong resolution of the matter, it would seem that prudence dictates sending the insurance carrier only what you both agreed upon – the physical findings. Most claims adjusters are savvy enough to know that a toxicology report is also available. If she doesn't call back and ask about it, or for an authorization to obtain it, that is her decision.

Some might think this resolution is disquieting, and I would not disagree. Being fretful is a part of being scrupulous. And the finer the distinction you are making, the more fretful you should be. In the final analysis here, making the fine, but accurate, distinction between the autopsy report and the toxicology report allows you to keep your word and still zealously protect your clients' interest. (And, no doubt you'll think twice in the future before volunteering to send material you haven't seen yet.)

The Forum, by
Lucille Fontana, Esq.
Clark, Gagliardi & Miller, P.C.
White Plains, NY

LETTERS TO THE FORUM:

We received the following reader response to the question posed by "Unsure":

Dear Unsure,

There is no reason to be unsure. The only course of action consistent with both professionalism and practicality is to send the entire autopsy report, as promised. There is no basis for assuming the claims adjuster would not come up with the information anyway, and any attempts at "cover up" would be exposed.

Sam was a passenger, so any alcoholic consumption by him has nothing to do with his untimely death. Nor does any drinking by him demonstrate any "underlying disease" which would affect the quantum of damages. The desire to spare the feelings of the parents is specious. Questions addressed to them about their son's drinking (how scandalous in this day and age!) are beyond their direct knowledge, and impermissible as irrelevant. The only professional posture is not concealment, but complete truth, with the ability to explain that the alcohol question should not affect the assessment of either liability or damages.

Edward J. Greenfield
J.S.C. (ret'd)
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently met with a new client (let's call him A. Fineman), reviewed his assets and financial situation (both present and predicted for the future), and was engaged to draft a will and a complicated estate plan. We agreed on a $3,000 flat fee for my services, rather than an hourly rate. In arriving at this figure I took into account several factors, chief among them being my estimate that it would take approximately 10 hours to do the work. This was to include the initial drafting, revisions after client review, and the eventual signing of the will and related forms (healthcare proxy, power of attorney, living will, HIPAA authorization). Mr. Fineman paid the full fee, in advance. However, just as I was about to start work on his file, I learned by sheer chance that another lawyer in my firm had just finished putting together a will and an estate plan for a client with circumstances very similar to Mr. Fineman's.

I obtained a redacted copy of my partner's work, and it appears as if I can revise and adapt it for Mr. Fineman's needs in about two hours. (Word processors make a big difference these days.) At my usual hourly rate, and even factoring in the additional time for client meetings and the formal execution of the documents, the most my client would pay would be about two-thirds of the agreed-upon fee – which I believe had been very reasonable in the first place. I should add that if my time had exceeded my estimate, I would not have requested any additional payment beyond the $3,000. Under these circumstances, what should I do regarding my present relationship with Mr. Fineman, and do I have an obligation to return any of the prepaid fee?

Thank you for your advice.

Yours sincerely,
Wanting to Be Fair

"Of course your divorce was messy. Look how messy your marriage was."

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is there a rule regarding the choice of *because of* instead of *due to*?

Answer: Los Angeles attorney Benjamin Shatz cites an old rule that *due to* can be used only as a predicate adjective (following the verb *to be*). According to Strunk & White, in *The Elements of Style*, *due to* is correct in: "This invention is due to Edison," in which *due to* follows the verb *be* and "losses due to preventable fires," in which *due to* directly modifies the noun *fires*. But *due to* is incorrect in: "He lost the game *due to* carelessness." In that sentence, the only correct usage is, "He lost the game *because of* carelessness."

That "rule" is no longer in force, although it is sometimes still quoted. Its longevity may be attributable to readers' devotion to Strunk & White's little book. In his 1935 revision of William Strunk's early 20th century grammar, E.B. White repeats Strunk's insistence that *due to* is correct only after the verb *to be*. He explains that he does so in order to retain the "flavor" of the original *Elements of Style*. White writes in his introductory Note:

> Professor Strunk was a positive man. His book contained rules of grammar phrased as direct orders. In the main I have not attempted to soften his commands, or modify his pronouncements, or delete the special objects of his scorn.

But the "due to" rule has been largely ignored through the years since it was first stated. And in language, wide usage always prevails and eventually persuades lexicographers. So *The American Heritage Dictionary of the English Language* (2000) now says, "[Because] due to is widely used and understood there seems little reason to avoid using it as a preposition." And *Webster's Third New International Dictionary* (Unabridged, 1993) lists *due to* as a preposition in a sentence like, "[T]he number and influence of investors are increasing, due to several causes."

Question: In the January column you answered a question about the meaning of "creative ambiguity." How about the terms *political euphemism* and *enlightened obfuscation*, both of which I see in the news?

Answer: All three phrases contain language designed to mold public opinion. (James Baldwin once cynically observed that "the root of language is to control the universe by describing it").

Political euphemisms are found in words like *ownership society, empowering* people to *control* their own money. *Private accounts* have become *personal accounts*. Republican strategist Frank Luntz is reported to have argued that *private accounts* sounds elitist, so if these accounts are called *private*, the legislation would fail. So call them *personal accounts*. (Quoted by Marcia Mercer, Scripps Howard News Service, February 8, 2005.)

Political euphemism also plays an important role in environmental causes. Republicans prefer the term *global climate variation* to *global warming*, which they say makes the problem seem more urgent than it actually is. Democrats argue that the term *global climate variation* is so nebulous as to strip the phenomenon of any reality. (*Chemical & Engineering News*, Editor's Page, January 24, 2005.)

While political euphemisms use language to favorably affect opinion, *enlightened obfuscation* uses language to confuse. Joseph Ellis uses that term in his book, *The Founding Fathers*, describing President James Madison's expert use of it in a House of Representatives debate about slavery. Madison regarded slavery as a moral embarrassment, but believed that ending it would be "premature, politically impractical, and counter-productive." In his speech about slavery, he used "convoluted syntax, multiple negatives, [and] indefinite antecedents," to turn from denunciation to delay in his second sentence:

> If this folly did not reproach the public councils, it ought to excite no regret in the patrons of Humanity & freedom. Nothing could hasten more the progress of these reflections & sentiments which are secretly undermining the institution which this mistaken zeal is laboring to secure against the most distant approach of danger.

H.L. Mencken denounced Thorstein Veblen, for his "incomparably tangled and unintelligible works" in which hollow nothings were stated in high, astounding terms, making them so mysterious that they sound portentous. Mencken quoted the first paragraph of Chapter XIII of *The Theory of the Leisure Class*, to make his point:

> In an increasing proportion as time goes on, the anthropomorphic cult, with its code of devout observances, suffers a progressive disintegration through the stress of economic exigencies and the decay of the system of status. As this disintegration proceeds, there come to be associated and blended with the devout attitude certain other motives and impulses that are not always of an anthropomorphic origin, nor traceable to the habit of personal subservience. (Prejudices: First Series, 1919, 59–83).

Compare Humpty Dumpty's retort to Alice, in *Through the Looking Glass*:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her new book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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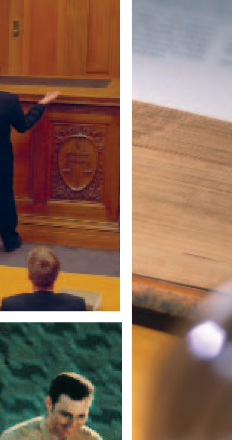

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Sarah Jane Harrigan
Cody John Harrison
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Sean Tristan Hayden
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Ronald T. Lo Russo
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Scott Andrew Morris
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Joseph Muallem
Megan Jeane Muoio

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Taehyun Park
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Wendy Jill Reisman
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Jennifer Sawyer
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Farah Nicole Schwartz
Kathryn Rohrer Schwartzstein
Aimee Marie Scillieri
Robert Seigal
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Dan Sella
Luke Semar
Pavel Seroklinov
Manda Marie Sertich
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Gregory Morris Shapiro
Umang Gautam Shastri
Jennifer Margaret Sheinfeld
Jun Sheng
Collin Robert Sherman
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Mark Jonathan Shubitz
Evan Ross Shusterman
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Alexander Sikoscow
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Jeffrey Brandon Sladkus
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Lindsay Smith
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Weishan Wang
Yan Wang
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Todd Andrew Weller
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Elisabeth Wickeri
Ian Scott Wilbur
Derek Andrew Williams
Jamie Dennise Williams
Michelle Williams
Jennifer Lauren Wilson
Steven M. Wilson
Alexander Joel Wolf
Keren Wolf
Amanda L. Wolfe
Richard A. Wolfe
Deborah Lynn Wolmark
Boji Wong
Christopher John Woods
Chad Yablonsky
Jennifer Sarah Yadegari
Chenli Yang
Hao Yang
David Yeger
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Shubing Yuan
Jun Zheng
Michael Theodore Zoppo
Rachel Beth Zublatt
Rachel Stephanie Zuckerman

SECOND DISTRICT

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Mohamad Adel Akbik
Ruth Akerman
Alison Andruszkewicz
Jennifer Bai
Seth Jared Bell
Alison M. Brady
Maria W. Bucci
Colleen Marie Buckley
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Olabanji Olusegun Elegbe
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Frances Maria Forgione
Israel Aaron Frenkel
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Ian Joseph Gaynor
Timothy Daniel Gearon
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Marina Golbert
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Eleftherios Kravaris
Christie Lynn Lafranchi
Oleg Levit
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Abraham Lowy
Antonino Lugara
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Matthew Thomas MacIntyre
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Claudia Maria Melo
Tony Mirvis
Marilyn Nieves
Ian Lloyd Nikol
Moh M. Noaman
Nnenna Onua
Christopher Harold Otterbeck
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Marianna Picciocchi
Viktor Vaclav Pohorelsky
Bella Promyslovskaya
Robyn Nicole Pullio
Kenneth L. Raisch
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Reinaldo E. Rivera
Yukiko Sakamoto
Matthew Ross Samet
Krista Lynn Santoro
Michael Andrew Santulli
Murtaza A. Sardharwala
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Simon Singer
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Shannon T. Smith
Jill Ellen Sodafsky
Leonid Sorits
Ilana Jenny Sussman
Jessica Taylor
Katherine E. Teitgen
Ryan Thompson
Sylvia Tiscareno
Cody R. Tray
Iyayi Uwa
Igor Vinbaytel
Christine Nicole Vonwangenheim
Keith Michael Wallach
John Cooper Ellis Wallin
Ying Wang
David Scott Warner
Dea Weisman
Cheryl Nicole Williams
Elizabeth Victoria Wright
Gennady Yankilevich
Fawn H. Zakheim

THIRD DISTRICT

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Cailin Connors Brennan
Matthew David Burin
Sean Thaddeus Childs
Douglas Coleman
La Vonda Sheryl Collins
Elizabeth Frances Colombo
Adam Hill Cooper
Nicholas John D'Alessandro
Eric R. Gee
Elena Gonzalez
Jeffrey D. Hart
James Benjamin Hettie
Donnial K. Hinds
Kristina Michele Hubicki
Matthew Charles Hug
Lynne Ann Hutter
Robert R. Jacobsen
Christine C. Kelly
Michael Patrick Kendall
Mary Theresa Kenny
Donna Kerwin
Jessica A. Knouse
Maria LaRosa
Young Jun Lee
Youngiun Lee
Jonathan Michael Madsen
Al August Maiwald
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Brian P. Marshall
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Michael M. McCormick
Michael Hunt McCormick
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Jessica B. Mocerine
Jessica Brooke Mocerine
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Sarah Moore
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Gregory G. Nickson
Colleen Ostiguy
Michael Panayotou
Michael Frank Panayotou
Amy Leigh Perry
Scott M. Peterson
Brian Patrick Quinn
James P. Riley
Heena Shaikh
Rachel Sutel Sherman
Donald Alexander Shults
Lauren M. Snyder
Kimberly M. Wells
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FOURTH DISTRICT

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Robert Edwin Donaldson
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Brian William Felton
Nichoel Lynne Forrett
Alyce M. Gilbert
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Christopher K. Mills
Christian P. Morris
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Megan M. Parsons
Carin E. Spreitzer
Peter Thaisz
Peter M. Thaisz
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FIFTH DISTRICT

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Holly Kozlowski Austin
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Jill Cori Breault
Eric T. Bronstad
Gregory Michael Brown
Kerry Lyn Buske
Eileen Ann Casey
Jason John Centolella
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Joo-young Chung
Geoffrey Jon Karol Ciereck
Paul John Colabufo
Heather M. Cole
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Christian C. Day
Paul Michael Deep
Michelle Arline Ellsworth
Janet Michelle Fall
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Juan Renteria
Dylan Anne Runyan
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Graham Benton Seiter
John Anthony Sickinger
Dongju Song
Alicia Marie Tisdell
Michael Evan Underwood
Elizabeth Dawson Vander Wal
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Elise M. Voutsinas
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Samantha D. Zappia

SIXTH DISTRICT

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Yong Chul Park
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Joseph Waldorf
Charles O. Wolff

SEVENTH DISTRICT

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Cody Ray Braithwaite
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Megan Elizabeth Dorr
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Peter John Glennon
Jared Preston Hirt
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John Joseph Jakubek
Nathan L. Johnson
Julie S. Jordan
Frances Patricia Mance
Scott Michael Mooney
Jordan Elliot Morgenstern
Christian Michael Nadler
Jeremy David Newman
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Francis Michael Ostrander
Spencer Dion Parr
Michael Joseph Pastrick
Matthew J. Peck
John Christopher Pilato
Elizabeth Kathryn Pulbratek
Cassandra Carter Rich
Cassandra Rich
Danielle Paola Salgado
Paul Bernard Shipper
Andrew V. Siracuse
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Casey F. Spencer
Scott A. Sydelnik
Janelle Marie Tandle
David Bradley Thurston
Jocelyn E. Torres
Ira Treuhaft
Elizabeth Anne Trittipo
Sara Elizabeth Visingard
Heidi A. White

EIGHTH DISTRICT

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Seth Jeremy Andrews

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Joseph Brian Catanzaro
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Cavette Althea Chambers
Sumita Chowdhury-ghosh
Andrew John Connelly
Lucille Ann Dadd
Marc Richard Davies
Kristen Balbick Degnan
Nicholas John Dicesare
Anne Nicole Dintino
Kevin Richard Doering
Michael Timothy Dwan
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Kathryn Morgan Eastman
Tracey Beth Ehlers
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Randi Michelle Enison
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Karine Montpetit Haselbauer
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Elizabeth A. Holden
Lana Michelle Huston
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Jason William Januszkiewicz
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Dennis Jose
Jason Richard Juron
Aaron Edward Kaplan
Tina Marie Kasperek
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Susan Reinecke
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Sara Susanne Van Strydonck
Christine Marie Vetter
Christine Vetter
Kamaljit Kaur Virk
Sara Katherine Walker
Michael Arthur Weishaar
Jennifer Marie Wilkinson
Jessica Star Wiltse

NINTH DISTRICT
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Panagiota Eleni Ainalakis
Roberta Anderson Adderly
Fernand M. Arsanios
Simon H. Baker
Matthew Scott Banner
Danielle Marie Barbato
Brian Patrick Barrett
Christina Barrett
Brian Jerome Bendish
Cheryl Beverson
Allison Lee Blonstein
Vaughn Norman Browne
Penelope Maria Campoli
Leah Carin Canton
Cara A. Ceraso
Robert Philip Cerrato
Bella Jean Chan
Krystina Eun-kyung Cho
Toby Denver Clark
Maria Concetta Corrao
Michele Alexis D'ambrosio
Michael Davis
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August Dumser
David Jonathan Ellner
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Lori Ellen Kolin
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Jodi Beth Leibowitz
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Donald Michael Nungesser
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Devyani Prabhat
Judith Ann Procopio
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Flaurine St. Louis
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Maryann Carroll White
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Rahsan Malik Boykin
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Andrea Laurency Cass
Steven Castaldo
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Younie Choi
Amol Nirav Christian
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Abel Feldhamer
Clara Feldman
Eric Fisher
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Matthew Rudolph Fleming
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Robert A. Flink
Dawn Marie Flower
Israel Fried
Carlo M. Fusco
Heather Anne Gallagher
Thomas L. Gallivan
Michael Jonathan Gelfand
Maureen Ann Glass
Saundra Jean Godina
Alexander Gofer
Eva W. Golinger
Christopher Michael Graziano
David John Grech
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Rashika Hettiarachchi
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Kathleen J. Hill
Lani Elaine Houston
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David Jakubowitz
Michael Adam Kasmarek
Aileen R. Kavanagh
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Mary Rhodes
Julie Ann Rivera
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Ingrid Mercedes Rodriguez
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Eric C. Ruland
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Michael Ian Schnipper
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Damien Smith
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Emil Soskin

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Stephen Spyntiuk
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Meryem Toksoy
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Jeffrey Turk
Jeffrey Errol Turk
Susan Marie Ulrich
Larissa Urcia
Raymond Vincent Varuolo
Kareem R. Vessup
Boris Volfman
Kristy Marie Wagner
Amos Weinberg
Joshua James-post Williams
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Jeffrey Stephen Wolstein
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Carly Lyn Baetz-stangel
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Laura Diggs Blackburne
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Dana Lyn Brubaker
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Mingli Chen
Eddie Chiang
Changhoon Choi
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Steven Louis Devito
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Timothy Hume Edmondson
Gerard Francis Feeney
Matthew Finkelstein
Rebecca Louise Fort
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Meisha A. Gravesande
Lisbeth Grisales
Jason M. Grunfeld
Charissa Ilardi
Paul P. Ip
Emanuel Kaliontzakis
Priti P. Kataria
Nazar Khan
Paul Khareyn
Sun Hee Kim
Younjae Kim
Stevan LaBonte
Sofia Lambrou
Joe C. Liu
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Jeanette Grace Malaty
Pamela Anita Marsh
Alyson Mathews
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Joemar Garrovillo Miane
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Hongxin Nie
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Heather H. Patton
Danielle S. Phanord-alexis
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Tamara J. Roff
Laura Ann Sheridan
Aimee Lauren Sklar
David Smoren
Despina Markela Stroumbos
Sam Sue
Yukiko Tanaka
Dionne Antoinette Thomas
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Kareem Vessup
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Elianeth Alicea
Ivette Patricia Alvarado
Lori Ann Alvino
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Richard Desgroppes
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Evan David Hochberg
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Melissa Costiere Holsinger
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Douglas Howard
Douglas Paul Howard
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Soonah Ju
Phillip Marek Kaczor
Terence Edward Kaden
Nanyi Kaluma
Sonosuke Kamiya
Takeshi Kamon
Herman Victor Kamrowski
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Joseph Keller
Sean Michael Kemp
Lida Kenichi
Sarah E. Kennedy
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Ryan Troy Ketchum
Irum N. Khan
Alexander Kharash
Amee Desai Khetan
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Ji Woon Kim
Ji Sun Jennifer Kim
Si Hyeon Kim
Una Kim
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Zenggui Li
Zhenggui Li
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Ping Liu
Ying Liu
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Soojong Park
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Amelia Suzanne Renkert-thomas
Allwyne Lee Richards
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Susan Richter
Lori E. Rifkin
Victor Rios
Jonathan Robell
Hara A. Robrish
Sarah Elizabeth Rocha
Sarah Rocha
Delfin Rodriguez
Jorge Alberto Rodriguez
Sandra M. Rodriguez
David Booth Rogers
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William Ross
Jennifer Ilanit Rubin
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Michael Ralph Sarno
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William Ward Saxton
Jason David Schall
Jason Schall
Benjamin Lawrence Schiffrin
Vanessa Ann Schlueter
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Kristen Michelle Schulte
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Celine Sellam
William Theodore Sellay
Eric Jordan Senderowicz
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John Shan
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Joshua Isaac Sherman
Akane Shibamura
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Jeffrey Blake Simon
Kate Kotsaftis Simon
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Catherine Roseman Smith
Courtney Catherine Smith
Jeffrey M. Smith
Katie M. Smith
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Avis Angella Somers
Soh-yung Erica Son
Michael Vincent Sosso
Melysa Heather Sperber
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Abraham Walter Strasser
Jill Kathryn Strickland
Daniel Edward Stuart
Yuanyuan Su
Erich Suitor
Wolfe-erich Eaton Suitor
Daniel Suleiman
Daniel Matthew Suleiman
Cheryl Yang Sullivan
Michael Giles Sullivan
Holly Allison Swayze
Doreth Tagjer
Hiroaki Taira
Ashish R. Talati
Masayuki Tamaruya
Shigeyoshi Tamura
Tara Danielle Tarrant
Jarrett Scott Taubman
James William Tessitore
Benjamin P. Tolkoff
Scott Eric Torguson
Omoyele Towry-Coker
Omoyele Oyindamola Towry-coker
Hong-anh Thi Tran
Nancy M. Trasande
Rosalynn Marie Trelease
Robert Tribuiani
Robert William Tribuiani
Jacquelyn Renee Trussell
Pi-ju Tsai
Siu (Annie) Ting Tsoi
Katherine Marie Turner
Melissa Christina Vallillo
Willem Van De Wiele
Ronald Troy Van Orman

Geiza Vargas-Vargas
Jason Peter Verhagen
Jonathan E. Von Kohorn
Jennifer Vorhies
Jennifer Ann Vorhies
Stephan A. Walder
Tasmin Waley
Tasmin Bianca Waley
Christine Hillman Waller
Alice Wang
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Dana Dewitt Clark Westfall
Nicholas Julian Whalen
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Thomas John Whitney
Katherine Wilhelm
Katherine Anne Wilhelm
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Michelle T. Wirtner
William Eric Wolf
William Wolf

Matthew B. Wolin
Jennifer M. Wollenberg
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Christopher John Woods
Claire Leah Workman
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Chunchun Yu
Hua Yu
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Robert Lee Zeglarski
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Yan Zeng
Yan Zhang
Yiqin Zhang
Adi Zidkiahu
Tong Zou
Daniel Eric Zwillenberg

MEMBERSHIP TOTALS

New Regular Members
1/1/05 - 3/31/05 __________ 3,159

New Law Student Members
1/1/05 - 3/31/05 __________ 379

Total Regular Members
as of 3/31/05 __________ 71,150

Total Law Student Members
as of 3/31/05 __________ 4,234

Total Membership as of
3/31/05 __________ 75,384

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to **The New York Bar Foundation**. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

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Evoke, invoke. To "evoke" is to cause. To "invoke" is to ask for or use.

Exist, subsist. One "exists" by being alive. One "subsists" on what one eats to stay alive. *Correct*: "To exist during court dates at 100 Centre Street, the prisoner subsisted on cold tea, cold pea soup, and cold bologna sandwiches."

Explicit, implicit. "Explicit" means "express," "clear," or "definite." It does not mean "full" or "complete." "Implicit," the antithesis of explicit, means "implied." It does not mean "empty" or "incomplete." Some explicit advice: Use "express" or "implied," which have not acquired colloquial meanings.

Express, expressed. To "express" means, pretentiously, to "say" or "write." "Express" also means "clear" or "definite." "Expressed" means "stated." *Correct*: "The New York State Unified Court System's express policies are expressed in Title 22 of the New York Codes, Rules and Regulations."

Factious, factitious, fractious. "Factious" is characterized by factions. "Factitious" means "artificial." "Fractious" means "inclined to make trouble," not "fractions."

Falsehood, lie. A "falsehood" is untrue, intentional or not. A "lie" is an intentional falsehood. A lie is not a fiction; fiction does not pretend to be true.

Famous, infamous, notorious. All mean "widely known," but "notorious" and "infamous" have negative connotations.

Farther, further. "Farther" refers to literal distance. "Further" refers to figurative distance and all senses but distance: "degrees," "quantity," "time."

Feel, think. "Feel" indicates emotion or sensation. As a verb, to "feel" is to be aware of something instinctively rather than through experience or to be convinced of something emotionally rather than intellectually. *Correct*: "I feel for the witness." *Correct*: "I feel I know who should win this case, but I cannot put my reasons into words." "Feel" is not a synonym for "assert," "assume," "believe," "conclude," "contend," "infer," "submit," or "think." X: "How do you feel?" Y: "With my fingers." A court cannot feel, and judicial opinions are better written when the judges do not write how they feel about a case. Something to think about: Authors who write, "I do not think that the statement is true" suggest that they do not think, not that they believe that the statement is false. Write, "I do not believe that the statement is true" *or*, better, "I believe that the statement is false" *or*, best, "The statement is false."

Few, fewer, less. Less is more: Use "less" for things that cannot be counted or which can be counted, but only as a group, not individually. Use "fewer" for things that can be counted individually. *Correct*: "Less sand; fewer grains of sand." As a comparative, "fewer" means "a smaller number": "fewer people." As a comparative, "less" means "a smaller amount of": "less pay." "Fewer" is the correlative of "many." "Much" is the correlative of "less."

Flammable, inflammable. Both mean capable of being set on fire, but "flammable" is more popular. The antonym of both is "nonflammable." Firesale advice: To be safe, use "combustible" and "noncombustible."

Flaunt, flout. To "flaunt" is to show off. To "flout" is to scoff at.

Flay. To flay is to skin. Only metaphorically does it mean to criticize negatively.

Forbid. Do not use "from" with "forbid." "The court did not forbid defense counsel *from* contacting the witness." *Becomes*: "The court did not forbid defense counsel *to* contact the complaining witness."

Foregoing, forego, forgoing, forgo. The "foregoing" is something that went earlier or has gone on before. "Forgoing" means "to give up." *Correct*: "Forgoing the opportunity to make the lawyer read the entire opinion, the judge referred the lawyer to the foregoing." Similarly, to "forego" is to precede in time and place. To "forgo" is to do without. *Tip*: When you mean "to do without," do without the "e" in "forgo" and "forgoing." *Another tip*: Most words that use the prefix "for-" mean "completely" or "against." All words that use the prefix "fore-" mean "before."

Foreword. A "foreword" is a preface written by someone other than the author of the text for which the foreword is written. It is not spelled "forward."

Former, ex-, latter. The "former" refers to what went first. The "latter" refers to what came most recently. These words may refer to two things only. In a series of three or more, use "the first (thing mentioned)" and "the last (thing mentioned)." As a time concept, "ex-" refers to the immediately preceding; "former" refers to all but the immediately preceding. *Incorrect*: "Bill Clinton is a former President." As of October 2001, President Clinton is the *ex*-President. *Correct*: "Gerald Ford is [not *was*] a former President." The word "ex" may be used without a hyphen. *Correct*: "Fred is Gwendolyn's ex."

Forthcoming. "Forthcoming" means "about to appear" or to be "available when required or promised." To be "forthcoming" does not mean to be honest, helpful, or cooperative.

Fortuitous, fortunate. A "fortuitous" event is accidental or coincidental. "Fortunate" means "lucky."

Founder, flounder. To "founder" is to go lame, to sink, or to fail completely. To "flounder" is to stumble about clumsily.

Fulsome, noisome. "Fulsome" is offensively excessive. "Noisome" is unpleasant, unwholesome, or dangerous. Neither word is complimentary, and neither necessarily refers to size or noise.

Good, well. Use "good" to modify a noun—"I feel good about this opinion." Use "well" to modify a verb or adjective—"I feel well enough to write an opinion today." *Correct*: "The law clerk did good things well." Do not use "good" as an adverb. "You write good." *Becomes*: "You write well." Do not use "well" as an adjective to mean "good." *Incorrect:* "Your robes look well." *Becomes*: "Your robes look good."

Gourmand, gourmet. A "gourmand" eats a great deal of food of whatever quality. A "gourmet" is an epicure, a fastidious eater who appreciates fine food.

Gratuitous. "Gratuitous" means "unwarranted," "unnecessary," or "undeserved." It does not mean "free."

Guilty, liable. "Guilty" carries a stronger connotation of blameworthiness than "liable." One is guilty of a crime but liable for a civil wrong.

Hanged, hung. One is "hanged" by the neck. Something is "hung": on the wall, a jury.

Healthy, healthful. To be "healthy" is to be in good health. Something "healthful," such as good food, can make people healthy. *Correct*: "The healthful food made me healthy."

Historic, historical. "Historic" means "important in history." "Historical" refers to history, such as a historical book, like the Gutenberg Bible, as opposed to a history book. *Correct*: "The historical popularity of the printing press comes from the historic Gutenberg Bible." Note: "A," not "an," precedes historic and historical, each of which has an aspirated "h."

Hoi polloi. "Hoi polloi" are the common people, not the elite. It may be Greek to you, by the way, but "hoi" in Greek means "the." "Hoi polloi" takes no "the."

Hopefully. "Hopefully" means "with hope," not "I hope." "Hopefully I will do the right thing." *Becomes*: "I will do the right thing, I hope." *Or* "I hope I will do the right thing." I am hopeful that you will remember this rule: "Abandon 'hopefully' all ye who enter here." ■

1. *See also* Fred Rodell, Woe Unto You, Lawyers! (2d ed. 1957).

2. 2 The Papers of Benjamin Franklin 254 (Leonard Larabee ed. 1960).

3. *Harris v. Superior Ct.*, 3 Cal. App. 4th 661, 666, 4 Cal. Rptr. 2d 564, 568 (2d Dist. 1992) (Gilbert, J.) (quoting Jonathan Swift, *A Voyage to the Country of the Houyhnhnms*, *in* Gulliver's Travels (1726)) (emphasis in Swift). In this vein, the Supreme Court of California reached the height of the art by noting that the color "white" can mean its antithesis "black." *See Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.*, 46 Cal. 2d 517, 527, 297 P.2d 428, 433 (1954) (Carter, J.) (citing *Mitchell v. Henry*, [1980] L.J. 15, Ch. Div. 181).

4. 149 U.S. 304, 307 (1893) (Gray, J.). *Nix* isn't the only vegetable case that spiced up the English language. *See Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 519 (7th Cir. 1991) (Bauer, C.J.) ("This spicy case finds its origins in several shipments of Jamaican sweet peppers.").

5. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

6. *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting).

7. *Dennis v. United States*, 341 U.S. 494, 508 (1951).

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BY GERALD LEBOVITS

Problem Words and Pairs in Legal Writing — Part III

Lawyers and their words have been condemned through the ages. From Luke 11:52: "Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindred."[1] From Franklin's Poor Richard's Almanac: "I know you Lawyers can, with Ease, / Twist Words and Meanings as you please."[2]

Lawyers use words to make a living by the sweat of their browbeating. As one court wrote, quoting Jonathan Swift: "Lawyers . . . practice '. . . the art of proving by words multiplied for the purpose, that *white* is *black*, and *black* is *white*, according as they are paid.'"[3]

Sometimes courts define words incorrectly. These errors become binding law. To the Supreme Court a tomato is a vegetable, not a fruit. Why did the Court nix a definition scientists accept? Because, according to *Nix v. Heddon*, a tomato is a vegetable "in the common language of the people."[4]

Don't be anti-Semantic. But recognize that the meaning of words changes over time and space. What was suitable yesterday might be unsuitable today. What's suitable somewhere might be unsuitable somewhere else. As Justice Holmes noted, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[5]

In the law, words mean nothing by themselves. After all, wrote Justice Brandeis, "[T]he logic of words should yield to the logic of realities."[6] Moreover, explained Chief Justice Vinson, "nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature."[7]

Easy, easily. "Easy" is an adjective: "Writing is easy for those who sweat blood." "Easily" is an adverb: "Judge X finished her opinion easily." These clichéd exceptions are easy to remember: "take it easy" and "easy does it." They should be "take it easily" and "easily does it," but no one uses them that way.

Economic, economical. "Economic" is the science of economics and life's necessities. "Economical" means "thrifty."

Effete: "Effete" means "exhausted." But since Spiro Agnew's "effete corps of impudent snobs," most people believe that "effete" means "snobs." The solution is never to use this skunked word.

Egoist, egotist. "Egoists" think only of themselves. They are not altruistic, but they are not necessarily conceited, either. "Egotists" are immodest.

Elicit, illicit. To "elicit" is to evoke or draw. Something "illicit" is illegal or immoral.

Emblem, symbol. An "emblem" is a pictorial representation, often with a motto. A "symbol" is a spiritual sign. *Correct*: "The First Amendment prohibits religious symbols on our national emblem."

Emigrate, immigrate. One "emigrates" from. One "immigrates" to. *Correct*: "The court attorney emigrated from Canada and immigrated to the United States."

Eminent, immanent, imminent. "Eminent" means "outstanding." "Immanent" means "dwelling within." Something "imminent" is threateningly close.

Empathy, sympathy. To have "empathy" is to identify with another's emotions. To have "sympathy" is to understand another's feelings. *Correct*: "My sympathy is with you at this sad moment. My parents died last year; I empathize with your loss."

Endorse, indorse. Use "indorse" for negotiable instruments and endorse in all other contexts. I believe that most American authorities will endorse this view.

Energize, enervate. "Energizing" gives energy. "Enervate" takes energy away.

Enormous, enormousness, immense. "Enormousness" and "immense" connote size. "Enormous" has a moral connotation, and "immense" does not. *Correct*: "Hitler committed enormous wrongs in an immense area."

Enters, enters into. Correct: "After X entered the transaction in the books, X and Y entered into a contract."

Envy, jealousy. "Envy" refers to resenting a luckier person. "Jealousy" refers to affairs of the heart. To have "sour grapes" is to malign what one wants but does not have or cannot get.

Epitaph, epithet. An "epitaph" is an inscription on a gravestone. An "epithet" is a slur.

Equivocate, prevaricate. To "equivocate" is to mislead by half-truths, ambiguities, and evasions. To "prevaricate" is to lie.

Every day, everyday. *Correct*: "If you wrote an opinion every day, that would not be an everyday feat."

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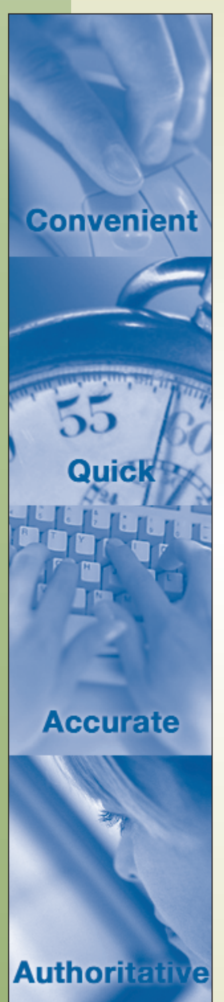

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