NEW YORK STATE BAR ASSOCIATION

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Journal

ELECTRONIC SIGNATURES: THEIR RISKS AND BENEFITS

I had my father's signet in my purse,

Which was the model of that Danish seal,

Folded the writ up in the form of th' other,

Subscribed it, gave't th' impression, placed it safely,

The changeling never known.

HAMLET, Act V, Scene II

Inside

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On The Cover

This month's cover illustration quotes Hamlet's explanation of how he intercepted the letter that Claudius, King of Denmark, sent with Rosencrantz and Guildenstern to the King of England, giving an order for Hamlet's execution. Hamlet substituted instructions for Rosencrantz and Guildenstern to be killed instead, sealing the message with a copy of his father's royal seal. The author of the article on electronic signatures suggests that the events of Shakespeare's drama would have taken a different turn if Claudius had been able to encrypt the message electronically with a strong encryption algorithm and kept the key to himself.

The cover photo shows actor John Gielgud as Hamlet in a 1936 Broadway production of the play.

Cover Design by Lori Herzing

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President's Message

PAUL MICHAEL HASSETT

Coping With Career Pressures

I have been planning for some time to write about a topic only vaguely defined but nonetheless critically important to the profession: the increasing pressures on lawyers in the modern practice and the effects of those pressures on the very lives of our colleagues. As I write this, I am recuperating in a hospital in Queens, having arrived here most unexpectedly. My brief sojourn has focused my attention and converted it from a purely academic inquiry to a most practical and personal problem. Fortunately, my prognosis is good and I hope I will soon be back to—I almost said full-speed and that I guess is part of the problem.

The current prosperity experienced by large firms in major urban areas across the nation has been widely reported. Associates in major Wall Street law firms were awarded bonuses last year that were greater than the salary many lawyers my age received when they began practice. At the same time, many lawyers in less populated areas struggle just to get by. In the past decade there have been record numbers of applications for law school and tens of thousands of new lawyers have entered the profession each year, attracted by the fascinating portrayal of lawyers in the media, by the glamour of Wall Street, by the chance to be where the action is and have a finger on the financial pulse of the nation, and by a desire to influence society and make it better. At the same time, tuition costs have increased, propelled simply by market forces, while admission levels have expanded well out of proportion to the availability of positions for law school graduates.

The result is tremendous competition for jobs in major metropolitan areas where the salaries are adequate to allow a new lawyer to pay off huge student loan debt. Those who get those jobs work long hours with little time for family or friends or entertainment, for community involvement or leisure activities. Those who do not find these jobs struggle simply to keep their heads above water.

The promise of partnership in a major law firm, with its rewards of financial success and prestige, has traditionally been a sufficient incentive for the long years of effort necessary to achieve it, but observant graduates of today see partners my age working as many hours as they ever did regardless of their compensation level. And so the profession is experiencing rampant dissatisfaction by young lawyers—with their positions and in some cases with their careers. A few years ago, the *Los Angeles Times*, reporting on the results of surveys of young lawyers, disclosed that many were "profoundly pessimistic" about the law, that they tended to be more troubled than other professionals by severe depression and drug and alcohol abuse and that half of those surveyed would not choose the legal profession again, so deep was their dissatisfaction. In a shocking revelation, the Mecklenburg County Bar Association in North Carolina reported that 11% of lawyers surveyed admitted to considering suicide at least once a month. In Michigan, 60% of respondents polled by the Michigan *Lawyers' Weekly* stated that they would not enter the profession if they had the chance to do it again. A Florida survey disclosed that about 80% of lawyers who responded felt depressed at least once a week.

Lawyer assistance programs throughout the nation are beginning to include depressive illness and stress, along with the traditional problems of alcohol and substance abuse and addiction, as problems for which lawyers can seek help from their professional association. I served for many years on the Board of Directors of the Erie County Bar Foundation which, as many of you know, is one of the few in the nation whose primary purpose is assistance to lawyers and their families in need. Over the years of my involvement with the foundation, it was easy to identify the growing number of applicants suffering from the stresses of their practice and the resulting depressive illness.

It is hard to imagine that ours is the only profession whose members are so afflicted, and it is also hard to understand how the problem seems to have grown during a time of general prosperity in the profession. But the systemic demand for higher compensation by younger lawyers and the continuing high cost of maintaining the technological tools necessary for a modern law practice have increased the pressure on individual practitioners to contribute to the revenues necessary to meet these demands. This pressure has led to a decrease in the amount of time available to allocate to other traditional pursuits. Involvement in bar association activities and in commu-

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nity pursuits from Philharmonic Orchestras to Little League sports has suffered, as has the commitment of law firms in general to *pro bono publico* service. And, of course, the cost to law firms of recruiting and training replacements for those associates who leave because of dissatisfaction after only a few years of practice is significant.

Perhaps the problem is rooted as much in the expectations of the next generation of lawyers as it is in the changing economics of the profession. Younger lawyers are simply not as willing to devote all of their waking hours to a career—they want at least some time during the work week to relax and pursue other interests. They expect some time off on the weekends and look forward to several weeks of vacation during the course of the year. In addition, some suggest that today's graduates expect to change careers several times during their lives—not jobs, but careers. They do not have the loyalty to the lifelong practice of the law, much less loyalty to the first law firm that employs them. In fact many, perhaps most, new law graduates fully expect to leave the profession some time, some much sooner than others and all much sooner than their employers expect. The *American Lawyer* recently reported that a survey of mid-level associates in more than 50 New York law firms suggests that, on average, 19% of those surveyed were looking for new jobs; at several firms the figure topped 40%.

Many bar associations have studied the problem, and while there certainly are no simple solutions, there are many things law firms can do to increase professional fulfillment and to assist lawyers to find an appropriate balance between their practice and their personal lives. Relaxation of billable hour requirements, flexible work hours and appropriate compensation adjustments for those who are willing to trade the financial reward for quality of life are several of the possibilities. Re-examining the traditional law firm partnership structure is another. Simple recognition by firm management that the problem exists and open communication among attorneys at all levels of the organization will, of course, open the door to solving the quality of life problem. Perhaps many would even conclude that the salary expectations of the profession in general are unrealistic in an atmosphere where general quality of life and professional fulfillment are for many as important as compensation.

Those of us in my generation who still practice in the same setting where we landed upon graduation from law school will become fewer and fewer as time goes on. Even those who stay within the profession will probably practice in a new city or in a new area of the law or perhaps just in a new firm. I am nonetheless certain that I am increasingly comfortable with the choices I have made over the years, choices that have left me in the same firm and engaged in essentially the same general practice I entered over three decades ago. I readily acknowledge being busier now than I was then, but I consider it an accomplishment for I know many who have been forced to leave the profession or to change positions simply to survive economically. The reward of professional fulfillment is still there as well, and as long as it is many will suffer the burden required to achieve it. But we all have to recognize that substantial change in the profession and change in those who choose it as a career must be addressed.

Widespread professional dissatisfaction and the resulting physical and emotional problems that it engenders are not only destructive to the individual practitioner but to the profession as a whole. If I learned anything from the few days I spent in Queens, it is that we must all strike an appropriate balance between the pressures of our careers and the overall quality of our lives. For me, I guess it means that I may never get back to full speed.

EDITOR'S MAILBOX

Recurring Conditions

In the September issue of the *Journal*, Y. David Taller opines that proof of any recurrent condition, whether transitory or structural, can defeat a defendant's notice defense. While Mr. Taller discusses certain intermediate appellate court case law in support of his thesis, he fails to even note the Court of Appeals' decisions in *Simmons v. Metropolitan Life Insurance Co.*, 84 N.Y.2d 972, 622 N.Y.S.2d 496 (1994), *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493 (1994), *Murphy v. Conner*, 84 N.Y.2d 969, 622 N.Y.S.2d 494 (1994), and *Mercer v. City of New York*, 88 N.Y.2d 955, 647 N.Y.S.2d 159 (1996). In those cases, the Court of Appeals reaffirmed its holding in *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986), and rejected the viability of transitory recurrent conditions, such as water, grease or debris on stairs or floors, as sufficient proof of constructive notice of a dangerous condition.

In *Simmons*, the Court of Appeals affirmed the Appellate Division, First Department's dismissal of a snow-and-ice case against the private defendant on the ground that the defendant did not have actual or constructive notice of the existence of the alleged ice patch. In the Court of Appeals, in support of his constructive notice argument, the plaintiff cited the recurrent condition cases, the fact that it had snowed one week earlier, and testimony that the defendant regularly

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cleaned the walkway by piling snow on the either side of the path, which created a dangerous condition. See Plaintiff's Letter to the Court of Appeals, dated October 20, 1994, at pp. 10-11; 12-13. The Court of Appeals affirmed, holding that the evidence was insufficient to establish notice as a matter of law because there was no evidence introduced as to the origin of the patch of ice. The Court specifically ruled that the testimony showing it had snowed a week before the accident "was insufficient to establish notice because no evidence was introduced that the ice upon which plaintiff fell was a result of that particular snow accumulation." The Court further found that any finding of constructive notice would be pure speculation. Consequently, the Court rejected the recurrent condition theory as a legally viable predicate for establishing constructive notice of this transitory condition.

In *Piacquadio*, decided contemporaneously with *Simmons*, the plaintiff fell on a liquid substance on a terrazzo staircase located near a kitchen. The defendant had previously placed nonskid strips on the stairs, which had worn out in places. In the Court of Appeals, citing the recurrent condition cases, the plaintiff argued, among other things, that defendant had constructive notice because the terrazzo steps were inherently dangerous and the defendant should have known about the likelihood of liquids spilling (See Plaintiffs-Respondents' Brief to Court of Appeals at 9-35; 28-29). The Court of Appeals found no evidence to establish constructive or actual notice of the particular liquid that caused plaintiff to fall and dismissed. The Court unequivocally held that "'a general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall." "[L]iablility could be predicated only on the failure of defendants to remedy the danger presented by the liquid *after* actual or constructive notice of the condition" (emphasis added). The Court thereby rejected the recurrent condition theory as a legally viable predicate to establish constructive notice of a specific transitory dangerous condition. Finally, in *Murphy*, the third case decided along with *Simmons* and *Piacquadio*, the Court of Appeals ruled that the mere existence of a highly polished floor is insufficient to establish a dangerous condition.

Subsequent to its decisions in *Simmons*, *Piacquadio*, and *Murphy*, the Court of Appeals decided *Mercer v. City of New York*, 88 N.Y.2d 955, 647 N.Y.S.2d 493 (1996), in which it again rejected the recurrent condition theory as a basis for constructive notice of a transitory condition. The plaintiff, a New York City Department of Sanitation worker, allegedly slipped and fell in a large grease puddle, which had accumulated on the floor of the garage facility at which he worked. The garage supervisor had admitted that oil generally leaked overnight from parked vehicles. *Mercer*, 223 A.D.2d 688, 637 N.Y.S.2d 456 (2d Dep't 1996). The jury returned a verdict for plaintiff and the city appealed on the ground that there was no notice of the particular oil spot on which the plaintiff claimed to have slipped. The plaintiff argued that constructive notice was established because the oil and grease spots on the floor of the garage were a recurring condition. *Id*. at 692. The Appellate Division, Second Department, rejected the plaintiff's recurrent condition argument in a 3-2 decision, citing *Simmons* and *Piacquadio*, and held that, "in the absence of any evidence of the origin of the patch of grease upon which the plaintiff allegedly slipped, or proof that it existed for a sufficient length of time to afford the defendant an opportunity to remove it, a finding that the defendant had constructive notice would be pure speculation." The Appellate Division dissenting justices, relying upon *Weisenthal v. Pickman*, 153 A.D.2d 849, 545 N.Y.S.2d 369 (2d Dep't 1989), would have affirmed liability on the strength of the recurrent condition theory. However, the Court of Appeals unanimously affirmed, finding that the plaintiff failed to establish notice and expressly holding that there was nothing in the record to establish that the city had actual or constructive notice.

Many appellate rulings have acknowledged and relied upon *Simmons*, *Piacquadio*, *Murphy*, or *Mercer*, to dismiss cases involving transitory conditions for lack of notice, notwithstanding recurrent or generalized condition arguments. *See, e.g*., *Estrada v. City of New York*, __ A.D.2d __, 709 N.Y.S.2d 105 (2d Dep't 2000) (oil on roadway); *Leo v. Mt. St. Michael Academy*, __ A.D.2d __, 709 N.Y.S.2d 372 (1st Dep't 2000) (wet stairs); *Low v. 138-15 Franklin Avenue Apartments Corp.*, 272 A.D.2d 57, 707 N.Y.S.2d 317 (1st Dep't 2000) (wet lobby floor); *Eldor Contractors Corp. v. County of Nassau*, 272 A.D.2d 509, 708 N.Y.S.2d 447 (2d Dep't 2000) (debris on floor); *Booth v. City of New York*, 272 A.D.2d 357, 707 N.Y.S.2d 488 (2d Dep't 2000) (snow and ice); *Smith v. Leslie*, 270 A.D.2d 333, 704 N.Y.S.2d 612 (2d Dep't 2000) (snow and ice); *Chapman v. City of New York*, 268 A.D.2d 498, 702 N.Y.S.2d 355 (2d Dep't 2000) (snow and ice); *Doherty v. Great Atlantic Pacific Tea Co*., 265 A.D.2d 447, 696 N.Y.S.2d 236 (2d Dep't 1999) (debris on floor); *Cheng v. New York City Housing Authority*, 262 A.D.2d 14, 690 N.Y.S.2d 560 (1st Dep't 1999) (wet floor); *Cruz v. 1926 Elsmere, Inc.*, 262 A.D.2d 150, 694 N.Y.S.2d 1 (1st Dept. 1999) (snow and ice); *Ortega v. New York City Transit Authority*, 262 A.D.2d 470, 692 N.Y.S.2d 131 (2d Dep't 1999) (slippery substance); *Fedida v. Paul Conte Cadillac, Inc.*, 258 A.D.2d 437, 638 N.Y.S.2d 870 (2d Dep't 1999) (grease in service area); *Abaya v. City of New York*, 257 A.D.2d 446, 683 N.Y.S.2d 263 (1st Dep't 1999) (snow

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Wide Use of Electronic Signatures Awaits Market Decisions About Their Risks and Benefits

By Bill Zoellick

The Electronic Signatures in Global and National Commerce Act[1] establishing the validity of electronic signatures for interstate and international commerce is an important piece of legislation, but not for the reasons portrayed in most of the press coverage. The act is not revolutionary, as some claim, but is in fact cautious and conservative in that it lets the market make the important decisions about electronic signatures and about the infrastructure required to use and trust them.

The focus on the market rather than legislation as the primary force to shape the use of electronic signatures has important implications for managers of businesses that might use such signatures. Rather than simply understanding the law, business managers also need to understand the risks and benefits associated with electronic signatures. They need to be able to identify the key capabilities that they should put in place to prevent fraud and to reduce the potentially significant liabilities associated with uninformed use of electronic signatures. Most important, they need to be able to make judgments about when the use of electronic signatures makes business sense.

This article begins with a brief summary of the Electronic Signatures Act, explaining what it does and what it leaves to the market. The review of the act leads naturally to the broader question of what needs to be in place before the parties to a transaction can trust and use electronic signatures. Next, the article looks at the most important problems and risks that companies wishing to use electronic signatures must address. It closes with suggestions about how business managers involved with electronic transactions should evaluate and address opportunities to use electronic signatures.

The hype surrounding the passage of the Electronic Signatures Act gave the impression that a consumer could now replace her/his written signature with an electronic one, and that this suddenly opens up a new era of e-commerce in which people will be able to use this personal electronic signature to buy cars, acquire homes and mortgages, and execute dozens of other important transactions. The reality is more complicated. Electronic signatures will be important, but will also require substantial judgment on the part of business managers to determine when their use makes sense. Managers must also match the selection of electronic signature technology and infrastructure with the costs, risks, and benefits unique to each particular signature application.

What the Act Does

Forty-six states already have some kind of legislation that establishes the validity of electronic signatures. In some, such as Utah, the legislation even specifies particular approaches to encryption, sets liability limits, and takes other steps toward constructing the infrastructure to support electronic signatures. But different states have passed different laws, and states cannot regulate interstate commerce or international transactions.

The federal law provides a way to harmonize the different state regulations and a framework for interstate commerce. The primary purpose of the law is to ensure that no signature or contract will be ruled invalid simply because it is in electronic form. In other words, elec-

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The author wishes to acknowledge the helpful criticism and discussion of an early draft of this article by Randy Kahn and Robert F. Williams of Cohasset Associates and by Scott Allison of Walker Digital.

tronic signatures and records are as good as paper ones, subject to the same general questions of authenticity that apply to paper documents.

The bill does not, of course, *require* that people use electronic signatures. In fact, it makes the use of electronic records and signatures in place of paper contingent upon the active consent of all parties involved in the transaction. Moreover, the consent must be provided electronically, in order to demonstrate that each person can actually access records electronically. Congress is attempting to ensure that people without access to the hardware to sign or access documents electronically are not excluded from doing business and contracting for services. On the other hand, the legislation does give businesses the right to charge an extra fee for having to deal with paper rather than electronic signatures and records—choosing to use paper can end up costing the customer more. Businesses also have the right to terminate a relationship with a customer who withdraws consent to receive electronic records. As use of electronic signatures and records matures and as market tolerance for "electronic only" operations increases, these provisions will allow businesses to accelerate movement away from paper.

Although the focus of most news coverage of the act has been on electronic signatures, the legislation is also important because of its treatment of electronic records (to which the electronic signatures would be attached). Given the active consent of a party to receive electronic information, the legislation establishes electronic records and electronic notice as satisfying requirements for notice in writing. Further, it makes it acceptable to use an electronic record in place of paper record in a broad class of instances where record retention is a requirement. Overall, the purpose is to establish that electronic records and signatures can replace paper for most transactions.

Another important feature of the act is that it creates a class of transactions and contracts that are exempt from the effect of the act. In other words, there are transactions for which electronic records, notice, and signatures cannot be substituted for paper. This set of exceptions includes wills, divorce and adoption documents, court orders and other court documents, eviction or foreclosure notices, notice of cancellation of life insurance or health insurance, cancellation of utility services, and product recall notices that impact health or safety.

Finally, the act preempts state legislation that contradicts the federal law or that requires use of specific technologies or methods of signing or encoding electronic documents. It does allow the states to specify alternative procedures or requirements for establishing the acceptability or validity of electronic signatures or documents.

Presidential Signing Ceremony

After President Clinton signed the "Electronic Signatures in Global and National Commerce Act" with pen and ink (still required for legislation, interestingly enough), he also signed it electronically.

The President's use of an electronic signature for the act contained symbolic messages other than the obvious one. One side effect of the publicity surrounding this event is that we all now know the password associated with the President's digital ID, "Buddy," the name of the President's dog. In his choice of a weak password and in his more revealing willingness to publicize his password, the President told us that he is certainly not going to be using electronic signatures himself. That's not surprising, of course. But, good communicator that he is, he is demonstrating that there are still educational and infrastructure barriers in the way of broad, routine use of electronic signatures.

What the Act Does Not Do

The act does not say what an electronic signature is, other than to provide the very general definition that it is an "electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."

An electronic signature could be my name, spelled in ASCII characters, at the bottom of a document. It could be a digitized image of my handwritten signature. It could be a digital signature using a public key architecture and a certification authority. It could be a biometric signature such as an electronically recorded thumbprint or a retina scan. It could be a voiceprint of me saying my name or it could be the digital encoding of the biometric factors (pressure, speed, direction) that I use in creating my handwritten signature as detected on a digital pad. Clearly, some of these signature technologies will be more secure or easier to authenticate than others. The Electronic Signatures Act will let the market sort out the winners from the losers.[2]

Consistent with the refusal to evaluate and choose technologies, the bill does not deal with any of the infrastructure needed to establish the validity of signatures, other than to state that when a notary public is required to verify identity, the notary can use an electronic

signature in performance of the notarization function. Similarly, the act does not deal with liability issues associated with certification authorities or falsification of signatures or documents. These issues are, as they are with paper documents, left to the states or to the Uniform Commercial Code.

What Signatures Need to Do

Before attempting to assess the probable impact of the act on e-business, let's step back and look at the broader question of what we need in order to have confidence in a signed document. Understanding the "big picture" issues will show how close we are to actually being able to use electronic signatures.

Authentication We need to know that the signature on the document actually belongs to the person we believe to be buying the home, signing the contract, incurring the debt, and so on. In other words, we need to know that the signature is not a forgery.

One of the most famous examples illustrating the critical importance of integrity is Hamlet's opening the letter that Claudius sent with Rosencrantz and Guildenstern, giving the order for Hamlet's immediate execution.

In the world outside of electronic signatures we use a number of systems to ensure against forgery. For frequent and typically relatively low value transactions we keep a record of the authentic signature on file (e.g., a bank's signature card). For more critical transactions we require that the signature be "notarized," which is to say that we trust a third party to verify that the signature is authentic. To make sure that the notary does her/his job, state laws make notaries liable for damages (usually limited to some fixed amount) if the signature turns out to be a forgery. For really important transactions, such as the sale of a house and the signing of a mortgage, we require that the signatories be physically present for the signing or provide power of attorney to someone who can be physically present. For such critical deals we still want to be able to look the other party in the eye. The ceremony surrounding the signing event signifies to all parties that the deal is done.

Integrity Once the document is signed we want to make sure that it is not altered. I want to be bound by the agreement that I sign, not by some other agreement.

With paper documents we typically do this by giving each signatory a copy of the signed document. When documents are sent back and forth to be executed over distance, we trust that the mail or express delivery packages are not opened and that the documents are not tampered with in transit. One of the more famous examples illustrating the critical importance of integrity is Hamlet's opening the letter that Claudius sent with Rosencrantz and Guildenstern to the King of England, sealed with the Danish king's royal seal, giving the order for Hamlet's immediate execution. Hamlet changed the order to request the execution of the letter's bearers, affixed his father's copy of the royal seal, and sent Rosencrantz and Guildenstern to their deaths. Integrity in transit matters.

Non-repudiation If I loan you money and you sign a note promising to repay it, I want to ensure that you cannot later "repudiate" your signature, claiming that it is not yours at all and that you made no promise to repay.

Faced with such a claim, I could hire an expert in handwriting analysis who might be able to convince a court that the signature is indeed yours. I would be in a much better position if I had also required the signatures of witnesses to the act of your signing. Notaries can serve as witnesses, because they keep a record of each signature that they authenticate.

Unresolved Issues

Given this outline of what is required to give us the confidence necessary to act on a signed document, how close are electronic signatures to meeting the requirements?

Authentication I have a digital signature of my own. It consists of a public key and a private key that allow me to send encrypted e-mail to other people with digital signatures. I can assert, through use of my private key, that a signed document came from me. Should you believe me?

I obtained my digital signature by going to the Web site of a Certification Authority (CA) and giving them my name and e-mail address, along with $15. That's it. Nobody looked at my driver's license, passport, or birth certificate. There is no checking mechanism that would prevent me from, say, creating a new e-mail address for my brother, Bob, and then paying another $15 to get a digital signature for Bob. The problem (or opportunity) would be that I, not Bob, would have the private key for Bob's signature. If I started using Bob's digital signature, and if companies accepted it as Bob's, I might be able to spend a lot of my brother's money.

The issue here is not the security of the actual digital signature, but the nature of the certification that authenticates it. The kind of digital certificate that I can get for

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my e-mail, and Bob's e-mail, is a "Class 1" certificate. There are other kinds of authentication and other kinds of certificates. For example, to get a Class 3 certificate from VeriSign, one well-known digital signature certification authority, one has to appear in person.[3] The point is that electronic signatures are not all alike and are not all equally worthy of your trust, even when they use the same technology for keys and encryption.

Remember what the act does. It simply states that it is permissible to use an electronic signature in places where I would have used pen and ink. It does not speak to the technical merits of different signature technologies, much less to the requirements for certification. It does not augment the existing authentication infrastructure with a new one that is appropriate for e-commerce. This is a critically important fact for web business people to keep in mind as they try to understand the impact of this bill. The infrastructure does not change just because of this bill.

If Claudius had encrypted the message using a strong encryption algorithm and kept the key to himself, Hamlet would have been a dead prince much earlier in the play.

Before electronic signatures are used in new ways, supporting new kinds of e-commerce, we need to establish mechanisms for authenticating electronic signatures. As we will see in looking at liability concerns associated with authentication, the problem is more complicated than simply having everyone get a Class 3 digital ID. The complexity and the need to allocate risk in different ways for different contexts is why it is exactly right that the act does not prescribe how to authenticate signatures, leaving it to the market to figure out what works best.

Integrity If Claudius had ordered Hamlet's death in an e-mail sent in clear text to the King of England, Hamlet may have still been able to change it to a request for the execution of Rosencrantz and Guildenstern, assuming he could intercept the e-mail. Perhaps relying on the connections of his friend Horatio, he could have captured it using a filter placed on the primary Internet links leaving Denmark. In that case he wouldn't have even needed his copy of the king's seal.

But if Claudius had encrypted the message using a strong encryption algorithm and kept the key to himself, Hamlet would have been a dead prince much earlier in the play.

Electronic signatures, coupled with encryption, are currently capable of ensuring the integrity of a message. This is what my Class 1 Digital ID does well. You may not be able to be sure just who the real person is who sent the message, but you can be sure that the message that you received was the message that was sent.

The biggest barrier to message integrity at the moment is the fact that a surprising number of business people do not encrypt their e-mail, even when it concerns sensitive, business-critical agreements.

Non-repudiation If you cannot authenticate the identity of the sender, the issue of non-repudiation is moot. We're back to the same infrastructure problem behind authenticating the identity behind a signature. It is possible to solve the authentication problem for many business applications, however. If you can take care of the authentication, you can get non-repudiation as well. The reason for this is that certain kinds of digital signatures act like a kind of electronic fingerprint and can be uniquely associated with the signer. It is worth noting that there are also kinds of "electronic signatures" included in the broad definition of the Electronic Signatures Act that would not address non-repudiation (e.g., the ASCII representation of my name). It will take a while for the market to settle on technologies that work and to weed out the ones that don't.

Liability The Electronic Signatures Act simply states that legal documents will not be declared invalid solely because they are in electronic form and contain electronic signatures. It does not make other changes in law or infrastructure. So nothing else should change, right?

Unfortunately, because electronic signatures are new technology, untested in the courts, the use of electronic signatures will inevitably raise new questions about who is responsible for paying the costs if something goes wrong. For example, consider the following hypothetical situation, presented and explored by C. Bradford Biddle.[4] Biddle's scenario assumes that some company or other entity steps forward to act as a certification authority—kind of like a super notary—keeping track of digital certificates, or signatures, and vouching for their validity. In this scenario, the "private key" is the part of the signature that the signer uses to assert authenticity.

> Cedric, a licensed certification authority, duly issues a certificate to Susan, who accepts it. Cedric publishes the certificate in a recognized repository. Susan's private key, which corresponds to the public key in the certificate, is kept on a floppy disk. Irving, a malicious com-

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> puter hacker, releases a computer virus on the Internet that finds its way onto Susan's computer. Subsequently when Susan uses her private key, the virus program surreptitiously sends a copy of Susan's private key to Irving. Irving immediately uses the private key to cash a $10,000 electronic check drawn upon Susan's account payable to a numbered, anonymous account in a state having rigorous bank secrecy laws. Irving disappears and cannot be found. As soon as Susan learns of the fraud she revokes her certificate.

Who covers the $10,000 loss? Susan's first hurdle if she wants to avoid the $10,000 loss is to repudiate the false signature. The Electronic Signatures Act does not say what the standard for non-repudiation should be. Some states, such as Utah, have set up more specific rules to deal with such issues. Under the Utah law, a document containing a person's electronic signature is presumed to have been signed by that person unless the individual can present "clear and convincing" evidence that he/she did not, in fact, sign the document. So, if she lived in Utah, Susan would need to start out by hiring an attorney and the technical expertise required to meet a high standard of proof in convincing the court that she did not sign the check.

However, even if Susan gets past that hurdle, she may still be liable for the loss. The Utah law makes the person who owns the electronic signature completely responsible for any loss due to a failure to exercise "reasonable care" in safeguarding the private key. Wouldn't "reasonable care" include use of a virus protection program? The Utah law doesn't say, so Susan would be left with the task of convincing the court that her inability to detect the virus was within the bounds of "reasonable care."

Biddle notes that under the Utah digital signature law Susan accepts much greater risk than she does by using her credit card, where consumer liability in the case of fraud is capped at $50. If she kept using only handwritten signatures, she would have no liability, because one cannot be bound by a fraudulent handwritten signature. Biddle observes that "no rational consumer would agree to accept this level of risk in a marketplace transaction. The benefits of having a certificate simply do not outweigh the very real possibility of facing extraordinarily large unreimbursed losses."[5]

But if we don't want to hold Susan responsible for the loss, who should hold the bag? The certification authority? If the authority is a third party that is not involved in the transaction, but only in validating the signature key, this could be quite a burden. Such a company would have no way of knowing whether the signature was tied to a micropayment of a few cents or tied to the purchase of a home. Unbounded liability for transactions to which you are not a party sounds like a great way to go broke.

The third alternative is to make the party who accepted the signature liable for the loss. In Susan's case, this would be the bank receiving the payment. In such a case, the bank might want to do away with the services of a third party certification authority, establishing its own records of signatures and its own rules for accepting them. The bank might, for example, set a limit on how much risk it is willing to take on the authenticity of

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Digital Signatures Evolved to Encrypt Messages on Public Networks

"Electronic Signature" is a broad term that encompasses many different approaches to establishing identity in electronic communications. Used in this broad way, electronic signatures include digitized images of signatures (as on faxed documents), biometric approaches to identification (e.g., retina scans, thumbprint scans), and the use of special encryption keys known as "digital signatures." This last category, digital signatures, is what many people have in mind when they talk about electronic signatures. Because digital signatures will see broad use, it is useful to have a high-level idea of how they work.

Digital signatures were invented as one part of a solution to a larger problem. The larger problem had to do with encrypting messages so that they could be transmitted securely over public networks such as the Internet. Good encryption technologies had been around for a long time, but they were all "symmetric" in the sense that the key used to lock (encrypt) a message was also the key used to unlock (decrypt) a message. This meant that secure communication depended on shared copies of keys. Whether the encryption system was the "Enigma" machines used by the Germans in World War II or the DES encryption scheme that became a standard within the financial and information processing communities in the 1970s, the extent to which anyone could communicate securely was limited by the extent to which they could safely distribute keys. For computer networks, this meant that you needed to find some way to communicate that was OFF the network—usually by secure private couriers—before you could communicate

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an electronic signature, requiring additional evidence of authenticity for amounts exceeding that limit. Note that the bank, as a party to the transaction, is in a better position to assess risk than a third-party certification authority would be.

The point here is not to resolve these issues or to argue for a particular solution. The examples and detailed discussion of liability are intended to drive home the idea that authentication is not a technical problem, but it is sometimes a legislative problem and *always* a business problem. There is overhead and expense associated with authentication—electronic signatures do not make that expense go away. The amount that you spend to reduce the probability of fraud needs to be balanced against the costs of fraud. If you are engaged in transactions where your worst case loss can be held to a few dollars, you may be willing to make signatures quick and easy, accepting some loss, in order to do more business. If you are, however, incurring substantial exposure, you will want to make the investment required to buy substantial assurance of authenticity.

Existing State Laws The new federal law is catholic (some might even say indiscriminate) in its embrace of electronic signature technologies and infrastructures. Its approach is to let the market do the work of sorting things out.

Some state laws, such as Utah's, prescribe particular approaches to electronic signatures. The federal law preempts state laws that "require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification." How will this affect the law and the use of the digital signature infrastructures that are already in place in Utah and in other states? This is a complicated question that will take time, and perhaps additional action on the part of state legislatures, to answer.

Probable Impact

We have looked at what the electronic signatures act does. We have also looked at what else needs to be in place before electronic signatures can be trusted. Let's summarize before moving on to a look at probable impacts.

- The Electronic Signatures in Global and National Commerce Act deals broadly with the use of electronic documents. Its intent is to ensure that, with a few exceptions, no contract, signature, or other legal document is invalidated solely because it is in electronic form.
- The act provides for a relatively small number of exceptions where a signature, notice, or agreement can still be required to be in paper form.
- The act relies on the market to decide what kinds of electronic signatures are useful. Its definition of "electronic signature" is broad enough to cover any conceivable approach to recording electronic signatures.
- Before companies will accept electronic signatures they need to know when to trust them as authentic and when not to. Just as the act leaves it to the market to sort out useful electronic signature technologies from those that are not secure, convenient, or are flawed in some other way, the act also leaves it to the market to develop useful mechanisms for validating signatures and establishing trust in electronic documents.
- There are important questions about liability associated with the use of electronic documents and signatures that are not clearly resolved by reference to existing laws and regulations concerning paper transactions. The electronic signatures bill does not touch on these. This is consistent with the decision not to prescribe details of signature technologies or authentication and trust mechanisms. But it does mean that there may be potentially large liabilities associated with the use of electronic signatures until there is more experience, legal precedent, and, possibly, legislation dealing with electronic signatures and records.
- The act preempts state laws to the extent that they are not consistent with the federal law and to the extent that they exhibit preference for particular technologies. Because state laws can augment the federal law in important areas such as authentication and liability, it will take time and perhaps some testing in the courts before the lines between federal law and state law are clear.

The short summary of these points is that a signature or contract cannot be considered invalid *solely* because it is electronic, but there are currently many other considerations that might make an electronic signature invalid. As of the date that the act was signed, there was very little in the way of legislation, accepted practice, or widely used infrastructure that would make electronic signatures safe for use between parties that did not already have a basis for trusting each other.

All the same, the act *will* succeed in stimulating increased use of electronic signatures and documents. But the initial increased use will not come in the form of auto purchases, home loans, and other general consumer commerce applications featured in early stories and commentary about the electronic signatures act. Instead, the initial use will come in contexts where the issues of trust and authentication are already addressed through existing relationships or mechanisms.

Consider for example the relationship between a manufacturer and a supplier where signatures are required for each order from the supplier, but where the overall relationship has been established in an existing purchase agreement. In this case each party can exercise control over the signature authority granted to employ-

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ees and concerns about liability and indemnification are already covered in the separate agreement. Dealing with paper or faxed signatures is simply an added cost. If such parties are not already using electronic signatures, the act should give them the green light to do so now.

Or consider the variety of transactions and the exchange of documents between insurance companies, insurance brokers, and customers. The act states that it is the express intent of Congress that the new law apply to the business of insurance. Insurance is a good candidate for early application of electronic signatures and record delivery because the costs of moving everything back and forth in paper are high. Just as important, the insurance company is in a position to establish an agreement with each customer that establishes the specific technologies to be used for signatures, authenticates the signature for each customer, and establishes the specific terms of the agreement between the company and the customer concerning loss or theft of digital keys, forgery, liability, and so on. In short, the insurance company can set up its own authentication infrastructure and liability agreements with its agents and customers, and so is free to make immediate use of electronic signatures.

Emerging Picture What emerges from these examples is a picture of electronic signature use that is very different from the view that one might begin with when first thinking about the problem. Most people have one handwritten signature. By analogy, one might expect to have one electronic signature and that this signature would be recognized and accepted by your insurance agent, your bank, and by the general business community. But, as we have seen, there are substantial problems associated with authenticating such signatures and with assigning liability for forgery in such a general scheme.

Those problems disappear, however, when the parties to a transaction can set up a separate, private agreement, as in the case of our manufacturer and supplier or our hypothetical insurance company, broker, and customer. Such case-by-case agreements governing electronic documents and signatures can treat the technology, authentication, and liability issues in ways that are appropriate to the scale and to the nature of the transactions being conducted. So, rather than having one electronic signature, analogous to your one handwritten signature, you will probably have a number of different electronic signatures for use in the different business contexts.

Analysis and Suggestions

Despite news stories that suggest otherwise, the Electronic Signatures Act is not going to be the catalyst for a sudden revolution in e-commerce. The aims of the bill are more modest than that, simply removing legal obstructions that might stand in the way of letting the market do its work in sorting out electronic signature technologies and approaches to authentication. Managers could misread the impact of the legislation if they look for broad, sweeping effects or expect the act to resolve matters that are still left to the market to sort out.

The real impact of the act is that it removes barriers to the use of electronic signatures in business contexts where such signatures already make business sense. The challenge for the manager is to recognize those contexts. You should look for the following kinds of business situations:

- *A high volume of transactions requiring signatures, so that there are real cost savings or performance improvements from adopting electronic signatures.* Frequently, electronic signatures will not make business sense for infrequent transactions between parties. The costs of establishing satisfactory authentication will often outweigh the savings from the use of the electronic signature.
- *Parties who already know each other, or have some other already-in-place or easy-to-establish mechanism for authenticating signatures.* If authentication is cheap and easy, then it is easier to make the business case for electronic signature use.
- *The ability to easily create agreements (or use existing ones) covering liability and fraud.* Again, existing infrastructure that can be adapted for use with electronic signatures makes the business case for electronic signatures easier by bringing down the costs.
- *Situations where the cost of fraud is relatively low* (e.g., transactions with a low value for each transaction). As noted above, if your risk of loss is lower, you can accept more risk of fraudulent transactions.

As the act suggests directly, the insurance business is form and paper intensive and deals with a great many transactions that meet at least some of these criteria. Supply chain relationships are another area in which many transactions meet these criteria.

The Electronic Signatures Act will also stimulate new areas of business for software vendors and service providers. The problems associated with presenting, tracking, managing, and authenticating electronic signatures and records are opportunities for the companies that can address them. Given the complexity and critical importance of being able to authenticate signatures, there will be interesting opportunities for companies that can outsource that capability for clients or that can provide customer companies with the tools and processes to manage the authentication themselves.

One important point that software vendors and service providers should remember as they address these

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opportunities is that the early applications will be *industry and situation specific*. For example, insurance companies will need technology and perhaps services in order to set up their own electronic signature management and authentication systems. The same will be true of financial services companies, retailers managing their supply chains, manufacturers sourcing materials from suppliers, and so on. The problems associated with authentication and liability in the general case will ensure that, for a while at least, these applications will be relatively narrow and focused on the needs of individual companies in particular vertical markets. The way for a software vendor or service provider to go wrong here would be to believe the hype about sudden revolution, wish away the authentication issues, and go after an undifferentiated, horizontal market. The technologies will be applied horizontally, but the approach to the markets must be vertical.

If, as Senator Spence Abraham, a chief sponsor of the act, said, the Electronic Signatures Act supplies the pavement for the e-commerce lane of the information highway, it will be supplying it one stone at a time, at least for awhile. All the same, most businesses will want to begin using the road soon, because early markets are the time to build advantage. But you should also be realistic about how much of the highway is complete and about how rough the ride can be if you drive fast where the pavement is still under construction.

1. Pub. L. No. 106-229, "the Electronic Signatures Act." The legislation, designated S.761, was signed by President Clinton on June 30, 2000. A copy of the full text of the bill is available from the "Thomas" service of the Library of Congress. Search for bill number S.761 at http://thomas.loc.gov/.
2. From a computer scientist's or web business person's viewpoint, anything moving on the Internet is necessarily in digital form, and so any kind of signature sent across the Internet would be a "digital signature." Attorneys and legislators, however, prefer to reserve the term "digital signature" for applications that use public encryption keys and matching private encryption keys to transmit documents securely and to "sign" them. The broader term "electronic signature," includes this more restricted class of "digital" signatures as well as other kinds of electronic signatures that do not use public key encryption.
3. For more information about VeriSign's classes of service, see the VeriSign OnSite 4.0 Administrator's Handbook, section 12.1.1, available on the web at http://www.verisign.com/onsite/doc/adminBook/adminBook/admin.html.
4. C. Bradford Biddle, COMMENT: *Misplaced Priorities: The Utah Digital Signature Act and Liability Allocation in a Public Key Infrastructure*, 33 San Diego L. Rev. 1143 (1996). Draft version available on the Internet. Accessed July 9, 2000 at http://www.acusd.edu/~biddle/mp.html.
5. C. Bradford Biddle, Legislating Market Winners: Digital Signature Laws and the Electronic Commerce Marketplace World Wide Web Journal. (Summer 1997). Accessed July 9, 2000 at http://www.w3journal.com/7/s3.biddle.wrap.html.

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ON the network. Clearly, secure communications with people that you have never met—something that we now take for granted on the Internet—was impossible.

The solution to this problem was first outlined by Whitfield Diffie in the mid-1970s. Diffie's insight was that it would be possible to get around the key distribution problem if you could invent a way of locking things that used two keys. Unlike symmetric encryption, where the sender and the receiver used the same key to lock the message and then to unlock it, Diffie proposed use of an asymmetric encryption scheme in which the locking and unlocking functions were split apart. A "public" key would be used to encrypt a message. The locked message could be decrypted only through use of an associated "private" key. Assuming that you could find a way to create such public-private key sets, you could then distribute public keys widely, by publishing them. If I wanted to send you a message, I would go to a directory where I would look up your public key. I would then use that key to encrypt the message and send it to you, Since you would be the only person with the corresponding private key, only you could decrypt and read the message.

The public/private key idea was a slick one. The only problem was that, for awhile, nobody could find a way to create an encryption scheme that used such asymmetric keys. Finally, though, Ronald Rivest, Adi Shamir, and Leonard Adleman came up with an encryption algorithm—later named "RSA" after the inventors' initials—that did the job. Rivest, Shamir, and Adleman knew that if they were going to build an asymmetric locking scheme they would need to focus on mathematical operations that are, themselves, asymmetric and one-directional. Most mathematical operations are symmetric and two-way. For example, if you add numbers together, it is just as easy to reverse the operation and subtract them. But there are a number of mathematical operations that are very difficult to run backwards. One of these is the "factoring" of a large number into its "prime" components. Prime numbers are numbers that are divisible only by themselves and 1. The numbers 1, 2, 3, 5, 7,11,13, and 17 are primes. The number 15 is not prime, because it can be broken apart into prime "factors" of 3 and 5. What is interesting about primes and factors from an encryption point of view is that while it is very easy to multiply two large prime numbers to create their product, it is extremely time consuming, given the product, to figure out the

original primes. This fact became a critical component of the RSA algorithm.

The RSA encryption scheme multiplies two very large prime numbers to create an even larger number, which is then used as the public key to the encryption scheme. Constructing the private key depends on knowing the two prime factors. If you pick numbers that are sufficiently large, millions of computers working together for hundreds of years will not be able to recover the primes.

Suppose that Joe wants to submit a sealed bid on property that Kathy is selling. Ed would like to eavesdrop on Joe's bid so that he could outbid him while still spending as little as possible. Kathy has published her public key — an enormously large number — for use by all bidders. Joe uses Kathy's public key to encrypt his bid. Once he has completed the encryption, there is no one, including Joe himself, who can read the encrypted message without knowing the prime factors of the public key. Because finding the prime factors by trial and error is extremely time consuming, Ed is locked out of the communication and only Kathy, who possesses the private key that expresses the factors, can read the bid.

But how does Kathy know that the bid really came from Joe? How does she know that this isn't an artificially low bid submitted in Joe's name by Ed? And, if she accepts the bid, how can she prove that Joe really made the offer, keeping him from repudiating the bid? In other words, how can all of this encryption be used to create a signature?

The answer lies in the fact that the unique link up between a private and a public key works in either direction. For purposes of secure communication, Joe uses Kathy's public key, which means that only Kathy can unlock the message, since only Kathy has the matching private key. But suppose that Joe also has public/private key pair of his own. He can then use his own *private* key to encrypt a message (as opposed to using the recipient's public key). This encrypted message will be readable only if a receiver has Joe's *public* key. Of course, since Joe's public key is published and freely available, that means that the message is available to anybody. But, since only Joe has Joe's private key, anyone decrypting this message with Joe's public key can be sure that it was sent by someone with Joe's private key—presumably Joe. If Joe tries to repudiate the message, denying that he made the bid, he is in the difficult position of having to explain how and why someone else has his private key.

A digital signature, then, is asymmetric encryption used in reverse. The sender uses his or her private key to encrypt a message. Anyone with the sender's public key can read it, but such readers can be sure that the message really was sent by someone in possession of the sender's private key—presumably the sender. For communications that are both signed and secure, the messages are doubly encrypted. Going back to our example, Joe would first encrypt the message with his own private key—"signing" it—so that Kathy can be sure that the message is from Joe. Then Joe would encrypt the message again, this time using Kathy's public key, so that he can send it and be sure that only Kathy can read it. When Kathy receives the message she first uses her private key to unlock the outer layer of protection and then uses Joe's public key to establish that the message was really signed by Joe.

Where do all of these public and private keys come from, and who keeps track of them? It is possible to do all of this encrypting and signing without any central authority, which is the approach taken by a program known as "Pretty Good Privacy" or PGP. (For free versions of PGP see www.pgpi.org; for commercial versions see www.pgp.com.) In the PGP model, each computer user generates his or her own keys and is responsible for getting the public keys out to people with whom he or she wants to do business.

More commonly, however, businesses use a central "certificate authority" (CA) who generates the big prime numbers, issues the keys, keeps track of who has them, and makes a directory of public keys available to anyone. Most common email packages are set up to automatically make use of the keys issued by CAs such as Verisign (www.verisign.com) both for purposes of creating signatures and for encrypting mail. The CA keeps track of the certificates and is responsible for validating them. If you receive a signed document, the CA tells you who signed it. For the most commonly used classes of signatures, however, the CA will only validate that a particular signature is associated with a particular email address. Although this is useful, it is very different than asserting that a particular individual person did the signing. As explained in the main text of the article, obtaining real certainty about the actual identity of a sender depends on the same techniques as any other identification process, ranging from passwords to personal appearances. The advantages gained from having a given degree of certainty about the identity of a signer must be balanced against the costs of obtaining that degree of certainty.

If you are interested in more information about digital signatures and about encryption in general, *The Code Book: The Evolution of Secrecy from Mary Queen of Scots to Quantum Cryptography* by Simon Singh (Doubleday, 1999) provides a readable, entertaining history of cryptography and includes a more detailed description of how the RSA algorithm works.

Bill Zoellick

Detecting Forgeries Requires Analysis of Strokes and Pressures

By R. Joseph Jalbert

An attorney reports that his client says, "I did not sign that. That is not my signature." The document examiner's job is to determine whether the signature is authentic. All cases are different and some involve special considerations, but document examiners follow some basic approaches in formulating their opinions.

The majority of questioned handwriting cases require a detailed study using a magnifier or microscope. When people attempt to forge handwriting, they focus on the general appearance, letter formation, size, style and slant of the writing. Handwriting consists, however, of individualized strokes and pressures that are not obvious to the naked eye.

When someone tries to copy another style of writing two difficult things must be done simultaneously. First, the forger must alter her/his own way of writing. Second, the forger must adopt all the writing habits of the writer being imitated. Some forgers copy a signature over an indirect light source, but most try to simulate the writing after practice indicates that the signature "looks close."

Normal writing is done automatically. We do not think of how we write letters but the forger does. Consequently, the natural flow of the pen in a simulated forgery becomes halting and pressures vary greatly. This can be seen under a magnifier or microscope. Also, the connecting strokes and shapes of letters most often do not exhibit the same class as those found in the original writing. The altering of shape and wavering strokes with patching not found in the original writing are suspicious in the questioned writing.

Document Procedure

To reach an opinion, the document examiner must have adequate known samples of writing to compare to the questioned writing. The quality and quantity of the known samples (referred to as exemplars or standards of comparison) that are available will determine whether a positive opinion can be reached.

The basic requirements for handwriting identification are:

- Adequate standards of comparison. This may be from six to as many as possible. The more standards the better. It is best to have examples written before and after the date of the questioned signature. This helps to assess the variability of the writer.
- The closer the standards are in time to the date of the questioned writing the better. Miranda warnings and affidavits normally contain signatures and initials written within minutes or hours apart. In such a case, good copies may be adequate to work with. Even though originals are always preferred, time constraints may require that a qualified opinion be given based on copies.
- The questioned and known writing should be of the same style. Script is compared to script. Printing is compared to printing. The same wording is also preferable.
- Examination of originals is preferred, especially the original of the questioned document. Fax and copy machines do not accurately reproduce the depth of line or line value. Depth of line is the weight or heaviness given to a stroke. Line value is the fluidness and width of the line. Lines tend to be thicker on downstrokes and lighter on upstrokes. Another advantage of originals is that they can eliminate the possibility of a cut-and-paste signature. Often examiners will qualify opinions of faxed copies with subject to review of the original. However, sometimes, examiners will be able to give positive opinions on copies of standards and questioned writing when they are written within minutes or hours of each another.

The sources of original writings are numerous: checks, wills, deeds, leases, criminal records, school pa-

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pers, drivers licenses, discharge papers, medical papers, employment applications and legal documents.

Request writing samples are normally taken only when comparable exemplars are not available. Request writing is not as good as non-request writing because the writer may attempt to change her/his writing.

Taking request writing is best done under direction of a document examiner. The examiner can then quickly determine whether the person is attempting to change her/his writing. One method to determine whether the client is attempting to change her/his handwriting is to have the client write a statement and sign it on one blank piece of paper. Take that paper away and have the individual repeat the writing. After three or four such samples, it is possible to compare the writings side-by-side for obvious differences in size, slant and formation of both capital and lowercase letters. Attorneys are advised to tell their clients not to attempt to change their writing. An attempt at alteration would be very suspicious to a judge and jury.

Once, in a visit to a jail to obtain a writing sample, the man signed several sheets with quick and fluid strokes. There was no hesitation in his signature. Yet, at trial, the document bearing his signature and held by the district attorney did show wavering and patch strokes. My opinion was that it was not his. Ultimately it was shown that his brother had forged the man's name.

Felt marker pens are not recommended for legal documents. The felt material does not show pressure patterns and is the easiest type of writing to forge. Black or blue ink ball point pens are recommended in signing legal documents.

Most of the time, given adequate standards of comparison and an original questioned document, document examiners can give definite opinions.

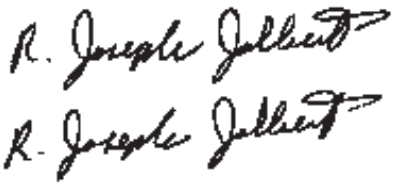
The FBI and other government laboratories give levels of opinions. The highest opinion will be a "positive identification." From there the descending order of certainty of an opinion are "highly probable," "probable," "indications," and "inconclusive."

Background of Document Examiners

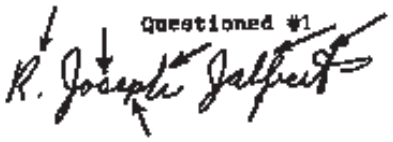
Many document examiners have worked for police departments and been trained through government document programs. The CIA and FBI are known to have excellent training programs. Others have studied handwriting analysis (graphology or graphoanalysis) to acquire the eye training needed to identify differences in handwriting and then acquired speciality training in document examination through other questioned document organizations or certified document examiners.

Document examiners differ in what they can determine from writing. Those trained in ink analysis, paper identification and typewriter identification excel in cases that depend on ink, paper or typewriter identification. Some graphologists who also work as document examiners and do not have the ink, paper or typewriter training background know their limits and refer such cases to document examiners with a speciality in that area. The FBI, for example, has specialists it routinely consults on difficult typewriter cases. On the other hand, graphologists can profile writers within degrees of certainty. Document examiners without the graphological background cannot.

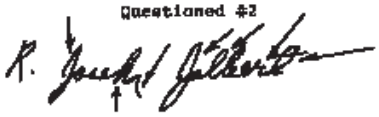
Each time a document examiner testifies in court, he/she must requalify as an expert and be subject to examination under *voir dire*. This is because document examiners are not licensed as attorneys or doctors are. The call for document examination work is not great enough to warrant a college to offer an undergraduate or graduate degree in document examination. George Washington University, Washington, D.C., did offer a degree in document examination about 15 years ago but discontinued it due to lack of demand.



Two known signatures of R. Joseph Jalbert show spontaneous, natural writing



Questioned #1 attempted forgery. The signature is drawn with even pressure. Arrows show discrepancies



Questioned #2 attempted forgery The signature shows identifiers different than originals or #1 This is a different person than the original or # writers

Internet Web Sites Offer Access To Less Expensive Case Law and Materials Not Offered Commercially

By William H. Manz

The availability of online legal information has increased significantly in recent years. For those seeking free or less expensive alternatives to pay services, numerous Internet Web sites offer possible options and many materials that are not offered commercially

The two giants in the field, Lexis and Westlaw, now receive competition on a national level from services such as Loislaw, Versuslaw, Quicklaw America, and the National Law Library, as well as local alternatives such as Montlaw in Montana and Code Co in Utah.

National specialty services such as State Net, State Capital Universe, and RegAlert provide material in the legislative and regulatory area. Different branches of state governments also offer various alternatives.

Most states, including New York, now provide judicial opinions, statutes, bills, attorney general opinions, and various other material free online. Retrospective coverage varies widely, searching mechanisms tend to be simple, and some materials are accompanied by the caveat that they are for informational purposes only and an official print version should be consulted.

This article surveys the availability of selected major New York legal materials on the new Internet Web sites and compares the services offered to those provided by the major commercial services, and in some cases, to those found in traditional print form.

New York State Courts

Court of Appeals decisions have long been available on the commercial databases. In fact, Lexis and Westlaw both have recently extended their coverage back to the inception of the Court in 1847. Although the databases of their smaller competitors do not match this, they all still provide many decades of case law. Loislaw coverage starts with 1924, VersusLaw and Quicklaw America with 1955, and the National Law Library with 1951.

By comparison, free Web sites providing Court of Appeals opinions offer a far smaller range of years.[1] The most extensive is Jurisline.com, which offers decisions from both the Court of Appeals and the lower courts starting with the early 1900s and currently ending with the first quarter of 1999. Court of Appeals opinions are offered by Cornell's Legal Information Institute (LII) beginning with 1990, at Findlaw.com starting with 1992, and at Lexis One since 1996. The other sites offering Court of Appeals opinions are intended to provide access only to recent opinions. The Court of Appeals' own site has cases for the current year, and Law.com, the New York Law Publishing Web site, has a six-month archive of recent decisions. The New York Law Reporting Bureau site keeps new opinions online until one month after they have been released on the quarterly updates to *New York Official Reports on LawDesk*.

None of the free sites can match the commercial services in search devices. Cornell's LII offers the most research aids, providing a topical index, party name listings, keyword searching and case summaries.

Except for Jurisline.com, Internet offerings for those seeking opinions from the lower New York State courts are very limited. Lexis One coverage starts with 1996. Law.com has a six-month archive of opinions from all the Appellate Divisions and the Supreme Courts of the Bronx, Kings, Queens, Richmond, Nassau, Suffolk, and Westchester. The Court of Claims Web site has opinions beginning with March 2000, with plans to extend retrospective coverage back to 1996. The Court System site has now added recent decisions from the Fourth Department, the Supreme Courts of Nassau and Suffolk, the New York County Commercial Division, and Westchester County Family Court. The Housing Court

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Web site includes summaries of Housing Court cases published in the *New York Law Journal* since 1996. In contrast LEXIS and WESTLAW coverage of lower New York courts now extends to the entire nineteenth century, and Loislaw offers Appellate Division opinions since 1924, and cases from *Miscellaneous Reports* since 1926.

Federal Courts in New York

Second Circuit opinions are well covered by the commercial services. LEXIS has decisions since 1912, and WESTLAW since 1891, Loislaw since 1971, VersusLaw and Quicklaw America since 1930, and the National Law Library since 1924. In contrast, free Internet access as provided by Findlaw.com, Touro Law School, and Pace Law School date only from 1995. As with New York opinions, Lexis One begins with 1996. Jurisline.com has a backfile of Second Circuit and district opinions dating from the 1910s, but coverage ends with 1998.

District and Bankruptcy court coverage is far less comprehensive. The Eastern District Web site contains selected opinions since November 1, 1999, beginning with the well-publicized *Brooklyn Institute of Arts and Sciences v. City of New York*.[2] The Southern District Web site also has selected recent rulings of participating judges. The Northern District Bankruptcy Court Web site posts selected recent decisions. The Western District Bankruptcy Court Web site has selected decisions from Judge Kaplan since 1992, both published and unpublished decisions from Judge Ninfo since 1992, and selected decisions of Judge Bucki since 1990.

Statutes and Regulations

The traditional online versions of the Consolidated Laws and Unconsolidated Laws offered by LEXIS, WESTLAW, and the Legislative Retrieval System have been joined by Loislaw.com, Quicklaw America, National Law Library, and Jurisline.com. Free Internet access to both the unannotated Consolidated and Unconsolidated Laws, periodically updated, is available at the Assembly Web site, and at Jurisline.com with quarterly updates. Online access to older versions of the statutes is still limited to LEXIS (since 1992) and WESTLAW (for 1987, 1989-97, 1999-2000).

There is no comprehensive free Internet access to the New York Code of Rules and Regulations, although selected sections appear on the Web sites of various state agencies.[3] Online access to the entire Code is still only by subscription through LEXIS, WESTLAW, Loislaw.com, and the Legislative Retrieval System. Regulation tracking is also provided by both LEXIS and WESTLAW, as well as by RegAlert, an Internet-based subscription service.

Legislative Materials

Bills Text and Bill Tracking Hardcopy versions of current bills are available free from the Assembly and Senate Document Rooms, and a subscription service is offered by Hamilton Printing, the publisher of the *Legislative Digest*. Older bills, dating from 1830, are located at the Law/Social Sciences section of the State Library.

Online access to bill text has been traditionally provided by LEXIS, WESTLAW, and the Legislative Retrieval System which offer both current bills and older legislation dating from the early 1990s. At present, the legislative Web site, and the individual Assembly and Senate sites[4] do not match the commercial services, or the coverage offered by the legislative Web sites of many other states, offering only bills from the current legislative session, with no retrospective coverage currently planned.[5]

Similarly, computer access to bill tracking services has been provided only through LEXIS, WESTLAW and the Legislative Retrieval System. All three New York legislative sites now also offer bill tracking. Along with the text of the bill, they provide a status report, which includes a bill chronology.

Enacted Legislation Hardcopy of enrolled bills is available from Miscellaneous Records, Department of State for a per-page fee. Final version of bills as sent to the governor are provided by the Senate and Assembly Document Rooms, and a subscription as part of session law service is available through Hamilton Printing. New enactments have also been traditionally published in *McKinney's Session Law News* (West Group) and *Advance Legislative Service for the New York Consolidated Laws Service* (LEXIS Publishing), both available as part of a code subscription service.

As with bills, online access is provided to subscribers of LEXIS, WESTLAW and the Legislative Retrieval System. The free Internet alternatives, the Assembly Web site, and the legislative Web site all limit their coverage to the current session.[6]

Legislative History Sources of New York legislative history are sparse and may be hard to obtain. The most likely sources of legislative intent for the typical enactment, and those most often cited by the courts, are Governor's, departmental, or sponsor's memoranda as reprinted in *New York Legislative Annual*, published by the New York Legislative Service, *McKinney's Session Laws*[7] since 1951, and *CLS Session Laws*,[8] or as found along with correspondence in the Governor's bill jackets.

Older memoranda, dating from 1983, are located at the State Library, and memoranda for the current session available from Assembly Public Information Office and Senate Office of Legislative Assistance and Services.

Online line access to these materials has been limited to documents since 1995 provided by the Legislative Retrieval System, and to those memoranda printed in *McKinney's Session Laws* and provided by WESTLAW. This is now supplemented by memoranda accompanying the

Addresses of Internet Sites

Materials noted in this article may currently be found at the following Internet addresses:

New York Court Opinions

Court of Appeals <http://www.courts.state.ny.us/ctapps/decision.htm>

Court of Claims <http://www.nyscourtofclaims.state.ny.us/decisions.htm>

Findlaw.com <http://www.findlaw.com/11stategov/ny/nyca.html>

Housing Court <http://tenant.net/Court/Hcourt>

Law.com <http://www.law.com>

Legal Information Institute <http://www.law.cornell.edu80/ng/ctap>

New York Law Reporting Bureau <http://www.courts.state.ny.us/reporter/Decisions.htm>

Unified Court System <http://www.courts.state.ny.us/decisiontc.htm>

Federal Court Opinions

Eastern District Court <http://www.nyed.uscourts.gov/doi/doi.htm>

Findlaw.com <http://www.findlaw.com/casecode/courts/2.html>

Jurisline.com <http://www.jurisline.com>

LexisOne <http://www.lexis1.com>

Northern District Bankruptcy Court <http://www.nynb.uscourts.gov/albanydecisions/albdecmenu.html>

Pace Law School <http://www.law.pace.edu/lawlib/legal/us-legal/judiciary/second-circuit.html>

Touro Law School <http://www.tourolaw.edu/2ndCir>

Western District Court <http://www.nysd.uscourts.gov>

http://www.nynb.uscourts.gov/utidec/utidecmenu.html>

Western District Bankruptcy Court <http://www.nywb.uscourts.gov/decisions.htm>

Statutes

Jurisline.com <http://www.jurisline.com>

New York State Assembly <http://assembly.state.ny.us/cgi-bin/claws>

Legislative Materials

New York State Assembly <http://www.assembly.state.ny.us> (bills, memoranda, and reports)

New York State Legislature <http://LEGINFO.STATE.NY.US:82nyslegmenugetf.cgi> (chapter laws, approval messages, and veto messages)

New York State Senate <http://www.senate.state.ny.us> (bills, memoranda, and reports)

Rules of Court

Combined Courts <http://www.nylj.com/rules>

Eastern District <http://www.nysed.uscourts.gov/rules/Rules.htm>

Eastern District Bankruptcy <http://www.nylj.com/rules/edbindex.html>

New York State Courts <http://www.nycourts.com>

Northern District <http://www.nynd.uscourts.gov/localrul.htm>

Northern District Bankruptcy <http://www.nynb.uscourts.gov/lbr/95lbrmenu.html>

Southern District <http://www.nysd.uscourts.gov/rules/Rules.htm>

Southern District Bankruptcy <http://www.nysb.uscourts.gov/pdf/revlocalrul.pdf>

Unified State Courts (Rules Amendments) <http://www.courts.state.ny.us/ucsrules.html>

Western District <http://www.nywd.uscourts.gov/2/localrules.htm>

Western District Bankruptcy <http://www.nywb.uscourts.gov/localrules.htm>

Departments and Agencies

Attorney General <http://oag.ny.us>

Committee on Open Government <http://www.dos.state.ny.us/coog/coog.html>

Comptroller <http://osc.state.ny.us/legal>

Department of Education <http://www.counsel.nysed.gov/Decisions/home.html>

Department of Tax and Finance <http://www.tax.state.ny.us/pubs_and_bulls/Advisor_Opinions/AO_tax_types.htm>

Division of Human Rights <http://www.nysdhr.com/orders.html>

Ethics Commission <http://www.dos.state.ny.us/ethc/ao.html>

Insurance Department <http://www.ins.state.ny.us/slcopin.htm>

Office of State Review <http://seddmznt.nysed.gov/sro/dec.htm>

Public Employees Relations Board <http://www.perb.state.ny.us/Dec.asp>

Public Service Commission <http://www.dps.state.ny.us/doc_search_form.htm>

Bar Associations

Association of the Bar of the City of New York <http://www.abcny.org>

New York County Lawyers Association <http://www.nycla.org/main.htm>

New York State Bar Association <http://www.nysba.org/members/publications/ethicsop>

bills for the current session and posted on the Assembly and legislative Web sites. The legislative site also provides Governor's approval messages and veto messages for the current session.

Other Legislative Materials Internet access to other legislative materials is still extremely limited.[9] The Assembly Web site provides Legislative Reports since 1995, Ways and Means Committee Reports since 1996, and Program and Counsel Committee Reports since 1997. Selected reports, issued since February 1993, are also now been available at the Senate Web site.

Not available online are such materials as Governor's Bill Jackets and the reports of the Law Revision Commission. Likewise, committee hearings, debate transcripts, Assembly and Senate journals for various years are variously available in print and/or microform, but only through sources at the Legislature or at selected libraries.

Rules of Court

The standard sources of court rules, the annual *McKinney's New York Rules of Court: State and Federal* from West Group, *New York Court Rules* by LEXIS Publishing, and their LEXIS and WESTLAW versions have now been augmented by several different free Web sites.[10]

The *New York Law Journal* provides rules for both state and federal courts at its Web site. Those for New York State courts are available at the state courts site, and recent amendments to state court rules are posted at the Unified Court System site. Local rules for each of the federal district courts are available at their individual Web sites. Rules for the bankruptcy courts for the Northern, Southern, and Western District Bankruptcy Courts are also available on the individual sites. Eastern District Bankruptcy rules are included on Law.com, the New York Law Publishing Web site.

Attorney General Opinions

Attorney General opinions have long been available in print form, and since 1990 have been published in a loose-leaf format by Lenz & Riecker as Opinions of the New York State Attorney General.

Free online access is now provided by the Attorney General's Web site for opinions issued since 1995.[11] This, however, does not come close to the coverage offered by LEXIS (since February 1976) and WESTLAW (since 1977).

Executive Orders

Unlike many other states, New York currently provides no Internet access to Governor's executive orders.[12] Access is still limited to the traditional sources, including the Governor's Press Office, the *Legislative Digest*, and *CLS Session Laws*.

Orders have also been published since 1960 in 9 Official Compilation of Codes, Rules and Regulations of the State of New York (N.Y.C.R.R.) Part 1.

Administrative Materials

Various Web sites have expanded access to state administrative rulings, decisions, and orders. Coverage varies, and as with case law and other materials, retrospective coverage usually does not match that provided by the commercial online services.

The Department of Tax and Finance Web site makes available advisory opinions since 1993. Much more extensive coverage of its materials is available on LEXIS (advisory opinions, memoranda, and hearing determinations since 1978) and WESTLAW (memoranda since 1978 and opinions of counsel since 1960).

Similarly, the Public Service Commission Web site now provides decisions since March 1995. This is exceeded by LEXIS coverage dating from 1984, and WESTLAW which offers full text decisions starting with 1974. This disparity in coverage also occurs in the case of the Comptroller's decisions which are covered since 1979 on LEXIS, and since 1977 on WESTLAW, but only since 1995 on the Comptroller's Web site.

A more marked difference in the nature of coverage exists for decisions of the Public Employee Relations Board. These are available in full text on LEXIS since March 1986 and WESTLAW since 1982. In contrast, the Board's Web site provides only summaries of recent decisions.

There are also several types of materials where LEXIS and WESTLAW still provide the only online access. These include Banking Department Opinions (LEXIS since 1990); Commission on Judicial Conduct Disciplinary Opinions (WESTLAW since 1978); Department of Environmental Conservation Decisions and Orders (WESTLAW since 1970); Freshwater Wetlands Appeals Board Decisions and Orders (WESTLAW since 1976); Tax Appeals Tribunal Decisions (LEXIS since June 1983); and Workers' Compensation Board Decisions (LEXIS since 1989 and WESTLAW since 1985). There is, however, one instance where Web site coverage is comparable to that of the premium services. Ethics Commission Advisory Opinions, available on LEXIS since 1991, and WESTLAW since 1988, are also posted on the Commission Web site since 1988.

The currently available free Web sites offer a valuable array of law-related information, some not available electronically elsewhere.

In one case Internet availability is identical to that provided in print. The State Education Department Office of State Review Web site begins its coverage of decisions on its site with 1991, as does its loose-leaf title, *Decisions of the State Review Officer*. The Education Department also provides Web access to Commissioner of Education decisions dating from July 1991.

Finally several Web sites are offering materials not published in hardcopy or available on commercial sites. These include Committee on Open Government Advisory Opinions since 1993 included on the Committee Web site; Division of Human Rights Orders at the Division Web site since 1999; and Insurance Department Informal Opinions at the Department Web site since 2000.

Professional Responsibility Opinions

Coverage of bar association professional responsibility opinions is a feature of several Web sites. The New York State Bar Association site now has the full text of opinions issued since September 1991. The New York County Lawyers Association site includes opinion summaries since October 1970 and full text since July 1996, and the Association of the Bar of the City of New York site offers an opinion index starting with 1986.

As with most other types of legal information available free on the Web, the materials on these sites do not match the retrospective coverage offered by LEXIS, which has opinions from the New York State Bar Association since 1991, and WESTLAW, whose ethics database includes opinions from the New York State Bar Association since 1977, New York County Lawyers Association since December 1979, the Association of the Bar of the City of New York since 1986.

Conclusion

Coverage of New York legal materials offered on the Internet does not currently provide a comprehensive alternative to the commercial services. Retrospective coverage is insufficiently extensive, and the search engines on most sites are too simple to allow the Internet to function as a legal research tool in the traditional sense. These limitations not withstanding, the currently available free Web sites do offer a valuable array of law-related information, some not available electronically elsewhere. They also can serve as an effective and useful free document retrieval service for selected materials that were formerly available only through online subscription services, in print publications, or by request from the Legislature or relevant departments, agencies, and libraries.

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1. Internet availability of Court of Appeals opinions compares favorably to that of the highest courts in larger or nearby states such as Illinois, Michigan, New Jersey, Ohio, and Pennsylvania where coverage typically begins in the mid-1990s.
2. 64 F. Supp.2d 184 (E.D.N.Y. 1999).
3. Other major states which do not currently provide free electronic versions of their entire administrative codes include California, Florida, Illinois, and New Jersey.
4. Other information available at the Legislative, Assembly and Senate Web sites include resolutions, floor calendars, and committee and hearing schedules.
5. For example, California provides bills since 1993, Connecticut since 1988, New Jersey since 1996, and Pennsylvania since 1985.
6. Many other states provide retrospective coverage. California posts enacted legislation since 1993, Connecticut since 1988, Illinois and Michigan since 1997, New Jersey since 1996, and Ohio since 1995.
7. Contain selected memoranda since 1951.
8. Include Governor's memoranda only.
9. In contrast, New Jersey offers online access to the text of legislative hearings since 1996, and copies of New Jersey Law Revision Commission reports since 1987.
10. In addition to official court rules these sites may also provide individual judge's rules, text of general order, and forms. There also may be links to the Public Access to Court Electronic Records (PACER), a dial-up system which provides subscribers with access to electronic court records, notably dockets.
11. Arkansas provides attorney general opinions since 1991, Connecticut since 1990, Delaware since 1995, Georgia since 1994, Illinois since 1995, Maryland since 1994, Virginia and Washington since 1996. Some states such as California and Colorado have databases dating from the 1980s. Oklahoma's coverage is the most extensive, including published opinions since 1948.
12. Nearby states posting executive orders on the Internet include Connecticut since 1995, New Jersey since 1990, and Pennsylvania since 1970.

The Keys to Clear Writing Convey Thoughts Gracefully

BY SUSAN MCCLOSKEY

The words we first commit to the page or screen seldom say what we want them to say. They render our meaning approximately, sometimes gracelessly. To make them express our thoughts clearly, we need to prod them gently or give them a vigorous shove.

The master key to clear writing is successful revising, the work of taking a second or third look at a draft as if someone else had written it. Successful revision depends on a writer's alertness to the common obstacles to clarity. This essay is about those obstacles and about the steps you can take to turn clear thoughts into clear words, sentences, and paragraphs.

Ambiguous Words

Ambiguous words are the enemy of clear writing. Legal writers are sometimes exempt from this general rule, although less often than many would like to think. Unable to anticipate every contingency, a lawyer drafting an agreement may build some wiggle room into key provisions. A litigator may de-emphasize a client's responsibility by changing the dangerously candid *My client made a terrible mess of things* to the deliberately passive *Mistakes were made*.

Such purposeful ambiguity seldom produces the baffling, knotted legal prose that makes readers despair. Clarity more often falls victim to ambiguity that no writer intends. Its sources are often inconspicuous—pronouns without antecedents, verbs that indicate actions without actors, harmless-looking modifiers. You can spot them only by looking for them and repairing the damage before sending a document into the world.

Pronouns cause ambiguity when writers forget the pronoun's job. The function of any pronoun is to take the place of a noun. If we had only nouns at our expressive disposal, we would have to write sentences like this one: The Defendant claimed that the Defendant could not see the Plaintiff's car entering the intersection because the Defendant's view of the Plaintiff's car was blocked by a UPS truck. With pronouns to serve us, we can write instead, The Defendant claimed that she could not see the Plaintiff's car entering the intersection because her view of it was blocked by a UPS truck.

The pronoun's great utility depends on its one-to-one correspondence with the single noun it replaces. As soon as a writer tries to make a pronoun stand in for an entire concept, trouble ensues. The demonstrative pronoun this, for instance, contributes more than its share to obscure legal writing. In the passage that follows, try to determine what the writer means by this:

> The school board took administrative action against teachers who absented themselves on Veterans Day. This was a violation of the collective bargaining agreement.

The singular *This* that opens the second sentence could replace any singular noun in the first sentence: *school board*, *action*, or *Veterans Day*. Among these possibilities, *action* is the antecedent readers would probably choose, because the writer has thoughtlessly left them to their own devices. But it is also possible that the writer means *This* to stand in for the concept represented by *teachers who absented themselves*. The grammatical problem here is that *absented* is a verb, not a noun, so a pronoun can't replace it. The semantic problem is the unresolved ambiguity: Was it the school board's action or the teachers' absence that violated the collective bargaining agreement? There is simply no way of knowing. Readers may guess correctly, but good writers don't leave their readers to guess.

You can solve the problem here by pinning down the meaning of *This*. Once you decide what you mean to say, all you need is a clarifying noun after the ambiguous pronoun:

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> The school board took administrative action against teachers who absented themselves on Veterans Day. This *action* [or this *absence*] was a violation of the collective bargaining agreement.

Whenever your draft features *This* without an accompanying noun to clarify its meaning, supply the noun in revision.

The relative pronoun *which* causes the same problem in different form. In the sentence, *My file on this matter is not complete, which means that you must submit any records supporting your claim*, the pronoun *which* refers neither to *file* nor to *matter*. Rather, it refers to the incompleteness of the file, the entire concept represented by the opening clause. A pronoun asked to carry such a burden of meaning will collapse under the load, because it is capable of referring only to a single word. Here, the writer needs to clarify what is meant by making explicit the meaning of *which*: *My file on this matter is incomplete; its incompleteness means that you should submit any records supporting your claim.* This revision clarifies meaning; unfortunately, it also sounds a little strained. More direct phrasing solves the problem: *The incompleteness of my file means that you should submit any records supporting your claim*, or, more simply, *Send me the records supporting your claim so that I can complete the file on this matter*. While *this* may need only a companion noun to clarify its meaning, *which* may require more thoroughgoing revision to eliminate ambiguity.

Passive verbs become active as soon as the writer specifies an actor and places him or her in front of the verb.

Other pronouns—*that* and *which*—cause problems of clarity when *which* appears where *that* belongs. Both pronouns introduce relative clauses—that is, clauses meant to define or elaborate the meaning of the noun to which they relate. There the similarity ends. A *which* clause provides incidental information about the noun it refers to; a *that* clause offers defining information. A *which* clause could be excised from the sentence without altering meaning; a *that* clause could not be. A *which* clause is usually set off by a comma or a pair of commas; a *that* clause is seldom punctuated at all.

You can test these distinctions by deciding which pronoun belongs in the blank in this sentence: *Foreign corporations _____ have received certificates of authority enjoy the privileges of domestic corporations*. Out of bad habit, many writers would fill the blank with *which* and leave the clause unpunctuated. But when you apply the "cut-the-clause" test, falsehood ensues. It is simply not true that foreign corporations enjoy the privileges of domestic ones. Only some do, those that have received certificates of authority. Because the relative clause can't be cut without misrepresenting the facts, *that* is the appropriate pronoun. It restricts the meaning of *foreign corporations* to the appropriate class.

Passive verbs, a major cause of lost clarity, appear on the top-ten list of baffling words, not because they are ungrammatical or even stylistically graceless, but because they are uninformative. To deprive a reader of essential information is the ready and easy way to banish clarity from any statement. Consider this sentence: *Outside counsel should be hired, and a thorough investigation of the FDIC's actions should be performed*. The reader of such a sentence has at least two questions, both of which spring from the passive verbs, *should be hired* and *should be performed*. Who is supposed to perform these actions? In-house counsel? The company's CEO? The next-door neighbor? The passive verbs allow the writer to remain stonily silent on this score. And what is the connection between the hiring of outside counsel and the investigating of the FDIC's actions? Are these actions unrelated, or is outside counsel supposed to do the investigating? A sentence that raises more questions than it answers abandons all claim to clarity and leaves the reader frustrated.

Passive verbs become active as soon as the writer specifies an actor and places him or her in front of the verb: *Fred Evans should hire outside counsel to investigate the FDIC's actions*, or *Fred Evans should hire outside counsel, and Barbara McDonough should investigate the FDIC's actions*. The active verbs, *should hire* and *should investigate*, pull the actors back into the sentence, replacing murk with clarity. When you know who did the deed that the verb describes, and when you lack a compelling reason to keep that knowledge to yourself, use the active voice.

One of our language's trickiest modifiers—the word *only*—is a potent enemy of clarity. We tend in speech to misplace it automatically, without much damage: *I only had enough change for one subway pass* instead of *I had enough change for only one subway pass*. But the standards of clarity are higher in writing than in speaking, in part because the writer isn't present to straighten out a reader's confusion. In writing, the misplacement of *only* can lead a writer to write something far different from what he or she intended.

Consider this sentence: *He spoke ill of her on the witness stand*. Place *only* before each word in turn and see what happens to the sentence's meaning:

1. Only he spoke ill of her on the witness stand [*everyone else spoke well of her*]

2. He only spoke ill of her on the witness stand [*he didn't compound ill speech with ill actions*]

3. He spoke only ill of her on the witness stand [*he never once said anything pleasant*]

4. He spoke ill only of her on the witness stand [*he didn't also speak ill of others*]

5. He spoke ill of only her on the witness stand [*same as number 4*]

6. He spoke ill of her only on the witness stand *[he spoke well of her elsewhere*]

7. He spoke ill of her on only the witness stand [*awkward, but the same as number 6*]

8. He spoke ill of her on the only witness stand [*there was only one stand*]

9. He spoke ill of her on the witness only stand [*only a witness was allowed on the stand*]

10. He spoke ill of her on the witness stand only [*same as number 6*]

Here, seven distinct meanings spring from the placement of *only*; the writer intended only one of them. To avoid the problem, take time in revision to ensure that *only* is where it belongs—usually, right before the word or phrase it modifies.

Unclear Sentences

Legal writers sometimes treat a sentence as if it were a plastic grocery bag, stuffing it with the verbal counterparts of mayonnaise, bananas, and furniture polish to avoid an extra trip from the car to the pantry. But sentences are less sturdy and capacious than grocery bags. Stuff one, and its seams will split. Wedge qualifying phrases and clauses in the space between subject and verb, and the sentence's contents will become a disorderly jumble.

Consider what happened to a thought that probably took shape in the writer's mind as *The insurer's right to subrogation survives the enactment of Connecticut General Statute § 52-225c*. By the time it touched down on the page of an internal memorandum, stretched out and crammed full, it looked like this:

> Based on the language of Conn. Gen. Stat. § 52-225c, its legislative history, and its construction and interpretation with other Connecticut statutes as well as the common law, a good argument can be made that the statute does not affect an insurer's right to subrogation *and* that right has survived the enactment of that statute, *although* a decision, *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits and Insurance Fund*, 746 F. Supp. 241 (D. Conn. 1990), in which the Court implied, in *dicta*, that an insurer's right to subrogation may not have survived the enactment of the statute, may undermine this argument.

This sentence violates two cardinal principles of clear construction. First, it is far too long. The meaning would be clearer if the writer did nothing more than divide the sentence at the italicized conjunctions and substitute *However* for *although*:

> Based on the language of Conn. Gen. Stat. § 52-225c, its legislative history, and its construction and interpretation with other Connecticut statutes as well as the common law, a good argument can be made that the statute does not affect an insurer's right to subrogation. That right has survived the enactment of that statute. *However,* a decision, *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits and Insurance Fund*, 746 F. Supp. 241 (D. Conn. 1990), in which the Court implied, in *dicta*, that an insurer's right to subrogation may not have survived the enactment of the statute, may undermine this argument.

In a world of page-limits and word-counts, remember that no one has prescribed the number of sentences a document can contain.

Divide most long sentences into shorter units, and structure each sentence so that its core elements (especially its subject and verb) are close together.

A second principle of clear sentence construction would clarify the last sentence in the passage above, which suffers from a badly disrupted core. The core of any sentence includes the grammatical elements that convey its essential meaning. *He won* is a complete sentence, for instance; its verb specifies an action (*won*), and its subject (*he*) specifies the performer of the action. In any sentence, these two elements act as the nucleus around which a careful writer arranges the remaining elements. The closer the subject and verb, the clearer the sentence. Sentences more complex than *He won* include a direct and sometimes an indirect object. Together, these three or four elements indicate who did what (*He won the case*) or who did what to or for whom (*He won the case for his client*).

In the unrevised sentence above, the verb, *may undermine*, and the direct object, *this argument*, pass the test of proximity. But the subject, *decision*, is separated from the verb by an appositive phrase, two relative clauses, and a prepositional phrase. The writer's meaning becomes easier to grasp as soon as she reduces that distance:

> A 1990 decision may undermine this argument.

She can then place the intervening material in a new sentence of its own:

> In *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits and Insurance Fund*, 746 F. Supp. 241 (D. Conn. 1990), the Court implied in *dicta* that an insurer's right to subrogation may not have survived the enactment of the statute.

The writer might apply the same clarifying principle to the first sentence of the passage. Here, moving the subject and verb closer together involves the prior step of accurately identifying the sentence's true subject. The current subject, *argument*, is a mere place-holder. The real subject is the evidence supporting the writer's conclusion that the insurer's right to subrogation survives the statute's enactment: the statute's language, legislative history, construction and interpretation, and the common law. The writer originally downplayed the importance of that evidence by subordinating it in the participial phrase beginning *Based on*. She also muffled the core verb (*could be made*) by making it passive. Once she makes the evidence her subject and makes the passive verb active, her point and the entire passage become clearer:

> The language of Conn. Gen. Stat. § 52-225c, its legislative history, and its construction and interpretation with other Connecticut statutes and the common law indicate that the statute does not affect an insurer's right to subrogation. That right survived the enactment of the statute. A 1990 decision, however, may undermine this argument. In *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits and Insurance Fund*, 746 F. Supp. 241 (D. Conn. 1990), the Court implied in *dicta* that an insurer's right to subrogation may not have survived the enactment of the statute.

When you want your sentences to be clear, direct, and easily intelligible—a goal always worth aiming for—take these two steps in revision: Divide most long sentences into shorter units, and structure each sentence so that its core elements (especially its subject and verb) are close together.

Unclear Paragraphs

Four principles govern paragraph development, and all contribute powerfully to clarity. The first pertains to the paragraph's function, the second and third to the sentences it contains, and the fourth to the connection between one paragraph and the next. Each contributes to clarity; together, they reinforce the logical power of a legal analysis or argument.

The first principle is that a paragraph develops a single point. Paragraphs that try to develop multiple points suffer from either vagueness or excessive length. In either case, they frustrate the reader's efforts to follow the logical progress of the writer's analysis or argument. Long, poorly defined paragraphs also deprive the reader of the visual cue of a paragraph break, which signals that the writer has finished considering one aspect of the topic and has taken up another.

The second and third principles are closely related. The second is that the opening sentence usually defines the paragraph's focus, telling the reader what the paragraph is about. The reader should be able to review the contents of a well-written document by rereading only the topic sentence of each paragraph. The third principle is that the remaining sentences should develop the topic sentence's point. A careful writer often reinforces the logic of this development through words or phrases that link one sentence to the sentence before. Those most often and appropriately used by attorneys are conjunctive adverbs, such as *furthermore* and *thus*, or prepositional phrases, such as *in addition*.

The fourth principle extends the idea of connection from consecutive sentences to consecutive paragraphs. Sometimes the logical or narrative continuity between

one paragraph and the next is so clear that no explicit link between them is necessary. But sometimes only transitional words, phrases, and clauses can make clear to the reader how paragraph B relates to paragraph A. For instance, when one paragraph closes with a strong assertion and the next opens with the word *However*, the reader instantly grasps that the new paragraph will qualify or challenge that assertion. A paragraph without a strong transition may require the reader to leap from one topic to another. Good writers remember that readers prefer to cross the bridges between paragraphs that good transitions create.

Confusion results when a writer overlooks even one of these four principles. A reader left to wander through ill-constructed blocks of text without the writer's guidance is soon lost and sooner exasperated. The following paragraph illustrates the problem:

> The UCC states that express warranties by the seller are created by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Our client must prove that 1) the promise related to the goods, and 2) the promise became part of the basis of the bargain. In *Sparks v. Stich*, the plaintiff buyer sought to invoke an express warranty for the sale of used farm equipment where the defendant seller had stated that the equipment was in "good working" order. The court held that "this general expression [does] not warrant against all imperfections. . . . This is particularly so in view of the low cost of each item and its used condition."

The writer's neglect of the single-point-per-paragraph principle compromises the clarity of his analysis. The paragraph deals with three different topics: what the UCC says, what the client must prove, and what the court held in *Sparks v. Stich*. A resourceful reader might intuit the connection between the first two topics, but the writer's meaning is clearer as soon as that link becomes explicit:

> The UCC states that express warranties by the seller are created by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." *To establish an express warranty*, our client must prove that (1) the promise related to the goods, and (2) the promise became part of the basis of the bargain.

How does the point of these two sentences—the client's burden in light of the UCC—relate to the focus of the third and fourth sentences, *Sparks v. Stich*? Here, even a nimble reader might balk at the intuitive leap the writer requires her to make. At the very least, the writer should give the case a paragraph of its own and relate it to the preceding paragraph through an effective transition:

> Case law further defines the elements of express warranty, implying a degree of specificity in connection with the seller's representation. In *Sparks v. Stich*, the plaintiff buyer sought to invoke an express warranty for the sale of used farm equipment where the defendant seller had stated that the equipment was in "good working" order. The court held that "this general expression [does] not warrant against all imperfections. . . ."

Here, the new second paragraph retains the focus of the first and extends it from the UCC to case law. Other logical links, including transitional words and phrases (such as *Second*, *Moreover*, *In addition*) are also possible here, but all serve the purpose of alerting readers to the logical connection between what they have just read and what they are about to read.

These revisions move the original paragraph closer to the goal of clarity. The writer can go the entire distance by stating the true focus of the first paragraph at its out-

The best legal writers, such as Oliver Wendell Holmes, have the habit of exemplification.

set. That focus is not merely what the UCC says, but the bearing of the Code on the client's actions:

> *The UCC specifies the circumstances under which our client can prove that an express warranty exists.* An express warranty is created by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." *Accordingly*, our client must prove that (1) the promise related to the goods, and (2) the promise became part of the basis of the bargain.
>
> Case law further defines the elements of express warranty, implying a degree of specificity in connection with the seller's representation. . . .

Such revisions at the paragraph level offer a writer greater opportunities for clarity than revision of words and sentences alone can provide. In most legal documents, the paragraph is the significant unit of thought, the space in which a litigator sets forth a point in an argument or a transactional attorney defines a responsibility of a party to an agreement. The discipline of checking your paragraphs to ensure that each has a topic sentence, a cohesively developed single point, and a strong link to the preceding paragraph can help you clarify a cloudy piece of writing and transform a clear piece into a compelling one. Well-constructed paragraphs, in short, are keys not only to writing clearly but also to winning arguments and closing successful deals.

Clarifying Examples

Even the most careful revision may sometimes leave a writer short of the goal of clarity. Unambiguous words, sentences of moderate length with intact cores, and paragraphs of tested soundness can do most, but not all, of the work that clarity requires. Legal principles are necessarily abstract, and the analyses and arguments that spring from them can all too easily follow suit. To counter this tendency, rely on two extraordinarily helpful words: *for example*. The best legal writers provide examples with disciplined abandon.

The most common example converts an abstract statement into a concrete instance, as in this passage:

> A foundation meets the "public support" test if it normally derives at least one-third of its gross receipts in the form of gifts or grants from qualifying public or governmental sources. For example, if the foundation has total gross receipts of $100,000 during the advance-ruling period, it is required to collect at least $33,334 from qualifying public or governmental sources—that is, from individual donors and local, state, or federal agencies.

By spelling out the foundation's responsibility in actual dollars and by specifying the meaning of qualifying public or governmental sources, the second sentence restates the meaning of the first in terms even a distracted or numbers-averse reader can grasp. But even a focused reader appreciates the way the example confirms that he has in fact understood the writer's initial point.

The same clarity can be achieved by translating a complex point into simpler terms. In the following passage from a land-use case, the first sentence is reasonably clear. The second makes it clearer still:

> The court concluded that if A holds property for public use and plans to develop that use only at some indefinite future date, it cannot prevent B from taking the property by eminent domain for an inconsistent public use. In other words, at least in eminent-domain cases, the tortoise doesn't always beat the hare.

By wittily translating the abstract meaning of the first sentence, the second reinforces the writer's point and makes it memorable.

The best legal writers, such as Oliver Wendell Holmes, have the habit of exemplification. Holmes's mind seemed to oscillate naturally between abstract principles and the specific instances that made them luminous. When he wanted to illustrate a limitation on freedom of expression, for instance, he imagined a man falsely shouting "fire!" in a crowded theater. To crystallize the difference between intentional and unintentional harm, he observed that "even a dog distinguishes between being stumbled over and being kicked."[1] Both examples ground the legal principle in daily experience, an inexhaustible vein that any writer seeking a clarifying instance can easily mine.

The keys to clear writing described here turn the general injunctions "Be clear!" and "Revise!" into specific things you can look for in your words, sentences, and paragraphs when clarity is your goal. Add them to your ring and use them. They will help you streamline the process of revision, making it possible for you to rework your documents fewer times. And you'll achieve what every good legal writer aims for: a clear, successful result.

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1. Oliver W. Holmes, *The Common Law* 3 (1881).

and ice); *Taylor v. New York City Transit Authority*, 266 A.D.2d 384, 698 N.Y.S.2d 52 (2d Dep't 1999) (snow and ice); *Hussein v. New York City Transit Authority*, 266 A.D.2d 146, 699 N.Y.S.2d 27 (1st Dep't 1999) (wet floor); *Madden v. Village of Tarrytown*, 266 A.D.2d 358, 698 N.Y.S.2d 153 (2d Dep't 1999) (snow and ice); *Davidson v. Hilton Hotels Corp.*, 266 A.D.2d 335, 698 N.Y.S.2d 171 (2d Dep't 1999) (snow and ice); *Forma v. City of New York*, 266 A.D.2d 186, 697 N.Y.S.2d 678 (2d Dep't 1999) (snow and ice); *Brown v. City of New York*, 265 A.D.2d 284, 696 N.Y.S.2d 69 (2d Dep't 1999) (snow and ice); *Hooghuis v. City of New York*, 264 A.D.2d 816, 696 N.Y.S.2d 183 (2d Dep't 1999) (snow and ice); *Faricelli v. TSS Seedman's, Inc.*, 259 A.D.2d 463, 686 N.Y.S.2d 85 (2d Dep't), *aff'd*, 94 N.Y.2d 772 (1999) (debris on floor); *Drevis v. City of New York*, 257 A.D.2d 595, 684 N.Y.S.2d 271 (2d Dep't 1999) (snow and ice); *Segretti v. Shorenstein Co. East*, 256 A.D.2d 234, 682 N.Y.S.2d 176 (1st Dep't 1998) (oil on floor); *Davis v. City of New York*, 255 A.D.2d 356, 679 N.Y.S.2d 677 (2d Dep't 1998) (snow and ice); *Robles v. City of New York*, 255 A.D.2d 305, 679 N.Y.S.2d 340 (2d Dep't 1998) (snow and ice); *Crawford v. MRI Broadway Rental,* 254 A.D.2d 68, 678 N.Y.S.2d 491 (1st Dep't 1998) (wet floor); *Goodman v. 78 West 47th Street Corp.*, 253 A.D.2d 384, 677 N.Y.S.2d 116 (1st Dep't 1998) (oil spill on sidewalk); *Baumgartner v. Prudential Insurance Company of America*, 251 A.D.2d 358, 674 N.Y.S.2d 84 (2d Dep't 1998) (snow and ice); *Agbi v. York International Corp.*, 249 A.D.2d 430, 671 N.Y.S.2d 319 (2d Dep't 1998) (oil on floor); *Durney v. New York City Transit Authority*, 249 A.D.2d 213, 671 N.Y.S.2d 262 (1st Dep't 1998) (debris on stairs); *Otero v. City of New York*, 248 A.D.2d 689, 670 N.Y.S.2d 545 (2d Dep't 1998) (snow and ice); *Urena v. New York City Transit Authority*, 248 A.D.2d 377, 669 N.Y.S.2d 662 (2d Dep't 1998) (snow and ice); *Fuks v. New York City Transit Authority*, 243 A.D.2d 678, 663 N.Y.S.2d 639 (2d Dep't 1997) (snow and ice); *Lowe v. Olympia & York Companies*, 238 A.D.2d 317, 656 N.Y.S.2d 930 (2d Dep't 1997) (wet floor); *Paciello v. Waldbaum's Supermarket,* 231 A.D.2d 618, 647 N.Y.S.2d 966 (2d Dep't 1996), *appeal denied*, 89 N.Y.2d 806, 654 N.Y.S.2d 716 (1997) (debris on floor); *Goldberg v. Hoffenberg*, 226 A.D.2d 424, 641 N.Y.S.2d 57 (2d Dep't 1996) (grease on a driveway); *Espinal v. New York City Housing Authority*, 215 A.D.2d 281, 626 N.Y.S.2d 790 (1st Dep't 1995) (debris in stairwell) and *Grillo v. New York City Transit Authority*, 214 A.D.2d 648, 625 N.Y.S.2d 293 (2d Dep't), *appeal denied*, 87 N.Y.2d 801, 637 N.Y.S.2d 688 (1995) (snow and ice).

Further, the Court of Appeals has spoken four times—in *Simmons*, *Piacquadio*, *Murphy*, and *Mercer*—on the issue of whether the recurrent condition theory is a valid predicate upon which to establish constructive notice in transitory-dangerous-condition cases and has explicitly ruled that the recurrent condition theory is no longer a viable theory on which to predicate constructive notice in such cases. It is time for all courts and the bar to adopt these holdings of New York's highest court.

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POINT OF VIEW

Why the Legal Profession Needs To Mirror the Community It Serves

BY L. PRISCILLA HALL

German Moses is dead. That means very little to you, but when I was asked to be one of the speakers on the topic "Why the Legal Profession Needs to Mirror the Community that It Services," it was the first thought that came to my mind. I always think of German Moses when I think of what it is I bring to the legal profession and to the judiciary.

German Moses is dead, but before he died he was a defendant on my probation calendar. I cannot remember the charges against him, but I remember him and his mother, who sat with pleading eyes in the back of my courtroom. When he appeared before me the first time, he was sullen, sulking and scowling with a reputation for being difficult. He was not a big man, but he was very black in color, my color. And he was hostile. And he was profane. And he projected a menacing aura, an aura of violence. White court officers would start to bristle as soon as he walked into the courtroom.

Lawyer after lawyer asked to be relieved because they could not get along with him. I despaired of any alternative other than jail because I could not get a lawyer to represent him continually. Finally I prevailed on a lawyer who I knew was patient and able to handle difficult people. He agreed but soon became exasperated also. He suggested, however, that perhaps German Moses needed an examination of his mental and emotional state to determine whether he had some organic problem that was causing his bad attitude. I quickly agreed.

When the report came back, everyone was surprised. All had assumed that German Moses was unintelligent, unlettered and uneducable. It turned out, and I quote the lawyer, "He is probably the smartest person in the courtroom." He was smart—German Moses—but he could not figure out how to negotiate in a racist society.

Because of who I am, I saw German Moses differently than others saw him. Because I know how it feels to be invisible, I could visualize him. Where others saw meanness, I saw fear. Where others saw truculence, I saw vulnerability. Where others saw a threat, I saw someone in need of supervision. Where others saw danger, I saw an individual waiting for someone to listen to him, to respect him. And to tell him what to do. So I did. I listened to him and I talked to him. I explained things to him. I told him what to do. Often he would threaten to defy my order, but he obeyed. Often he argued that he was not going to return to court, but he was always there when required. In fact, he once dragged himself in on crutches, having gotten into a fight in Philadelphia and been taken to the hospital. But he managed to get to New York and to the courtroom on the proper adjourned date. I assigned him to intensive supervision and the probation officers complained. They wanted to violate his probation because of his attitude. But I continued to remonstrate with German Moses and to admonish him. And gradually, oh so slowly, he calmed down.

I still remember the day the probation supervisor walked in smiling about German Moses. German Moses was doing well. He was reporting as he was supposed to. Going to the classes he was directed to attend. So instead of reporting to my courtroom on a regular basis, he was restored to probation. Oh happy day!

Decades ago, German Moses was Jewish, or Italian or Irish. Although perhaps not ethnically identical, the administrators of justice—the judges, prosecutors, police, defense attorneys, court officers, probation and parole officers—did look like the defendants who passed through the courthouse portals. Then, the system believed in probation, parole and rehabilitation, and the dispensers of justice exercised discretion to individualize justice and prevent the destruction of a people. And, based on the ethnicity of today's criminal justice administration, one would have to conclude that those prior policies have been overwhelmingly successful.

Now that the criminal justice system is filled with black and Latino defendants, it is dedicated to jailing people for "quality of life" crimes, imposing higher and higher mandatory minimums, and the ability of administrators of justice to exercise discretion is so severely reduced it is almost nonexistent.

Last Sunday's *Times* carried opinion editorial pieces by ten Americans of diverse backgrounds, including Patricia Williams, a Columbia University law professor and a winner of one of this year's MacArthur "Genius" Awards; Robert L. Johnson, chairman of Black Entertainment Television and soon-to-be airline entrepreneur; and Barbara Smith, owner of restaurants in Manhattan, Sag Harbor and Washington, D.C. In spite of their respective academic brilliance, money or fame, each wrote about the experience of being invisible in a white society. If Prof. Williams, Robert Johnson and Barbara Smith are invisible, what hope is there for the German Moseses?

Some time after German Moses had been restored to probation, the supervisor walked in looking unhappy. He had unhappy news. German Moses was dead. I was devastated. What more could I have done? Still I knew I had

tried. I made a difference if only for a while.

I still make a difference. Because of who I am, I bring something additional to the process. Because of who I am, I see things a little differently. Because of who I am, I hear things a bit differently. Because of my experiences, I bring a different perspective, a different approach, to the problem-solving apparatus that is the criminal justice system.

That difference is what makes diversity valuable. Diversity can make the invisible visible. It can allow the judicial system to treat people not merely as bodies, "perps" or numbers. Diversity has a very distinct advantage. It allows justice to see.

L. PRISCILLA HALL is a justice of the Supreme Court, Kings County. This article is adapted from an address she gave in July at an American Bar Association, "Town Meeting on Diversity in the Legal Profession."

Language Tips

By Gertrude Block

Question: To describe our adversary's ignoring of critical points in our opening brief, my co-counsel and I used the word *elide*. (Dictionaries define *elide* as "strike out.") However, when asked to substitute the phrase *elide over*, I refused because *elide* includes the word *over*, and it makes no sense to say "strike out over." But several judicial opinions using the phrase *elide over* were then produced. What is the answer?

Answer: Before responding to New York attorney Joe Genova, who sent this question, I checked the usually reliable *Words & Phrases* for opinions using the phrase "elide over," but found none. And neither *Black's Law Dictionary* (6th edition) nor Statsky's *Legal Thesaurus/Dictionary* (2nd edition) listed the word *elide*. Both the verb *elide* and its corresponding noun form *elision* are most common as grammatical terms.

Both *Webster's Third* (unabridged) and *The American Heritage Dictionary* (Second College Edition) list *elide*, which is derived from the Latin verb *laedere* (meaning "strike") plus the prefix *ex* ("out"). *Webster's* defines *elide* as "to suppress or alter, to strike out." The *AHD* defines *elide* in its grammatical sense, as "to omit or slur over a syllable in pronunciation." If you pronounce the word *comfortable* as "comf'table" or "comf'terble," you have "elided" the *or* sound between the *f* and the *t* in that word.

There seems to be no objection to Mr. Genova's choice of *elide* in the context he provided. He can argue that judicial opinions support his choice. Or to maintain the peace, he might substitute *ignore*, *omit*, or *leave out*, all of which have slightly different meanings.

Question: Attorney Maureen Kane writes from Mesa, Ariz., to ask which phrase, "*in determining*" or "*by determining*," is correct in the following statement: "The trial court erred (in/by) determining that the matter was moot."

Answer: Either of the prepositions, *in* or *by*, is correct. The statement could also substitute "when it determined" instead of either phrase: "The trial court erred when it determined that the matter was moot." Geographical areas may differ in their choice.

From the Mailbag

Several readers have commented about the July/August "Language Tips" column discussing the problems of translating Spanish into English. In that column, an American who lives in Mexico wrote that Americans who ask Mexican women if they are "embarazado" may be unaware that the adjective means "pregnant" in Spanish.

Many readers wrote to object. Albany attorney Paul Gillan, delighted that his four years of Spanish study at Princeton, had finally paid off, noted that the "o" ending of the adjective refers to the masculine gender, so a woman would be "embarazada" not "embarazado."

Other correspondents agreed with Mr. Gillan. From Minneapolis, Attorney Miguel Gonzalez commented that the illustration better indicated the erroneous effort of a non-native Spanish speaker to translate Spanish into English literally. *Embarazada*, he wrote, could also mean "shy, or embarrassed," and he listed several such possible translation problems. For example, "El es sensible" can mean either "He is sensible" or "he is sensitive" in English.

In the June *Language Tips*, I wrote that "Professor Mary Smith, who is a member of this faculty, is on sabbatical at present" was correct, the relative clause being non-restrictive because Mary Smith was already identified by name. That statement was true. However, correspondent Mr. Richard Inz correctly wrote that if there were two Mary Smiths who were professors, the sentence should then state, "The Professor Mary Smith who is a member of this faculty is on sabbatical at present." My thanks to Mr. Inz for making the point that the clause beginning "who" would then be a restrictive clause with no commas, because it answers the question, "Which Mary Smith?"

New York City correspondent Jonathan Lang sent the following advice that he said will save lawyers millions of words: "Instead of using 'in the event that' use 'if.'"

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

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

Tribute

Justice Robert H. Jackson

By Eugene C. Gerhart

It is indeed a pleasure to contribute on this occasion to your splendid memorial honoring a great American lawyer whom we all admire and respect, Jamestown's son, Robert Houghwout Jackson. Bob Jackson left a great record as a county-seat lawyer from Jamestown. He was outstanding as a U.S. Supreme Court judge. His part in the international trial prosecuting the Nazi war criminals at Nuremberg after World War II was unique.

Like Lincoln, Robert H. Jackson did not graduate from college or law school, but his record proved, as his briefs and arguments proved, that he was most effective in his choice and use of words. President Franklin Delano Roosevelt wisely selected him to be the U.S. Attorney General. Justice Louis D. Brandeis of the Supreme Court praised his work in that office, saying that Jackson "should be attorney general for life."

As a Supreme Court Justice himself, Jackson stood for integrity, honesty and independence. When he differed as a justice in a case in which as attorney general he had earlier advised President Roosevelt, he later changed his mind when the case came before the Supreme Court. With typical Jackson good humor, he said, "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." Massachusetts v. United States, 333 U.S. 611, 639-49 (1948).

Alpheus T. Mason, my favorite Princeton professor of politics, was proud of what he called 18th century liberalism. Justice Jackson, in my own opinion, was not a "knee-jerk intellectual liberal." He was for the underdog when the underdog was right, but the underdog was not automatically right just because he was an underdog. Jackson's dissent in the Supreme Court decision involving the American concentration camps in World War II is worth quoting. Korematsu was born on American soil, as an American citizen of Japanese ancestry. The Supreme Court permitted such people, although American citizens, to be incarcerated on the West Coast as part of a war-time military expedient. Jackson dissented, saying: "My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner." Korematsu v. United States, 323 U.S. 214 (1944).

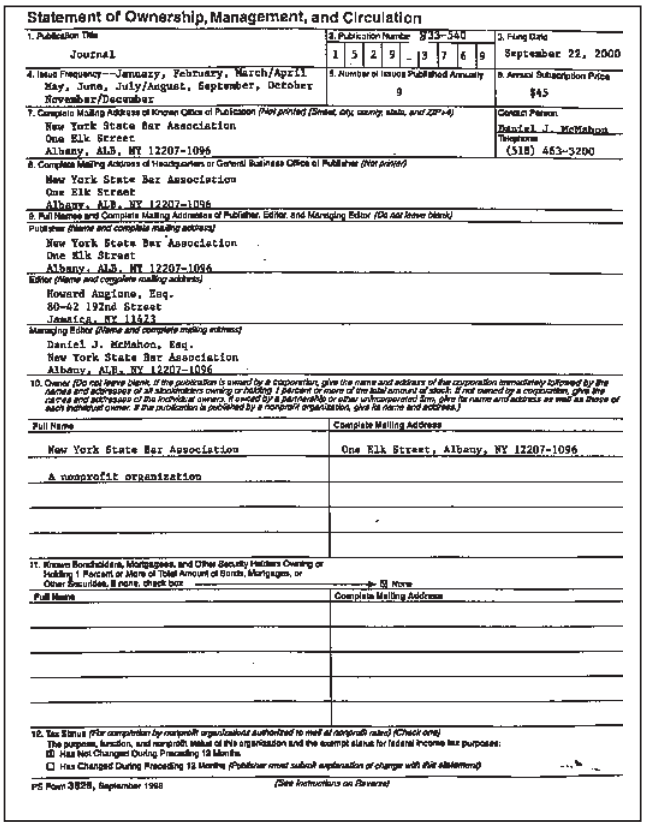
After World War II, Jackson was our leading American advocate in the prosecution of the Nazi war criminals in Nuremberg. This was a move by international law advocates to hold individual men responsible under international law for their crimes against humanity. At Nuremberg, Jackson, as American's advocate, was on a world stage. The world today is following the precedents that he and our allies established. John W. Davis, a leading New York appellate lawyer, said after Jackson's argument in Nuremberg, "Jackson's final argument was one of the greatest examples of advocacy I have ever read."

Winston Churchill and others have said the history of mankind is the history of war. The peaceable alternative to war is enforceable law. Society needs rules of conduct that must be enforceable because without order and enforceable law, society can accomplish very little. Mobs protect nobody's rights. The hierarchy seems to be this: first, we need order; second, we need rules of conduct that we call law; third, we need a recognized superior to enforce laws.

The holocaust in Europe in World War II is an example of what happens when fair laws are not enforced. The alternative to struggle and war is enforceable law—as Jackson said, "Leave to live by no man's leave underneath the law." If we are to have that, we need the kind of men that Robert Houghwout Jackson exemplified in his wonderful essay, "The County-Seat Lawyer." Here are Jackson's own words:

> But this vanishing country lawyer left his mark on his times, and he was worth knowing. He "read law" in the Commentaries of Blackstone and Kent and not by the case system. He resolved problems by what he called "first principles." He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay. Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation he was no mere hired hand. But he gave every power and resource to the cause. He identified himself with the client's cause fully, sometimes too fully. He would fight the adverse party and fight his counsel, fight every hostile witness, and fight the court, fight public senti-

Continued on page 54



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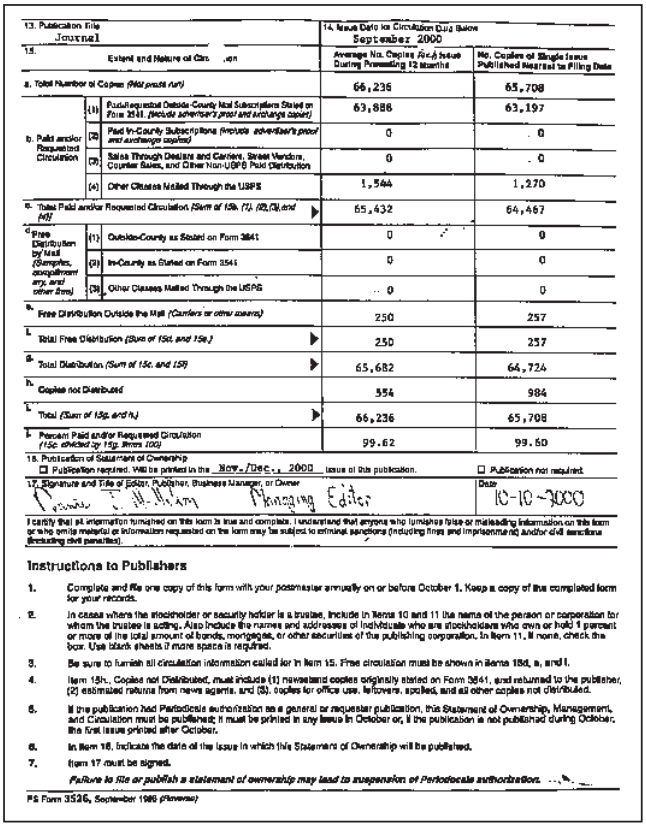

13. Publication Title: Journal	14. Issue Date for Circulation Data Below: September 2000	
15. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	66,236	65,708
b. Paid and/or Requested Circulation (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	63,886	63,197
(2) Paid In-County Subscriptions (Include advertiser's proof and exchange copies)	0	0
(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
(4) Other Classes Mailed Through the USPS	1,544	1,270
c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2),(3),and (4))	65,432	64,467
d. Free Distribution by Mail (Samples, complimentary, and other free) (1) Outside-County as Stated on Form 3541	0	0
(2) In-County as Stated on Form 3541	0	0
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e. Free Distribution Outside the Mail (Carriers or other means)	250	257
f. Total Free Distribution (Sum of 15d. and 15e.)	250	257
g. Total Distribution (Sum of 15c. and 15f)	65,682	64,724
h. Copies not Distributed	554	984
i. Total (Sum of 15g. and h.)	66,236	65,708
j. Percent Paid and/or Requested Circulation (15c. divided by 15g. times 100)	99.62	99.60

16. Publication of Statement of Ownership
☐ Publication required. Will be printed in the Nov./Dec., 2000 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: Managing Editor — Date: 10-10-2000

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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PS Form 3526, September 1998 (Reverse)

The *Journal's* 2000 Statement of Ownership, Management and Circulation

Index to Authors 2000

Index to Authors 1999

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GERHART
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> ment, fight any obstacle to his client's success. He never quit. . . . The law to him was like a religion, and its practice was more than a means of support; it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found him their only mediator and advocate. He was too independent to court the populace he thought of himself as a leader and lawgiver, not as a mouthpiece. He "lived well, worked hard, and died poor." Often his name was in a generation or two forgotten. It was from his brotherhood that America has drawn it statesmen and its judges. A free and self-governing Republic stands as a monument for the little known and unremembered as well as for the famous men of our profession. The County-Seat Lawyer, 36 A.B.A.J. 497 (June 1950).

I recall that once Bob Jackson said to me when I approached him about writing his biography, "Nobody would be interested in reading my biography." My legal assistant, Lorraine Wagner, and I interviewed him on numerous occasions in Washington. We were delighted when he invited his own secretary, Elsie Douglas, to have lunch with us in his chambers. He had a way of making ordinary people feel completely at ease.

I commend Jamestown and its lawyers for erecting a monument here to one of America's greatest lawyers. This statute of a great American advocate will be a continuing inspiration to future lawyers and judges, as well as American citizens who stand for fairness, integrity, fundamental decency and honor in American Law. I am happy to be able to contribute to his memorial ceremony. I salute you all, and mostly Robert Houghwout Jackson, whose life is an enduring memorial in law.

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required by Customs in his declaration.
His purpose for coming here, he wrote, was "pleasure,"
and not to sell toys—he was not seeking treasure.
All the toys that sat piled so high in his sleigh
Kringle said he planned to just give away.
But Santa's not recognized (as he should be)
pursuant to 501 sub (c) sub (3)
as a charity safe from the revenue code.
Gift taxes were levied on all of the load.

Kringle was sworn in, and said on the stand
that the toys were all made on Canadian land.
Assembled by elves[8] in a workshop at night,
at the North Pole that's lit by the cold northern lights.
Kris Kringle's *one* license must be poetic,
(The North Pole he spoke of must be the magnetic
because at the true Pole—at ninety degrees
north latitude—one will find nothing but seas.)
The magnetic pole is to what he referred,
because that's in Canada—Kringle demurred.
"No NAFTA duty is owed *you* because,
my goods are Canadian under the laws."

Kringle's luck had run out—for the federal sage
had read all of NAFTA—all 2,000 pages.[9]
"The *parts* in your toys were made, my good man,
in Pacific rim countries—Hong Kong and Japan."
It seems under NAFTA and its terms of art
the whole's less important than some of its parts.
One thousand pages in total defined
the formula three countries' bureaucrats signed.
It takes all those pages to figure what's meant
by NAFTA's term "regional value content,"
and "transaction value" and other mind numbers,
"bewildering reading" and all truly bummers.
"Unworkable ultimately," say trade reporters.[10]
Still, Kringle was pinched by Ms. Grinch on the border.
He summed in rambling phrases disjointed.
He pleaded that our children would be disappointed.
"NAFTA," he said, "needs one *more* page because
the drafters forgot to include Santa's clause."

Kris had no passport and no bills of lading
for his toys or components. As the evening was fading
he was warned with *Miranda* just as the judge ordered,
and then was turned back across Canada's border.
And we heard him exclaim as he drove out of sight,
"You all have a right to sing *Silent Night*."[11]

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1. The case referred to in this article is fictitious, although the references to the U.S. Code are correct. *See also Truckers Face Safety Crackdown on Day Border Was to Open*, New York Times, Dec. 19, 1995, p. B10.
2. 19 USC §§ 3301 *et seq*. NAFTA applies to U.S. trade with Mexico and Canada. It defines "Mexico" in § 3301(1) as "the United Mexican States" *if* the agreement is in force there.
3. 19 USC § 3411.
4. In 49 USC 40102(a)(6).
5. 25 USC § 500(a) permits the secretary of commerce to take reindeer by eminent domain and give them to "native Alaskans." However, that term includes descendants of those who inhabited Alaska in 1867 and apparently it was unclear if Mr. Kringle qualified to hold reindeer under that definition.
6. 49 USC § 40102(a)(7).
7. 16 USC § 670k(3).
8. NAFTA requires that labor standards in the exporting countries be similar to those in the United States, and inspectors could be sent to Santa's Workshop Ltd. where the toys were assembled to see if fair labor standards were employed there. Canadian officials had received complaints under their discrimination laws that Kringle (d/b/a/ Santa's Workshop) would not hire tall people or even those of average height.
9. C. Siegle, *Report Card: World Trade*, World Trade, June 1994, Vol. 7 No. 4, pp. 123-124.
10. *Id*. *See* C. Russell, *Tariff shifts and NAFTA*, Global Trade and Transportation, Vol. 11 No. 2, Feb. 1994, pp. 21-22.
11. If you cannot afford to carry a tune and a mortgage at the same time, a caroler will be assigned to you free of charge.

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RES IPSA JOCATUR

NAFTA's Why Santa Claus Is Not Comin' to Town

BY JAMES M. ROSE

On the Mexican border, Texas safety inspectors have applied rigorous safety standards in an effort to turn back the tide of Mexican trucks seeking to do business in the United States under the North American Free Trade Agreement (NAFTA).[1] The agreement[2] provides that regulations of the U.S. secretary of transportation concerning the safety of vehicles entering the United States apply to those who seek to bring goods into this country.[3]

On the night before Christmas when all was in order,
Kris Kringle's sleigh was stopped at the border.
Agents in kerchiefs and ear-flapped fur caps
stopped his sleigh full of toys at a spot on the map
where Customs inspectors make travelers pause
to check that they're complying with all of our laws.

Sue S. Grinch, an inspector, said "Something's the matter
with Kris Kringle's sleigh and his toys, as the latter
failed some of the tests that exist under NAFTA,
while in prior years he knew he 'didn't hafta.'"
And, Sue Grinch said, "You can't enter this nation
'cause your sleigh's not equipped for air navigation."

The sleigh was just lit with a single red light
on the nose of a reindeer, and can't fly at night
unless it's equipped with required transponders,
and the right-colored lights placed on Blitzen and Donner.
The arraignment occurred in its proper progression,
and Judge Hawley Smoot ruled at that evening's session:

"The vehicle Kris Kringle drove was a sleigh.
It wasn't an aircraft, this court holds today.
'Foreign aircraft' is a term defined in Forty-nine USC,
at section forty thousand one hundred three (C).
In that definition we are given directions
To where 'aircraft' is defined in the previous section.
A 'contrivance invented, used,' (the law recites there)
'or designed to navigate or fly in the air.'"[4]

A sleigh is not "aircraft," the trial court opined,
because it won't "fly" as *that* term is defined.
If a sleigh hits a bump and just leaves the ground
to judge that it's aircraft's not legally sound.
"Must Olympic ski jumpers," her Honor then queried,
"Wear lights on their skis if I follow your theory?"
Judge Smoot told Ms. Grinch, the chagrined prosecutrix,
"The government's certainly up to some new tricks!
Toys may be carried by carrier pigeons,
but they don't become aircraft, not even a smidgen."

"The means of propulsion for Kris Kringle's sleigh
was actually reindeer, large mammals that weigh
quite a bit, and do not achieve aviation
in Mexico, Canada or in this nation.
'Reindeer' are defined in an unhelpful way
in Twenty-five USC five hundred (j)
as 'reindeer and caribou.'[5] But it doesn't say
in section forty thousand one hundred two (a),[6]
in the forty-ninth title ('aircraft engines' defined)
that Congress had caribou herds on its mind.
And the magistrate simply could not fathom why
the government argued that reindeer could fly.

"There *is* one section of federal law
that defines 'off-road vehicles.' Congress foresaw
the need for some guidelines for when snowmobilers
drive off-road vehicles or use three-wheelers.
But in snow or on sand or on land used by voters,
defined 'off-road vehicles' all employ motors.[7]
A reindeer-drawn sleigh, it takes no erudition
to find, is not motorized by definition.

"If a sleigh hits a bump it may vault in the air,
but nobody makes one to *navigate* there.
A sled's not an aircraft that's *meant* for the sky.
Your argument—just like a reindeer—can't fly."

Kringle, however, remained at the bar.
He had no passport. He said he lived far
away in a workshop he built near a shoal,
assembling toys at the globe's Northern Pole.
"I don't long for Florida as I grow older,
I want to live in a place that is colder."
A stateless world citizen. (What could be dumber!)
He said that he lived at the South Pole in the summer.
A doctor who testified to the reporter
said Kringle must have a bi-polar disorder.

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