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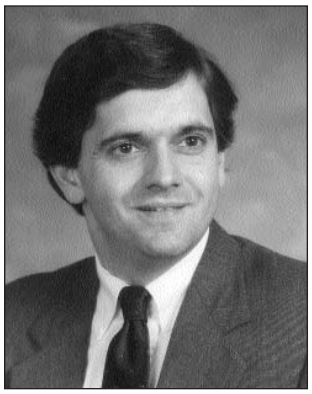
ONEONONE

A publication of the General Practice, Solo & Small Firm Section
of the New York State Bar Association

A Message from the Chair

Summer in the City



Already in 2001 the General Practice, Solo and Small Firm Section has introduced many exciting events for its members. January's Annual Meeting program in New York City was a tremendous success with programs on estate planning and ethics in addition to the continuation of our annual Cyber Café at which participants are able to experience the latest in practice technology on a hands-on basis.

In April, the GPS&SF Section was proud to host its "Shaping the Future" program in New York City. The Association's President, Paul Hassett and its President-Elect, Steve Krane, joined our panelists for a full day of presentations and discussions on how today's legal environmental is shaping our practices as well as how we as practicing attorneys can benefit from the constant changes that we are experiencing each and every day.

In addition to these programs, the GPS&SF electronic newsletter has been well received by our members. Every Section member may register as a subscriber for *E-Brief* at www.nysba.org and entering our Section Web site through the GPS&SF link.

Now that summer is upon us, it is time to turn our attention toward our upcoming summer program which will be held for the first time in a number of years in Manhattan at the Algonquin Hotel. The program is scheduled for Friday, July 27, 2001 and Saturday, July 28, 2001. Our substantive program is entitled "Representation of the Professional Clients from Cradle to Grave" and is designed to introduce our members to all aspects of representation of the professional client. Our panelists will present programs in the following areas of practice: Business Structure and Operations, Matrimonial, Estate Planning, Retirement Planning, Employer/Employee Practice Tips, as well as Criminal Law implications that may affect the professional client.

In addition to the substantive programs, the GPS&SF Section is sponsoring an evening of Mets Baseball at Shea Stadium, as well as dinner for the entire family at the ESPN Zone in Times Square. The program has been carefully scheduled to allow members and their families enough free time to enjoy all of the benefits of Manhattan in the summer. Representatives of the New York City Convention and Visitors Bureau will be joining us Saturday morning for a program designed for the entire family on what there is to see and do in New York. The Bar Association's staff has gone to great efforts to present a very informative program at a very reasonable cost. We hope that you will all be able to join us in New York this summer.

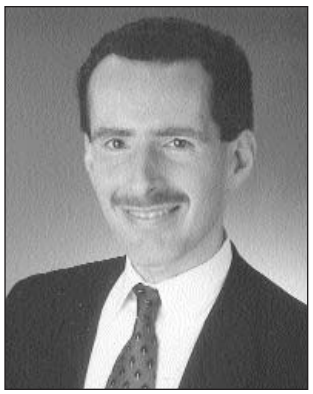
Jeffrey M. Fetter

Inside

From the Editor

For your words to be eternal, they need not be everlasting.

Abba Eben, Israeli Statesman and Ambassador



One day, the Chair of the General Practice Section walked into my office in midtown Manhattan. She sat down and asked for a moment of my time. I know, she said, that you have a lot on your plate, and I do not want you to spread yourself too thin. But, do you think that you might have a few hours every three months to spend editing a newsletter for the General Practice Section?

I put down my pen. A "few hours every three months," I asked. "How few?" "Well, she said, "really, it's as much as you want it to be (pause) to do an excellent job. But, you decide."

Ordinarily, I would have turned down the offer without hesitation. I was only a couple of years out of the District Attorney's office. I was finding my niche in my practice, teaching, and working on what would become a three-volume treatise for West. And, besides, being single, if I had a "few hours every three months," I'd prefer to spend that time doing things that single folk do in Manhattan.

But I was being asked by the *Chair* of one of the most prestigious Sections of the New York State Bar Association. And, besides, this big shot of a Chair, well, she was my mother. And how can you say no to Mom?

That was 13 years ago. And I have never looked back with regrets. It turned out to be just a tad more than "a few hours every three months." But it was worth it. In *One on One*, the Section has a product for which we can be very proud. *One on One* has received acclaim from Bar Associations across the country, and has been a model for publications of other Associations and Sections. As Chair of the Section, I was thrilled to hear Association staff and Section Chairs acknowledge with appreciation the product we produced. And at national conferences for newsletter editors, I was proud to see the faces of fellow editors, sitting in awe of our Section newsletter.

Thirteen years is a long time in anyone's life, let alone that of a young, restless lad from the Bronx. Since my inaugural issue, I became more active in our Association, chairing or co-chairing the Special Committee on AIDS and the Law and chairing the Special Committee for Solo and Small Firm Practitioners for a total of more than seven years. And, as you know, I Chaired this wonderful Section for 19 months, a period longer than any previous Chair except for our founding Chair, Bob Ostertag. I took over the reins of the Section's highly successful and often copied *GP Fax Update* since 1996. During my tenure as Chair, I worked with the dynamic Steve Gallagher to develop *E-Brief*, our electronic monthly newsletter. I have loved every minute of my work for the Association and, most especially, with *One on One*. I hope that love has shown. But, as the song from *Pippin* goes, everything has its season.

With all the time and effort I invested in *One on One*, I could not have done it without the help of some very special people with whom I have had the privilege of working. First, and foremost, is the Newsletter Production Staff in Albany, who do the *real* work in following my crazy directions and putting together what you see as the final product. My first "boss," if you will, was Mary Beth Martin, who was so good at what she did that no one could infringe on her territory. After Mary Beth left, Wendy Pike took over and was soon joined by Lyn Curtis. Two better and more wonderful people simply do not exist. Thank you for everything, ladies. And pass on the thanks to your boss, Dan McMahon, a person who, through GP, I have had the pleasure and privilege of working with even before he took over the publications unit of the Association. Thanks for bending those "drop dead" deadlines for me, Dan.

In addition to the Albany staff, I have had the honor of working with 11 wonderful people (other than myself) who have proudly served this Section as Chair. Included among them are Muriel Kessler, Jim Reid, the late Hon. Lewis Friedman, Frank Rosiny, Senator Neil Breslin, Hon. Joel Asarch, Allen Lashley, Bill DaSilva, Irving Garson, Bill Helmer and Jeff Fetter. Thank you all for your encouragement.

Finally, there are the people who keep my engine running. My folks, my office staff and associates, thank you for your everlasting support. My bride—even after nine years, still my bride—thank you for your love and for sharing me with this great Association. And my dearest sweet children, Rachel Rose and Michael, who have graced the pages of *One on One* and have relished our Summer Meetings.

And thank *you*, members of this great Section, for your support over the years. See you on the back side.

Steven L. Kessler

The Basics of *Batson* in New York

By David J. DeMar

Batson v. Kentucky[1] and its progeny prohibit a party from using peremptory challenges to exclude a prospective juror from service when such a challenge is based upon that juror's membership in a cognizable group. A cognizable group is one that is "a recognizable, distinct class [that has been] singled out for a different treatment under the laws, as written or applied."[2]

This prohibition applies equally to the prosecution[3] and to the defense.[4] A party may assert a *Batson* challenge even when he does not share membership in the same cognizable group as the prospective juror.[5]

Although the overwhelming majority of reported opinions concern *Batson*'s application in criminal cases, note that *Batson* also applies to civil cases.[6]

The use of peremptory challenges in a manner which does not comply with *Batson* standards is a violation of the Equal Protection clause of the 14th Amendment to the United States Constitution[7] and the equal protection and civil rights guarantees of the New York State Constitution.[8]

Cognizability

The cognizable group must be limited and definable by some clearly identifiable factor. The group must have a common thread of attitudes, ideas and/or experiences. There must be a community of interest among the group's members such that the group's interests cannot be adequately represented if it is excluded from jury service.[9]

Cognizable groups include:

1. African-Americans (race);[10]
2. Males or females (gender);[11]
3. Caucasians;[12]
4. Italian-Americans (ethnic origin).[13]
5. Jewish-Americans (ethnic origin, not religious affiliation);[14]
6. Hispanics (ethnic origin).[15]

The Supreme Court of the United States has declined to consider the question of whether or not to extend *Batson* to include peremptory strikes based upon membership in a religion.[16] However, other courts have specifically extended it.[17]

Other courts have held that peremptory challenges based solely upon religious affiliation are prohibited by their respective state constitutions or other state laws.[18] The distinction should be made that a peremptory strike premised upon a juror's specific belief which is based upon that juror's religious conviction *is* permissible.[19]

The following are examples of groups that are not cognizable:

1. Simply "minorities"[20]; Note however, that it is possible to lodge a *prima facie Batson* objection by alleging that a party has used peremptory challenges in a discriminatory manner against jurors who posses membership *in more than one cognizable group*.[21]
2. Postal workers.[22]

The Three-Step Process

Once a party raises a *Batson* objection, the court must conduct its inquiry pursuant to a three-step process.

1. The party raising the challenge must make a *prima facie* showing that the opposing party has exercised its peremptory challenges to exclude one or more members of a cognizable group and that other facts or circumstances exist to raise an inference of discrimination.[23] As stated in *People v. Bolling*,[24] what constitutes a *prima facie* showing of discrimination depends

> . . . on the circumstances of each case. It may be based upon a pattern of strikes, the specific questions put by the prosecutor to the prospective jurors, a comparison of Caucasians accepted with African-Americans or Latinos excluded, the establishing of objective facts showing a prospective juror might favor the prosecution or other factors.[25]

The Court of Appeals later reiterated that

> 'There are no fixed rules for determining what evidence will give rise to an inference sufficient to establish a prima facie case' (*People v Bolling*, 79 NY2d 317, 323-324, supra). A pattern of strikes or questions and statements made during the voir dire may be sufficient in a particular case (see, *Batson v Kentucky*, *supra*, at 97; see also, *People v Jenkins*, 75 NY2d 550, 556, *supra*). Additionally, this element may be

> established by a showing that members of the cognizable group were excluded while others with the same relevant characteristics were not (see, *People v Bolling, supra*, at 324). Another legally significant circumstance may exist where the prosecution has stricken members of this group who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution (see, *People v Scott*, 70 NY2d 420, 425). The court should also take into consideration the fact that the mere existence of a system of peremptory challenges may serve as a vehicle for discrimination by those with racially motivated inclinations (see, *Batson v Kentucky, supra,* at 96*).*
>
> Further, although rarely dispositive, the fact that a disproportionate number of strikes have been used against members of a particular racial or ethnic group may be indicative of an impermissible discriminatory motive (see, *People v Jenkins*, *supra*, at 556). Conversely, '[t]he mere inclusion of some members of defendant's ethnic group will not defeat an otherwise meritorious [*Batson*] motion' (*People v Bolling, supra*, at 324). The inclusion of token members of a racial group is not an acceptable substitute for a jury selected by racially neutral criteria, *and the exclusion of even one member of a group for racial reasons is abhorrent to a fair system of justice (*emphasis added*).*[26]

The absence of an accurate record regarding the race and/or gender and/or ethnicity of the challenged or other jurors may lead to a finding that *prima facie* discriminatory intent has not been established.[27]

2. If the Court finds that the movant has met the burden of establishing *prima facie* discriminatory intent in the use of peremptory strikes, the burden then shifts to the opposing party to come forward with race-neutral[28] reasons for its peremptory strikes.[29]

Even if the reason is "ill-founded" it will be upheld unless discriminatory intent is inherent in the explanation.[30] In short, the race-neutral reasons need not be persuasive or plausible.[31] The race-neutral reasons can relate to a juror's status as a former crime victim, his residence, marital status, employment, appearance, etc. In short, almost any reason can pass judicial muster even a superstitious[32] or offensive one.[33]

3. The burden then shifts back to the party making the objection to establish that the alleged race-neutral reason is in fact "pretextual."

This is accomplished by establishing that jurors who were similarly situated were not challenged[34] or where the party accused of a *Batson* violation has failed to relate the race-neutral reason to the facts of the case and to the juror's qualifications to serve on that case.[35] A reason will not survive if it is patently ridiculous.[36]

The court may, *sua sponte,* raise a *Batson* objection.[37]

Remedies

When it has been established during jury selection that a juror has been excluded in violation of *Batson* principles, the court must order the juror to be seated as a juror.[38]

However, when a determination that there has been a discriminatory use of peremptory challenges is not made until after the trial "reversal of [a] . . . defendant's conviction is the only remedy."[39]

When it appears during a round of jury selection that there may be a developing pattern of discrimination, the court may order that those jurors who may have been discriminated against be retained beyond the current so that they may be seated in case a pattern does emerge.[40] A party can request additional opportunities to attempt to establish a *prima facie* case, but if there has already been an "ample opportunity" to do so and no further request is made, then there is no error by the trial judge in finding that no pattern of discrimination has been established.[41] If a pattern does emerge and a *Batson* objection is sustained, then a safe and fair remedy is for the judge to seat the impermissibly challenged juror in the seat he/she would have occupied in the earlier round(s).[42]

Only one New York State appellate court has ruled on the issue of *when* a *Batson* objection must be raised. It must be raised, *at the latest,* prior to when the last juror is sworn.[43]

The Court of Appeals has steadfastly declined to endorse a more specific procedure than the three step process outlined above for a court to use during the process of considering a *Batson* challenge. The conduct of the inquiry has been placed within "the sound discretion and molding of the trial courts . . . as long as the substantive principles are satisfied."[44] The Court prefers

> . . . an open court exchange between the competing camps, with appropriate opportunity for input from both sides to make a proper record and to assist the trial court in its . . . supervision of the jury selection.[45]

Consequently, there is no requirement that counsel testify under oath at a post-verdict *Batson* hearing, nor does defendant have the right to cross-examine the prosecutors at such a hearing.[46]

Caveats

1. A guilty plea is a waiver of *Batson* objections.[47]

2. It is incumbent upon the maker of a *Batson* objection to articulate and develop all the factual and legal grounds supporting the claim during the colloquy in which the objection is raised.[48]

3. A trial court's ruling that a proffered race-neutral reason for a peremptory strike is not a pretext for discrimination is entitled to great deference on appeal[49] so a party should specifically object at every step of the three step process to preserve arguments for appellate review.[50]

4. Practice tip—Establishing an optimum juror profile in advance of voir dire can, *inter alia*, help avoid inadvertently stumbling over *Batson's* pitfalls.[51]

Endnotes

1. 476 U.S. 79 (1986).
2. *Castaneda v. Partida*, 430 U.S. 482, 484 (1977).
3. *See Batson*, *supra*.
4. *Georgia v. McCollum*, 505 U.S. 42 (1992).
5. *Powers v. Ohio*, 499 U.S. 400 (1991).
6. *Edmondson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 630 (1991). *See, e.g., Barnes v. Anderson,* 202 F.3d 150 (2d Cir. 1999) (in an action alleging civil rights violations committed by Unified Court System Court Officers in N.Y.C. Housing Court, new trial ordered where district court erred by denying a *Batson* motion without explicit adjudication of the credibility of the non-movant's race-neutral explanations for the challenged strikes).There is an absence of reported state court civil action judicial opinions from New York dealing with *Batson* issues. Most probably this results from the fact that generally speaking, in state civil actions *voir dire* is not judicially supervised, nor is a court reporter present unless requested by a party to the litigation.
7. *Georgia v. McCollum*, *supra.*
8. *People v. Kern*, 75 N.Y.2d 638 (1990), *cert. denied sub nom. Kern v. New York*, 498 U.S. 824 (1990)
9. *See Castaneda*, *supra*; *see also* D. DeRiggi: Batson *and Membership in a Cognizable Group*, N.Y.L.J., July 14, 1997, p. 1, col. 2.
10. *Batson*, *supra.*
11. *J.E.B. v. Alabama*, *ex rel. T.B.*, 511 U. S. 127 (1994).
12. *People v. Stiff*, 206 A.D.2d 235 (1995), *lv. denied,* 85 N.Y.2d 867 (1995), *cert. denied sub nom. Stiff v. New York*, 516 U.S. 832 (1995).
13. *People v. Rambersed*, 120 Misc. 2d 923 (Sup. Ct., Bx. Co. 1996), *aff'd,* 254 A.D.2d 81 (1st Dep't 1998), *lv. denied,* 93 N.Y.2d 856 (1999)
14. *U.S. v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997).
15. *People v. Hernandez*, 75 N.Y.2d 350 (1990), *aff'd,* 500 U.S. 352 (1991).
16. *See State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied,* 511 U.S. 1115 (1994). (Jehovah's Witnesses not a cognizable group).
17. *See, e.g., State v. Purcell*, 18 P.3d 113 (Ariz. App. Div. 1, 2001) (*Batson* extended to strikes based solely upon religious membership or affiliation); *People v. Gray*, 104 Cal.Rptr.2d 848 (Cal.App. 2 Dist., 2001), specifically relying upon *dicta* in *People v. Wheeler,* 148 Cal.Rptr. 890 (1978); *State v. Hodge*, 248 Conn. 207 (1999), *cert. denied sub nom. Hodge v. Connecticut*, 528 U.S. 969 (1999).
18. *See People v. Langston*, 167 Misc. 2d 400 (Sup. Ct., Queens Co. 1996) (holding that *Batson* doctrine does not apply to peremptory challenges based on juror's Islamic religious affiliation, but New York Constitution prohibited such peremptory challenges); *Thorson v. State*, 721 So.2d 590 (Miss. 1998) (strike based on religious affiliation prohibited by state law); *but see Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1994) (*en banc*) (specifically declining to extend *Batson* to religious affiliation).
19. *See Hodge*, *supra*; *U.S. v. Stafford*, 136 F.3d 1109 (7th Cir. 1998), *cert. denied,* 525 U.S. 849 (1998) (*dicta*).
20. *People v. Smith*, 81 N.Y.2d 876 (1993).
21. *People v. Ramos*, 223 A.D.2d 565 (1996), *lv. denied,* 88 N.Y.2d 852 (1996) (African-American women).
22. *People v. Trent*, 273 A.D.2d 50 (1st Dep't 2000).
23. *People v. Childress*, 81 N.Y.2d 263 (1993).
24. 79 N.Y.2d 317 (1992).
25. *People v. Bolling*, *supra* at 323-324.
26. *People v. Childress, supra at* 266-267. *See e.g. People v. Rodriguez*, 258 A.D.2d 270 (1st Dep't 1999), *lv. denied,* 93 N.Y.2d 902 (1999) (fact that party exercised disproportionate number of challenges against females did not support *prima facie* discrimination where venire contained *substantially* greater number of females); *People v. Millan*, 216 A.D.2d 93 (1st Dep't 1995), *lv. denied,* 86 N.Y.2d 798 (1995) (federal *habeas corpus* citations omitted. *Habeas corpus* was ultimately denied.) (fact that prosecutor exercised 2 out of 5 challenges against 2 persons who were the first to be considered, insufficient in and of itself to establish *prima facie* discriminatory intent).
27. *See People v. Smith*, 186 A.D.2d 35 (1st Dep't 1992), *aff'd, People v. Smith*, 81 N.Y.2d 875 (1993), *rearg. denied, People v. Smith,* 81 N.Y.2d 1068 (1993).
28. Now that the types of cognizable groups recognized in *Batson* jurisprudence have expanded from race to include gender and nationality, the term "race-neutral" is inaccurate and misleading. Justice Alvarado (*see* n. 2, *supra*) and I suggest that the term "group-neutral" would be a proper replacement.
29. *Batson*, *supra*; *Childress*, *supra*; *see, e.g., People v. Barnes*, 261 A.D.2d 281 (1st Dep't 1999), *lv. denied,* 93 N.Y.2d 719 (1999) (juror's demeanor showed distrust of police when asked about issue of police veracity); *People v. Wint*, 237 A.D.2d 195 (1st Dep't 1997), *lv. denied,* 89 N.Y.2d 1103 (1997) (juror's soft spoken demeanor was ill-suited to her role as possible foreperson); *People v. Payne*, 88 N.Y.2d 172 (1996) (peremptory challenge based on the fact that juror's neighborhood is made up of residents of predominately one ethnic group or race is race-neutral reason, but that type of linkage *may be a pretext*); *People v. Pagano*, 216 A.D.2d 71 (1st Dep't 1995), *lv. denied,* 87 N.Y.2d 849 (1995) (challenging of teachers was based on attorney's prior experience with teachers as possible jurors, was case-related and was consistently applied); *People v. Roberts*, 208 A.D.2d 410 (1st Dep't 1994) (juror felt son had been wrongly convicted-indicated possible hostility toward prosecution; held racially-neutral reason); *People v. Jackson*, 213 A.D.2d 335 (1st Dep't 1995), *lv. granted,* 86 N.Y.2d 736 (1995), *appeal dismissed,* 86 N.Y.2D 860 (statement that prosecutor felt "uncomfortable" with juror because juror had been dismissed from civil venires, not *specific* enough to be race-neutral reason). *See also* D. DeRiggi, *Appellate Court Guidance on* Batson *Challenges*, N.Y.L.J., March 12, 1996, p.

1, col. 1 (cataloguing permissible and impermissible race-neutral reasons).

30. *See People v. Allen*, 86 N.Y.2d 101 (1995).

31. *See Purkett v. Elem*, 514 U.S. 765 (1995) (prosecutor used peremptory challenge to strike juror with long unkempt hair, beard and mustache; reason found to be race-neutral); *People v. Payne*, 88 N.Y.2d 172 (1996).

32. *See Purkett, supra*.

33. *See, e.g., People v. Dolphy*, 257 A.D.2d 681 (3d Dep't 1999), *lv. denied,* 93 N.Y.2d 872 (1999) (prosecutor used peremptory challenge against African-American juror-no *Batson* violation found where race-neutral reason given by prosecutor was that his experience showed that overweight people are always sympathetic to defendants); *compare with People v. Miller*, 266 A.D.2d 478 (2d Dep't 1999), *lv. denied,* 94 N.Y.2d 923 (2000) (defense counsel used peremptory challenge to exclude juror because she seemed to be "unhealthy" and overweight and might not be able to sit through one week of testimony—*Batson* violation found where reason was race-neutral but was ultimately held to be pretextual). It is curious that the Appellate Division does not explain *why* it affirmed the trial judge's ruling on whether or not the reason was pretextual except to note, relying on *People v. Hernandez*, *infra,* that a trial's judge's rulings are entitled to great deference in this regard.

34. *See, e.g., People v. Rivera*, 272 A.D.2d 140 (1st Dep't 2000), *lv. denied,* 95 N.Y.2d 857 (2000).

35. *See People v. Jones*, 223 A.D.2d 559 (2d Dep't 1996), *lv. denied,* 88 N.Y.2d 880 (1996).

36. *See People v. Reyes*, 274 A.D.2d 323 (1st Dep't 2000), *lv. denied,* 95 N.Y.2d 870 (2000) (defense counsel offered "my client thought the juror looked small and diminutive," trial judge stated, "[if]we are going to do that everybody can be excused." Appellate Division affirms trial judge's ruling that the race-neutral reason was pretextual).

37. *See People v. Nelson*, 214 A.D.2d 411 (1st Dep't 1995), *lv. denied, People v. Nelson*, 85 N.Y.2d 977 (1995). In *People v. Nelson*, *supra*, the Appellate Division held that the record did

> . . . not support defendant's claim that the trial court interfered excessively and improperly in the proceedings. The trial court properly noted, *sua sponte*, the *prima facie* existence of a ***Batson*** violation when the defense peremptorily challenged eight out of ten white venire persons, and properly requested that defense counsel provide race-neutral reasons for the challenges.

See also Williams v. State, 669 N.E.2d 1372 (Ind. 1996) (summarizing how courts in other jurisdictions have treated this issue).

38. *People v. Bolling*, 79 N.Y.2d 317 (1992), *reconsideration denied sub nom. People v. Steele,* 80 N.Y.2D 827 (1992); *but see People v. Rivers*, 2001 WL 301887 (1st Dep't, March 27, 2001) (After making its final *Batson* ruling the court offered to declare a mistrial and begin jury selection anew; defendant rejected this offer which would have provided a reasonable remedy for all *Batson* claims, thereby waiving these claims).

39. *People v. Irizarry,* 165 A.D.2d 715, 718 (1st Dep't 1990). In *Irizarry*, the Appellate Division criticized the remedy chosen by the trial court:

> We also note our disapproval of the procedure utilized by the trial court once the issue was raised. Where jury discrimination is asserted, various remedies are available including the recalling of the excused jurors, a mistrial, or reversal of the conviction, depending upon the point in the proceedings when the issue is raised and the action taken in response thereto. Where a finding of jury discrimination is not made until after the conclusion of the trial, reversal of the conviction is the only remedy, and the one to be avoided if at all possible. Here, defense counsel commendably articulated the concerns about the use of peremptory challenges promptly, at an early stage of jury selection. The appropriate response by the court at that juncture would have been the recalling and reseating of the challenged juror for further inquiry. Instead the court waited until after the jury was impaneled before addressing the issue and denied the mistrial motion without making a specific finding on the critical issue of whether there was a pattern of purposeful discrimination. The subsequent issuance of findings in a written opinion was not a procedure designed to promptly confront and, where demonstrated, correct instances of purposeful discrimination in the jury selection process.

People v. Irizarry, supra at 718-719.

40. *See People v. McLeo*d, 2001 WL 301428 (1st Dep't Mar 27, 2001); *People v. Moten*, 159 Misc. 2d 269 (Sup. Ct., Queens Co. 1993).

41. *People v. Wiliams*, 271 A.D.2d 363 (1st Dep't 2000), *affirming* Alvarado, J. (Part 55, Sup. Ct., Bronx Co.).

42. *People v. Moten*, *supra.*

43. *People v. Harris*, 151 A.D.2d 961 (4th Dep't 1989).

44. *People v. Hameed,* 88 N.Y.2d 232, 236 (1996), *cert. denied sub nom. Hameed v. New York*, 498 U.S. 824 (1997).

45. *People v. Hameed*, *supra* at 238.

46. *See People v. Hameed*, *supra*.

47. *People v. Green*, 75 N.Y.2d 902 1331 (1990).

48. *See People v. James*, 278 A.D.2d 340, 717 N.Y.S.2d 346 (2d Dep't December 11, 2000) (Defense counsel stated only that prosecutor had "pretty much taken off all African-American men" not enough to lodge step one *prima facie* challenge). Failure by appellate counsel to raise a *Batson* objection on appeal when it has been lodged during *voir dire* constitutes ineffective assistance of appellate counsel. *People v. Reyes*, 151 A.D.2d 262 (1st Dep't 1989).

49. *People v. Hernandez*, 75 N.Y.2d 350 (1990), *aff'd,* 500 U.S. 352 (1991)

50. *See, e.g., People v. Reyes*, 274 A.D.2d 323 (1st Dep't 2000), *lv. denied,* 95 N.Y.2d 870 (2000) (after defense counsel offered allegedly race-neutral reason for challenging juror, fact that court ordered that juror be seated "over the defense objection" did not preserve defendant's appellate argument that court failed to make step three finding of discriminatory use of peremptory challenge); *See People v. Geigel*, 262 A.D.2d 200 (1st Dep't 1999), *lv. denied,* 93 N.Y.2d 1018 (2000) (defense argument that court improperly combined steps two and three of *Batson* review process is not preserved on appeal *if not specifically raised*).

51. *See* T. Liotti & D. Cole, *Voir Dire: Making the Most of 15 Minutes*, N.Y.L.J., June 22, 2000, p. 1, col. 1.

David J. DeMar (B.A., Columbia '82; M.A. (Phil.), J.D., Duke University '87) has served as a Court Attorney with the Unified Court System since March 1992. Since January 3, 1994, he has proudly served as Court Attorney to Hon. Efrain Alvarado, A.J.S.C.

This article was adapted from a presentation given as part of "Defense of a Criminal Case," a CLE program at the Bronx County Bar Association on May 8, 2001.

Environmental Litigation

By Michael A. Oropallo

Environmental law is ubiquitous. Unlike many traditional areas of practice, environmental law and litigation does not stand alone. Instead, environmental law borrows many of its doctrines from the old and well-established common law. However, environmental law "bootstraps" that jurisprudence with new regulatory and statutory schemes. Thus, environmental law is a hybrid.

To practice environmental litigation, attorneys must be willing to be innovative. Due to its recent emergence, little substantive case law exists that might give the practitioner guidance as to where his or her client stands. By the same token, the lawyer practicing environmental litigation must be familiar with a multitude of statutes and regulations.[1] With those laws in mind, one must look to case law and legal doctrines associated with more traditional torts such as negligence, trespass and nuisance, in order to "craft" legal arguments.

This article is designed to guide the general practitioner through the maze of legal issues that a lawyer is faced with when clients present themselves with "environmental problems." We will attempt to stress the practical over the substantive. For a better understanding of the "problems," and to explain possible solutions, we will begin the discussion with a sample scenario, and end with some options on how to proceed.

The Flying "K"

It is a typical weekday afternoon, and you are sitting in your office mulling over the most recent edition of *One on One*. Suddenly your phone rings, and on the other end of the line is your long-time client, Tex Aco. Tex has "a problem." Recently, while getting ready to sell a piece of property that was formerly used as a gasoline service station in the 1980s by the Flying "K," Tex decided (without your input) to do some follow-up. After being asked by the prospective purchaser to investigate, Tex agreed to do a "phase one." A phase one is a typical environmental investigation performed by engineers/consultants, to determine the presence of environmental contamination.

The phase one unfortunately identified several potential environmental threats. The gas station had been abandoned by Flying "K" in 1985. However, there remained in the ground several underground storage tanks (USTs) formerly used to store petroleum. In fact, one of those tanks had in it an unidentified liquid substance. There are two more smaller tanks located under the building, together with a grease pit and some asbestos pipe coverings that are all but disintegrated.

As you might imagine, the potential purchaser, Les Money, has repudiated the purchase contract. To add insult to injury, Les made a call to the New York State Department of Environmental Conservation (NYSDEC), informing them of the situation. However, and without realizing it was "wrong," Tex had, in the interim, and without informing the NYSDEC, had the tanks excavated by one of his "hired men," and directed that the USTs, and the "white chips" next to the heating pipes, be buried in the "back 40" behind Tex's farm.

Tex is now calling you from the farm, and the NYSDEC is at his door. He needs help! **What do you do?**

"Insurance coverage can make or break most clients' financial situation."

A. Get the Facts

Like many a law school exam, there are a number of issues that present themselves in the above scenario, both civil and criminal. The first thing that needs to be done, though, is to begin to undertake "damage control." Before Tex gets himself into any additional "hot water," you need to get him to stay quiet until you get there. You explain to Tex that he should not speak to anyone until you get there, and Tex agrees. You arrive at the farm just in time to receive copies of appearance tickets, Notices of Violations, and civil complaints. After the matter hits the "front page" the next day, you receive several more civil complaints from the adjoining neighbors of the Flying "K," and landowners living next to the farm's "back 40."

1. What do you do first?

There are as many options or alternatives here as there are lawyers that practice environmental law. Most likely, the pleadings you receive will contain a number of allegations, and will probably cite various statutes. Though most of those citations can technically apply, usually there are a few to several (in Tex's case) legal claims that are the primary focus of the regulatory agency or plaintiff. Before you even begin to research the law, however, make a set of copies and forward everything to Tex's insurance carriers.

Insurance coverage can make or break most clients' financial situation. Therefore, it is critical to sit down with Tex, get the names of every insurance carrier that

he has had since he owned the Flying "K" property. Get actual copies of you can.[2] Then, put together a letter to each of these carriers (return-receipt is a good idea), and ask for a defense and indemnification. This *must* be done immediately, as an insurer will disclaim coverage if they don't receive notice "as soon as practicable."[3] While this will not assure coverage, it may. More often than not, if there is a covered "occurrence," an insurer will defend under a "reservation of rights."[4] In any event, you have preserved your client's rights to defense costs, which may reach six-figures in many of these cases.

Once you have placed the carriers "on notice," (or before such, depending upon how much time has transpired), you then have to put in an appearance (or obtain an extension, or otherwise move), in order to protect your client's rights. This is often the time that you might want to think about referring the matter out to an environmental practitioner. There are many reasons to consider such, and every situation is different. However, there are many "traps" for the unwary, and knowing the "players" can often benefit the client. Sometimes, the best arrangement can be a dual representation, where you act as a liaison with environmental counsel. Whether you do decide to refer the matter out, or end up defending the client in whole or in part by yourself, we will explore some of the legal issues that might come into play in Tex's situation.

a. Navigation Law

The New York State Navigation Law regulates petroleum and prohibits the discharge of petroleum.[5] The person responsible for a discharge of petroleum must immediately notify the NYSDEC. Moreover, the person responsible for the discharge must remove the discharge immediately. Additionally, the owner of USTs must notify the NYSDEC prior to the permanent closure or removal of the USTs.

Tex's excavation of the abandoned USTs violates a number of Navigation Law requirements.[6] First, Tex failed to notify NYSDEC prior to the removal of the USTs. Tex had an obligation to complete a form and submit it to NYSDEC 30 days prior to the removal of the UST. Second, to the extent there was any evidence of a release of petroleum from the USTs, assuming the capacity of all the USTs exceeded 1,100 gallons, the NYSDEC needed to be notified of such contamination. Upon notification of the contamination, NYSDEC would have opened a "spill file" number associated with the property.[7] Third, there are specific closure requirements for the USTs, including a site assessment, cleaning of the UST carcass, and other steps to minimize releases of petroleum to the environment.

With regard to Tex's decision to re-bury the USTs in his "back 40," this was a very bad decision. Unfortunately, Tex now has two properties that are likely contaminated with petroleum. To the extent there is contamination at both properties, the NYSDEC will open a "spill number" for each parcel. Not only will Tex be responsible to clean up and remove the petroleum contamination, the NYSDEC will likely issue significant penalties for the violation, and Tex's apparent attempt to hide the contamination. The Navigation Law authorizes penalties up to $25,000 per day per violation.

"Sometimes, the best arrangement can be a dual representation, where you act as a liaison with environmental counsel."

b. Criminal Activity

As Sergeant Friday always said, "everything you say can and will be held against you in a court of law." Admissions made by Tex at the time of NYSDEC's arrival, and prior to yours, may effectively seal his fate in any subsequent criminal proceeding. Just like other law enforcement agencies, the NYSDEC maintains an entire bureau of trained criminal investigators that employ various and effective techniques to get a person to talk before coming to the realization that they need a lawyer. It is therefore imperative that clients be instructed at the very earliest opportunity that they are to say and do nothing to anyone about what they did and why. If there is a story that must be told, it should be told by counsel, or in certain instances, by the client, in the presence of counsel.

A credible admission by Tex concerning the removal and improper disposal of the USTs, and asbestos-containing materials, and the utilization of personnel not properly trained, may result in a grand jury indictment and a subsequent trial where the legal burden of proof will remain with the People. However, the practical burden will effectively shift to Tex when he moves to suppress those admissions, or tries to prove that he did not make them. Given the multifarious laws and regulations concerning USTs, petroleum, solid and hazardous wastes, confined spaces, health and safety training, worker protection and permissible exposure limits, asbestos exposure and abatement, it is certain that Tex violated several environmental laws. Depending on his mental state at the time (which you have often questioned), it is quite possible that he committed certain environmental crimes as well. Compounding Tex's woes is that his possible environmental crimes may have resulted in the exposure and endangerment of another, which will surely raise the ire of the prosecutors, if not the judge and jury as well.[8]

c. Asbestos

There are specific Industrial Code provisions that govern the removal and disposal of asbestos. Provided that the "white chips" that Tex had removed were actually asbestos, Tex may face additional civil and criminal penalties.

d. Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, *et seq.*)

RCRA, first enacted in 1976 (as the Solid Waste Disposal Act), established a system for the control of "hazardous waste."[9] By requiring the tracking of waste from "cradle to grave," RCRA ensures that hazardous waste is properly handled and accounted for from the point of generation through transportation, treatment, storage, and ultimate disposal (the paperwork that is required to ride along with the waste is called a "manifest"). While CERCLA or "Superfund"[10] is more commonly associated with hazardous waste, it should be noted that the overwhelming majority of hazardous waste is regulated under RCRA, which must be adhered to by any new generator of waste, or operating facility with historical deposition of hazardous waste from its operations. CERCLA is primarily concerned with abandoned sites that have an imminent threat to the environment.

RCRA was amended in 1986 to also address environmental risk incident to underground storage tanks containing petroleum or other hazardous substances. Pursuant to RCRA, the Environmental Protection Agency has promulgated regulations regarding the specifications, maintenance and ultimate closure of underground storage tanks. Additionally, RCRA provides for the reporting of any release of a hazardous waste or petroleum.

Finally, in addition to the risk-reduction and remedial aspects discussed above, RCRA allows for citizen suits against any person who has contributed to the handling, storage or disposal of any solid or hazardous waste which may present an "imminent and substantial endangerment to health or the environment."[11] Accordingly, a neighbor may sue to force a potentially responsible person to clean up such a threat.

Considering the facts surrounding the Flying "K" in the context of RCRA, the following concerns are raised:

1) The disposal of "white chips" may actually be an unlawful release of hazardous waste. RCRA requires the waste "generator" to characterize the waste and, if determined to be hazardous, manifest the waste and assure that it is properly transported to a facility licensed to accept that particular waste. In the instant case, the unregulated transport and dumping may subject the generator to criminal liability. Additionally, depending on volume dumped, the release of "white chips" to the environment may have been subject to a reporting requirement (which must be done within hours of the release).

2) Similarly, the release of the contents of the underground tank may have been in violation of the requirement to characterize possible hazardous waste (because the contents are "unknown," it is possible that the tank may have been used for solvent recovery; which is often hazardous waste). If the contents were confirmed to be petroleum, Tex could avoid the hazardous waste requirements for disposal (since, under RCRA, petroleum waste is deemed to not be hazardous). However, the release of petroleum is nevertheless proscribed and RCRA provides the authority for imposing remediation of any site impacted by the release.

3) The tanks were, most likely, not removed in accord with EPA regulations.

4) Depending on where the "unknown" tank contents ended up, Tex may be susceptible to a citizen suit action to force the cleanup of the waste (if the state or federal government does do so first).

Note that, in addition to the foregoing RCRA concerns, there exist state law analogues to most of the RCRA provisions discussed (citizen suit authority is one notable exception). Accordingly, a well-publicized illegal dumping will likely draw the attention of not only the United States Attorney, but the State Attorney General (and any local DA that seeks the cultivate a "green" image).

e. Indemnification

Indemnification is what most of our clients are looking for, when faced with potential environmental liabilities. If there is a potential source for indemnification, it is almost always worth pursuing. That is, provided that the entity (or its insurance company) is viable. Therefore, one should carefully examine possible sources of indemnification.

Generally, there are two types of indemnification, common law and contractual. Common law indemnification arises when a person becomes vicariously liable for the negligence of another. In such a case, the vicariously liable party would be entitled to claim indemnification from the actively culpable party, provided that party is solvent and viable. Contractual indemnification exists, as the term suggests, *vis-à-vis* an agreement between the parties. Most contracts contain "indemnification clauses." These provisions form the basis for a contractual indemnification claim.[12] Contractual indemnification claims are often preferred to common law indemnification claims. Furthermore, contractual language can supersede the common law. Therefore, we will address contractual first.

In our particular situation, Tex, and/or his attorneys, should investigate the facts of the matter to determine whether or not any agreements existed between Tex (as lessor) and the Flying "K" (as lessee). If so, the specific language of the agreement between contracting parties would likely control as to the liabilities between them.[13] As between Tex and the Flying "K," it is likely that Tex would be entitled to indemnification from the Flying "K," for "any liabilities arising out of the use or condition of the land." However, this language, as has the entire field of environmental law, has evolved over the years. For instance, there may be a dispute over whether the language of the agreement actually intended such a result. Courts will usually give the agreement the meaning set forth within the "four corners" of the instrument, and interpret the contract by its "clear and unambiguous" language.[14] The results vary on a case-by-case basis.

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In addition, there will likely be some litigation over the extent to which the Flying "K" may be liable, and for what, if any, damages. This is especially applicable given Tex's conduct. The Flying "K" may even try and argue that the underlying contract, and any indemnification language contained therein, is void because of Tex's illegal and clandestine actions.

Common law indemnification, again, is a bit more esoteric. In this case, one would probably make a claim against the Flying "K" for common law indemnification based upon the fact that the Flying "K" is responsible for the underlying contamination from the USTs at the former gasoline service station. After all, it is clear that the Flying "K" left the USTs at the site.[15] Tex could also base his claim, in part, upon New York's Navigation Law, as was discussed above. However, there will be claims that even if the Flying "K" is liable for some or part of the damages, that Tex exacerbated the situation, and failed to mitigate the damages.

Conclusion

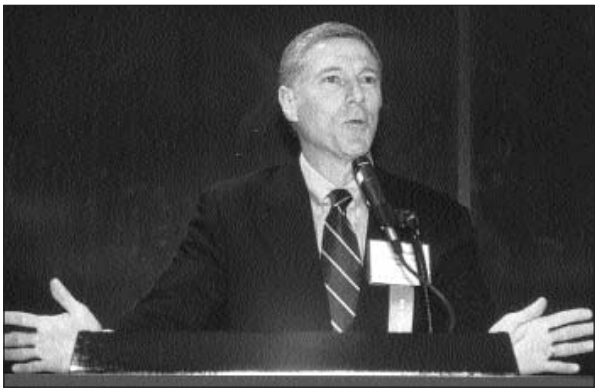
As you can see, a plethora of legal issues arose in a very short phone call from a single client. While we have attempted to outline some of these issues, they are just the proverbial "tip of the iceberg." A good working knowledge of environmental law, together with some innovative lawyering, some prompt action, and a little luck, can sometimes save your clients significant time, expense, consternation, and perhaps even jail time.

Hopefully, this article has provided you with some practical information for use in your practice. As a general practitioner, it is a good idea (and very often good business) to have a working knowledge of these areas, in order to assist your clients when receiving calls like, but hopefully less egregious than, Tex's as is referenced in our example. An early response is often necessary to protect your clients' rights.

Endnotes

1. It very well may be impossible to know each and every provision of OSHA, RCRA, TSCA, and others, one must recognize which laws apply, and be prepared to determine their applicability.
2. There do exist companies that have archives of policies for years in question. You may need to eventually contact one of these sources.
3. New York does not require prejudice on the part of the insurer, and short periods of time that pass before "notice" is given have been held to sustain a disclaimer.
4. In such a case, your client may be entitled to choose his own attorney. *See Utica Mutual Insur. Co. v. Cherry*, 38 N.Y.2d 735 (1973).
5. *See* N.Y. Nav. Law §§ 181 *et seq.* (McKinney 2001). *See also White v. Reagan*, 171 A.D.2d 197 (3d Dep't 1991).
6. Regulations implementing the Navigation Law can be found at 6 N.Y.C.R.R. Part 613.
7. The "spill file" at the NYSDEC is often the first place to look for information. The NYSDEC has forms that can be filled out to obtain this information pursuant to the Freedom of Information Law contained in New York's Public Officers Law.
8. This may also spawn "toxic torts" from nearby residents, or from the "hired man."
9. This definition varies depending upon a number of factors and criteria.
10. 42 U.S.C. §§ 9601 *et seq.* (West 2001).
11. *See* 42 U.S.C. § 6972 (West 2001).
12. Obviously, the most common indemnification agreement is an insurance policy.
13. Recognizing that any ambiguities would be construed against the party who drafted the agreement.
14. *See Kass v. Kass*, 91 N.Y.2d 554 (1988).
15. Of course, there may be a proof problem, compounded by a potential "spoliation of evidence" issue.

Michael A. Oropallo is a partner at the Syracuse office of Hancock & Estabrook LLP. His practice includes the trial and litigation of complex civil matters, including various environmental laws. He would like to acknowledge the assistance of fellow partner, Douglas H. Zameles, and associates Wendy A. Marsh and Thomes W. Raleigh.



Michael S. Ross, center stage, during the Annual Meeting Ethics panel presentation.

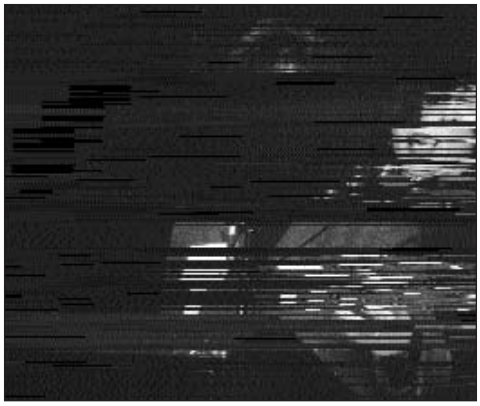
Frank R. Rosiny (r) and Ethics panel moderator Steven L. Kessler listen and learn.

Scenes from the

2001 Annual Meeting

January 23, 2001
New York Marriott Marquis

Incoming Section Chair Jeffrey M. Fetter presenting a plaque to outgoing Section Chair Steven L. Kessler at the Section's Annual Dinner at the Penn Club in Manhattan.



Debbie Scalise discussing the don'ts and really, really don'ts of the practice of law during the Ethics panel presentation.

Hot Tips panelists await their turn while listening to Betty Semel during the popular morning CLE program.

Outgoing Section Chair Steven L. Kessler and Hot Tips moderator and former Section Chair Willard H. DaSilva enjoying a light moment during the festivities.

Scandal by Gaslight

By William S. Helmer

At the beginning of ***Anna Karenina,*** Tolstoy advises us that "Happy families are all like; every unhappy family is unhappy in its own way." Maybe so, but my column today tells the tragic stories of two unhappy families that shared a number of seemingly innocuous characteristics. For one thing, they were united by time, place, and class. They were members of the State's social, political, and legal elite, travelling in style by rail between Washington, New York City, Albany, and Saratoga during the "Gilded Age" following the Civil War.

They also displayed a peculiar marital knot in their family trees.

In the Nineteenth Century, legal divorce was infrequent, but many marriages were cut short by the death of one of the spouses before the children had grown up and moved away. After a suitable period of mourning, the surviving spouse would typically begin the search for a new mate. That search often led him or her to others in the same predicament—widows and widowers with children.

Thus, the blended "Brady Bunch" style of household was not uncommon in those days. Inevitably, cases arose in which the young girls and boys who were thrown together as siblings began to develop a romantic affinity for one another. We may assume that marriages in such cases were usually no more or less successful than any others, but, in both of the families that are my subject, the marriages ended in the bloody murder of one of the spouses by a family member.

Reuben Hyde Walworth was the "last Chancellor" of New York's Court of Chancery, which was replaced by the Court of Appeals in 1848. It is said that the bar's enthusiasm for the new court plan was motivated in large part by the prospect of forcibly retiring the querulous Chancellor. Reuben was a prominent Whig politician who had been nominated for the U.S. Supreme Court in 1844 and had run unsuccessfully for Governor in 1848.

A widower with several precocious children, among whom were the brothers Clarence and Mansfield Tracy, Reuben married the widow Sarah Hardin in 1851. Mansfield followed his father's lead a year later by marrying Sarah's daughter Ellen. She gave birth to a son, Francis by name, in the following year.

A few years later, Clarence converted to Catholicism, eventually settling in as the priest assigned to St. Mary's Church in Albany. Interestingly enough, this church today faces the back of the building that became the new home of the Court of Appeals in 1917. Among Clarence's many accomplishments was the superb English translation of the great German hymn "Holy God We Praise Thy Name." Mansfield Tracy also achieved some minor renown for his novels, which, unlike his brother's translations, were destined to lapse into total obscurity.

But we do remember Mansfield for reasons unrelated to his literary efforts. After two decades of marriage, he separated from Ellen, and he was not reticent about what he alleged to be his wife's demerits. This conduct, most untypical for a Victorian gentleman, enraged young Frank, who confronted his father in his New York office one day in 1873. The argument ended when Frank fatally shot his father.

An eerie parallel to this story arose a decade later in Crefeld, Germany, where the daughter of the late Ira Harris, the Republican Civil War senator from Albany, met her end violently only two days before Christmas. Clara Harris's mother had died in 1844. Her father, a rising lawyer and politician, then married widow Pauline Rathbone in Albany in 1848. Throughout the Civil War years, Rathbone's son Henry courted Clara when he was able to get away from the warfront, and the two were engaged to be married when they accompanied President and Mrs. Lincoln to Ford's Theatre on the fatal evening of April 14, 1865.

Fearfully wounded by the Bowie knife of John Wilkes Booth, Colonel Rathbone slowly recovered and married Clara in Albany on July 11, 1867. After three children and a series of professional disappointments, Rathbone received a diplomatic posting in Germany. The change of scenery only aggravated the manic tendencies that had already become evident, and, when Henry learned in late 1883 that Clara had made plans to remove herself and the children from an increasingly dangerous situation, he brutally shot and stabbed her to death.

Henry Rathbone spent the rest of his days in a German hospital for the insane, dying finally in 1911 (incidentally, Tolstoy had died a few months earlier at the age of 82, while fleeing from his pursuing family). Frank Walworth endured a considerably more brief period of incarceration—just four years in state prison.

But these stories have outlasted their protagonists. Author George Mallon has recently told the Rathbone tale in the superb novel ***Henry and Clara.*** The Walworth tale is told in detail by the Walworth museum in Saratoga Springs, which occupies the top floor of the Casino in that City. Maybe someone someday will open a museum or write a book about the recent family disasters at Gracie Mansion, but I prefer to hope that that particular New York tale will pass into a swift and well-deserved oblivion

How to Find and Replace Character Symbols in Word

By Marilyn Monrose

Did you ever try to search for the Section (§) or Paragraph (¶) symbols in Word, then realized that Word wouldn't let you access the characters from the Symbols box? You're not alone. Many people don't realize that you have to use the character's KEYBOARD SHORTCUT KEYS to input the symbol. This is the only way Word will let you globally replace a symbol or character in the **<Find and Replace>** dialog box.

There are two ways to type the character's keyboard equivalents in Word. One is using Word's existing shortcut keys for some of the characters in the Symbols box and the other is pressing the **ALT key** in combination with numbers on the **NUMERIC KEYPAD**. The latter's particular key combinations are part of a universal language understood by computers and applications everywhere.

Using Word's Shortcut Keys

For example, if you wanted to globally replace the **"e"** in the word **"resume"** with an accented **"é"** for **"résumé"** you would do the following:

1. Access the **<Symbol>** box, click your cursor over the **"é"** character in **<normal text>** font and make a note of its shortcut keys at the bottom of the box next to where it says **<Shortcut key:>**. It should read **"Ctrl+',E"**.

   NOTE: When typing a shortcut key like "*Ctrl+',E*", DO NOT type the comma that separates them. You would hold down the <CTRL> key and hit apostrophe (') first, then hit the letter <*E*> immediately after. The comma in between is just Word's way of letting you know there are more keys to press.

2. Exit the <Symbol> box.

3. Press <CTRL+H> for the <Find and Replace> dialog box. Type the word "resume" in <Find>, then go to <Replace>.

4. Type **"r"**, hold down the **<CTRL>** key, then type an apostrophe **" ' "** and **"E"**, one after the other in quick succession (do not type the comma), then release the **<CTRL>** key. The accented **"é"** should appear next to **"r"**.

5. Continue typing **"sum"**, next to **"é"**, then reapply **"é"** again, either by using the shortcut keys or copying and pasting. Hit **<Replace All>**.

6. All occurrences of **"resume"** will be replaced with **"résumé."**

Unfortunately, not all characters in the Symbols box will have shortcut keys attached to them. But just because Word didn't supply any, doesn't mean you can't access them another way. That's when you would use the ALT key/Numeric keypad combination.

Using the ALT Key in Combination With the Numeric Keypad

In reality, whenever we type a letter from the keyboard, the computer really sees that letter as a series of numbers. This is how we communicate with the computer. For example, when you type the letter "A", the computer may see it as "001000110" first and then turn it into a letter on the screen. Computers speak in the numeric language of zeroes and ones. This is how they *really* process our information. I'm not going to get into a long history on this, but if you wish to learn more, there are plenty of books on the market that can help you understand it better.

You can use the **<ALT>Key/<Numeric Keypad>** combination with *any* computer application, not just Word. This particular key combination was preserved by programmers, so that certain key combinations could be accessed when needed.

For instance, Word does not have a shortcut key for the Section symbol **"§"**. So, if you wanted to globally replace the word **"Section"** with the Section symbol **"§"**, you would have to use the **<ALT> Key + Numeric Keypad** combination, which is **<ALT+21 (Numeric Keypad)>**. Hold down the ALT key, then type 21 on the NUMERIC KEYPAD (make sure NUM LOCK is on) and the Section symbol will appear.

1. To replace the word **"Section"** with the Section symbol **"§"**, press **<CTRL+H>** for the **<Find and Replace>** dialog box, type the word **"Section"** in **<Find>**, then go to **<Replace>**.

2. Hold down the **<ALT>** key and type **"21"** on the **<Numeric Keypad>**, then IMMEDIATELY release the **<ALT>** key for the symbol to appear. Hit **<Replace All>**.

All occurrences of the word "Section" will be replaced with the Section symbol (§).

On the next page is a list of commonly used symbols and their **ALT Key/Numeric Keypad** shortcuts. I hope you find it useful.

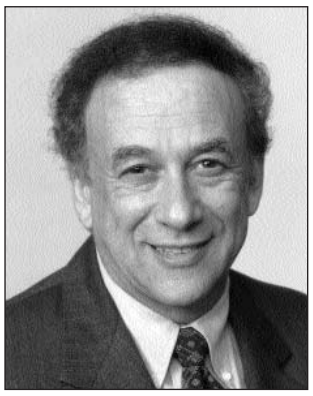
List of Symbols & Numeric Keypad Keystrokes

Symbol	Keystrokes	Symbol	Keystrokes
§	<ALT> + 21 (Numeric Keypad)	Æ	<ALT> + 146 (Numeric Keypad)
¶	<ALT> + 20 (Numeric Keypad)	ô	<ALT> + 147 (Numeric Keypad)
Ç	<ALT> + 128 (Numeric Keypad)	ö	<ALT> + 148 (Numeric Keypad)
ü	<ALT> + 129 (Numeric Keypad)	ò	<ALT> + 149 (Numeric Keypad)
é	<ALT> + 130 (Numeric Keypad)	û	<ALT> + 150 (Numeric Keypad)
â	<ALT> + 131 (Numeric Keypad)	ù	<ALT> + 151 (Numeric Keypad)
ä	<ALT> + 132 (Numeric Keypad)	ÿ	<ALT> + 152 (Numeric Keypad)
à	<ALT> + 133 (Numeric Keypad)	Ö	<ALT> + 153 (Numeric Keypad)
å	<ALT> + 134 (Numeric Keypad)	Ü	<ALT> + 154 (Numeric Keypad)
ç	<ALT> + 135 (Numeric Keypad)	¢	<ALT> + 155 (Numeric Keypad)
ê	<ALT> + 136 (Numeric Keypad)	£	<ALT> + 156 (Numeric Keypad)
ë	<ALT> + 137 (Numeric Keypad)	¥	<ALT> + 157 (Numeric Keypad)
è	<ALT> + 138 (Numeric Keypad)	P	<ALT> + 158 (Numeric Keypad)
ï	<ALT> + 139 (Numeric Keypad)	*ƒ*	<ALT> + 159 (Numeric Keypad)
î	<ALT> + 140 (Numeric Keypad)	á	<ALT> + 160 (Numeric Keypad)
ì	<ALT> + 141 (Numeric Keypad)	í	<ALT> + 161 (Numeric Keypad)
Ä	<ALT> + 142 (Numeric Keypad)	ó	<ALT> + 162 (Numeric Keypad)
Å	<ALT> + 143 (Numeric Keypad)	ú	<ALT> + 163 (Numeric Keypad)
É	<ALT> + 144 (Numeric Keypad)	ñ	<ALT> + 164 (Numeric Keypad)
æ	<ALT> + 145 (Numeric Keypad)	Ñ	<ALT> + 165 (Numeric Keypad)

Marilyn Monrose, the Legal Word Processing "Doctor"™, is the author of two legal word processing training manuals entitled Advanced Word 97 for the Legal User Made Easy and Advanced Wordperfect 7&8 for the Legal User Made Easy. For more information, call 212-579-9306 or email: trainmanuals@dialalesson.com.

Contractors and Their Subcontractors

By Martin Minkowitz



The Exclusive Remedy Doctrine (or Rule) as expressed in section 11 of the New York State Workers' Compensation Law prevents an employee from suing his or her employer in tort for damages from an injury which arose out of and in the course of the employment. Employers are protected from such suits as long as they have covered their employees for the required statutory payment of compensation. There are few exceptions to this protection once the coverage has been provided for. The employer provides for the payment of compensation by either purchasing an insurance policy from the State Insurance Fund, an insurance company authorized to sell workers' compensation insurance, or by being authorized by the Workers' Compensation Board to self insure the employees.

It should follow that an employee who provides workers' compensation benefits should be able to defend against a suit by an injured worker by raising the defense of the Exclusive Remedy Doctrine.

That would probably be the result except in the case of a contractor who engages a subcontractor to assist in performing all or part of his contract.

The subcontractor has an obligation to provide for workers' compensation coverage for its employees. If the subcontractor fails to provide for such coverage the contractor becomes responsible for the payment of the benefits for the subcontractor's employee who sustains an injury which arises out of and in the course of that employment.[1]

In a recently reported case a contractor's counsel faced that issue. The subcontractor failed to obtain workers' compensation coverage for its employees and in accord with the statutory mandate, the contractor's compensation coverage stepped in to pay the benefits. When a suit was brought against the contractor by the subcontractor's injured employee, the contractor's counsel pleaded the defense that the exclusive remedy of the injured worker was workers' compensation. It was argued that since the benefits were being paid by the contractor, it was providing coverage and that prohibited the injured employee from bringing suit against it. When the question arose was the contractor the employer who was entitled to the benefits of the Exclusive Remedy Doctrine, the contractor's counsel argued that his client was the alter ego of the employer/subcontractor. As the alter ego it was the employer and entitled to the defense.

"If a contractor does employ a subcontractor, it should make sure provision has been made by the subcontractor for workers' compensation coverage for its employees and provide proof of such coverage to the contractor."

The court concluded that, while it was possible that a contractor could be the alter ego of the subcontractor, it was not so under the facts of this case.

Situations that would have the effect of making the contractor deemed to be the alter-ego of the subcontractor could exist in a parent and subsidiary corporation which is operated as a single entity;[2] or when a special employment relationship exists.[3]

The court went on to note that the course of dealing between this contractor and its subcontractor was consistent with an on going course of business rather than an inter-relationship between the two parties. The contractor did not provide the subcontractor with any tools for use in the project they were working on; they did not share offices and there were no directors officers or shareholders in common between the two entities.

While this is only a N.Y. Supreme Court decision,[4] it does provide an interesting interpretation of section 56 of the Workers' Compensation Law as it relates to the exposure of a contractor to litigation by its subcontractors employees, when it has paid then workers' compensation benefits.

If a contractor does employ a subcontractor, it should make sure provision has been made by the subcontractor for workers' compensation coverage for its employees and provide proof of such coverage to the contractor.

To be a contractor who is subjected to this sort of liability, one must be under contract to do work for another. It would follow that if your client owns property upon which he or she is constructing a building, the people or companies that he or she engages to do the work may not be subcontractors for the purpose of this provision of the law.

Finally, in representing a contractor in such a situation where the contractor has been required to pay workers' compensation benefits to an injured employee of the subcontractor, the contractor can proceed against the subcontractor for indemnification. It may also assert a lien against any money that is still owed to the subcontractor for his work performed under its contract.

Endnotes

1. *See* § 56 WCL.
2. *See Plosza Cooper Tank & Welding Corp.,* 213 A.D.2d 385.
3. *See Levine v. Lee's Pontiac,* 203 A.D.2d 259.
4. *Diaz-Barba v. Mark John Corp.,* N.Y.L.J. 03/27/01 Lebowitz J.

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They Can't All Be Like This Can They?

By Charles B. Rosenstein

Do you ever get the feeling that you are the only attorney with the most difficult clients on the planet? Do you find yourself longing for that routine real estate closing that you had become so fond of and at which you actually enjoyed handling? Rest assured that the rest of us feel your pain and can and do sympathize with your plight. Perhaps it was simply a long week that somehow turned into a long month that has seemed to have become a long year thus far. We strive to do the best job that we can for our clients and seek only the payment of our reasonable fees in a timely manner and a thank you from the client at the end of the transaction for doing the job for which we were hired. Our clients today seem to want more and more of our time devoted to their transaction and at the same time expect to pay a fee that does not justify the time that they are demanding. This is truly a dilemma that we practitioners need to address now lest we continue to complain about this scenario and do nothing about it in the future.

By way of example, a client called me today and advised me that she believed that she offered too much money for the "for sale by owner property" as she has now looked at other homes in the area and they are selling well below her offering price. Obviously, I as the attorney, failed to properly counsel her as to the proper price to pay for the property that she had seen and toured three previous times and that I had never laid eyes on. Did she truly expect me to advise her as to the proper purchase price to offer? Obviously, I was to immediately cancel the contract so as the price could be renegotiated to a more "reasonable" purchase price. It is interesting to note how, conveniently, the client failed to remember that only two weeks before, she had called our office in dire need of an attorney to draft a purchase contract offer and wanted to come in that day. How quickly she forgot that I had seen her within 30 minutes of her phone call, drafted the contract while she waited after a full consultation wherein she advised me of the price she wished to offer. In fact, it was not just the price she wished to offer, but it was the price that she and the seller had discussed and agreed upon prior to her coming to see me to draft the contract. How could I have possibly let her enter into that contract when she asked me? Why wasn't I acting in her best interest? I need not continue with the list of questions that were being fired at me. Leave it to say that I advised her that I would not have this conversation with her, that I was doing exactly what she retained me to do for her and that if she was not satisfied she was MORE than welcome to seek another attorney to represent her.

"Our clients today seem to want more and more of our time devoted to their transaction and at the same time expect to pay a fee that does not justify the time that they are demanding."

The next call was from a client who was calling to advise me that he had hired movers for April 30, 2001 and wanted to know what time his closing was scheduled for so he could advise the movers. I informed the client that although I would love to set up the closing, he had yet to receive clearance to schedule his closing by his lender and as such, could not give him the answer he was looking for. Once again, somehow, I had failed to properly represent my client by not allowing him to schedule his movers as he had wanted. This call is oh so similar to the "I gave my landlord notice that I would be moving out of the property by the end of this month so we really need to close by the 25th so I have time to move" call. Obviously I once again failed to assure the client of the exact time and date of his closing at least a month in advance so he could make his moving plans and I certainly should have advised him not to give his notice until the closing was scheduled so he was not "out on the street." Of course we can't forget the all too popular call that includes the "you never told me that I would need that much money for closing." Obviously, I was remise in not preparing a complete and accurate closing statement at the time of the contract signing so as the client would know to the penny the funds required at the closing to take place in six to eight weeks.

How about the call inquiring as to why my closing has not been scheduled yet? Obviously, I should have

had the appraisal ordered earlier or satisfied the conditions of the commitment myself, or gone over to the other attorneys office in person when he would not return my phone calls to his office.

But of all of these calls and complaints, the best one of my recent recollection was when the seller refused to give his social security number as required on the TP-584 in order to file the deed with the county clerk. He advised us that this was personal and private information that he would not disclose. Now of course, my client the purchaser is looking at me to find out if this is normal at a closing and was actually quite understanding when I told her that this was a first for me and that I could not force the seller to reveal this information at the present time. Now most clients would have you leave the closing and hightail it down to a local supreme court judge in order to obtain an immediate order to require the divulging of this information. Of course this would all be included in the fee they were paying you for the real estate closing. Thankfully this client was a bit more understanding than most of my recent clients. We are still waiting for this number in order to complete our closing.

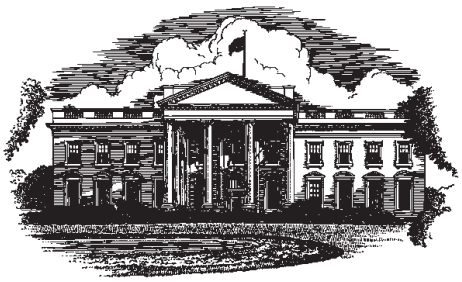
We simply cannot be all things to all people. We will never be able to satisfy every client's request and desire on every occasion. Do clients truly believe that we truly enjoy creating these problems for them? How difficult is it to understand that we do not seek to create these issues as they only create a significant amount of additional work for us that we truly would rather do without and for which we are not paid? Perhaps this venting has been as a result of dealing with too many ungrateful clients who fail to understand that we are not bad people seeking to make trouble for them as this only makes trouble for ourselves. Or maybe it is the result of having to deal with too many consistently recurring problems with structural inspections, mortgage contingencies, closing dates, funds needed to close, pre-closing walk through issues, etc. However, I continue to endure with the thought of that one client who is truly grateful for the service that you provided to her and for the assistance you provided throughout the process. Or that one client who says "that is a good idea, I never thought of that." It is these clients that SHOULD dominate our client base and for which we continue to practice in this area. I am truly aware that practitioners have unique and different issues to address in their specific areas of practice and real estate practitioners are no different. I leave you to contemplate your practice area and the everyday stresses that you encounter. When push comes to shove, do remember that we should enjoy what we do and that we are all lucky enough to not have to repeat these immortal words each and every day: "would you like fries with that ma'am?" KEEP PRACTICING!

"We will never be able to satisfy every client's request and desire on every occasion."

Charles B. Rosenstein is managing partner at Rosenstein & Bouchard in Albany. Mr. Rosenstein, chair of the Real Estate Committee of the General Practice, Solo & Small Firm Section, also serves as the Section's Treasurer.

Hail to the Chief

With the inauguration of our 43rd President in the history books, it is time to see how much you know about some of the men who preceded George W. as the leader of the free world. Good luck!



1. Who was the first President inaugurated in Washington, D.C.?
2. Who was the first President inaugurated for a term limited by the Constitution?
3. Who was the youngest President-elect at the time of his inauguration?
4. Who was the first President to wear a beard at his inauguration?
5. How was snow removed from Pennsylvania Avenue for President JFK's inaugural parade?
6. Which inauguration was the first to be televised?
7. Who was the first inaugurated President to be from outside the original 13 colonies?
8. Which was the first inaugural recorded on movie film and gramophone record?
9. Which President was the first to ride to his inaugural in an automobile?
10. Who was the only 20th century President to walk with his family from the Capitol down Pennsylvania Avenue to the reviewing stand in front of the White House?

Answers:

1. Thomas Jefferson in 1801.
2. Dwight D. Eisenhower in 1852. The 22nd amendment limited a President to two terms.
3. JFK was 43 years, 236 days. Theodore Roosevelt was 42 years, 322 days old when he was sworn in after the assassination of President William McKinley.
4. Abraham Lincoln in 1861.
5. Army flame throwers.
6. The inauguration of Harry S. Truman and VP Alben W. Barkley in 1949.
7. Abraham Lincoln of Illinois.
8. That of William McKinley in 1901.
9. Warren G. Harding, on March 4, 1921.
10. Jimmy Carter, on January 20, 1977.

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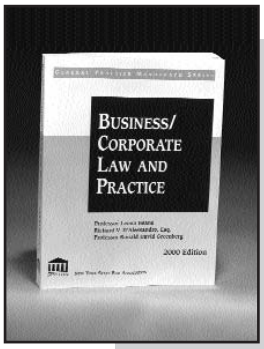

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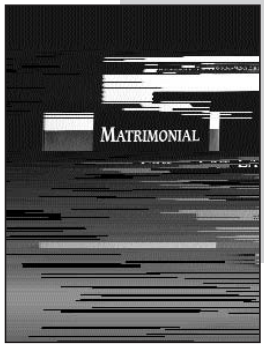

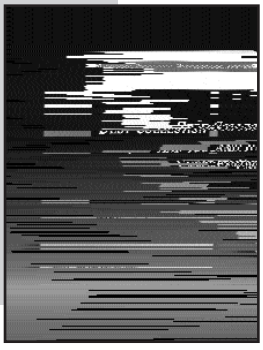

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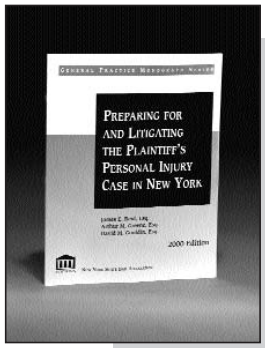

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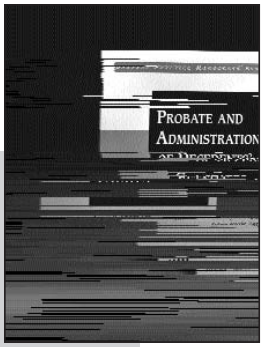

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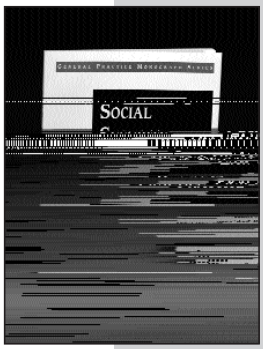

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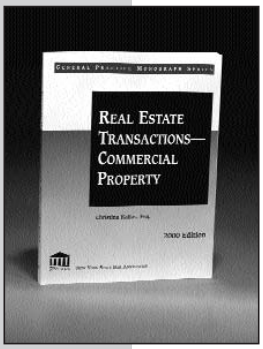

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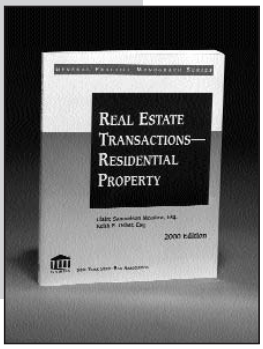

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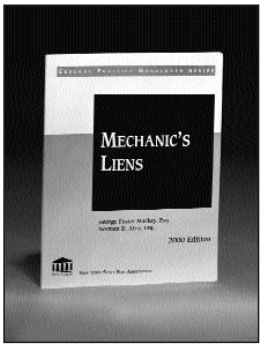

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