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Journal

THE SOURCES OF AUTHORITY

Inside

Editorial Offices
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

Advertising Representative
Network Publications
Sheri Fuller
10155 York Road, Suite 205
Crestridge Corporate Center
Hunt Valley, MD 21030
(410) 628-5760
e-mail: sfuller@networkpub.com

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On The Cover

This month's cover, prepared to accompany the article on the sources of authority used most often by New York appellate courts, reflects a sampling of the volumes where these legal precedents are found.

Cover Design and Photo by Lori Herzing.

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President's Message

STEVEN C. KRANE

Con Te Partiró

Nearly a full year has passed since I wrote my first President's Message to you. In that column, entitled "Family Values," I observed that "we have the power, by working together, to achieve much that is in the common good." I could not have foreseen the tremendous challenges the legal profession and the nation as a whole would face in the months that followed. Nor could I have imagined the extent to which the New York State Bar Association and the rest of the organized bar would be required to work together for the common good during my term in office.

None of us are the same as we were one year ago. We have all been irreversibly changed by the tragic events of September 11, by the loss of so many friends, colleagues, and loved ones. We have lost our sense of invulnerability, the deep-seated belief, born of decades of security, that there could be no more Pearl Harbors, that our national defense was impregnable. We relearned a lesson that history has taught us too many times—that we can never let down our guard. The attacks confirmed the unassailable truth that there will always be some renegade regime jealous of our stature as the greatest nation in the world.

By meeting the challenges of the past year, we have learned much about ourselves individually and as an organization of lawyers. We learned that, with coordinated action aimed at a common goal, there is virtually nothing that the legal profession cannot achieve. Seemingly insurmountable obstacles and the most difficult problems can be overcome by application of our skill and the persuasive power of our collective voice. We must never underestimate the power we have as a group to achieve our goals. With that in mind, as I pass on the mantle of leadership to my worthy successor, allow me to give my own exhortation, a valedictory of sorts, to the members of this great Association.

First, we must continue to strive to improve our system of justice and government of laws. This is our highest and best goal. Our Association has been and will continue to be a force to be reckoned with, one that uses the strength of its influence and the power of its reasoning to achieve widespread reforms. This has been an essential element of our charge since bar associations were first formed in the 1870s to address widespread corruption in our political system. While we have managed over the past century to eliminate much of the avarice that characterized our government in yon days of yore, there is still much work to be done. We are mortals, and imperfect by definition. Improvements are always possible. Lawyers are in the best position to make meaningful contributions to what must be an ongoing effort of change.

Second, we must continue to strive to provide universal access to justice. Though I have spoken of this previously in this space, I must do so again and echo the sentiments of Chief Judge Judith S. Kaye, who, earlier this year in her Orison Marden Memorial Lecture at the Association of the Bar of the City of New York, urged lawyers to find a way to harness the *pro bono* energy that permeated the legal profession immediately after September 11. But no matter how much *pro bono* service the members of the bar provide, it will never be enough to satisfy the burgeoning needs of the poor. We cannot slacken in our efforts to urge our legislators to provide adequate funding to civil and criminal legal services. Our society cannot afford to maintain an underclass of individuals who are told they have rights but are not given the means to vindicate them. Justice without access is illusory, and societal unrest is an inevitable result.

Third, we must continue to protect the interests of New York lawyers. Our Association must speak for all the lawyers who reside or practice in our state, currently 137,000 of us. If we do not, we can be sure that no one else will. At the same time, we must avoid becoming a protectionist guild, in appearance or actuality. That is a role that we unfortunately seem to assume all too readily. We dilute the value of our position when we embark on a purely self-interested course. A "just say no" approach may have worked for Nancy Reagan, but a responsible profession cannot continually resist all changes, even those that appear to be detrimental to it. As issues present themselves, we must evaluate them independently on their merits, and do our best to take positions that are in the interests of all concerned, not just of ourselves.

Steven C. Krane can be reached at 1585 Broadway, New York, N.Y. 10036

PRESIDENT'S MESSAGE

Fourth, we must continue to police ourselves and maintain the highest professional standards. We are fortunate that our profession continues to be self-regulated, and that we have not fallen victim to oversight by lay bureaucracy. Nor have we succumbed to those who would convert us into a nationwide profession, eliminating the ability of states to chart their own course and establish professional standards and regulatory structures that comport with their own cultures and needs. In order to preserve our ability to police ourselves, however, we must police ourselves responsibly. This may require some small, short-term sacrifices to achieve long-term benefits. We must continue to advocate for attorney and judicial disciplinary systems that are adequately funded and, most importantly, have the trust and confidence of the public.

Finally, we must remember who we are. Before she outgrew it, my daughter had a *Lion King* towel that said, simply, "Remember who you are." Over the past year I have often thought about Mufasa's advice to his young son, and passed it on to many lawyers. We are members of a great and learned profession, with roots deep in antiquity. When I was in Spain earlier this year, I announced with pride that our Association was celebrating our 125th anniversary, only to learn that the Barcelona Bar Association was preparing for its *700th*. We have a great and storied history. Let us not forget the good we have done and the excellence of which we are capable, individually and collectively. Some may snipe at us, or make us the butt of ill-conceived jokes, but we must always remember who we are, and always be proud to be lawyers.

It has been my honor to serve as your president for the past year, carrying forward the great work of those who came before me, and hopefully helping set high standards for those who will follow. Unlike Douglas MacArthur, I have no great parting words. Quite frankly, that is because I do not plan any departures. There is much work that needs to be done, and all hands will be needed to achieve our goals. Let us all join together and greet the future.

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Other

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New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos

By William H. Manz

Virtually every New York State appellate opinion contains citations to authority, whose number and character vary according to the length of the opinion and the issues involved. To better determine what the courts actually use as authority, this article surveys the citation practices of the Court of Appeals, the Appellate Division and the Appellate Terms.[1]

For the Court of Appeals and the Appellate Division, the statistics were derived from all majority, concurring, dissenting and *per curiam* opinions published in *New York Reports 2d* and *Appellate Division 2d*.[2] For the Appellate Terms, all opinions published in *Miscellaneous Reports 2d* were included.

Judicial opinions and administrative decisions are classified as primary authority. All other material is considered secondary. Constitutions, statutes and regulations, often required by the subject matter of a case, and whose use is less of an exercise in judicial discretion, are not included. The legal treatise category also includes practice books, legal dictionaries, and works of legal history. The legal periodicals group consists of law reviews, bar journals and articles in the *New York Law Journal*.

A citation was counted only the first time it appeared in an opinion. Citations used in footnotes were included in the totals. Almost all the data were gathered manually with some supplementary information derived from Westlaw searches. Page counts were taken from the official reports and rounded off to the nearest half page. Because of the limited number of opinions available for each judge, no attempt was made to discern any individual citation practices or preferences.

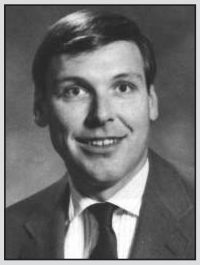
Overview

An overview of the study results shows the following trends in current New York appellate court citation practices:

- A large majority of in-state case citations, with an overall preference for cases no more than 20 years old.
- Limited use of out-of-state decisions with no definite preference for any particular jurisdiction.
- Very limited use of unpublished decisions or of opinions appearing only on LEXIS, Westlaw, and in the *New York Law Journal*.
- A demonstrated affinity for *McKinney Practice Commentaries*, but a generally low rate of citation of legal encyclopedias, *ALR* annotations, and the *Restatement*.
- A general reliance on bill memoranda to determine legislative intent, but with an increased interest in bill jacket correspondence by the Court of Appeals.
- The modest use of various non-legal sources, with a virtual absence of Internet materials.

Citations to Cases

As indicated by Table 1, the Court of Appeals majority opinions in 2000 averaged 5.2 pages in length, and cited an average of 10.9 cases per opinion. (See pages 12-13 for tables.) These totals represent a decline from previous sample years since 1980, which had opinion lengths as high as 6.0 pages in 1990 and an average of more than 12 case citations per case in both 1980 and 1990.[3] In contrast, majority opinions from the four Departments of the Appellate Division averaged 5.4 pages in length, and contained an average of 12.9 citations per opinion. Published Appellate Term decisions, all *per curiam* and memoranda opinions, were far shorter, averaging only 3.6 pages and 1.2 case citations. At each level, the prevailing opinions cited more authority when there was a dissent. Court of Appeals decisions where there was a dissent contained an average of 15.7 case citations, compared with only 10.6 for unanimous opinions. For the Appellate Division, the comparable statistics were 14.0 case citations in opinions where there were dissents, and 12.7 where the opinion was unanimous. In Appellate Term opinions, there were 4.8 case citations



William H. Manz is the senior research librarian at St. John's University School of Law and the author of *The Guide to Legislative and Administrative Materials*, published by William S. Hein & Co. A graduate of Holy Cross College, he received a master's degree in history from Northwestern University and a J.D. degree from St. John's University School of Law.

where there was a dissent and 3.4 citations where there was none.

Like other high state courts, both the Court of Appeals and the Appellate Division have a marked preference for their own opinions over those of other state courts. Overall, New York decisions predominated, representing 77.7% of all cases cited by the Court of Appeals and 81.2% cited by the Appellate Division. The citations of the Appellate Terms were almost exclusively to in-state decisions, with 99% coming from New York courts. As indicated by Tables 3 and 4, both the Court of Appeals and the Appellate Division cited most often to their own decisions. Of the cases cited by the Court of Appeals in 2000, 59.6% were its own opinions, while Appellate Division decisions constituted 44.2% of the total cited by the four departments. Within the Appellate Division, the First, Second, and Third Departments demonstrated a preference for cases from within their own Department. These decisions constituted 47.3% of Appellate Division cases cited by the First Department, 57.8% cited by the Second Department, and 54.8% cited by the Third Department. The Fourth Department, which had only 14 published majority opinions in 2000, was the exception, with only 21.8% of cited Appellate Division decisions coming from that court.

Changing dockets, with a significant increase in the number of cases involving constitutional or regulatory issues, have led to an increase in the number of citations to federal cases by the Court of Appeals in the second half of the 20th century.[4] Similar to other sample years since 1970, the Court of Appeals averaged 2.2 federal citations per majority opinion in 2000.[5] The Appellate Division used less federal authority, averaging only 1.9 federal citations per majority opinion. As Table 2 indicates, the Court of Appeals cited more U.S. Supreme Court Opinions, while the Appellate Division cited more often to circuit and district court opinions.

Citation of out-of-state opinions by the Court of Appeals has declined over the years, probably reflecting the presence of fewer cases where no sufficient New York precedent was available.[6] In 2000, only 3.7% of cases cited by the court came from other states. This was slightly higher for the Appellate Division, where 4.7% of opinions contained a citation to an out-of-state decision. There has also been a change in the states cited. Before 1940, Massachusetts stood out as the most cited non-New York jurisdiction.[7] Now, however, apart from New Jersey, whose courts are cited a few more times than any other individual jurisdiction, none of the factors suggested as influences on citation patterns—population, number of published cases, and geographic proximity—appear to clearly apply.[8] For example, the Court of Appeals cited cases from Washington and Wisconsin as often as those from California, and the Appellate Divi-

The Ten Most-Cited

"Most-cited" studies have achieved a certain level of popularity in recent years. Articles have appeared discussing the most-cited law reviews, legal books, legal scholars, U.S. Court of Appeals cases, and even the *Federalist Papers*. Listed below are the most-cited New York Court of Appeals cases since 1977. Counts were based on the LEXIS Shepard's service that lists the number of "citing cases." The cite counts are current as of late March 2002.

1. *People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932 (1983). 1,733 cites. Cited on the issue of viewing the evidence in the light most favorable to the people.
2. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980). 1,118 cites. Cited on the issue of denial of summary judgment.
3. *People v. Bleakley*, 69 N.Y.2d 490, 515 N.Y.S.2d 761, 508 N.E.2d 672 (1987). 1,044 cites. Cited on the question of whether a verdict was against the weight of the evidence.
4. *People v. Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 (1981). 690 cites. Cited on the issue of whether the effective assistance of counsel was denied.
5. *People v. Gonzalez*, 47 N.Y.2d 606, 419 N.Y.S.2d 913, 393 N.E.2d 987 (1979). 662 cites. Cited in cases involving counsel's request to be relieved.
6. *In re Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285, 347 N.E.2d 647 (1976). 542 cites. Cited on the issue of the right of direct appeal being terminated with the entry of judgment.
7. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). 520 cites. Cited in cases involving the denial of summary judgment.
8. *People v. Gaimari*, 176 N.Y. 84, 68 N.E. 112 (1903). 463 cites. Cited on the issue of witness credibility being primarily determinable by the trier of fact.
9. *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173, 652 N.E.2d 919 (1995). 420 cites. Cited on the question of an issue being unpreserved for appellate review.
10. *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787 (1975). 368 cites. Cited on the issue of harmless error.

sion cited Iowa decisions more often than nearby populous Pennsylvania. The citation totals for individual states are so low, that even one case can have a major impact. An example for 2000 is *Consford v. Consford*,[9] a Third Department decision involving whether full faith and credit should be accorded to a child custody determination made by a Texas court. Here, Judge Carpinello's majority opinion and Judge Peters' dissent combined to produce eight citations to Texas decisions, equaling or exceeding the combined total cited by all New York appellate courts for other recent years.[10]

While use of out-of-state opinions has declined, citations to foreign cases have all but vanished. The last New York judge who commonly cited British opinions was Benjamin Cardozo. Since then, only a handful of British cases are cited each year, and these are invariably very old decisions, included for historical purposes. The year 2000 was no exception, with only two British citations—one by the Court of Appeals to *Heaven v. Prender*,[11] and one by the First Department to *Hadley v. Baxendale*.[12]

Virtually all cases cited by the Court of Appeals and the Appellate Division were published in the official New York reporters.

Virtually all cases cited by the Court of Appeals and the Appellate Division were published in the official New York reporters. Of the more than 3,600 cases cited by these courts, only six were unpublished slip opinions with no electronic availability, only 20 had just LEXIS and/or Westlaw citations, and only eight were published exclusively in the *New York Law Journal*. Only in Appellate Term decisions did citations to cases from the *Law Journal* appear with any regularity, largely as cites to earlier Appellate Term opinions.

Like other courts that have been the subject of citation studies, the Court of Appeals, the Appellate Division and the Appellate Terms all displayed a definite preference for more recent decisions. More than 70% of all cited Court of Appeals decisions were no more than 20 years old, as were more than 85% of the cases cited from the other New York courts, and more than 90% of federal circuit and district court opinions. Decisions by the New York Court of Appeals and the U.S. Supreme Court had the most durability. More than 10% of the cited Court of Appeals cases and more than 15% of those from the Supreme Court were more than 50 years old.

Citations to Legal Treatises and Legal Periodicals

Throughout their history, the New York courts have made steady but limited use of legal treatises, with such early favorites as Kent and Blackstone later giving way to such noted authorities as Corbin and Williston.[13] Again, more contemporary New York favorites were the most-cited titles in 2000, including Weinstein, Korn & Miller's *New York Civil Practice*, Siegel's *New York Practice*, and *Prince, Richardson on Evidence*.

Unlike legal treatises, whose use by the courts has remained fairly constant over the years, the citation of legal periodicals has varied widely. Initially ignored as the mere product of callow law students, the regular citation of law reviews in New York was later pioneered by Judge Cardozo. By the 1980s, law review citations were a regular feature in Court of Appeals opinions,[14] but recently their use has declined,[15] perhaps reflecting judicial dissatisfaction with much of the content of current law reviews.[16] As Tables 7 and 8 indicate, the Court of Appeals was most likely to use the law reviews, with one or more such citations appearing in 14.4% of the majority opinions, compared with only 9.7% for the Appellate Division. Not surprisingly, law reviews were entirely absent from the shorter Appellate Term memoranda or *per curiam* decisions.

No single law review title received a large number of citations. The largest number of cites in 2000 was four to *Brooklyn Law Review*. In addition, only two reviews, *Columbia Law Review* and *Family Law Quarterly*, received as many as three citations. This reflects the current practice of citing a wide variety of titles, rather than favoring the publications of the elite law schools. For example, in 1930, citations to *Harvard Law Review* represented 59% of the titles cited by the Court of Appeals.[17] In sharp contrast, in 2000, only one of the 61 legal periodical citations by all the New York appellate courts was to a *Harvard Law Review* article.[18] Finally, as with cases, the courts are most likely to cite to recent articles. In 2000, almost half of the articles cited were no more than 10 years old; all but three were published since 1980.

Citations to *Restatement*, Encyclopedias, *ALR*, and *Practice Commentaries*

Historically, courts have made steady but limited use of such sources as the *Restatement*, legal encyclopedias and *ALR* annotations. In 2000, the Court of Appeals and the Appellate Division cited to the *Restatement* 20 times. The *ALR* annotations, generally regarded as mere case finders and not persuasive authority, received only four citations. The Court of Appeals had no citations to a legal encyclopedia, but there were 10 such citations in Appellate Division opinions, and four in Appellate Term decisions. Not surprisingly, the most popular title

CONTINUED ON PAGE 14

Table 1: Average Majority Opinion Length and Case Citations

Court	*Tot. op.*	*Tot. pp.*	*Avg. pp.*	*Tot. ci.*	*Avg. ci.*
Ct. App.	97	506.5	5.2	1055	10.9
App. Div. 1	68	457	6.7	883	13.0
App. Div. 2	28	145	5.8	432	15.4
App. Div. 3	44	178	3.7	524	11.9
App. Div. 4	14	57	4.1	142	10.1
Total App. Div.	154	837	5.4	1981	12.9
App. Term 1	35	35	1.0	118	3.4
App. Term 2	51	69	1.4	188	3.7
Total App. Term	86	104	1.2	306	3.6

Table 2: Total Case Citations

	Ct. App.	*App. Div.*	*Other N.Y.*	*Total N.Y.*	*S. Ct.*	*Other Fed.*	*Other State*	*For.*	*Grand Total*
Ct. App.	747	182	45	974	153	79	46	1	1253
App. Div.	788	1067	106	1961	156	184	113	1	2415
App. Term	102	194	99	395	1	2	1	0	399
Total	1637	1443	250	3330	310	265	160	2	4067

Table 3: Case Citation Percentages

	Ct. App.	*App. Div.*	*Other N.Y.*	*Total N.Y.*	*S. Ct.*	*Other. Fed.*	*Other State*	*For.*	*Total Other*
Ct. App.	59.6	14.5	3.6	77.7	12.2	6.3	3.7	0.07	22.2
App. Div.	32.6	44.2	4.4	81.2	6.5	7.6	4.7	0.04	18.8
App. Term	25.6	48.6	24.8	99.0	0.2	0.5	0.2	0.00	1.0
Total	40.3	35.5	6.1	81.9	7.6	6.5	3.9	0.04	18.1

Table 4: Case Citations Per Majority Opinion

	Ct. App.	*App. Div.*	*Other N.Y.*	*Total N.Y.*	*S. Ct.*	*Other Fed.*	*Other State*	*For.*	*Total*
Ct. App.	6.2	1.6	0.4	8.3	1.4	0.8	0.5	0.0	10.9
App. Div.	4.1	5.7	0.6	10.4	0.9	1.0	0.5	0.06	12.9
App. Term	0.9	1.6	1.0	3.5	0.02	0.0	0.02	0.9	3.6

Table 5: Age of All Cited Cases

	0-10	*11-20*	*21-30*	*31-40*	*41-50*	*51-100*	*101-150*	*151+*
Ct. App.	43.7	30.8	17.2	4.3	2.5	8.2	2.3	0.0
Oth. NY	65.7	21.1	6.6	1.9	1.4	2.8	0.4	0.06
Oth. State	39.2	30.4	7.6	11.4	3.2	5.7	0.0	0.0
S. Ct.	21.6	24.5	20.3	9.6	6.1	15.4	2.3	0.3
Oth. Fed.	63.6	27.7	7.6	2.9	0.7	1.1	0.0	0.0
Brit.	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0

Table 6: Ten Most Cited States

State	*Ct. App.*	*App. Div.*	*App. T.*	*Total*
1. New Jersey	3	10	0	13
2. Texas	1	11	0	12
3. California	3	8	0	11
4. Pennsylvania	4	4	1	9
5. Florida	2	6	0	8
6. Iowa	1	6	0	7
7. Massachusetts	0	7	0	7
8. Washington	3	4	0	7
9. Illinois	3	2	0	5
10. Georgia	2	2	0	4

Table 7: Total Citations to Secondary Authorities

	Tr.	*Lgl. Per.*	*Lgl. Enc.*	*RS*	*ALR*	*McK. P.C.*	*Misc.*	*Total*
Ct. App.	43	30	0	7	1	18	92	191
App. Div.	37	31	10	13	3	15	81	190
App. Term	8	0	4	0	0	4	2	19
Total	88	61	14	20	4	37	175	400

Table 8: Percent of Majority Opinions Containing Secondary Authorities

	Tr.	*Lgl. Per.*	*Lgl. Enc.*	*RS*	*ALR*	*McK. P.C.*	*Misc.*	*Tot. Sec.*
Ct. App.	24.7	14.4	0.0	5.2	0.0	15.5	32.0	56.7
App. Div.	13.6	9.7	1.9	9.7	1.3	9.7	10.4	49.4
App. Term	11.6	0.0	4.7	0.0	0.0	4.7	2.3	18.6

Table 9: Most Cited Treatises

Title	*Ct. App.*	*App. Div.*	*App. T.*	*Total*
Weinstein, Korn & Miller, N.Y. Civil Practice	3	3	3	9
Siegel, New York Practice	6	1	1	8
Prosser & Keeton on Torts	5	1	0	6
Richardson on Evidence	5	0	1	6

Table 10: Sources of Cited New York Legislative History Documents

	Ct. App.	*App. Div.*	*App. T.*	*Total*
Bill Jacket Documents	44	18	1	63
Legis. Document Series	5	2	1	8
McKinney's Reprints	5	12	0	17
N.Y. S. Legis. Ann. Reprints	3	15	0	18
Total	57	47	2	116

Table 11: Types of Cited New York Legislative History Documents

	Ct. App.	*App. Div.*	*App. T.*	*Total*
Memoranda	37	41	1	79
Bill Jacket Letters	10	0	0	10
Reports	2	6	1	9
Other	3	0	0	3

CONTINUED FROM PAGE 10

was *New York Jurisprudence 2d*, with nine cites. Receiving almost as many citations as the *Restatement*, *ALR*, and encyclopedias combined were *McKinney Practice Commentaries*. Offering expert authority on New York statutory issues, they were cited 37 times by the appellate courts in 2000. The most popular were those covering the Civil Practice Law and Rules and the Criminal Procedure Law. In many instances, citation to the *McKinney* commentaries indicate real reliance on the material, and not just a perfunctory reference, as is often the case with treatises or law review articles.[19]

Another development has been the far greater use of bill jacket correspondence, particularly by the Court of Appeals, which cited these documents 10 times in 2000.

Citations to Legislative Materials

Although the New York courts frequently address questions of statutory interpretation, there is often little relevant material available. Standard research works do provide an extensive list of potential sources,[20] but in reality the courts most often refer to a narrow category of documents.

Most popular are memoranda, which represented 78.2% of the legislative materials cited by the appellate courts in 2000. Historically, the most popular source for memoranda has been reprints in *McKinney Session Laws* and the *New York State Legislative Annual*. Recently, however, there has been a greater tendency to cite directly to memoranda as found in governor's bill jackets, particularly by the Court of Appeals and the Third Department. Another development has been the far greater use of bill jacket correspondence, particularly by the Court of Appeals, which cited these documents 10 times in 2000.

Miscellaneous Citations

As in the past, in addition to the major sources of legal authority, the courts made limited use of such legal authorities as ethics opinions,[21] attorney general opinions,[22] and administrative orders.[23] There was also the usual limited use of a wide variety of non-legal materials, including newspaper articles,[24] non-legal treatises,[25] and standard English-language dictionaries.[26] Finally, despite the explosion of materials available on the Internet, only one appellate opinion in 2000—from the Court of Appeals—contained a citation to a Web site.[27] With the ever-increasing amount of material now available on the Internet, the number of citations to Web sites is certain to grow,[28] but given the ready availability of the most-cited legal materials in print format or on the major electronic commercial databases, Web-based documents cited are likely to be limited to non-legal sources and/or difficult-to-obtain administrative materials.[29]

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1. For more detailed studies of the use of authority by the Court of Appeals, see William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850–1993*, 43 Buff. L. Rev. 121 (1995) ("Manz I"); William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 Buff. L. Rev. 1273 (2001) ("Manz II"). For an earlier citation study of the Court of Appeals, see Mary Bobinski, Comment, *Citation Sources and the New York Court of Appeals*, 34 Buff. L. Rev. 965 (1978).

   There are currently three Appellate Terms. The Appellate Term for the First Department hears appeals from the Civil Court of the City of New York and the Criminal Court of the City of New York in New York and Bronx Counties. 22 N.Y.C.R.R. § 640.2. The Appellate Term for the Second Department, second and eleventh judicial districts, hears appeals from the Civil Court of the City of New York and the Criminal Court of the City of New York in Queens, Richmond, and Kings Counties. 22 N.Y.C.R.R. § 730.1(b). The Appellate Term for the Second Department, ninth and tenth judicial districts, hears all appeals other than those from the Supreme Court, Surrogate's Court, Family Court, County Court criminal appeals, appeals from the District Court of Nassau County, District Court of Suffolk County, and appeals from town, village, and city courts. 22 N.Y.C.R.R. § 730.1(d).
2. For the Appellate Division, the large number of published *per curiam* opinions relating to attorney misconduct were omitted. These opinions were generally less than a page long and cited few authorities.
3. Manz II, *supra* note 1, at 1300, table 1.
4. *See* Manz I, *supra* note 1, at 129.
5. Manz II, *supra* note 1, at 1302, table 6.
6. *Id*. at 1279.
7. Manz I, *supra* note 1, at 155, table 10.
8. Manz II, *supra* note 1, at 1279.
9. 271 A.D.2d 106, 711 N.Y.S.2d 199 (3d Dep't 2000).
10. A Westlaw search for Texas citations for 1998, 1999, and 2001 produced the following results: 1998—two opinions with three citations; 1999—five opinions with six citations; 2001—six opinions with eight citations.
11. 11 Q.B.D. 503 (1883), *cited in Lauer v. City of New York*, 95 N.Y.2d 95, 109, 711 N.Y.S.2d 112, 733 N.E.2d 184 (2000).
12. 156 Eng. Rep. 341 (Exch. 1854), *cited in Inchaustegui v. 666 5th Ave. Ltd. P'ship*, 268 A.D.2d 121, 125, 706 N.Y.S.2d 396 (1st Dep't 2000).
13. *See* Manz I, *supra* note 1, at 159–61, table 17.

14. *Id*. at 159, table 16.

15. Manz II, *supra* note 1, at table 13.

16. *See, e.g.*, Judith Kaye, *One Judge's View of Academic Law Writing*, 39 J. Legal Educ. 313, 320 (1989) ("I am disappointed not to find more in the law reviews that is of value and pertinence to our cases").

17. Manz II, *supra* note 1, at 1284.

18. Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946), *cited in All Terrain Props., Inc. v. Hoy*, 265 A.D.2d 87, 93, 705 N.Y.S.2d 350 (1st Dep't 2000).

19. *See, e.g.*, *In re Raymond G.*, 93 N.Y.2d 531, 535, 693 N.Y.S.2d 482, 715 N.E.2d 486 (1999) (three quotations from practice commentaries in only one paragraph).

20. *See, e.g.*, Ellen M. Gibson *et al.*, New York Legal Research Guide (1998) (discussing memoranda, bill jackets, veto jackets, debate transcripts, public hearings, commission reports, legislative documents, records and briefs, and Revisers' Notes).

21. *See, e.g.*, D.C. Bar Ass'n Legal Ethics Comm. Op. 273 at 192, *cited in Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 185, 710 N.Y.S.2d 578 (1st Dep't 2000).

22. *See, e.g.*, 1999 Op. N.Y. Att'y Gen. 42; 1999 Op. N.Y. Att'y Gen. 21, *cited in Peterson v. Corbin*, 275 A.D.2d 35, 42, 713 N.Y.S.2d 361 (2d Dep't 2000).

23. *See, e.g.*, N.Y. City Mayor Exec. Order No. 16, (1978), as *amended by* N.Y. City Mayor Exec. Order No. 78 (1984), *cited in City of New York v. Uniformed Fire Officers Ass'n*, 95 N.Y.2d 273, 281, 716 N.Y.S.2d 353, 739 N.E.2d 719 (2000).

24. *See, e.g.*, Edward Felsenthal, *AIG Will Offer Insurance Policy for Defendants in Patent Cases,* Wall St. J., Jan. 7, 1994, at B9, *cited in Darby & Darby, P.C. v. VSI Int'l*, 95 N.Y.2d 309, 314, 716 N.Y.S.2d 378, 739 N.E.2d 744 (2000).

25. *See, e.g.*, Jarnow & Dickerson, Inside the Fashion Business (6th ed. 1997), *cited in Bijan Designer for Men, Inc. v. Fireman's Fund Ins. Co.*, 264 A.D.2d 48, 51, 705 N.Y.S.2d 30 (1st Dep't 2000).

26. *See, e.g.*, Webster's Collegiate Dictionary (10th ed. 1993).

27. *See* Applications of a Child with a Disability [Bd. of Educ. of Kenmore-Tonawanda Union Free Sch. Dist.], Nos. 96-55 & 96-66 (St. Educ. Dep't, Off. of St. Rev. Nov. 20, 1996), *available at* <http://seddmznt.nysed.gov/sro/96%2D55%2666. htm>, *cited in In re Beau II*, 95 N.Y.2d 234, 241, 715 N.Y.S.2d 686, 738 N.E.2d 1167 (2000).

28. A Westlaw search indicated that the number of Internet citations rose to four in 2001, with three cites by the Court of Appeals and one by the Appellate Division.

29. For an overview of what Internet sites are being cited by courts nationally, see Manz II, *supra* note 1, at 1296–98.

Reflections on Building a Practice

Lessons From the Neighborhood Provide Secrets to Success

BY KENNETH P. NOLAN

I like work. In fact, I've enjoyed every job I've ever had, from delivering papers to cleaning slop in the Prospect Park Zoo cafeteria, to teaching apathetic inner city teens, to trying cases. Not only do I like work, but I actually like people—even the smelly ones on the subway, the lying weasel adversaries, the arrogant and bullying judges.

Maybe it's my small-town ethos where hard work was essential to survive and everybody knew and liked each other. Our parents were raised in the neighborhood and didn't leave. My father grew up in 22 Sherman Street, I was born at 29 Sherman. My mother's childhood home was four blocks away. Families had loads of kids—Hugh Carey, our congressman, had 14. Three generations often lived in one row house and everyone had dozens of cousins. Sure there were bad people out there, but we only read about them in the newspaper.

After all, this was Brooklyn in the late '50s, early '60s, its own world. Geographically it was part of New York City, but we had nothing to do with the city. Sure we rode its subways to Yankee Stadium or Madison Square Garden. And our fathers worked there, but we were isolated in our sameness. Of course we came into contact with others—Irv, who owned the dry goods store, still had a tattoo on his arm with a number from the concentration camp.

But we learned early that the world was difficult and, to get ahead, you had to work and hard. Every kid had a paper route or delivered groceries from Key Food, and when it snowed, we'd shovel sidewalks and stoops for a few bucks. Money was always scarce and we all heard our mothers whisper, "Tom we can't afford it." So most needed an occasional helping hand, whether from the local pol, the church or the union. Look for someone you knew, from the neighborhood. Only they could be trusted. "Take care of your own" was our mantra. Because if you don't—even at those impressionable young ages, we knew the answer.

It took a few years into college before I realized how small my world actually was. And when the drug scourge murdered friends, I realized that my neighborhood was not "Ozzie and Harriet." It took knowledge and death to tell me that the real New York City and beyond was more than difficult, it was cruel and callous.

And there was a time where I believed that my being from the neighborhood was a detriment: the fear of the unknown, the stick-with-your-own immigrant mentality, take a safe union or civil service job because there'll be another Depression—you know. But many of us broke free, spurred by parents whose dreams of education were crushed by the Depression, or by a priest who encouraged potential.

But as I practiced law, I realized it helped me in doing what is increasingly the most important legal chore, attracting business. What I learned growing up—be respectful, be competitive, get along with people—has made me able to build a practice. We all know the reality of our profession; the rainmaker is never asked to leave the firm and she's the one who sits on the executive committee. Years ago, a neighbor's firm broke up. He was a partner in a mid-sized firm that had been around for years. I asked him how long into the interview did it take to be asked how much business he had. "That's the first question asked" was his response.

When I became a lawyer, I was amazed that many didn't want to work hard and many disliked people. If you don't want to work, take a job with its 9-to-5 hours and mandatory vacations, and if you don't like people, go into business and sit behind a desk and stare at a screen filled with numbers. But if you want clients to ensure your independence and financial security, whether in a firm or in a storefront in your hometown, you must follow some simple guidelines that I learned very early, yet most lawyers ignore.

KENNETH P. NOLAN, a member of the *Journal*'s Board of Editors, is with the New York City firm of Speiser, Krause, Nolan & Granito. His practice is devoted primarily to plaintiff's personal injury and wrongful death litigation. A graduate of Brooklyn College, he received his J.D. from Brooklyn Law School.

Want to. Work ain't fun and attracting business is more than just meeting the general counsel of GE on the golf course. Sure, personal contacts open the door, but no one is going to send you a case or have you represent their company solely based on your charm and good looks. And most of us did not grow up in the country clubs with the CEOs of Fortune 500 companies.

A young lawyer should join bar associations, charitable and community organizations, making contacts, meeting people, doing good. Don't spread yourself too thin. It's worthless to join 10 bar associations just for your resume. Join one or two and become active. Most are desperate for people to do the grunt work—organize the meetings, write the newsletters. You have to have the mindset that you want to build a practice so you never have to depend on someone else to make a living. And the time to begin is right away, even before you graduate from law school.

Make the commitment, spend the extra time attending the meetings, expanding your circle of friends.

Join a church, synagogue, charitable or community organization. Time is precious and I wasted nights at endless meetings with discussions about some traffic light or how the church parking lot was being used by those too lazy to find a parking spot. But you never know what effect your charitable work will have years later, who you will meet, who you will impress.

When I was first admitted, a couple who lived down the block from my mother had a dispute with their landlord, whom I also knew. You can never refuse a mother, especially when you're first admitted, so I went to see the Feeneys, and they showed me the letter from the landlord's attorney, who was an institution in the neighborhood. I had interned for a summer in law school for South Brooklyn Legal Services, so I was somewhat familiar with landlord-tenant procedure and law and accepted the couple as clients. Everyone knew each other for decades. Indeed my clients lived above the feisty and philosophical landlord ("They owe me rent. I want them gone.") in the two-family house for years. How hard could it be? We'll move out in a month or two whenever we find another apartment. A letter agreement would suffice, I thought. We're all friends. Wrong.

I immediately learned that landlords and tenants are rarely buddies. The landlord's lawyer had done thousands of these and I had to play catch up. Luckily, the judge gave my clients a few extra weeks to find a place, and they did, much to my relief. Of course the landlord and her seven children didn't talk to me for years. My clients were extremely grateful, but didn't even send me a bottle of wine. Yes, my mother volunteered my services, "Kenneth won't charge you. He works for a Manhattan law firm."

Years later, Mr. Feeney, an iron worker, fell from a scaffold and was seriously injured. Since my practice was plaintiff's personal injury and wrongful death litigation, I was called by his wife and went to Bellevue to see him. He told me that other family members were friendly with other lawyers who specialized in this practice. "But I want you, Kenny. You helped us years ago when we couldn't afford to pay you. You're my lawyer." Not only did we both prosper when his case settled, but he referred other iron workers to me as well.

The landlord-tenant litigation (my last one ever) kept me in the library after work and caused me to awaken at 3 a.m., mind racing, fearful of screwing up and ruining my reputation within months of being admitted. But it was worthwhile—I helped friends who didn't know what to do and they were grateful, although I didn't realize it for years.

Of course, this is the exception. In most matters, the return on your time will not pay off in million-dollar settlements or lucrative hourly retainers. But if you don't put in the time, you will never have the opportunity, never receive the phone call from the newly formed start-up, "We need some legal advice and I met you a few months ago at career day at the junior high, can you stop by so we can ask you a few questions?"

I learned very soon that it's a tough world out there, and after 25 years of practice it seems tougher than ever. Don't fear competition, because it won't disappear. So make the commitment, spend the extra time attending the meetings, expanding your circle of friends. You never know who will be the next Bill Gates.

Work hard. Building a practice, whether you're on your own or in a firm, is hard work. First, you have to take care of your caseload, which is often overwhelming and all-consuming. And the reality is that the effort is not for everyone. Many feel more comfortable with a steady paycheck that doesn't deviate based on how much business you generate. In addition, the demands of family, friends and leisure may be much more important than income and professional prestige.

Sadly, it's often an agonizing choice. I taught for five years before turning to law. Although the Brooklyn high school was not academically easy, the rewards (and frustrations) were tremendous, and then there were Christmas and Easter vacations, the summer, and a whole host of other holidays. 180 days of work a year. When I met my fellow teachers a few years after I left,

they would always mention how fortunate I was to have gone to law school. I was never certain they were right, especially on sweltering summer days while riding the No. 4 subway.

The paramount dilemma, however, is between work and family, especially for women who remain primarily responsible for raising children. Working the 60-hour week with meetings and networking strains the best relationships. You will miss some dance recitals, soccer and tee-ball games. You can juggle so that most of the time you're with your family on the important events, but not as much as a 9-to-5 job. You can still do both, but there will be conflicts and you have to make the choice.

Yet there's no substitute. You have to be available to your clients, whether plaintiff or defendant. It would be nice and easy for them to be able to come to your office, but many won't or can't travel. Most are reasonable in their demands, but some aren't and these cause the headaches and the late nights. But if you aren't willing to spend the time, hold the hand, soothe the worries, then someone else will.

For a plaintiff's lawyer, the clients are the referring attorneys who send a steady stream of clients. Many times it's Aunt Verna who tripped and fell at the supermarket and broke her wrist. So you have to go to Aunt Verna's apartment, sit for an hour or two and hire an investigator to take some photos of the site, write the demand letter and try to settle, all the while knowing that liability is iffy, at best. Occasionally, you get lucky and make Aunt Verna happy. But for the most part, these are not profitable hours. But if you want the multimillion-dollar case, you'd better handle the good friend/relative cases properly. Even if you know that the case will be rejected, it is always better to do it in person, explain the law, the emotional toll of a lawsuit, the probability of failure. As one forwarding attorney once told me, "I refer you cases not because you win them, but for the way you reject them."

Hard work will pay off. Sometimes it takes years, but with some luck, the contacts that you made when young will turn into clients and referrals as you age.

Know your stuff. Not only must you be diligent, but you must know what you're doing. A drop-dead gorgeous face will only go so far. Clients want results. Maybe in Little League, everyone played and winning wasn't emphasized. This is the big leagues with millions and jobs at risk. Trying hard is no longer adequate and winning, whether a motion, a trial or appeal, is success.

So know the law, the facts, the procedure, the judge's dislikes. Be prepared to discuss all the intricate details of the law, the nuances of the facts and the venue and how they affect the result. Not every client is sophisticated, but many shop around and have some familiarity with a particular statute or case. And some, especially those in-house counsel, will know as much or more than you. Bring copies of pertinent cases, articles, jury verdicts. Show them you've done your homework, you're competent and experienced. If you're young, drag an older colleague to the beauty contest to satisfy the white hair element. I don't care if you buy your suits at Armani or Max Mara, nothing impresses like knowledge. Always have it, ready to be displayed.

And stick to the law that you know. Don't handle a divorce case no matter how simple if you specialize in medical malpractice litigation. Sure it's tempting to help a friend or prominent neighbor. But it's dangerous. Suddenly the simple divorce turns ugly, you're hit with a thousand motions and the big shot loudmouth is telling everyone that you screwed up his son's divorce. Your reputation is stained because you were arrogant and believed your own hype.

Learn about the venue, the judges, jurors, the local rules. Are you up against a courthouse regular, a golfing buddy of the judge? Research the jury verdicts, the predilections of the judge. Don't be afraid to google your adversary and learn the gossip. Use the Internet. I'm amazed what you can learn about firms, individuals, venues. Most of the material is mundane, but hey, you never know.

Like people. Look, not every lawyer can attract business. If your idea of a wild Saturday night is a good cup of tea and a Thomas Hardy novel, then it may be a bit

difficult to become pals with the general counsel who likes martinis and after-hours clubs. But not impossible. Not everyone can charm a room like Bill Clinton. But even Rudy Giuliani, with his sour disposition, was elected mayor twice.

Acknowledge your weaknesses. If the last case you read was in law school, bring a partner who actually can use Westlaw. Don't be afraid to make your pitch as a team, working together. Unless it's simple, routine litigation, you need assistance anyway. Get and use it, whether it's the young associate or your mother who has practiced for 40 years. If you're the silent one-word answer type, bring the Tammany Hall-like pol who knows everyone and can tell a joke.

Most law practices are people-oriented. And if you actually like people, attracting and keeping them as clients is easier. Not only must you like them (not easy, you know), you must respect them (sometimes harder). Recently, a widow told me why she had retained me. "You told your receptionist to hold your phone calls while the other lawyer I saw took five cell phone calls during our meeting. My time is valuable too," she said indignantly.

Lawyers meet clients when they seek help. Often we learn about the family hatred, the greed, the cheating, the cruelty, the weakness. We, too, have some of these same frailties but they remain hidden. One young lawyer just couldn't deal with some clients. She genuinely disliked them and for all the right reasons. She was given other work, for it was obvious in her communication with them. People may not have attended Princeton, but they know when they are treated with respect. And if you can't, then you will lose them as clients and whoever else they would refer in the future.

So even if you have the personality of a wooden table, business generation will not be a problem if you like and respect the individual. Difficult to smile when you know all the mortal sins, but no one will ever canonize you either.

Tell the truth. Yes, you learned this in kindergarten, but this is hardest for me because most times the potential client doesn't want to hear the truth. If you don't believe me, try it. Next time you have the chance to land a huge client, start the conversation with, "You know you can lose this case." Somehow those words never jump right out of my mouth and that little devil on my shoulder is always whispering, "Tell them after they sign the retainer."

The client wants, needs, covets success. So does your adversary. Only one can win. Clients are angry, distraught, sullen, emotionally bouncing off the wall and want you to solve all their problems. Impossible of course, but there are some out there who will promise a trip to Mars just to land the retainer. It's very difficult to tell a potential client that victory is a long shot, that the judge is plaintiff- or defense-oriented, the jury will hate them, the law does not allow this or that. But it's not fair, is always the plea. Life is unfair, as Jack Kennedy once said.

Yet there is no substitute. If you lie or gloss over reality, eventually your client will learn the truth, and the anger, the feelings of betrayal will increase. It's better to be a stand-up gal and pronounce the good and the bad. Sure you will lose a client or two to the deceitful, but I've been told many times after the retainer was signed, "You were the only one to tell me the truth."

You must not only be honest at the outset but all during the relationship. Communicate clearly and often. If there's a particularly horrendous development, reveal it face to face. Honesty is burdensome, but it truly is the best policy.

Unfortunately, the work of building a practice doesn't end when you make partner or turn 40. It never ends. Such are the demands of our profession. And the thank-you notes don't land on my desk as often as they should. But occasionally we make a difference and whether acknowledged or not, it allows me to sleep soundly and comfortably at night.

Thorough Trial Preparation Is Vital for Courtroom Success

BY JOHN P. DIBLASI

It makes little difference in the world of trial advocacy what law school you went to, whether you were an editor of the law review, how innately intelligent you are, or how much experience you have accumulated. If you are not prepared you will lose.

I often see lawyers who rely on their experience and courtroom savvy to win cases, only to be undone by a well-prepared neophyte. A lawyer once said to me that he didn't need to know anything about a case to select a jury. I couldn't disagree more. You must know everything about your case before you are anywhere near the courtroom. If you do not the person who will suffer most is not you but your client. The question becomes then how do we prepare?

Reviewing the Case File

A thorough review of the pleadings, the complaint and the answer, is where your preparation must begin in every civil case. Whether you represent the plaintiff or the defendant, you must be completely familiar with all of the causes of actions set forth, and the factual allegations supporting them.

You must review the complaint as plaintiff's counsel to see if there is any need to amend. As defendant's counsel you must make a review of the complaint, to be prepared to make a preclusion motion at trial if the plaintiff attempts to offer evidence that involves causes of action not set forth or factual allegations that result in surprise and prejudice. Defense counsel must review the answer to determine whether there is any need to amend, in particular to add affirmative defenses, cross-claims or counterclaims that should be pled. The plaintiff's counsel should review the answer, in the same way defense counsel has reviewed the complaint, to be prepared to make a motion to preclude.

Is the Complaint Complete?

All too often after the selection of a jury and prior to the opening statements, the plaintiff's counsel seeks to amend the complaint to include a cause of action that should have been set forth in the original pleading, or to add essential factual allegations that have been omitted. Pursuant to the provisions of the CPLR, both the complaint and the answer must give notice of the transaction or occurrence, or series thereof that gives rise to the claims, and must set forth factually the elements which support a cause of action or a defense as a matter of law.[1]

When drafting any complaint or preparing for trial you must review those sections of the Pattern Jury Instructions[2] as a starting point to ensure that you understand what is needed to prove the causes of action. The annotated commentary following every charge is an invaluable research tool in ensuring that you have set forth the cause of action and the factual allegations needed to support the same. Whether you are dealing with a cause of action set forth in the Pattern Jury Instructions or one that is not contained therein you must thoroughly research the case law with respect to the causes of action set forth in your complaint.

It is within the court's discretion, at the time of trial and before the presentation of evidence has begun, to grant leave to amend the pleadings to add a cause of action without the granting of costs or a continuance that would invariably result in a mistrial. The court would be justified in doing this assuming that there is no surprise, no prejudice, no unfair advantage being gained by the amendment and that no further discovery is warranted. It would be unlikely that an application to amend to add a cause of action on the eve of trial would not result in surprise, prejudice, unfair advantage, and the need for further discovery, and accordingly a denial of the same. The CPLR provides:

> Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or oc-

JOHN P. DIBLASI has been a justice of the state Supreme Court, Westchester County, since 1994. From 1990–1994, he was a city court judge in Mount Vernon. A fellow of the American Bar Foundation, he has taught trial advocacy skills at Pace University School of Law and his alma mater, St. John's University School of Law. He is a graduate of Syracuse University.

Author's Note

Every time I write an article on trial advocacy I feel I run the risk of making lawyers feel that somehow their performance is substandard. I do not feel that way. The majority of lawyers who appear before me are well-prepared and are dedicated advocates for their clients. My hope is that lawyers and their clients can benefit from what I see each year in the course of presiding over more than 20 jury trials to a verdict and at least 100 more than settle somewhere between openings and the verdict.

My father, Vincent A. DiBlasi (1923–1997), was my mentor, best friend, and one of the finest trial lawyers I have ever watched in a courtroom. He could tell stories about courtroom legends such as Harry Gair, Al Julien, Harry Lipsig, Hon. Jack Fuchsberg, and the Hon. Samuel Liebowitz from first-hand experience from trying cases against them, and in the case of Justice Liebowitz before him. Whatever I have become as a trial lawyer or trial judge I owe to my father. As a trial lawyer he lived by the maxim "Preparation presupposes genius." He quoted it from one of his professor's at St. John's University, which he attended as both an undergraduate and law student when it was located on Schermerhorn Street in Brooklyn. It embodied his entire theory of trial practice, and he would use it in a motivational way to embolden me as a young lawyer to try cases against those with far more experience. His theory was that most cases are won or lost in the preparation process. Senator Bill Bradley once put it another way, "Be prepared or lose to someone who is."

John P. DiBlasi

> currences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as maybe just including the granting of costs and continuances.[3]

Further:

> Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented.[4]

This motion would normally be made on papers sometime before the start of jury selection. The dilemma that develops for the trial judge is whether leave should be freely given at a point where the jury has been selected and the application is made prior to or immediately after openings. This is not a situation where the presentation of evidence has commenced, and an application to conform the pleadings to the proof would be appropriate. Where the plaintiff's counsel knew well in advance that this application would be made and delayed in doing so until this juncture, and where prejudice to the defendant ensues thereby giving the plaintiff an unfair advantage, preclusion would be completely justified. In the alternative the court could declare a mistrial, award costs to the aggrieved party, allow the amendment, response thereto, and required discovery. The court must ultimately balance the waste of time and judicial resources, and the prejudice to the defendant by virtue of a further delay in the proceedings, against the prejudice to the plaintiff who may lose a cause of action, or have the complaint dismissed. In the case of preclusion that results in the outright dismissal of the entire complaint, or a significant cause of action, the plaintiff is relegated to bringing a malpractice action against his attorney.

Once the plaintiff's introduction of evidence has begun and facts have been put into the record that would support the new cause of action, or support the cause of action already set forth in the plaintiff's complaint, the following motion may be made pursuant to the CPLR:

> Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.[5]

This section of the CPLR contemplates that no objection has been made to the introduction of the evidence supporting a new cause of action or supporting a cause of action that was inadequately pled, or the evidence has been admitted over an objection. If defense counsel fails to make any objection to the introduction of the proof that gives rise to a new cause of action, or proof that cures a defect in a cause of action inadequately pled in the complaint, it would seem that any opposition by the defendant to an application to conform the pleadings to the proof would be waived. If evidence was admitted over an objection, the defendant is certainly in a position where the right to oppose an application to conform the pleading to the proof has been preserved. If the objection by defense counsel is sustained regarding the admission of proof supporting the new cause of action, or a cause of action inadequately pled, the plaintiff's counsel must now seek leave to amend.[6]

In preparing for trial, counsel for both the plaintiff and the defendant base their preparation on the causes of actions and allegations contained in the complaint. The theory of the case, the *voir dire* and selection of the jury are predicated upon that preparation. Absent an

amendment that will result in no prejudice, what costs or continuances will abate any prejudice once the jury has been selected? Jury tolerance for any delay in the proceedings—much less a discretionary grant of a continuance of several days to allow an amendment in the pleadings, a response thereto and additional discovery—may in and of itself cause a mistrial. One of the goals of the CPLR is to liberalize pleading requirements and to allow amendments thereto. Depending on the facts, the most logical way for the court to proceed in the interests of justice, may be to declare a mistrial, assess costs and set a schedule for the service of the amended pleading, responses thereto, and for any discovery flowing therefrom. The problem for the practitioner is that all of this is within the discretion of the court, and whether counsel seeks leave to amend before the introduction of the evidence, or seeks to conform the pleadings to the proof, the court may very well deny the application or simply preclude any evidence from being offered that would support the new cause of action or cure the factual defect in the cause of action already pled.

Examples

Failure to Plead a Cause of Action In a trial for personal injuries and damages where the plaintiff, a tenant, was the victim of a sexual assault, the complaint set forth only a cause of action for common law negligence on the part of the landlord. The complaint failed to set forth a cause of action for failure to provide adequate security.

The plaintiff's counsel had apparently rehearsed the plaintiff's direct examination to the point where the testimony was practically memorized, a mistake in witness preparation that is discussed in a prior article.[7] When the middle of the plaintiff's direct examination was reached and questions were asked about the failure to provide adequate security, defense counsel moved to preclude the asking of any such questions because no such cause of action was pled in the complaint, mentioned anywhere in the bill of particulars, or brought up in the course of discovery.

If the cause of action or facts related to the same had been referenced in any pleading, the bill of particulars or anywhere in the discovery materials exchanged, this would have eliminated any prejudice to the defendant and certainly would have supported a motion to amend pursuant to CPLR 3025(b). The court granted the motion to preclude, which eliminated a third of the direct examination and put the witness into such a state of confusion due to the rehearsed nature of her testimony that she fled the witness stand in tears. The case was settled for a sum that was nowhere near the jury verdict potential.

Last-minute Claim for Punitive Damages In a case seeking damages for personal injuries based upon the alleged conduct of the defendant, which included a criminal conviction for driving while intoxicated and the commission of additional acts that would support the award of punitive damages, immediately before the opening statements the defendant conceded liability and any issue involving the serious physical injury threshold.[8] These concessions surrounding the facts of the accident were effectively eliminated from consideration by the jury, and the only remaining issue to be tried was fair and adequate compensation for the injuries sustained.

Defense counsel then made a motion *in limine* to preclude the plaintiff from offering any evidence at trial regarding the happening of the accident and the defendant's criminal conviction for driving while intoxicated. If the plaintiff had included a claim for punitive damages in the complaint, the plaintiff would still have been entitled to go into the facts surrounding the accident and the defendant's criminal conviction. If precluded from proving any of these facts, the plaintiff would lose an extreme tactical advantage, which is to have the jury consider conduct of the defendant that clearly would have had the potential effect of increasing the award of damages. The plaintiff moved to amend the complaint to include a claim for punitive damages.[9]

Because punitive damages are not a separate cause of action but must be set forth as a demand for relief in the request for damages in the complaint, the court would have to deny the motion and allow some evidence of the happening of the accident for background purposes. Here, however, there was no legitimate basis for doing this. The court could have precluded the plaintiff's counsel from offering any evidence about the happening of the accident because it was no longer in issue as the defendant had conceded liability and the threshold issue. A motion to amend the complaint to include a claim for punitive damages should be denied, due to the lateness of the motion. Having had available for several years the facts that would support a claim for punitive damages created a laches situation. If an amendment were allowed, the defendant would be confronted with a new, prejudicial claim for damages not covered by an insurance policy for automobile liability. The court could declare a mistrial to allow the amendment, given defense counsel's use of the tactic of waiting until the very eve of trial to concede liability and threshold. However, why as plaintiff's counsel would you put yourself or your client in this position and hope that the court in its discretion would do so?

A careful review of the pleadings before the trial would have revealed the inadequacy of the complaint in

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its failure to include a claim for punitive damages. If you have a legitimate claim for punitive damages based upon the defendant's conduct, why omit the claim from your complaint? You should always plead any viable cause of action or relevant sets of facts that is available to your client.

Late Spoliation of Evidence Claim In a case where a third-party defendant employer was alleged to have engaged in a willful destruction of evidence (spoliation) essential to the plaintiff's products liability case, leave was granted prior to the trial to amend the plaintiff's complaint to include such a cause of action directly against the plaintiff's employer. In essence, if the plaintiff was unable to make out a case against the defendant on the products liability or common law negligence claims, the jury could be asked to consider whether the destruction of evidence by the employer was the cause of this and make an award of damages as if the plaintiff had prevailed under its original theories.

The plaintiff's counsel amended the complaint to set forth a common law negligence cause of action against the employer. This was not the cause of action that the amendment was granted for pursuant to the court's order. Further, any such complaint would have to be dismissed as such an action by an employee against an employer is prohibited by virtue of the remedies afforded the plaintiff under the Workers' Compensation Law. The amended complaint failed to allege any facts against the employer based upon the willful destruction of evidence.

The defendant's counsel moved immediately after openings to dismiss the plaintiff's complaint, and plaintiff's counsel sought leave to amend. The court was left with the choice of declaring a mistrial or dismissing the plaintiff's direct cause of action against the employer because of the inherent prejudice that such an amendment would create. Although the court exercised its discretion under the circumstances and granted a mistrial to allow the amendment, the response thereto and further discovery, the court would have been fully justified in dismissing the plaintiff's complaint against the employer and directing that the trial proceed.

When an Amendment Is Needed

The examples cited above were designed to illustrate the need for a thorough review of the complaint before the time arrives to select a jury. Laches, or the failure to promptly move to amend once you become aware or should have become aware of the omission, combined with any form of prejudice or the creation of an unfair advantage, requires preclusion at the time of trial.

Upon review prior to trial and upon finding that your complaint is inadequate, you

should immediately move by an order to show cause to stay the trial of the action, and seek leave to amend the complaint,[10] thereby allowing your adversary time to serve a responsive pleading and the opportunity to conduct any additional discovery that may be warranted. Further, by separate letter, you should advise the defendant that you will make your client available for further deposition and, if necessary, a further medical examination limited to the amendment. You will also need to provide any needed authorizations, and any additional records that your adversary would be entitled to receive. If you have done all of this contemporaneously or in advance of the submission of the order to show cause and have asked your adversary to consent to the amendment, you have put yourself in a much better position with the court in terms of having your motion granted.

The Answer

It is extremely important from both the plaintiff's and defendant's perspective that counsel mark the pleadings as soon as the answer is served. This is not something that should be done as part of trial preparation, but should be done immediately upon the preparation or receipt of the answer to guide both parties on the facts in issue during the course of discovery.

Marked pleadings consist of a copy of the plaintiff's complaint that has noted to the left of each factual allegation in the complaint, an "A" for "admit," "D" for "deny," "DKI" for "deny knowledge" or "information sufficient," "DEXC" for "deny except admit as to certain facts," along with a copy of the defendant's answer and the plaintiff's answer to any counterclaims interposed.

Marked pleadings must be provided to the trial court by the party who filed the note of issue.[11] This rule is also reiterated in the Uniform Rules for the New York State Trial Courts, which also require the submission to the court of a copy of the bill of particulars.[12] In recognizing that many attorneys or firms may not follow this practice, and that the first time the pleadings are marked is during the trial preparation process, special attention must be given to those issues that are in dispute and those that are not. Issues involving ownership, operation and control of some premises, product or vehicle must be scrutinized.

I have seen numerous instances where defendants have admitted ownership of a vehicle but have denied permissive use, or admitted ownership of some premises or product but not control or operation. The answer of the defendant to the individual allegations in the plaintiff's complaint is the direction to the plaintiff's counsel that the plaintiff must prove by a fair preponderance of the credible evidence[13] the truth of the same. I have seen too many examples of attorneys being surprised at trial by an "innocuous" denial of fact that may turn into a major legal issue resulting in the dismissal of a cause of action, or the complaint in its entirety.

Affirmative Defenses

"A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading."[14] The key words "shall plead all matters" mean that if you fail to plead the affirmative defense you will be precluded from proving it at the time of trial. The question becomes, what is an affirmative defense? The ones most commonly asserted are comparative negligence, failure to use a seat belt, threshold, the statute of limitations, fraud, the statute of frauds, account stated and illegality. This is not an all-inclusive list. The word "surprise" in the statute must guide defense counsel in determining whether you should have pled the affirmative defense, and forms the basis for your motion to preclude at trial if you are the plaintiff's counsel.

Have you set forth all of the affirmative defenses that are available to you as defendant? Do you need to make a motion to amend?[15] As the plaintiff, what must you be prepared for by way of countering the affirmative defenses? Is there an affirmative defense in the answer, such as the statute of limitations, that could lead to the dismissal of the entire action? What facts may the defendant's counsel attempt to offer at trial that should have been set forth as an affirmative defense, and that you as the plaintiff's counsel should move to preclude the introduction of?

Cross-claims and Counterclaims

"A counterclaim may be any cause of action in favor of one or more defendants . . . against one or more plaintiffs,"[16] the key words being "any cause of action." If, as a defendant there is any cause of action that you wish to assert against the plaintiff, whether it is related to the litigation or not, you may assert it.

Everything that applies to the plaintiff's complaint now applies to the defendant's counterclaims. Does the counterclaim set forth all causes of action? Does it allege sufficient facts in support of the same? Has the plaintiff served an answer to the counterclaim (the reply)? "There shall be a reply to a counterclaim denominated as such."[17] Do you need to amend?

"A cross-claim may be any cause of action in favor of one or more defendants . . . against one or more defendants,"[18] the most common being for indemnification and contribution. There is no requirement to serve an answer to a cross-claim, unless one is demanded. If an answer to the cross-claim is not demanded, the cross-claim is deemed denied.[19] The most common error in this area is the failure of a defendant to cross-claim against all co-defendants for indemnification and con-

tribution. As defense counsel reviewing the answer before trial have you cross-claimed against all of the co-defendants? Do you need to amend? Have all of the co-defendants cross-claimed against your client?

The Bill of Particulars

The bill of particulars serves to amplify the pleadings. Although it is not a pleading itself, the Court of Appeals has held that it may be considered by the court in support of a motion to preclude or a motion to amend where the information in it would correct a legally insufficient pleading.[20]

If the bill of particulars should be supplemented or a motion to amend should be made, it should be done well in advance of trial.

The most common problem arising with a bill of particulars is the failure to set forth all of the injuries or damages that have been sustained, which results in a motion to preclude at the time of trial, assuming the defendant has no other notice of the alleged injuries or damages. The CPLR allows one amendment as of right to the bill of particulars at any time up until the filing of the note of issue.[21] A supplemental bill of particulars setting forth continuing special damages and disabilities may be served up to 30 days before trial.[22] Amendments to the bill of particulars should be allowed in the absence of prejudice.

Again, all of the same caveats with respect to a careful review of the pleadings by counsel for both parties apply to the bill of particulars. If the bill of particulars should be supplemented or a motion to amend should be made, it should be done well in advance of trial.

Use of Pleadings and Bill of Particulars at Trial

Starting with jury selection, the pleadings may be used during the trial. The Court of Appeals held more than 100 years ago:

> There is no rule of law which requires a party in any action to put his adversary's pleadings in evidence before his counsel can be allowed to comment upon them in his address to the jury. Statements, admissions and allegations in pleadings are always in evidence for all the purposes of the trial of the action. They are made for the purpose of the trial, and are before the court and jury, and may be used for any legitimate purpose.[23]

Even with the abbreviated nature of the jury selection process today, the pleadings and the bill of particulars may be referred to in setting forth the claims that have been made, the defenses thereto, the counterclaims, the cross-claims, and in discussing the issues that are in dispute and those that are not. During the opening statements, the same uses may be made of these items. In addition, because the complaint, answer, and bill of particulars are often verified by the parties to the proceeding, they may be referred to as prior sworn statements and may be referred to and used by counsel in their openings for whatever tactical advantage may be gained.

In preparing the witness for trial, the pleadings and bill of particulars must be reviewed by the party who has verified them, and even if the same contains an attorney's verification the witness must be familiarized with the contents of the same. Clearly, the pleading or bill of particulars, which contains an attorney's verification, is based at least in part on information provided by the party; and despite the fact that it is not signed by the party, it may be effectively used during cross examination. A party must be prepared to answer any question concerning allegations in the complaint, answer or bill of particulars that conflicts with subsequent testimony given at the examination before trial or by virtue of any other discovery materials.

A careful review of these documents from the standpoint of what they allege, what they fail to allege, and what is exaggerated is extremely important. As a document that has been sworn to by a party, or that contains information provided by a party, it may be used for impeachment purposes on cross-examination just as any other prior inconsistent statement would be. Given the fact that these documents are sworn to at a point much closer in time to the events that form the basis for the proceeding, and before formal discovery has been commenced, they should be given greater weight. Certainly the party's recollection is not getting better with the passage of time. It is extremely important for counsel for both the plaintiff and the defendant to compare the allegations in the complaint and the bill of particulars, and the admissions and denials in the answer, with the subsequent discovery materials that have been produced. Particular attention should also be given to testimony at a deposition to determine if there are any inconsistencies.

If the party fails to testify to factual allegations set forth in the pleadings, they may be used to show the original allegations that were sworn to were false.

If the party makes a claim during the trial that was not mentioned in the pleadings or bill of particulars, and assuming that the court has granted a motion to preclude, counsel may use the pleadings to show that no such claim was made in the formal papers that are much closer in time to the accident. Further, discovery did not reveal any such claim or facts, and therefore the

pleadings may be used to show that the witness' testimony has been recently fabricated for the purpose of trial. By the same token, on redirect counsel may refute an allegation of recent fabrication by showing that the pleadings contained the very facts to which the witness is now testifying at trial. This is one of the rare situations where a witness may use his own written pretrial statement during the trial without a successful objection of bolstering being made.

Finally, if the witness exaggerated claims that are set forth in the pleadings or bill of particulars, these documents may be used at trial to show the exaggeration made under oath at the onset of the litigation.

Keep in mind that once the verified pleading or bill of particulars has been served, you may not withdraw the allegations in an effort to deprive the cross-examiner of the right to question the party about it. The pleading is still a prior sworn statement that may be used for cross-examination purposes.

Finally, keeping all of these uses in mind, the pleadings may be referred to during the course of the summation, and effectively so by an advocate who has reviewed them carefully before trial.

Reviewing the Entire File

This topic falls into the area that you never know your file as well as you should. All correspondence, notes and memorandums to the file, investigative reports, records, witnesses' statements and expert reports/responses should be carefully reviewed. A fresh look at these materials before trial may give you new insights into the case, may cause you to amend your pleadings or supplement your bill of particulars, or may cause you to conduct a further investigation into any number of issues in the case. In situations where you have not handled the case from its inception, or several attorneys have worked on the matter, this review becomes all the more important.

Make sure that any materials that are the subject of a discovery demand or order have been exchanged—such as the names and addresses of any witnesses,[24] adverse party statements,[25] photographs, documents[26] and expert responses.[27] Inevitably there is always a demand for these items and others, or a preliminary conference order directing the same to be produced. Your failure to exchange same will result in your being precluded from using these items or calling these witnesses at the time of trial.

The most common mistakes that are made are in the areas of exchanging the names and addresses of witnesses and the exchange of expert responses. I have noticed a recent trend whereby most counsel are serving a notice for discovery and inspection seeking the names of *all* witnesses to be called at the time of trial. Increasingly, preliminary conference orders are encompassing this same language in their discovery directives regarding the same. Some counsel are taking the liberty of interpreting this as meaning "eyewitnesses to the occurrence" or are assuming, based upon past practice, that discovery of witnesses is limited to this definition.

As a trial judge I have recently encountered numerous situations where my colleagues have issued an order directing the production of the "names and addresses of all witnesses the party intends to call at trial." For the trial judge that is the law of the case, and is not subject to interpretation. As long as the witness is going to provide testimony that is somehow related to the underlying occurrence, you must exchange the demanded witness' information. Counsel who tailor their discovery response to provide only the names and addresses of eyewitnesses to the occurrence will wind up on the wrong end of a preclusion order.

The expert responses present their own set of problems. If the expert response is inadequate and you have not moved to preclude its use or have it supplemented before trial, do not expect the court to grant any such application once the trial has begun. The problem I see occurring repeatedly is the service of an expert response on the eve of trial that is inadequate in some aspect regarding the information it provides. The aggrieved party is left with no time to move to preclude or require the service of an adequate response. Under these circumstances, the aggrieved party should immediately serve a notice of rejection, and in addition move by order to show cause to stay the trial. Counsel should seek an order of preclusion, or a direction that the expert response be supplemented, and the opportunity to either retain an expert or supplement any prior response.

No argument is more unavailing with respect to counsel's delay in serving an expert witness response than to tell the court, "I thought the case was going to settle, and I did not want to spend the money on an expert until I was sure the case was going to trial." If you have undertaken to represent a client in a proceeding where an expert witness is required, you have an obligation to retain an expert sufficiently in advance of trial to make a timely exchange of an expert's response. I do not wish to digress into the many cases surrounding the timely exchange of CPLR 3101(d) responses,[28] but I would suggest that counsel should always serve the expert response as close to the date that the expert is retained as is reasonable, and in no event should the response be served any later than 60 days prior to trial.

Finally, you must review all discovery demands, discovery orders, your responses thereto and your adversary's responses thereto to ensure you have both exchanged and received all of the materials you are entitled to. Clearly, if you have failed to exchange mate-

rials, you must do so immediately. If you have failed to obtain certain materials, you have a problem. The service of the note of issue and certificate of readiness certifies that all discovery is complete. As plaintiff's counsel, before these items are served you must be sure you have in your possession all items of discovery that you need. The receipt of the note of issue and certificate of readiness by defense counsel should trigger a comprehensive review of the entire case file to ensure that all demands and orders have been complied with by your adversary; and in the absence of the same, a motion to strike the note of issue and certificate of readiness should be made. Your review at this juncture should include a careful review of the deposition transcripts to ensure that any items demanded at the time of the deposition have been provided.

Serving a trial subpoena seeking the items you failed to obtain during the course of discovery is a last resort.

What do you do when your case is scheduled for trial and upon reviewing the file you realize you failed to demand certain items of discovery, or your adversary failed to comply with a discovery demand or order? Make a good faith effort to obtain the discovery items from your adversary, by both oral and written request. If you cannot do so, bring on an order to show cause to stay the trial and obtain the discovery materials. While your oversight may not require the court to give you the discovery that was not obtained before the note of issue and certificate of readiness were served, absent a showing of real prejudice to your adversary the court in its discretion may grant the application. Serving a trial subpoena seeking the items you failed to obtain during the course of discovery is a last resort. However, if served upon a party the subpoena will not survive a motion to quash, as subpoenas for trial may *not* be used to obtain materials that should have been otherwise obtained during the course of discovery. Clearly, you will fare better with a nonparty.

Reviewing the Depositions

What a great advantage it is to have all of the anticipated testimony of a party or witness transcribed and sworn to before the trial and available for your use as either evidence-in-chief or for the purposes of impeaching a witness.[29] What a terrible error it is when counsel fails to review the depositions adequately before trial, thus rendering this material useless.

Watching attorneys fumble in front of a jury while attempting to locate deposition testimony that they wish to read into the record is extremely troubling. There is nothing that annoys jurors more than delay. It gives the jury the impression that you are not prepared and hurts your credibility. This material should be at your fingertips, ready to use immediately.

Deposition testimony may be read into evidence as part of your case-in-chief,[30] or used to show that the witness made a prior inconsistent statement.[31] Upon the reading of part of any deposition "any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read."[32] In addition, you must be ready to object to any portion of the deposition which should be inadmissible at trial even if no objection was made at the deposition.[33]

How do you meet the challenge of having the deposition testimony immediately available for use during the trial? First, read all of the depositions without taking any notes to familiarize yourself with all of the testimony. Next, the depositions should be read a second time and every deposition should be briefed and indexed. All of the important points of every witness' testimony should be summarized briefly with the page and line number of the testimony given. You then should develop an index for your cross-examinations referring to the key points that you will cover, so that the relevant portion of this prior testimony is immediately available for impeachment purposes. An index of any testimony of an adverse party you plan to read into the record as part of your case-in-chief should be prepared separately, along with an index of any questions asked of your client that were objected to at the deposition, or that you plan to object to at trial. It sounds complicated but it is not.

Finally, if you are going to use a deposition during the trial, make sure the court has a copy. Unless the court has the deposition before it, the judge cannot make a ruling on an objection to counsel reading in testimony from a deposition.

Case File Organization

If the case file is not readily available, you are not organized. Both the jury and the court will quickly recognize disorganization. It damages counsel's credibility and may very well undermine the credibility given to you by both the jury and the court with respect to the presentation of your client's case.

The first thing you should do is remove from your file all nonessential material, correspondence, billing records, etc. This will often reduce the size of the file taken to court by two-thirds. It is annoying to have to reassemble the file when the case is over, but you will

have a much smaller file to go through if you need to find something in court.

Whether you represent the plaintiff or the defendant, you should have a set of marked pleadings and the bill of particulars available for immediate use. Exhibits you intend to offer into evidence should be pre-marked and readily available. It is very disturbing as a judge to have counsel ask for time to find their exhibits and put them in order in the middle of a trial, an experience I have had more often than I would like. Further, like the deposition, if there are statements, reports or other documents that you intend to use to impeach the credibility of a witness, you must have them at the ready.

All discovery demands, discovery orders, and responses thereto should be separated and readily available. I cannot count the number of times that counsel have made a motion to preclude immediately before or during the trial based upon the failure of their adversary to make a required discovery exchange, only to be told that the order or demand requiring the same was left at their office. Upon an application to preclude, counsel should request that both the discovery demand/order and response thereto be marked as a court exhibit to ensure that these items are part of the court record for the purposes of appeal.

All of the skills attendant to being a trial advocate may be developed by any lawyers willing to repeatedly invest the time not only in themselves, but more importantly in their client's cause.

Briefed and indexed depositions with copies for the court should be at your disposal. Any decisions before the trial that constitute the law of the case with respect to any issues should also be readily available, along with copies for the court. Further, if you intend to rely on a statute in effect at the time the action arose, you are *required* to submit to the court a copy of the specific provisions.[34]

A formal memorandum of law should be prepared in advance of trial with respect to any significant legal question that may arise due to a motion *in limine* or as a result of an evidentiary or procedural objection during the trial. Copies of this memorandum of law must be available for the court and counsel, and should also be marked as a court exhibit. Although counsel may be directed pursuant to court rule to submit a memorandum of law in advance of trial,[35] nothing is more impressive to a judge than an attorney who has anticipated legal issues and, in advance of trial, taken the time to prepare a memorandum of law. Nothing is less impressive than an attorney who anticipated the legal issue but simply gives copies of cases to the court in support of the position, or, in the worst case scenario, merely the citations. Clearly, not every legal issue that may arise during a trial may be anticipated, and sometimes counsel has no choice but to cite cases or provide the court with copies of the same, but this should be avoided if possible.

Finally, formal written requests for charge should be prepared before you step foot in the courtroom, and they should always be marked as court exhibits when they are submitted.

Developing the Theory of Your Case

After you have thoroughly reviewed your file, the first step in developing the theory of any case is to determine what your requests for charge will be. The best place to begin your research is with the Pattern Jury Instructions. Given the vast number of charges for specific causes of action, it is easy to ascertain from the charge and the case law set forth in the annotations what must be proved to establish any cause of action or defense. Suffice it to say it is not enough to read the charge and the annotations. Counsel must read the cases to become familiar with the law and how it was applied to specific facts. Absent a charge in the Pattern Jury Instructions, counsel must research the applicable case law to determine the elements of the cause of action.

If you know what you have to prove to ensure that you are successful in getting the court to grant your application for specific charges, you know how you must develop the theory of the case, and what you hope to accomplish by the end of the trial. This will guide you in your trial of the entire case from jury selection through closing with the hope that the court's charge will ultimately sound like a ratification of all that you have attempted to prove on behalf of your client.

Conclusion

Years ago when I first began teaching trial advocacy at Pace University School of Law, I heard a judge, who was a fellow faculty member, say that great trial lawyers were born, not made. I couldn't have disagreed more. The art of being a great trial lawyer may depend in part on a person's intellectual ability, public-speaking skills, and the ability to endure the stresses of being in court. However, all of the skills attendant to being a trial advocate, not the least of which is the art of adequate preparation, may be developed by any lawyers willing to repeatedly invest the time not only in themselves, but more importantly in their client's cause. In essence, from

my own experience my father was right: "Preparation presupposes genius."

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1. CPLR 3013.
2. New York Pattern Jury Instructions—Civil (3d ed., West Group 2002) (PJI).
3. CPLR 3025(b).
4. CPLR 3025(d).
5. CPLR 3025(c).
6. CPLR 3025(b).
7. John P. DiBlasi, *Preparing Your Witness for Trial*, N.Y. St. B.J., Vol. 65, No. 8, at 48 (Dec. 1993).
8. N.Y. Insurance Law § 5104.
9. *See* 1B PJI § 2:278.
10. CPLR 3025(b).
11. CPLR 4012.
12. Uniform Rules for the N.Y.S. Trial Courts § 202.35(a)(1), (2) ("Uniform Rules").
13. 1A PJI § 1:60.
14. CPLR 3018(b).
15. CPLR 3025(b).
16. CPLR 3019(a).
17. CPLR 3011.
18. CPLR 3019(b).
19. CPLR 3011.
20. *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 565, 307 N.Y.S.2d 647 (1970).
21. CPLR 3042(b).
22. CPLR 3043(b).
23. *Holmes v. Jones*, 121 N.Y. 461, 466 (1890); *Hayes v. Henault*, 131 A.D.2d 930, 933, 516 N.Y.S.2d 798 (3d Dep't 1987) ("Since a bill of particulars is a pleading, it is always before the court and may be referred to by counsel and its contents may be read to the jury. Thus it need not be introduced as evidence") (citation omitted).
24. *Zellman v. Metropolitan Transp. Auth.*, 40 A.D.2d 248, 339 N.Y.S.2d 255 (2d Dep't 1973); *Zayas v. Morales*, 45 A.D.2d 610, 360 N.Y.S.2d 279 (2d Dep't 1974).
25. CPLR 3101(e).
26. *Kandel v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).
27. CPLR 3101(d)(1).
28. *Marks v. Solomon*, 174 Misc. 2d 752, 667 N.Y.S.2d 194 (Sup. Ct., Westchester Co. 1997).
29. John P. DiBlasi, *View From the Bench: Lawyers Need Detailed Knowledge of Rules for Using Depositions at Trial*, N.Y. St. B.J., Vol. 73, No. 8, at 27 (Oct. 2001).
30. CPLR 3117(a)(2).
31. CPLR 3117(a)(1).
32. CPLR 3117(b).
33. CPLR 3115(d).
34. Uniform Rules § 202.35(2)(b).
35. Uniform Rules § 202.35(2)(c).

Statutes and Case Decisions Reflect Appellate Division Latitude In Reviewing Punitive Damages

BY EDMUND C. BAIRD

Got a punitive damages verdict you don't like? Even if you lose the post-trial motion, you should consider an appeal. The Appellate Division has considerable discretion in reviewing the amount of such awards, and in appropriate cases it does not hesitate to modify them.

So how do you decide whether you have an appropriate case? In general, the court will modify awards, by *remittitur*, which are "grossly excessive" when measured against the nature of the defendant's conduct, the extent of the harm suffered by the plaintiff, and the wealth of the plaintiff. If the challenge at the Appellate Division fails, however, it is probably time to quit. Because of limitations on the jurisdiction of the Court of Appeals and its interest in issues of broader legal significance, there is almost no chance of further review.

This article looks at the factors the Appellate Division has considered in challenges to the size of punitive damage awards, the requirements of federal due process in this context, and the possibility of *additur* for punitive awards that are grossly inadequate. It concludes with the factors that control review by the Court of Appeals.

Legal Background

Punitive damages are imposed to punish those who engage in wrongful conduct and to deter such conduct in the future.[1] Traditionally, such damages may be awarded when the defendant's conduct "is morally culpable, or is actuated by evil and reprehensible motives."[2] The fact finder must typically find the defendant's conduct to be "wanton and reckless" or "malicious" in order to award punitive damages.[3] This standard may be altered by statute, however. For example, N.Y. Civil Rights Law § 51 allows punitive damages for the lesser showing of a "knowing" violation.[4]

The Court of Appeals set out the framework for reviewing punitive damage awards in *Nardelli v. Stamberg*.[5] The amount of such damages, the Court said, is a question that rests primarily in the discretion of the trier of fact, and this determination is not to be lightly disturbed. Nevertheless, it stated that both the trial court and the Appellate Division have the discretion to order a new trial, unless the plaintiff consents to a reduction in the award.

The *Nardelli* decision cautioned that this discretion may only be exercised when the award is "grossly excessive as to show by its very exorbitancy that it was actuated by passion."[6] This test goes back nearly 200 years in New York,[7] and is grounded in the idea that the measure of such damages is fact-dependent and is based, to a large degree, on a subjective determination. Short of an "outrageous or extravagant" award, there is no objective standard or rule that courts can apply to determine whether it is excessive.[8] When the court determines that the award meets this standard, the court grants a *remittitur*—that is, it grants a new trial on punitive damages unless the plaintiff stipulates to the court's revised assessment of the damages.[9]

Every New York appellate decision in this area has considered only whether the punitive award is too high; none has considered an argument that the punitive award is too low. Therefore, most of this article considers challenges based on a claim that the award is exorbitant. However, in rare cases a party may be able to seek *additur* on the grounds that a particular punitive award is grossly insufficient. This argument is also considered below.

Factors in Reduction of Awards

"Malafides of the Defendant" One factor the Appellate Division has often considered in deciding whether punitive awards are grossly excessive is "the malafides of the defendant,"[10] an inquiry that explores whether the conduct predicating the punitive damages

EDMUND C. BAIRD is an associate in the Rochester office of Phillips, Lytle, Hitchcock, Blaine and Huber LLP, where his focus is on commercial litigation and appeals in state and federal courts. A graduate of the University of Rochester, he received his J.D. from Washington University School of Law.

was merely reckless, rather than intentional and malicious. Conduct found to be merely reckless has justified the reduction of a punitive award.[11] On the other hand, and all other things being equal, punitive awards for vicious, reprehensible, and unprovoked misconduct will be affirmed.[12] A court will also consider the defendant's previous history of engaging in similar conduct.[13]

Even when conduct causes little or no actual damage, a significant punitive award is often justified in order to punish the wrongdoer.

Courts have relied on evidence that the defendant quickly recognized his or her wrongdoing and immediately took steps to minimize the damage done in reducing punitive awards.[14] In addition, where the plaintiff's damages are somehow precipitated by his or her own conduct—*e.g.*, where the plaintiff provoked the defendant's assault—the courts have been willing to reduce the award.[15]

Relation to Harm Done Courts also consider the relationship between the size of the punitive award and the harm done. Some courts do this by looking to the ratio of the compensatory and punitive awards.[16] In an assault case where a plaintiff was awarded $2,500 in compensatory and $200,000 in punitive damages, the Appellate Division reduced the punitive award, noting that it was 80 times the compensatory damages awarded.[17] Other courts, without reference to the ratio between the awards, have nonetheless stated that the punitive damages must "be reasonably related to the harm done."[18]

Such considerations should be used with care, however, because they often fail to account for the deterrent and punishment purposes of punitive damages. That is, even when conduct causes little or no actual damage, a significant punitive award is often justified in order to punish the wrongdoer and deter such conduct in the future.[19] Thus, the courts allow substantial punitive awards based on conduct causing only nominal damages.[20]

For this reason, it has been observed that punitive damages need bear no ratio to compensatory damages.[21] Nonetheless, courts consider the gravity of the injury in reviewing punitive awards.[22] And where the court determines that the compensatory award is excessive, it often reduces the punitive award also.[23]

There are two recurring fact patterns in which the Appellate Division has been unimpressed by large awards. The first involves large punitive awards in libel or malicious prosecution actions that have arisen out of what one court has called "commonplace conflicts between employees at the workplace."[24] For example, where a press release falsely indicated that a deputy sheriff was terminated for unprofessional conduct purportedly causing internal strife, jury awards of $150,000 compensatory and $100,000 punitive were reduced to $5,000 compensatory and $15,000 punitive.[25] The second fact pattern involves situations when the plaintiff's most significant damages have arisen from the humiliation of being arrested, fingerprinted, and booked on charges that turn out to be false. In such cases, the Appellate Division has also been willing to reduce large jury verdicts.[26]

The Second Circuit has directed federal courts reviewing punitive damage awards to consider the amounts awarded in other analogous cases.[27] However, no Appellate Division case uses this approach.[28] Despite the superficial appeal of such an analysis, the fact-intensive inquiry required in the review of punitive awards suggests that in the end this approach would often have limited analytic utility. Further, as noted earlier, the appropriate size of a punitive award is a question committed in the first instance to the jury's determination. The courts' role in reviewing such awards is to keep them in "reasonable bounds."[29] The fact that one award is held not to be grossly excessive does not mean that another much larger one is grossly excessive.

Thus, the litigant should be careful to avoid too much reliance on such precedents. On the other hand, a punitive award affirmed in a previous case against actors involved in a given transaction may be highly probative in the review of an award against other parties, arising out of the same occurrence.[30]

Wealth of the Defendant Because punitive damages are meant to deter, courts also consider the wealth of the defendant in determining whether a punitive award is grossly excessive.[31] Thus, a large award is more likely to be affirmed when the defendant is a wealthy corporation,[32] and to be reduced when the defendant's means are modest.[33] It should be noted in this regard that there is authority in New York that, unless it is otherwise relevant to the case, evidence of the defendant's wealth should not be introduced until the jury has found for the plaintiff on liability.[34] Courts following this rule will hold as improper any reference to a defendant's wealth by counsel before a determination on liability has been made, and modify by *remittitur* or remand for a new trial outright.[35]

Miscellaneous A few other miscellaneous considerations appear in the cases. When there were improprieties in the conduct of the trial that likely prejudiced the jury in setting the amount of the punitive damages, the

court may reduce the award, if it does not remand for a new trial. For example, the Appellate Division has been willing to reduce such awards where counsel made prejudicial comments to the jury,[36] or prejudicial evidence was admitted at trial.[37]

Courts have considered other factors in evaluating punitive awards. In a case regarding a landlord's improper attempt to interfere with a tenant's occupation of its leasehold, the court determined the proper measure of punitive damages by analogy to a statute awarding three times actual damages for wrongful forcible entry or detainer.[38] And another court affirmed an award of punitive damages measured so as to deny defendant a profit from its wrongful conduct.[39]

New York vests considerable discretion in the Appellate Division to review the size of punitive damage verdicts.

Additur

Although there is apparently no reported New York appellate decision reviewing whether a punitive award is inadequate, such authority seems to be implicit in *Nardelli*. Certainly, if a jury may be motivated by passion to award a grossly excessive award, it may be similarly moved to make grossly inadequate awards; and at least one trial court has so held.[40] Just as the appellate division has the authority to increase, by *additur*, inadequate compensatory awards,[41] so it should have the authority to increase inadequate punitive awards.[42]

That said, because the decision to award such damages resides in the jury's discretion, it would most likely be a rare case that would warrant such relief. In the one New York case on the subject, the defendant was found guilty of a serious abuse of trust, and the court was convinced that given the reprehensibleness of the defendant's conduct, the amount awarded by the jury would not adequately deter or punish the defendant.[43]

Due Process Considerations

Although a comprehensive treatment of the subject is beyond the scope of this article, defendants challenging a punitive award as excessive may also have arguments under the U.S. Constitution. The U.S. Supreme Court has held that punitive damage awards violate the 14th Amendment's due process clause when they are so "grossly excessive" that the defendant cannot be said to have had adequate notice of the size of the penalty beforehand.[44]

In making this determination, courts consider the "degree of reprehensibility" of the conduct, the ratio between the compensatory damages awarded and the punitive award, and the other sanctions imposed by law for comparable misconduct.[45] Federal appellate courts review these determinations *de novo*,[46] and the same should hold for the Appellate Division.

At first blush, it might be thought that *Nardelli*'s "grossly excessive" standard and the due process "grossly excessive" standard are one in the same. However, at least one Second Circuit decision suggests that they are distinct.[47] The two standards are grounded in separate rationales: *Nardelli* seeks to insure that the policies of punishment and deterrence are properly implemented by the jury; due process is grounded in the Constitution's concern that litigants be given reasonable notice of the liabilities created by their conduct. Thus, one policy may be satisfied where the other is not.

For example, an award might deter and punish—satisfying state law concerns, even where there was no reasonable notice—in violation of due process. And even where there was reasonable notice, the award in a given case may exceed what was required to deter and punish. In any event, no New York appellate court has passed on the question, and defendants are well advised to preserve both challenges in the trial court.

Court of Appeals Review

Once a punitive award survives the Appellate Division, there is little chance of further review in the Court of Appeals. Even if the Court were to accept the case, it has jurisdiction only to review questions of law.[48] The amount of a punitive damages award is not such a question, and therefore the Court of Appeals regularly declines to review challenges to the amount of punitive awards.[49]

An exception to this rule is that the Court of Appeals may review whether the Appellate Division abused its discretion in deciding the case.[50] Thus, an appellant seeking to overturn the Appellate Division's ruling on a punitive damages award must show that the court abused its discretion in so ruling, an exceedingly hard thing to do.[51]

Conclusion

New York law vests considerable discretion in the Appellate Division to review the size of punitive damage verdicts. If an unhappy litigant can point to factors showing that the jury acted out of prejudice, or that the amount of the award was out of proportion with the harm done or conduct of the defendant, he or she should not hesitate to ask the Appellate Division and, therefore, the trial court, for *additur* or *remittitur*. Save

exceptional circumstances, however, the Appellate Division's word is likely be the last, because the Court of Appeals is unlikely to hear appeals on the subject.

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1. *See*, *e.g.*, *Home Ins. Co. v. American Home Prods., Inc.*, 75 N.Y.2d 196, 203, 551 N.Y.S.2d 481, 550 N.E.2d 930 (1990).
2. *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961).
3. 1B N.Y. Pattern Jury Instructions 3d 2:278 (2001).
4. *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 150, 454 N.Y.S.2d 971, 440 N.E.2d 1317 (1982).
5. 44 N.Y.2d 500, 503–04, 406 N.Y.S.2d 443, 377 N.E.2d 975 (1978).
6. *Id.*; *see Toomey v. Farley*, 2 N.Y.2d 71, 83–84, 156 N.Y.S.2d 840, 138 N.E.2d 221 (1956).
7. *See Fry v. Bennett*, 9 Abb. Pr. 45, 53–54 (N.Y. Sup. Ct. 1859); *Coleman v. Southwick*, 9 Johns. 45, 51–52 (N.Y. Sup. Ct. 1812).
8. *Coleman*, 9 Johns. at 52 (Kent, Ch. J.).
9. *Nardelli*, 44 N.Y.2d at 503–04; *K. Capolino Constr. Corp. v. White Plains Hous. Auth.*, 275 A.D.2d 347, 349, 712 N.Y.S.2d 158 (2d Dep't 2000).
10. *See*, *e.g.*, *Lynch v. County of Nassau*, 278 A.D.2d 205, 206, 717 N.Y.S.2d 248 (2d Dep't 2000); *Nellis v. Miller*, 101 A.D.2d 1002, 1003, 477 N.Y.S.2d 72 (4th Dep't 1984); *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 472, 244 N.Y.S.2d 259 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964).
11. *Kern v. News Syndicate Co., Inc.*, 20 A.D.2d 528, 528, 244 N.Y.S.2d 665 (1st Dep't 1963); *see Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus & Mary*, 237 A.D. 640, 644–45, 262 N.Y.S. 104 (2d Dep't), *aff'd*, 262 N.Y. 320, 186 N.E. 798 (1933) (reducing award where court noted that "it may be a question" whether defendant's callous statements showed he acted with the requisite recklessness to justify punitive damages).
12. *See*, *e.g.*, *Ramlakhan v. Mangru*, 253 A.D.2d 806, 678 N.Y.S.2d 111 (2d Dep't 1998); *O'Donnell v. K-Mart*, 100 A.D.2d 488, 474 N.Y.S.2d 344 (4th Dep't 1984); *Rosenzweig v. Avzar*, 34 A.D.2d 818, 311 N.Y.S.2d 752 (2d Dep't 1970).
13. *Falcaro v. Kessman*, 215 A.D.2d 432, 627 N.Y.S.2d 562 (2d Dep't 1995).
14. *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 61, 559 N.Y.S.2d 336 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 981, 571 N.Y.S.2d 907, 575 N.E.2d 393 (1991); *Riker v. Clopton*, 83 A.D. 310, 312, 82 N.Y.S. 65 (1st Dep't 1903). *But see Rushlow v. Plattsburgh Republican Pub. Co.*, 262 A.D. 931, 932, 28 N.Y.S.2d 867 (3d Dep't 1941) (refusing to reduce award for newspaper's libel, even though retraction was published next day, where paper could have easily checked truth of item at issue before publishing).
15. *See Baume v. 212 E. 10 N.Y. Bar Ltd.*, 222 A.D.2d 211, 213–14, 634 N.Y.S.2d 478 (1st Dep't 1995); *Parkin v. Cornell Univ., Inc.*, 182 A.D.2d 850, 852, 581 N.Y.S.2d 914 (3d Dep't 1992). For other cases reducing punitive awards where similar facts are present, see *Loeb v. Teitlbaum*, 77 A.D.2d 92, 432 N.Y.S.2d 487 (2d Dep't 1980) (concerning malicious prosecution action based on an arrest for trespassing where the plaintiffs were allegedly fired, but nonetheless returned to their job the next day and refused to leave); *Moyle v. Franz*, 267 A.D. 423, 46 N.Y.S.2d 667 (2d Dep't 1944) (regarding libelous statements that were made in response to published attacks on defendant by plaintiff).
16. *Manolas v. 303 West 42d St. Enters*, 173 A.D.2d 316, 569 N.Y.S.2d 701 (1st Dep't 1991); *see McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 271, 682 N.Y.S.2d 167 (1st Dep't 1998); *cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–83 (1996) (holding that a high ratio between punitive and compensatory damages is an indication of a "grossly excessive" punitive award in violation of the due process clause).
17. *Manolas*, 173 A.D.2d at 317.
18. *Chylstun v. Kent*, 185 A.D.2d 525, 527, 586 N.Y.S.2d 410 (3d Dep't 1992); *see I.H.P. Corp. v. 210 Central Park South Corp.*, 16, A.D.2d 461, 467, 229 N.Y.S.2d 883 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963). *Chylstun* and *I.H.P.* also state that the award should be reasonably related to the "flagrancy of the conduct which caused the harm"; this consideration is covered above under "Malafides of the Defendant."
19. *Toomey v. Farley*, 2 N.Y.2d 71, 83, 156 N.Y.S.2d 840 138 N.E.2d 221 (1956); *see* Thomas R. Newman & Stephen J. Amuty, Jr., *Appellate Review of Punitive Damage Awards*, *in* Insurance, Excess, and Reinsurance Coverage Disputes 1990, at 409, 411–12 (PLI Lit. & Admin. Practice Course Handbook Series No. H4-5023 1990); *cf. BMW*, 517 U.S. at 582 (noting that higher ratios are justified under due process "in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").
20. *Toomey*, 2 N.Y.2d at 83–84; *Chylstun v. Kent*, 185 A.D.2d 525, 586 N.Y.S.2d 410 (3d Dep't 1992); *Reinah Dev. Corp. v. Kaaterskill Hotel Corp.*, 86 A.D.2d 50, 448 N.Y.S.2d 686 (1st Dep't 1982), *rev'd on other grounds*, 59 N.Y.2d 482, 465 N.Y.S.2d 910, 452 N.E.2d 1238 (1983); *Cohen v. Hallmark Cards, Inc.*, 70 A.D.2d 509, 415 N.Y.S.2d 657 (1st Dep't 1979).
21. *Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 227 n.15, 22 N.Y.S.2d 47, 397 N.E.2d 737 (1979) (citing *Toomey*); *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 472, 244 N.Y.S.2d 259 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964).
22. *See, e.g., Kern v. News Syndicate Co., Inc.*, 20 A.D.2d 528, 528, 244 N.Y.S.2d 665 (1st Dep't 1963).
23. *See Kathleen Foley, Inc. v. Gulf Oil Co.*, 12 A.D.2d 644, 645, 208 N.Y.S.2d 781 (2d Dep't 1960) (reducing punitives "in view of the reduction in the compensatory damages"), *aff'd*, 10 N.Y.2d 859, 222 N.Y.S.2d 691, 178 N.E.2d 913 (1961); *see also, e.g.*, *Lynch v. County of Nassau*, 278 A.D. 205, 717 N.Y.S.2d 248 (2d Dep't 2000); *Parkin v. Cornell Univ., Inc.*, 182 A.D.2d 850, 581 N.Y.S.2d 914 (3d Dep't 1992); *Byrd v. New York City Transit Auth.*, 172 A.D.2d 579, 568 N.Y.S.2d 628 (2d Dep't 1991); *O'Neil v. Peekskill Faculty Ass'n Local No. 2916*, 156 A.D.2d 514, 549 N.Y.S.2d 41 (2d Dep't 1989); *Feldman v. Town of Bethel*, 106 A.D.2d 695, 484 N.Y.S.2d 147 (3d Dep't 1984); *Nellis v. Miller*, 101 A.D.2d 1002, 477 N.Y.S.2d 72 (4th Dep't 1984); *Silverstein v. Marine Midland Trust Co.*, 1 A.D.2d 1037, 152 N.Y.S.2d 30 (2d Dep't 1956).
24. *Angel v. Levittown Union Free Sch. Dist., No. 5*, 171 A.D.2d 770, 773, 567 N.Y.S.2d 490 (2d Dep't 1991).
25. *Nellis v. Miller*, 101 A.D.2d 1002, 477 N.Y.S.2d 72 (4th Dep't 1984). For other examples, see *Parkin*, 182 A.D.2d at 852; *Angel*, 171 A.D.2d at 773; *Heller v. Ingber*, 134 A.D.2d 733, 521 N.Y.S.2d 554 (3d Dep't 1987) (reducing punitive award only); *Loeb v. Teitlbaum*, 77 A.D.2d 92, 105–06, 432 N.Y.S.2d 487 (2d Dep't 1980). *But see Hanlon v. MacGilfrey*, 64 A.D.2d 724, 406 N.Y.S.2d 605 (3d Dep't 1978) (upholding award of $1,000 compensatory and $20,000 in mali-

cious prosecution action where employer charged former employee with theft of hydraulic jack).

26. *See Lynch v. County of Nassau*, 278 A.D.2d 205, 206, 717 N.Y.S.2d 248, 249 (2d Dep't 2000); *Loeb*, 77 A.D.2d at 105–06; *see also Parkin*, 182 A.D.2d at 852, (noting plaintiff's "brief" contact with the criminal justice system). *Compare Saurel v. Sellick*, 244 A.D. 845, 279 N.Y.S. 323 (3d Dep't 1935) (upholding $1500 compensatory and $500 punitive award for 5-hour false arrest of plaintiff).
27. *See*, *e.g.*, *Mathie v. Fries*, 121 F.3d 808, 817 (2d Cir. 1997); *Ismail v. Cohen*, 899 F.2d 183, 186–87 (2d Cir. 1990).
28. In reviewing the size of a *compensatory* award under CPLR 5501(c), the court in *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 56–57, 559 N.Y.S.2d 336 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 981, 571 N.Y.S.2d 907, 575 N.E.2d 393 (1991), reviews awards affirmed in other cases, but in the end does not rely on this analysis in reducing the award. *Laurie Marie M.* does not use this approach in reviewing the amount of the punitive award. *Id.* at 61.
29. *Angel*, 171 A.D.2d at 773; *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 472, 244 N.Y.S.2d 259 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964).
30. *Keen v. Keen*, 124 A.D.2d 938, 939, 508 N.Y.S.2d 682 (3d Dep't 1986).
31. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 271, 682 N.Y.S.2d 167 (1st Dep't 1998); *Prozeralik v. Capital Cities Comms.*, 188 A.D.2d 178, 185–86, 593 N.Y.S.2d 662, *rev'd on other grounds*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993).
32. *See O'Donnell v. K-Mart*, 100 A.D.2d 488, 492, 474 N.Y.S.2d 344 (4th Dep't 1984).
33. *See Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 61, 559 N.Y.S.2d 336 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 981, 571 N.Y.S.2d 907, 575 N.E.2d 393 (1991).
34. *Rupert v. Sellers*, 48 A.D.2d 265, 272, 368 N.Y.S.2d 904 (4th Dep't 1975).
35. *Varriale v. Saratoga Harness Racing, Inc.*, 76 A.D.2d 991, 992, 429 N.Y.S.2d 302 (3d Dep't 1980); *see Parkin v. Cornell Univ., Inc.*, 182 A.D.2d 850, 852, 581 N.Y.S.2d 914 (3d Dep't 1992).
36. *Manolas v. 303 West 42d St. Enters*, 173 A.D.2d 316, 569 N.Y.S.2d 701 (1st Dep't 1991); *see Parkin,* 182 A.D.2d at 852 (noting "gratuitous" remarks of counsel about defendant's wealth); *Varriale,* 76 A.D.2d at 992 (remanding for new trial based, in part, on improper remarks by counsel recommending size of punitive award).
37. Although the court's reasoning is somewhat obscure, see *Maybruck v. Haim*, 40 A.D.2d 378, 340 N.Y.S.2d 469 (1st Dep't 1973); *see also Buggie v. Cutler*, 222 A.D.2d 640, 642, 636 N.Y.S.2d 357 (2d Dep't 1995) (reducing punitive damages award in assault action which jury apparently made equal to personal injury settlement defendant received from someone else related to incident). In *Kern v. News Syndicate Co., Inc.*, 20 A.D.2d 528, 528, 244 N.Y.S.2d 665 (1st Dep't 1963), and *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 472, 244 N.Y.S.2d 259 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964), both courts noted that evidence had been improperly received but held the error harmless, and they also entered *remittiturs* on punitive damages. Neither case drew an explicit link between the two holdings, however.
38. *I.H.P. Corp. v. 210 Central Park South Corp.*, 16 A.D.2d 461, 467, 228 N.Y.S.2d 883 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963).
39. *Reinah Dev. Corp. v. Kaaterskill Hotel Corp.*, 86 A.D.2d 50, 55–56, 448 N.Y.S.2d 686 (1st Dep't 1982), *rev'd on other grounds*, 59 N.Y.2d 482, 465 N.Y.S.2d 910, 452 N.E.2d 1238 (1983).
40. *See Micari v. Mann*, 126 Misc. 2d 422, 429, 481 N.Y.S.2d 967 (Sup. Ct., N.Y. Co. 1984) (increasing punitive award where verdict not sufficient to deter or punish defendant).
41. CPLR 5501(c); *Clarke v. Selover*, 260 A.D.2d 981, 983, 689 N.Y.S.2d 300 (3d Dep't 1999).
42. *See Ligo v. Gerould*, 244 A.D.2d 852, 853, 665 N.Y.S.2d 223 (4th Dep't 1997) (awarding punitive damages where court determined that lower court erred in awarding none).
43. *Micari*, 126 Misc. 2d at 429.
44. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).
45. *Id.* at 575–85.
46. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001).
47. *Mathie v. Fries*, 121 F.3d 808, 817 (2d Cir. 1997) (holding that it had the authority to engage in the review of a punitive award in a § 1983 action distinct from the due process analysis).
48. N.Y. Const. art. VI, § 3; CPLR 5501(b).
49. *Laurie Marie M. v. Jeffrey T.M.*, 77 N.Y.2d 981, 571 N.Y.S.2d 907, 575 N.E.2d 393 (1991); *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 753, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991).
50. *Patron v. Patron*, 40 N.Y.2d 582, 584–85, 388 N.Y.S.2d 890, 357 N.E.2d 361 (1976).
51. *See I.H.P. Corp. v. 210 Central Park South Corp.*, 12 N.Y.2d 329, 334, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963); *see Patron*, 40 N.Y.2d at 585 (refusing to hear challenges to an exercise of discretion where no legal propositions were advanced to raise a substantial question of abuse of discretion, the results were not outrageous enough to shock the conscience, and there were no extraordinary circumstances).

Juvenile Drug Treatment Court Uses "Outside the Box" Thinking To Recover Lives of Youngsters

A person who saves even one life, it's as if he has saved the entire world. The Talmud

BY ANTHONY J. SCIOLINO

One definition of *insanity* is "doing the same thing over and over again and expecting a different result." Escaping from the absurdity of such insanity was the impetus behind the Monroe County Juvenile Drug Treatment Court, a non-traditional court that is the first of its kind in New York State. An outgrowth of the state's successful adult treatment courts, it began in Rochester in June 2000 as an experiment to improve outcomes for substance-abusing youngsters appearing as respondents in Family Court. Now, two years later, this innovative court is producing some remarkable success stories.

On December 13, 2001, the Drug Treatment Court held its first graduation ceremony. **Erick**, age 15, was one of five graduates, four males and one female. As a seventh grader, Erick got caught at school with marijuana. His mother had missed all the telltale signs of drug use. When informed by school authorities, she could not believe the news. A three-year downward spiral then began for this former honor student, including school suspensions, numerous incidents of serious misbehavior, violent temper outbursts, and delinquency.

Finally Erick's mother, at wit's end, petitioned him into Monroe County Family Court as a *person in need of supervision*. He was accepted into the Drug Treatment Court. After a rocky start and numerous setbacks, Erick was able to turn things around. Erick's case manager, Kathy Kohler, and I attended one of his baseball games last summer to cheer him on. By graduation 15 months later, he was off drugs, making A's in school and working part-time in a craft store. He no longer associated with any of his former drug-using friends, kept a busy schedule, including playing in a summer baseball league, and was taking a vocational course in automotive repair. In a letter written to me after Erick's graduation, his mother wrote: "Thank you for giving me back my son."

Our only female graduate was 17-year-old **Monica**, who was arrested for shoplifting. She entered Drug Treatment Court as a respondent in a juvenile delinquency petition, a defiant, out-of-control street kid with spiked hair, and left 14 months later as a straight-A student. After her valedictory address at the December graduation ceremony, the overflow crowd gave her a standing ovation. Her remarks brought tears to the eyes of just about everyone, including me. Imagine my surprise, when she actually *thanked* me for remanding her to secure detention following a serious rule infraction at Park Ridge Chemical Dependency Adolescent Residence. "Judge, I was thinking of running away. By locking me up you saved my life," she said. Monica dreams of being an author someday, and is planning on attending college this fall.

Collaboration and Teamwork

The Drug Treatment Court is the product of a planning process that included all its numerous stakeholders working together in a *collaborative* process over an extended period of time. Collaboration and teamwork were essential to the court's planning and implementation, and they continue as key components of its successful operation. During the 18 months before it opened, representatives from the juvenile prosecutor's office, juvenile defender's bar, treatment providers, Department of Social Services, probation, court staff (including me as the prospective presiding judge), and representatives from various community groups met regularly to work out the many details. We were determined to build *a better mousetrap*, an experimental juvenile court different from the existing model.

ANTHONY J. SCIOLINO, the presiding judge of the Monroe County Juvenile Drug Treatment Court, became a judge of the Monroe County Family Court in 1987. Earlier, he was an assistant district attorney in Monroe County and in private legal practice. A graduate of Columbia University, he received his J.D. from Cornell Law School.

Steps in the Drug Court Program

The Drug Court program begins with an evaluation process and is then implemented in a three-phase sequence that culminates with graduation.

Evaluation Phase

A person who has been identified as clinically appropriate for Drug Court is given time to begin treatment, complete any needed paperwork and to allow both the court and respondent time to make sure the placement is best. The evaluation phase normally lasts from two weeks to two months. To qualify for admission to the program, a candidate must meet these requirements:

1. Be found clinically appropriate by treatment provider.
2. Be screened by Juvenile Probation or Drug Court personnel.
3. Be accepted into the program by the presiding judge.
4. Sign the Drug Court Agreement.
5. Sign Release of Information.

Phase I

To successfully complete Phase I, a participant must have:

1. Four consecutive weeks of no dirty urine tests.
2. Three consecutive weeks of attendance at school program with no unexcused absences and no incidents of acting-out behavior.
3. Four consecutive weeks of attendance at court.
4. Three consecutive weeks of no missed curfews.
5. Recommendation by treatment staff, case manager, family, school personnel and court.

Phase II

To successfully complete Phase II, a participant must have:

1. Been in Drug Court for at least 20 weeks after admission.
2. Six consecutive weeks of no dirty urine tests since completing Phase I.
3. Four consecutive weeks of no unexcused absences from school program since completing Phase I.
4. Four consecutive weeks of no unexcused tardiness at school since completing Phase I.
5. Documented increase in school performance.
6. Four consecutive weeks of no missed curfews since completing Phase I.
7. Six consecutive required court appearances with no unexcused absences since completing Phase I.
8. Completion of written assignment presented to the Judge about the most important things learned in Phase II. (At least three pages.)
9. Recommendation by treatment team, case manager, family, school representative and court.

Graduation Requirements

To graduate, a participant must have:

1. Been in Drug Court for at least 20 weeks after admission.
2. Twenty consecutive weeks of no dirty urine tests
3. Documented optimum school performance since the completion of Phase II.
4. No unexcused absences at court appearances for 16 weeks.
5. No unexcused school tardiness or absence for 12 consecutive weeks.
6. Completion of community service project.
7. No curfew violations for 12 consecutive weeks.
8. Recommendation by treatment provider, case manager, school representative, family and court.

Discussions were frank and sometimes heated, but potential problems were identified and dealt with honestly. What everyone shared was an agreement that traditional methods of dealing with drug-abusing youngsters were not working well enough and a willingness to consider alternative ways to improve results with this population. We agreed that too many youngsters were slipping through the cracks of the judicial system. Either they were not identified as drug users because of inadequate screening protocols, or once identified they were not getting the help they needed to change their destructive lifestyles.

Besides openness to disparate views and genuine concern for the welfare of children, all stakeholders brought to the table a willingness to engage in *outside the box* thinking—a willingness to consider alternative ways of doing things besides business as usual. In particular juvenile prosecutors and defenders needed to rethink their traditional roles, the former suspending their "lock 'em up and throw away the key" mentality, and the latter, their "get 'em off at any cost" bent. Probation officers needed to be willing to give up their near-monopoly of post-disposition case management for juveniles not in out-of-home placement. Concessions were

made to arrive at a model that would be effective, yet function within the requirements of law.

The planning process employed a problem-solving approach advocated by Judith S. Kaye as the state's chief judge.[1] In preparation for becoming the presiding judge, I attended week-long training courses at The National Judicial College in Reno, Nev., and The National Drug Court Institute in Williamsburg, Va. Both provided excellent training and access to presiding judges of treatment courts already in existence, whose enthusiasm for the treatment court concept borders on the evangelical. While at The National Judicial College, I observed the local juvenile drug treatment court in operation and talked to its judge and team members.

What emerged from our planning process was the Monroe County Juvenile Drug Treatment Court, a work in progress with adaptations being made as new lessons are learned. The collaborative spirit that pervaded the gestational period of our treatment court now survives in the spirit of teamwork that permeates meetings held before weekly court sessions, currently held on Wednesday afternoons, where each youngster's case is discussed and individual strategy is planned. Since launching the court, members of our team and I have attended conferences of the National and State Associations of Drug Court Professionals, where training and networking opportunities are provided.

Drug Court Organization

A juvenile drug court is a special docket within a family court to which selected drug-related juvenile delinquency cases or cases involving disobedient, truant, runaway, or similar "beyond control" juveniles are referred for handling by a designated judge when this behavior is exacerbated by substance abuse. There are currently 209 juvenile treatment courts already in existence in 40 states, with 120 more in the planning stage.[2] Six are planned for New York State by year-end.[3] Certain courts that have been in existence for a while and have achieved impressive results are designated as *mentor courts*, whose personnel are available to work with other jurisdictions planning to set up such specialized courts.

In juvenile drug court, the judge performs a non-traditional role. He or she is a proactive participant who closely monitors all cases through frequent status hearings. The judge works *collaboratively* with a team of service providers (from treatment, juvenile justice, social services, school and vocational training programs), the prosecutor and defense counsel. The approach is "holistic" with emphasis on problem solving. Outcomes are considered more important than case processing. Together, the judge and team determine how best to address the substance use and other related problems of the youngster and family that brought the youngster into the justice system. Parental involvement in the program is mandatory. The adversarial system is de-emphasized; proceedings are less formal and less punitive. There is more accountability, communication, and coordination than in traditional juvenile courts.

Photo by Hon. Anthony Sciolino

Arts Reach of Rochester, Inc., Public Market Mural Painting Project.

The following characteristics are common to their approaches:

- Much earlier and more comprehensive intake assessments;
- Immediate access to treatment;
- Much closer integration of information obtained during the intake and assessment process with subsequent decisions made in the case;
- Much greater focus on the functioning of the family, as well as the juvenile, throughout the period of participation in the drug court program;
- More intensive provision of support services, such as mentoring, tutoring, and parenting programs, to address personal and family needs;
- Much greater coordination among the court, the treatment community, the school system, and other community agencies in addressing the needs of the juvenile, the family, and the court;
- Much more active and continuous judicial supervision of both the juvenile's progress in treatment and compliance with other program conditions and the various treatment and other support services being provided;
- Increasing reliance on a range of personal and skill development programs such as music and arts, physical fitness, computer technology, and creative writing, as critical components of service delivery systems to enhance participants' self-confidence, self-esteem and competencies;
- Immediate judicial use of both sanctions applied for noncompliance and incentives/rewards to recognize progress by the juvenile and the family.[4]

Photo by Hon. Anthony Sciolino

Overnight Camp, Rotary Sunshine Campus.

Because children are not just *short adults*, developing a juvenile drug court is a more complex task than developing an adult court. Among the unique challenges presented are:

- Develop strategies to motivate juvenile offenders to change their attitude and behavior, taking into account gender, ethnicity, emotional maturity, and mental health issues;
- Counteract negative influences of peers, gangs, and family members who may also be substance abusers;
- Address the needs of often dysfunctional families and, at times, the intergenerational nature of neglect and abuse problems;
- Comply with confidentiality requirements in a collaborative, information-sharing framework;
- Respond to the developmental changes that juveniles experience while they are under the court's jurisdiction.[5]

"What makes working with these youngsters especially tricky is that they can't walk away from a household or school that may be contributing to their drug use," comments Daniel DeBruin, our treatment court specialist. "One of the mantras for the recovering community is that you have to change the people, places and things in your life to be successful in fighting your addiction. Not being able to change their surroundings makes it even more difficult to give these youngsters the strength and tools they need to alter their behavior."

Participation in treatment court is voluntary. Juvenile participants, many of whom would otherwise be candidates for out-of-home placement, can remain in the community, usually at home, in return for a minimum one-year commitment to and satisfactory completion of the program. When remaining at home is contraindicated, we have preferential access to beds at local residential treatment facilities. To be admitted into our treatment court, there must be some indication that the offense is a result of substance abuse and the youngster must have a DSM IV[6] diagnosis of substance abuse or dependence.

The court works closely with treatment providers, teachers, family members and others to insure each participant measures up to program expectations. The team attempts to create an atmosphere conducive to positive lifestyle changes. Team members willingly go the extra mile to connect with our kids and demonstrate affection and concern for them. When the father of one of our participants died, for example, representatives from the team attended the wake and funeral service. When Monica graduated from Park Ridge Adolescent Residence after a nine-month stay there, some of us, at her request, attended the graduation ceremony to celebrate with her and her family. On another occasion, team members paid for and participated in serving a special barbecue dinner for residents and staff of the Park Ridge Adolescent Residence.

The court's program is divided into stages of participation, or phases.[7] Each phase requires the participant to achieve specific goals that result in promotion from one phase to the next. In order to be considered for promotion, each participant must submit a letter of request to me as presiding judge explaining how he or she meets the minimum guidelines. Graduation from Drug Court requires the successful completion of all phases. The phases are described in the accompanying box on page 38.

Despite the many obstacles faced by young people caught up in an addictive lifestyle, results to date in the Monroe County Juvenile Drug Treatment Court show dramatic lifestyle changes. They are attributable to our court's close judicial monitoring and collaborative problem-solving process, together with access to numerous support services. We have partnered with many groups within the community to provide our participants with a variety of enriching, character-building experiences, experiences designed to teach them alternative, wholesome behaviors, enjoyable things to do that make them feel good *without* using drugs.

Program Partners

One of our community partners is St. Joseph's Villa, a nonprofit agency which provides adventure-based programming. Programs are scheduled every Wednesday evening immediately following court sessions, one Saturday each month, and for special events. Through group interaction, recreation, exercises, games, role-playing, and various other creative activities, youngsters are challenged within a safe and supportive environment to explore their behaviors and attitudes, to develop new skills and apply them to real-life situations.

Group activities include hiking, canoeing, orienteering, and other outdoor activities. During an overnight camping trip at Rochester Rotary's Sunshine Campus in February, they learned team-building skills on an obstacle course. Another time, they went on an all-day cross-country skiing excursion. At day's end, one kid exclaimed, "Gee, I didn't know I could do that."

Another of our partners, Arts Reach of Rochester, Inc., provides our youngsters with several creative outlets. The program last summer allowed them to choose between a performance or arts activity involving clowning and mural painting. Those who chose the former staged a fully costumed clown performance in the main foyer of Monroe County's Hall of Justice to the delight of the appreciative noontime audience, which included courthouse personnel and children from a downtown childcare center, invited as special guests.

Unity Health Systems, as a partner agency, has been a dramatic force in the Juvenile Drug Treatment Court. It has provided a case manager, Kathy Kohler, who is a conduit of information to the team regarding respondents assigned to her. Ms. Kohler has an excellent relationship with area schools and often is able to be a change agent—from unsuccessful school program assignments to more appropriate ones.

Unity has made a commitment that includes mental health and substance abuse assessments for all prospective participants in detention and speedy assignments to treatment, as well as preferential residential or in-patient placements for Drug Court youngsters.

Another program available to our youngsters is the RABHIT Program (Rapid Asset Building Health Intervention in Teens), sponsored by the University of Rochester's School of Nursing. This is a 10-week program designed to reduce risk-taking behaviors and improve health outcomes. Psychiatric nurse practitioner, Mary Riccelli, R.N., has been added to the court team to implement a health promotion–behavioral intervention curriculum. She is available to respond quickly to our kids' health needs.

Dr. Jeff Alberts, an adolescent medicine specialist doing a fellowship at the University of Rochester School of Medicine and Dentistry, provides clinical services to our youngsters at Threshold Center for Alternative Youth Services, another of our partners. Dr. Alberts, an amateur photographer, took photographs at the graduation ceremony, including ones of our graduates and their families. They were later provided to each graduate.

Compeer Inc. of Rochester, is our newest community partner. This partnership, developed in response to the need of so many of our youngsters for responsible adult role models, will recruit, screen, and train approximately 15 mentors. Mentors will work with youngsters who have a dual diagnosis—substance abuse and mental health issues. Mentors will be expected to make a year-long commitment and to spend at least two to four hours per week with their assigned youngster. Each will receive a stipend to offset the cost of joint activities. A mentor will provide an intensive one-on-one relationship designed to support and encourage the development of positive decision-making skills. This caring adult will also provide a model for adaptive behavior and teach appropriate reactions to the kinds of stressors our kids and their families encounter.

Because one of the requirements for graduation is improvement in school attendance and academic performance, we have also formed cooperative relationships with area school districts.

Most of our youngsters struggle in school for various reasons, including special education needs and emotional issues. Teachers and administrators of our partner schools have been amenable to giving special attention to our youngsters, working with us to help them achieve school success. Youngsters, for example, are asked to bring to court sessions *run around sheets* filled out and signed by each of their teachers concerning attendance, tardiness, and achievement. Teachers willingly comply.

We have also enjoyed good results in cutting through bureaucratic red tape when attempting to resolve knotty issues involving getting our kids into educational/vocational programs appropriate to their abilities. Our Drug Court specialist and case managers routinely attend meetings at school with administrators, counselors, teachers, and family members to work out educational issues.

To further improve our kids' chances to succeed in school, we have formed a partnership with Roberts Wesleyan College's education department to provide tutoring. This partnership came about through the efforts of Jennifer Swapceinski, an Americorps member who also oversees our program's community service component. A *win-win* situation, education majors gain valuable experience working with academically challenged kids and our kids get the help they need to do better in school. Teachers tell us that they notice significant improvement in the attitude and behavior of drug court participants who receive this tutoring.

In addition to partnerships and services already in place, we have a number of projects in the planning stages. One is a parents' support group, where parents can meet regularly to share common concerns, benefit from each other's experiences, and receive instructions on handling their youngsters' problems. Another is an alumni group of graduates to maintain contact with them and to keep them connected to the court, perhaps, as junior counselors or mentors.

The Juvenile Drug Treatment Court will also be assisted by an Internal Revenue Code section 501(c)(3) organization, Friends of Children and Families in Crisis. It was founded to allow for tax-exempt donations to the Juvenile Drug Court as well as to other court programs. Among the donated items received have been tee shirts from a manufacturer of a popular brand of youth clothing. Many who received these as rewards wore them with pride on the next and subsequent court dates. Those who did not receive them were challenged to work harder in the program to earn one. Another significant donation came from two members of Rochester Rotary Club—the funds to pay for an overnight camping experience at Rotary Sunshine Campus located in Rush, N.Y.

More Success Stories

The third of our graduates was **Josh**, age 15, who was petitioned into Family Court as a *person in need of supervision* for truancy. He had been "kicked out" of middle school for disruptive behavior. Before being accepted into Drug Treatment Court, Josh had never attempted drug treatment. His mother, who favored an out-of-home placement for him, was reluctant to commit to the involvement required of a parent in our program.

Josh was two days from being placed in an Albany-based adolescent residential facility when he was accepted into drug court. Following a number of setbacks, he spent three months in the St. Joseph's Villa Life House Program, a local residential facility for at-risk youth. His mother agreed to engage in family counseling. Gradually Josh's attitude and behavior changed.

Although Josh struggled in a traditional academic setting, he had artistic talent. After he completed the Life House Program, team members helped him gain admission to a local public school specializing in the arts. After a while, he began to blossom. Last summer he and other juvenile respondents participated in mural painting, an option available from our Arts Reach of Rochester, Inc., partner. The mural was co-sponsored by the City of Rochester as part of the city's Public Market Renovation Project. William Johnson, mayor of Rochester, attended the mural's unveiling ceremony, which was covered by local media. The teen artists beamed with delight from all the attention. Shortly before graduating, Josh secured a part-time job designing tee shirts and CD covers. One of his art works, a pencil sketch of an eagle, is now displayed in our courtroom.

Our fourth graduate was **Jonathan**, age 16. Like Josh, Jonathan was petitioned into Family Court for truancy as *a person in need of supervision*. His home situation was not good. His parents lived in separate households, both had substance abuse problems, and Jonathan's residency kept switching from one parent to the other. He presented with a negative attitude and no interest in change. After a few weeks in treatment court, he absconded. An arrest warrant was issued. Close to a year later, Jonathan's sister turned him in on the warrant. On his first appearance before me, he asked to be readmitted into treatment court. After a trial period during which he demonstrated a willingness to work in our program, he was given a second chance.

After an individualized treatment program was put in place for him, Jonathan was released from detention into the custody of his sister, a single mother with two small children. In short order we helped him get into a vocational educational program with a woodworking component. Among the rules of behavior imposed as conditions of his release was that he help his sister with childcare responsibilities, including reading a story to the children every night. A bond developed between him and his nephew and niece that helped Jonathan see his world in a different light.

By participating in our adventure-based program, Jonathan discovered a talent for basketball. During the clown performance at the Hall of Justice, he also discovered talent as a performer. He did a superb job in his clown persona, one that Emmett Kelly would have applauded. The little kids from the downtown daycare center squealed with delight at his antics. Afterward, some of them asked for his autograph. Jon's positive experiences clearly contributed to his success in meeting program goals.

George, age 16, our fifth graduate, petitioned into Family Court as a juvenile delinquent for engaging in an adolescent prank, also had significant educational issues. Upon being accepted into treatment court, he told his case manager, "I'm unhappy and I can't stop using." Father of a daughter named Davina, George was constantly arguing with his child's mother. He had been given several evaluations for chemical use, but never started treatment.

With us he began and completed drug treatment. We helped him get into an appropriate educational/vocational program, provided him with a tutor, and he began to enjoy school success for the first time in his life. We provided him with parenting skills training, and he began to be a better father and to get along better with his daughter's mother. Each time he received a reward for progressing to the next level toward graduation, Davina received a gift too. At graduation, George was dressed like a Wall Street investment banker and his smile could not have been broader if he were about to receive the Nobel Peace Prize.

My law clerk, Maryanne Townsend, baked a pumpkin pie for one of our kids, after he raved about pumpkin pie at a picnic outing. Ms. Townsend and case manager Ms. Kohler regularly convene a Women's Group to discuss issues of importance to our female participants.

A similar group is being developed for our male participants.

When school started last September and one of our participants was ashamed to go because he did not own a decent pair of sneakers, a team member made sure he got a pair. Team member Janet Montgomery, from the Department of Social Services, assists participants and their families to access public assistance benefits in an expedited manner. She provides bus tokens when transportation is an issue. Dan DeBruin, our treatment court specialist, has provided kayaking and automobile driving lessons.

Team members often dig into their own pockets when program funds are not available, for example, in purchasing level promotion rewards like posters or books. I am fortunate to work with a team of extraordinary people who share a common vision about what our court is all about. Their *can do* attitude is inspirational to me, particularly when setbacks occur or when my own enthusiasm starts to wane. They deserve all the accolades for the success we have had thus far.

Photo by Dr. Jeff Alberts

First Graduating Class, December 2001. From left to right, rear row: Monroe County Family Court Supervising Judge Anne Marie Taddeo, Judge Anthony Sciolino. Front row: George; Erick; Josh; Ronald W. Pawelczak, Chief Clerk, Monroe County Family Court; Jonathan, Monica.

Youngsters who fail to meet treatment, school, home, or community goals face sanctions including written assignments, scaled-back curfews, house arrest, community service, or stays in detention. Rewards for good behavior include praise or a handshake from me as judge, hugs, applause, certificates of achievement, and gifts of donated items like tee shirts, gift certificates to fast-food eateries or a shopping mall, and tickets to sporting events. Rewards function much better as behavioral motivators than sanctions.

Graduation Requirements

The Drug Treatment Court's first graduation ceremony was held December 13 in the biggest courtroom in the Hall of Justice on a Thursday afternoon. Attendance of all participants was required. Before the ceremony, each male graduate received a boutonniere, and Monica, our only female graduate, a corsage. The event was co-presided over by Joseph J. Traficanti Jr., the deputy chief administrative judge; Thomas M. Van Strydonck, the administrative judge of the Seventh Judicial District; Ann Marie Taddeo, the supervising judge of Monroe Country Family Court; and me as presiding judge of our court. Judge Traficanti is also the deputy chief administrative judge for Drug Treatment Courts in New York State.

Mayor William Johnson was among the guest speakers. Each graduate received a certificate of graduation, an engraved clock/calculator, and a gift certificate. The ceremony was designed not only to recognize the achievement of our graduates, but also to inspire our non-graduating participants to persevere in their efforts to reach the same goal. Chief Judge Kaye has agreed to be guest co-presider and speaker at our next graduation ceremony on June 13, when five more participants are expected to complete the program.

To graduate, participants must complete a 20-hour community service project. They have the option of doing one suggested by the team or one that they propose that is approved by the team. Monica chose the latter option and worked at Lollipop Farm, a local animal shelter. Other graduates, including Josh, designed and painted a mural at FoodLink, a local food bank.

Not only is a community service project required for graduation, the numbers of hours of community service at places such as Grandeville Senior Living Community, Volunteers of America, FoodLink, Open Door Mission, and Action for a Better Community is used as a sanction for failure to meet program expectations.

Photographs of participants are taken at Drug Treatment Court events such as Buffalo Bills training camp or the clown performance at the Hall of Justice. Photos are also taken at level promotion ceremonies held during court sessions. Copies of photographs are then presented to each participant as a reminder of his/her accomplishment. Special effort is made to determine each participant's strengths. Rewards are designed to build on particular strengths. Monica, the graduate interested in becoming an author, for example, was given a scholarship to attend a *Writers and Books* workshop. Erick, who was interested in athletics, received tickets for him and his family to attend a Buffalo Bills football game.

To graduate, participants must remain drug-free, improve school attendance and achievement, perform community service, engage in various skill-building activities, among other requirements, and demonstrate

positive attitudes and changed behaviors. Random and frequent drug testing occurs before court sessions, at treatment sites, and even at a participant's home. Grounds for expulsion from the program include: (1) continuous non-compliance with program requirements in spite of use of graduated sanctions and incentives; (2) voluntary choice to discontinue participation; (3) threatening behavior to treatment staff, court staff, or other participants; and (4) failure to comply with specific program rules, for example, by adulterating or otherwise manipulating a urine sample.

Conclusion

Presiding over this non-traditional, problem-solving court is one of my most satisfying experiences in a 15-year judicial career. Working with these wonderful kids, gradually building rapport with them, breaking down barriers and earning their trust, becoming their surrogate father figure, struggling with them through their lows, celebrating their highs, is a tremendously fulfilling experience. Participating in the court's first graduation ceremony was an exhilarating experience that I will never forget.

I will also never forget an incident that happened in the early months of treatment court when I asked a young man who was obviously struggling with his recovery from drugs what more we as a team could do to help him. He looked me straight in the eye and said, "Just keep believing in me."

That is what everyone connected with the court does for our youngsters. We believe in them and want to help them believe in themselves. We believe they are capable of doing and being more; that they are redeemable; that they can become productive members of the community. We refuse to give up on them and will not allow them to give up on themselves. Our goal is to create a supportive environment within which they can develop to their full potential.

The success of the innovative approach we employ results in large measure from the coercive power of courts to change attitudes and behaviors. Experience in adult drug courts shows that a defendant in court-ordered drug treatment is twice as likely to complete a treatment program as someone who seeks help voluntarily. The same holds true for juveniles. Avoidance of placement for a year or longer, out of home and often out of area, is a powerful motivational tool.

Throughout the United States, more and more judges in the last 10 years have concluded that they can and should play a proactive role in trying to solve the problems fueling their caseloads; that outcomes are surely as important as process and precedents. Hands-on judicial involvement is a trend that is growing in popularity as judges look at different approaches to solve difficult social problems, particularly when traditional approaches do not work well enough. In an effort to improve results, hundreds of experimental courts have sprung up across the country. Besides specialized drug courts, these "problem-solving" courts include domestic violence courts, community courts, mental health courts, and others.

Courts, however, cannot carry out this problem-solving role alone. Collaboration with government agencies and community groups is essential. Our treatment court has been blessed not only with an outstanding team, but also with supportive governmental and community partners. Governmental agencies include the U.S. Department of Justice, Americorps, N.Y.S. Office of Court Administration, County of Monroe, and City of Rochester. Besides the community partners previously mentioned, others include McDonald's Restaurants, Wendy's Restaurants, Rochester Rotary Club, United Way of Greater Rochester, Legal Aid Society, and Hillside Children's Center.

As a Family Court judge whose caseload for more than 15 years has been filled with people who use drugs or are affected by people who use drugs, I am pleased to be a part of this developing non-traditional, problem-solving judiciary. I have seen too many broken lives and witnessed too much human misery occasioned by the scourge of drugs to be unwilling to try a new approach.

I applaud all the good people in Monroe County who engaged in *outside the box* thinking to create our juvenile drug treatment court and continue to engage in it to make it a success. What better reward, after all, can there be than saving human lives?

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1. *See* Judith S. Kaye, *Making the Case for Hands-on Courts*, Newsweek, Oct. 11, 1999, at 13.
2. American University's OJP Drug Court Clearinghouse and Technical Assistance Project, Juvenile Drug Court Activity Update: Summary Information (Feb. 2002).
3. Joseph J. Traficanti, Jr., Deputy Chief Administrative Judge, Director, Office of Court Drug Treatment Programs, The First Year: Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan L. Lippman (Jan. 2002), *available at* http://www.courts.state.ny.us/1styrdc.pdf.
4. Clearinghouse and Technical Assistance Project at Juvenile and Family Drug Courts: An Overview, OJP Drug Court American University (Dec. 2000), *available at* http://www.american.edu/justice/publications/juvoverview.htm.
5. *Id*.
6. American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders (4th ed. 1994).
7. Monroe County Juvenile Drug Treatment Court Policy and Procedure Manual (June 2001).

The Historic Perspective

Belva Ann Bennett Lockwood: Teacher, Lawyer, Suffragette

BY ALEXANDER M. SELKIRK

Among the many New York attorneys who have made significant contributions to the jurisprudence of the state and the nation is Belva Lockwood, a woman of the 1800s whose achievements took place in the face of both professional adversity and personal tragedy. Overcoming resistance that had blocked women from even entering law school, she became an accomplished lawyer, lecturer and suffragette.

Born in Royalton, a small community in Niagara County, on October 24, 1830, Belva Ann Bennett Lockwood had a brief education in public schools and gave an early demonstration of her brilliance by teaching in one-room schools at the age of 15. At the age of 18, she married Uriah H. McNall, a local farmer and sawmill operator, but his untimely death in 1853 left her a 22-year-old widow with the responsibility of raising their young daughter, Lura. Undaunted, she enrolled at Genesee College (now Syracuse University) and received a bachelor's degree in June 1857.

In September 1857, she accepted a position as principal of the Lockport Union School. Reacting to the wage discrimination against women that she had first noted as a young teacher, she took to heart speeches by women's rights activist Susan B. Anthony and revised the school's curriculum for women students. She introduced the then-radical subjects of public speaking, gymnastics and botanical walks in the women's course of studies.

In 1866, she and her daughter moved to Washington, D.C., where she opened one of the first private co-educational academies in the nation's capital. Acting on an interest in law that had begun when she had taken a course given by a local attorney in Lockport, she also began to observe congressional debates and proceedings in local and federal courts.

In 1868, she married a 65-year-old Baptist minister and dentist, Dr. Ezekiel Lockwood, and later gave birth to their only child, a boy named Jessie. Spurred on by a resolve to correct inequalities that she saw in the treatment of women, Indians and blacks, she decided to become a lawyer. Encouraged by her daughter, who agreed to care for baby Jessie, and by her husband, who assumed responsibility for the academy, the now 40-year-old Lockwood sought admission to a law school.

Law School Student

One law school administrator, the Rev. G.W. Samson, responded to her application with the remark that "the attendance of ladies would be an injurious diversion of the attention of the students." At the National University Law School, William Wedgewood, the vice chancellor, disagreed with his faculty's decision and offered to teach her, but cautioned that the faculty probably would not give her a diploma even if she completed her studies. Nevertheless, Lockwood found 14 other women who wanted to study law, and in 1871 all were admitted. During her admission struggle, baby Jessie died from typhoid fever at the age of 18 months.

Despite the demands of her studies, Lockwood kept up a busy schedule of speaking and lobbying for her favorite causes. She drafted a bill requiring the U.S. Civil Service to pay equal wages to male and female employees of the same rank, lobbied for it, and Congress passed it.

In May 1873, after she had completed her studies with distinction, National University Law School attempted to deny her and other graduating women their diplomas because male students were opposed. She was also told that the Supreme Court of the District of Columbia would block her admission to the bar. She appealed to President Ulysses S. Grant, who was *ex officio*

ALEXANDER M. SELKIRK is trial counsel to the firm of Martin, Fallon & Mulle in Huntington and a judge advocate officer with the 42nd Infantry Division of the New York Army National Guard. He has served as an assistant county attorney in the torts and family bureaus of Suffolk County, and as a trial counsel to several insurance companies. A graduate of St. John's University, he holds a J.D. from New York Law School and a master of laws in trade regulation from New York University School of Law.

Belva Lockwood

president of the law school, and at his direction she received her diploma and was admitted to the bar.

Practicing Attorney

Lockwood opened her own law office in her home, taking in two women partners and a woman "typewriter," the equivalent of the modern-day legal secretary. She could be seen going from appointment to appointment in the crowded streets of the District of Columbia on her tricycle, which she described as being "faster than waiting for hired cabs." Her office became the meeting place for national leaders in the struggle to improve conditions for women.

She fought to secure equal property rights for women in the District of Columbia, together with equal rights to guardianship of children. She drafted an amendment to the Statehood Bill, granting suffrage to women in Oklahoma, Arizona and New Mexico. The co-founder in 1867 of the capitol's first suffrage organization, the Universal Franchise Association, she was later active in the National Women's Suffrage Association, lobbying and speaking on behalf of women's rights.

An early obstacle arose when the U.S. Court of Claims refused to admit her to argue on behalf of a client. Charles Nott, the court's presiding judge, said: "A woman is without legal capacity to take the office of attorney. After all, since a woman's husband was responsible for her debts, if a female attorney embezzled clients' trust funds, the court would have to put the husband in jail." Lockwood lobbied Congress again, and prevailed. Congress passed a bill providing that any woman who had practiced for three years in the highest court of a state or in the District of Columbia should be admitted to practice before the U.S. Supreme Court.

On March 3, 1879, Lockwood became the first woman admitted to practice before the U.S. Supreme Court. Personally, it was a bittersweet occasion, however. Her husband had died two years earlier.

Presidential Candidate

In 1884, the two most prominent women's rights activists, Susan B. Anthony and Elizabeth Cady Stanton, decided they could best continue their work for women's suffrage by working with an established national party, the Republican Party. Lockwood, then 54, broke with them and accepted the nomination of the National Equal Rights Party of the Pacific Coast as its presidential candidate, making her the first legitimate woman candidate for president. (Victoria Woodhull had run in 1872, but had not reached the constitutionally mandated age of 35 and did not campaign formally because she was in prison.) Her running mate was Marietta L.B. Stow.

The party's platform supported suffrage for women, reform of marriage and divorce laws, equal treatment of native Americans, veterans benefits, Civil Service reform, prohibition of alcohol, and greater action on behalf of universal peace. It also included a variety of economic measures to reduce the public debt, limit monopolies, improve trade and revive the expansion of industry in the east and south. Even though women were not allowed to vote, the ticket received 4,149 votes.

When the party nominated Lockwood again in 1888, one of the keystones of her platform was a pledge to appoint a woman to the U.S. Supreme Court.

A Native American Cause

From 1891 to 1906, Lockwood worked on the biggest case of her career, a suit by the Cherokee Indians against the U.S. government.

The roots of the claim went back to 1828, when gold was discovered on Cherokee tribal lands in Georgia. Pressure from white neighbors to remove the Cherokee

so the gold could be mined resulted in congressional ratification of the Treaty of New Echota in 1835, in which the agricultural Cherokees ceded their lands to the federal government in return for a promised payment of $1 million. After coercing a minority of the Cherokees to sign the treaty, federal troops in 1838 forcibly removed 14,000 of them to Indian territory, now known as Oklahoma. This culminated in what became known as the "trail of tears" in which 4,000 Cherokees on the march died from exhaustion and exposure to cold.

More than 60 years later, the federal government had not paid all of the $1 million, plus interest, and Lockwood represented the Cherokees in their bid to recover the unpaid amounts. In 1905, the Cherokee claim reached trial in the U.S. Court of Claims. The court agreed that the Cherokee claim was just, but did not approve the payment of interest. In the appeal to the U.S. Supreme Court, the 75-year-old Lockwood argued forcibly that the government should pay interest because the money had been in an interest-bearing account.

In *United States v. Cherokee Nation*,[1] the Court held in favor of the Cherokees and awarded them $5 million, the largest sum it had ever awarded up to that time. Lockwood's fee, for close to 15 years of work, was $50,000. Like other victories in her life, however, this one was also overshadowed by a personal tragedy. Her daughter, Lura, had died, leaving Lockwood to raise her four-year-old grandson, Forest.

Final Years

In 1913, at the age of 83, Lockwood retired from the active practice of law, but not from public service. The U.S. State Department sent her to Europe on several occasions as a delegate to international peace conferences to lobby on behalf of one of her favorite causes—using arbitration instead of war to resolve international disputes. Among the honors accorded her was membership on the committee that nominated recipients for the Nobel Peace Prize.

She supported President Wilson's peace platform in the presidential election of 1916, and made her final public speeches on his behalf. She died in Washington, D.C., on May 19, 1917.

A life-size oil portrait of Lockwood, unveiled by the women of the District of Columbia in 1913, now hangs in the gallery of the National Museum. The New York Chapter of the National League of Women Voters has placed her name on its state honor roll.

1. 202 U.S. 101 (1906).

NYSBA welcomes 147 new Sustaining Members to ranks

We wish to extend our sincere gratitude to the following 147 individuals who have recently become new Sustaining Members of the New York State Bar Association. Sustaining Members are a distinguished group of 546 members who provide the Association with extra financial support to help NYSBA maintain its leadership position as the voice of New York attorneys.

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Lawyer's Bookshelf

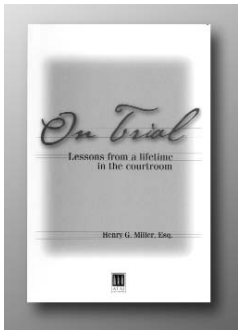
On Trial: Lessons From a Lifetime in the Courtroom, by Henry G. Miller, ALM Publishing, www.lawcatalog.com; 165 pages, $24.95. Reviewed by Anthony R. Palermo.

This book is a jewel from beginning to end. It contains a treasure trove of professional tips for practicing trial lawyers, but it is also a literary work that can be read and enjoyed by a larger audience. Many of the suggestions discussed in a trial context have broader application in assessing and addressing human behavior encountered in nontrial situations.

Drawing on more than 40 years of trial experience (winning most, but also learning while losing), Henry G. Miller, a past president of the New York State Bar Association, has created a unique compendium of sage advice, lessons, rules and guidance for litigators and others. His work exhibits perceptive human insights and astute observations as he offers simple and sound tactical trial advice.

Starting with the "Acknowledgments" in *On Trial: Lessons From a Lifetime in the Courtroom*, Miller, a senior member of the firm Clark, Gagliardi & Miller P.C. in White Plains, previews the feast of wit, wisdom and charm that the reader is about to experience. Unabashedly, he confesses: "I have borrowed, cited and stolen so much from other trial lawyers that I'm reminded of the old quip: plagiarism among lawyers is called research." This most enjoyable gem is filled with gifted literary style, practical learning and humor.

In 12 relatively short chapters (the entire book is 165 pages), the author provides concise, common sense counsel covering a broad range of trial topics. In easily understood, nontechnical language, the reader is instructed in the following subjects: jury selection, opening statements, direct and cross examination, summation, settlement, expert witnesses, and dealing with difficult judges and opposing lawyers. The end result is a tutorial triumph.



As an introduction to each chapter, Miller effectively presents selected proverbs, quotations or sayings that succinctly synthesize a simple message that relates to the subject to be discussed. For example, in Chapter 2, entitled "Opening—The Twenty-seven Steps," we find this quotation from Plato: "The beginning is half of the whole." And Chapter 9, "Living With Defeat," begins with this prescient quotation from Montaigne: "There are defeats more triumphant than victories." In Chapter 10, "Courage, or Trying a Case When the Judge and Jury Hate You," an impressive imperative from Benjamin Cardozo commands our attention: "The timorous may stay home."

Throughout this work, the author identifies fictional persons encountered in true-life trial situations by judicious use of memorable names. For example, in Chapter 8, "Nine Secrets for Dealing With Judges," Mr. Miller explains how trial lawyers might behave when confronted with judges who could conceivably exhibit a fixed attitude in certain situations. There we find an intriguing collection of ploys and prescriptions: "Enlighten Judge Dimness," "Anticipate Judge Swift," "Stiffen Judge Lax," "Excite Judge Listless," "Challenge Judge Slant," "Love Judge Grumpseat," "Flatter Judge Prideface" and "Revere Judge Goode." Finally, above all else, "Judge Judges Gently."

A similar mechanism is used in identifying both fictional witnesses and lawyers. Thus, in a chapter discussing expert witnesses, we find characters named "Dr. Everytopic" (who is an expert on every subject) and "Dr. Yale Fakir" (who is a real faker). Trial lawyers are given catchy names such as "Nick Noviss," "Bill Blunder," "Jeremiah Sage," "Samuel Sly" and "Ms. Charmen Smile." It doesn't take much imagination for a reader to comprehend a trial situation when the author sets the stage so well. Through this literary device, and using his artistic talent for descriptive names, the author creates memorable mental images appropriately defining special character traits or flaws that in turn help to underscore underlying themes.

Those interested in trial practice, or even just watching trials (actual or fictionally created for television or movie entertainment), will enjoy reading this book. I strongly recommend it for both education and entertainment. It is a masterpiece. My only regret was that *On Trial* was too short and ended too soon. I wanted more!

There is a saying: "Those who can, do; those who can't, teach." In this creative classic, Henry Miller demonstrates that he does both.

The dust jacket for *On Trial* includes rave reviews from seven prominent attorneys. They include Joseph W. Bellacosa, dean of St. John's Law School and a former judge of the Court of Appeals, who writes: "*On Trial* is an instructive collection of common sense lessons drawn from the author's vast courtroom experience." From Johnnie L. Cochran, Jr.: "*On Trial* is a 'must read,' full of nuggets of wit and wisdom, a veritable panoply of prescriptions for success for the modern day trial lawyer." From Alan M. Dershowitz: "There is no substitute for experience, and this fine book teaches some excellent lessons from the school of hard knocks. Read it and learn." And from Robert F. Fiske, Jr.: "Every trial lawyer can learn a lot from this book written by one of the great trial lawyers of our time."

Anthony R. Palermo is of counsel to Woods Oviatt Gilman LLP in Rochester, New York and a past president of the NYSBA.

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Language Tips

By Gertrude Block

Question: What is the proper word (these or those) to refer to a previous list of facts or objects, and why? Below is my example:

(a) Demand for Verified Bill of Particulars;

(b) Demand for Discovery and Inspection;

(c) Demand for Expert Witness Reports;

(d) Notice to take Deposition upon Oral Examination;

(e) Demand for Sources of Collateral Payment.

These or Those documents are attached as Exhibit "C."

Answer: Attorney Byron Babione, who submitted this question, added that his secretary, Patricia A. Weeden, had challenged his use of the word "those" in the above context. I answered Mr. Babione that the word "those" would be grammatical, but that "these" is preferable, because it more clearly refers directly to the items listed. The word "these" is idiomatic in this context, so the word "those" might be confusing.

Question: My friend and I disagree about which word is proper to begin a sentence: generally or in general. For example, in the following sentence, which is correct: "Generally *or* In general it is better to serve a defendant personally." My friend is certain that the word generally is incorrect because it is an adverb.

Answer: The correspondent, attorney Steven K. Erickson of Buffalo, may tell his friend that he is wrong. Either "generally" or "in general" is grammatically correct to begin a sentence. The same is true for most adverbs and for adverbial phrases like in general—for example, the adverbs originally, usually, unconditionally, possibly, frankly, and many others. Adverbial phrases (like in general, in particular, in effect, in truth, and others) are also grammatically correct.

However, there may be a stylistic problem with placing adverbs (such as the word "however," which introduced this sentence), and other qualifiers, amplifiers, and ho-hum words at the beginning of sentences. The language that begins a sentence and the language that ends it should contain the most important ideas because the reader notices those spots most. So qualifiers (such as nevertheless, however, and for the most part) and amplifiers (in addition, furthermore, moreover, and others); and ho-hum words (as a matter of fact, indeed, certainly, and others), which usually contain the least important ideas, should be placed in the middle of the sentence to indicate their relative unimportance. However, if these words are important, stress them by putting them at the beginning or the end of the sentence.

From the Mailbag I:

More e-mails have arrived in response to the January *Language Tips* column, in which a reader questioned the propriety of lawyers' identifying themselves by adding "Esq." to their names. In that column I wrote that attorneys generally oppose applying that honorific to themselves, although the honorific could properly be used to address other attorneys.

One reader wrote that my answer has caused her considerable consternation. As a new lawyer, feverishly networking to land her first job, she has used "Esq." on her labels and business cards, and has just considered adding it to her cover letter and resume. She is now fearful of offending prospective contacts by appearing "self-glorifying."

I regret that I have added to the problems of a new job-seeking lawyer, who signs herself "Faux Pas Phobic." Fortunately, however, she has not yet added "Esq." to her cover letter and resume, which seems to arouse the most ire among lawyers. I wish the new attorney the best of luck in her job search.

Another e-mail on the same subject arrived from attorney Patricia Keary, an Irish solicitor who was admitted to practice in New York in August 2000. She wrote that in correspondence she receives from the New York State Bar Association she is addressed as "Esquire." Because in Ireland that honorific is used only to describe a male lawyer, Ms. Keary mistakenly believed that a Bar Association administrator had listed her name as "Patrick," thinking she was a man. The January *Language Tips* has removed that confusion.

From the Mailbag II:

In the February *Language Tips*, Fordham Law School professor Michael M. Martin commented that one of his pet peeves was the use of so-called "hereinafter parenthetical insertions." A number of readers have written to express their opinions, all agreeing that the word hereinafter is usually unnecessary.

Attorney Harry Steinberg wrote that he would add initials in parentheses after the full title if the initials alone were not obvious. For example, he would not use a parenthetical for the FBI but he would for less well-known organizations. For Mr. Steinberg, whether an organization is sufficiently well known to omit the parenthetical explanation is a judgment call. He added that he has almost totally abandoned parentheticals and has received no complaints.

Professor Jay Weiser, of the Baruch College Zicklin School of Business, agreed that "hereinafter" is atrocious legalese and should be omitted. However, the drafter should state the term in full, adding the abbreviation parenthetically because it is unfair to readers to dispense completely with the entire term, forcing them to puzzle out what it means. He suggests the following format: New York Estates, Powers and Trusts Law (EPTL).

Other e-mails on the subject of "hereinafter parentheticals" have arrived and will be added to the next *Language Tips* column. Thanks to all who have written.

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611. Her e-mail address is Block@law.ufl.edu.

magazines, omit serial commas to save space. But serial commas are helpful. They reflect a natural pause in spoken English. Sound out this sentence: "Apples, oranges, and bananas." Did you pause before the *and* that preceded *bananas*? Of course you did.

Serial commas also promote clarity: "Yesterday the police arrested five criminals, two robbers and three burglars." How many people did the police arrest, five or ten? If you use serial commas, your reader will answer *ten*. If the reader knows that you never use serial commas, your reader will answer *five*. No ambiguity.

Serial commas are also required to divide elements from sub-elements: "Juice, fruits and nuts, and dairy"; or "Juice, fruits, and nuts and dairy"; or "Juice, fruits and nuts and dairy"?

An example of correct serial-comma usage: The legal-writing "process incorporates five stages: prewriting, writing, rewriting, revising, and polishing."[4] Exception: Do not use a serial comma before an ampersand: "Gatsby, Howe & Hummel."

Signal to the right. In the earlier editions of the *New York State Official Reports Style Manual*, affectionately called the *Tanbook*, commas appeared after signals (*id.*, *see*,). As of March 1, 2002, the *Tanbook* directs writers not to use commas after signals. Commas never go after signals, according to the *Bluebook*.

A defining moment. Use commas to define or explain terms. "Respondent moved for legal, or attorney, fees." "Fight noun banging, or noun plagues."

Don't supply information. Use commas to omit elliptical words, words a reader can immediately supply: "He chose a word processor; she, dictation." The comma replaces *chose*.

Don't let parentheses throw you a curve. Commas go after parentheses, not before them: "I went to New York University School of Law (NYU), graduating in 1986."

Cite the sites. In *Bluebook* format, commas go after citations when citing in text: "The court in *X v. Y*, 99 F.4th 99 (14th Cir. 2002), held that . . ." This issue does not arise under *Tanbook*, which requires that parentheses, not commas, enclose textual citations: "The court in *X v Y* (99 F4th 99 [14th Cir 2002]) held that . . ."

Learning to use commas can stop you in your tracks. Commas punctuate your thinking. But if you don't want cereal—er, *serial*—commas to eat you up alive, you'll pause to learn all about them. Maybe the pause will even be refreshing.

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1. *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting).
2. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 662 (2d Cir. 1946) (Frank, J., dissenting).
3. Also note the passive. The sentence should read: "Case law does not support the view that trial judges have agendas."
4. Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written 416 (3d ed. 2000) (capitals deleted).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, currently assigned to Brooklyn and Staten Island. An adjunct professor and the Moot Court faculty advisor at New York Law School, he has written numerous articles and Advanced Judicial Opinion Writing, a handbook for New York State's trial and appellate courts, from which this column is adapted. His e-mail address is Gerald.Lebovits@law.com.

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Todd Steven Sharinn
Tia Shim
Janet V. Siegel
Charmaine Larecia Slack
Randi-lynn Smallheer
John Christopher Smith
Samantha Southall
Michael Spiegeland
Joshua A. Spivak
Courtney Denise Spivey
Jennifer Ann Sponzilli
Jonathan Edward Staehr
Monica Jill Stamm
Thaddeus John Stauber
Edward J. Stein
Richard Ian Stempler
Michael Stepper
Ethan Immanuel Strell
Sonya Ann Strnad
Eileen Suh
Jay Young Sung
Jonathan E. Swerdloff
Michael Christopher Swiader
Cecilia Chie Takayama
Joyce Tavoulareas
Leza Skky Tellam
Donalaine B. Temple
Michelle Clara Thompson
Andres Fernando Torres
Melanie J. Torres
C. Cora True-Frost
Ryan M. Turner
Sara Jane Van Dyke
Richard R. Vanderbeek
Adorys Velazquez
Gary I. Vinokur
Jennifer L. Volpe
Irene Vomvolakis
Ruth J. Wachspress
John Vincent Waters
Daniel Nathan Webb
Karen Ellen Weinberger
Lawrence Alan Weinstein
Ronnell Lee Wilson
Terry Lee Wit
Hans Witteveen
Clifford Merle Work
Wendy Tai Yun Wu
Yasmin Kimberly Yanthis
Haeyeon Yoon
David W.S. Yudin
Matthew David Yusick
Paul Stephen Zambonini
Robert Zanetti
Benjamin Lloyd Zazove
Yi Zheng
Daniel Francis Zimmerman
Brian Alan Zuro

SECOND DISTRICT
Issa Abdullah
Robert James Adinolfi
Barri Nicole Altberg
Jared Anderson
Effia Akyaa Aning
Alex Ali Ayazi
Patricia Eileen Becker
Guy A. Bell
Anthony Michael Bellini
Simone Berman-Rossi
Derwin-Mark Bernard
Joshua D. Bernstein
Karen J. Bernstein
Craig Garrett Bienstock
Matthew P. Blum
Joan K. Braverman
Joseph John Burruanio
Pasquale R. Calcagno
Ida A. Caputo
Anthony Clemenza
Alfonso DeCicco
Jessica G. Earle
Tracya Natasha Edwards
Christian Romeyn Everdell
Vishta Jalali Farahani
Joseph P. Farrell
Victoria Ferrantelli
Stefano A. Filippazzo
Eileen G. Flaherty
Thomas Foley
Meredith J. Fried
Steven Ira Garfinkle
Justin Martin Gillman
Ian David Girshek
Joel A. Glaser
Gregory Gorodetsky
Tracy Lynne Hofmann
Mark David. Hunter
Allan I. Kahn
Jonas C. Katz
Vullnet Kolari
Peter Wade Kolp
Paul Kotlyar
Elizabeth Kroczynski
Stanley P. Kupfer
Anna Latkovskaia
Elena P. Lazarou
Gina Levy Abadi
Lissa G. Luke
Paraskevoula Mamounas
Jeffrey Mann
Susan Barbara Master
Kelly A. Mcgee
Robyn Jill Mendelson
Marc J. Monte
Patrick J. Morale
Michelle L. Murphy
Eric D. Musselman
Raymond Dennis Negron
Carmen A. Nicolaou
Marc A. Novick
Benedette Nkiruka Nwankwor
Umana E. Oton
Michael Pellegrino
Stephanie M. Pillar
Stephen J. Polter
Juliet Patricia Powell
Rudolf B. Radna
Linda M. Rojas
Jonathan S. Roller
David F. Rubin
Lauren D. Ruff
Solomon Sandberg
Rodney Sandiford
Frank T. Santoro
Dan J. Scarfo
Tatyana Shamaev
Lloyd Steele
Salvatore Strazzullo
James Robert Sweet
Tracy Tang
Natali J.H. Todd
Jonathan P. Tortora
Marcel M. Van Tuyn
Bryan C. Wallace
Joel S. Walter
Michael P. Welch
Jacob Zelmanovitz

THIRD DISTRICT
Tara Jean Angelo
Dennis J. Annechino
Liam M. Apostol
Matthew L. Chivers
David M. Clark
Ralph A. Cohn
William J. Decaire
Sara A. Duncan
Robert M. Gibson
Seth D. Gilboord
David R. Green
Andrew N. Greher
John R. Higgitt
Sonia Kruppenbacher-meyer
Daniel C. Lynch
Christine A. McCue
Sean M. Morton
James A. Muscato
Jennifer P. Nigro
Melissa E. Reilly
Matthew P. Ryan
Erik C. Sanderson
Adam J. Silberlight
Amy E. Van Den Broek

FOURTH DISTRICT
Heather A. Davis
Amanda K. Hiller
Laura M. Kruegler
Deborah Slack
Calvin J. Snell
Matthew J. Sypniewski
Stephen A. Vanier

FIFTH DISTRICT
Karen Marie Brandt
Scott A. Brenneck
Kevin C. Brown
Patrique A. Campbell
Molly A. Cappuccilli
Oleg Chernyavsky
Heather L. Clark
John D. Cook
Mary Beth Depasquale
Matthew R. Dunn
Ann T. Ealy
Megan Helen Eshbaugh
Andrea Christine Godfread-Brown
Donna M. Graber
Ellen M. Hemmerlein
Craig C. Humpleby
Hannah R. Jones
Jeong-Soo Kim
Dafni Soterios Kiritsis Cappers
Eugene Earl Klindienst
Diego Lebaudy
Elaine L. Lee
Maureen E. Maney
Francis X. Matt
Mark Aaron Moldenhauer
Shelly Mui
Mickelle Ann Olawoye
Patrick L. Oot
Kevin Michael Pole
Katherine E. Potter
Amy Frances Quandt
Susan R. Rider
Mary Rebekah Snyder
David M. Stewart
Eileen Dorsey Walsh
Michele L. Wendt
Mara A. Willie
Joseph John Zavaglia

SIXTH DISTRICT
Amy E. Barabas
Sidharth Bhasin
Matthew Alexander Goettel
Randal I. Goldstein
George Gonzalez
Eric W. Goodale
Douglas S. Horowitz
Adam S. Karasik
Katherine J. Ma
Daniel F. Mulvihill
Yoon Oh
Jennifer K. Prossick
Adam J. Siegel
Damian Michael Sonsire

SEVENTH DISTRICT
Maroun G. Ajaka
Brooke Louise Beares
Lynne Marie Blank
Karlee S. Bolanos
Jeffrey S. Bouman
John R. Bowler
Donald James Cheney
Jeffrey Louis Ciccone
Gerald Anthony Coniglio
Jason M. Dunn
Ryan Bodiford Feeney
Rayne Lynne Hammond
Timothy Edward Jennings
Efstathia G. Kyriakopoulos
Ann-marie Luciano
Margaret Anne Lyons
Jay Nelson Malone
Heather Clarke Mapstone
Devin Lawton Palmer
Anita L. Pelletier
Jonathan Swoffer Penna
Courtland D. Rae
Lori A. Robb
Kathia M. Rojas
Nicholas L. Rossi
Lori Jean Stone
William Kemsey Taylor
Jason Philip Torres
Brenda K. Wonder
David F. Zammiello

EIGHTH DISTRICT
C. Michael Bader
Audrey Anne Barr
Kevin John Bland
Frank M. Bogulski
Stephen E. Brooks
Kevin D. Brown
Gregory A. Cascino
Anthony Joseph Cervi
Erin Lea Clark
Eric Dylan Cownie
Karen Marie Darling
Toni Delmonte
Robert J. Demarco
Diane Y. Devlin
Daniel J. Dolce
Danielle Katherine Elliott
Joshua Isaac Feinstein
Jennifer R. Fields
Jacob J. Herstek
Michael Douglas Hollenbeck
Racheal Christine Irizarry
Brendan Patrick Kelleher
Patricia Anne Kelleher
Sung Mo Kim
Stanley P. Konzel

Peter Matthew Kooshoian
Andrea Corbett Kuettel
Terry Daniel Loretto
Nicole B. Palmerton
David R. Roggenbaum
M.K. Gaedeke Roland
Sean Daniel Schoenborn
Jill Michelle Skretny
Michael Edward Sliwinski
Drummond Carl Smith
Shahid Hussein Syed
Sara Lynne Thrasher
Edward William Tracy, Jr.
Pierre A. Vincent
Jennifer E. Visco
Judy Nicholena Cuzzacrea Wagner
Carly M. Wilsman
Colleen Marie Wood
Roger Jon Yehl

NINTH DISTRICT
Danielle Marie Abate
Walter John Adams
Jeffrey R. Aibara
Christopher William Antoni
Richard A. Berube
Jeffrey M. Casaletto
Laura Caterina
Thomas K. Chong
James John Cioffi
Amy P. Ciota
Kathryn C. Collins
William J. Cortellessa
Jody Tamar Cross
Philip De Noia
Adeline Delgado
Angela Dibiasi
Gennaro D'Onofrio
Gerry Feinberg
Theresa Ann Girolamo
Leo Gojcaj
Brent S. Golisano
Robert John Grande
Timothy A. Green
David A. Group
Katherine Gavin Hall
Scott E. Hansen
Mary K. Hawthorn
John Gavin Huncke
Christina S. Kanlong
Amy Rosenstadt Kellogg
Sheri Michelle Levson
Brian G. Maloney
John J. Martinez
Kelley Kristen Mcgraw
Kayo Naruse
Andrew William Negro
Erna Neufeld
Louise Alison Nield
Christina Therese Peters
Michele C. Petitt
Justin David Pruyne
Kelly Ann Ruane
Deanna Camac Sandor
Charles L. Sant'elia
Jennifer C. Starr
Walter Storey
Kathryn B. Thorsen
Jacquelynn M. Vance
Jacquelynn Vance-Pauls
Dov B. Wenger
Kimberly M. Williams

TENTH DISTRICT
Brian Anthony Abamont
Bradley R. Aronstam
Robin Ann Audubon
Lisa Azzato
James E. Bahamonde
Candace Michelle Bartone
Patrick Louis Basilice
James G. Bernet
Sylvia Bishai
Lauren B. Blyer
Harold Anthony Bollaci
Carle Anthony Borelli
James M. Boyce
Ralph Branciforte
Michael J. Brown
Theresa V. Brown
Van Brown
Christina R. Bruderman
Brian P. Butler
Gregory Caggiano
Susanne Marie Cahill
John Joseph Caracciolo
Christina A. Cattaneo
Nicholas P. Chiara
James N. Chios
Jennifer A. Choinski
Tammy Berdette Collins
Laura Jean Coogan-Leavy
Christian Paul Daglieri
Joseph A. DeMarco
Patricia M. Diffley
Jeffrey Michael Donato
Linda Donato
Dennis F. Dowd
Raymond S. Doyle
Bethany Danielle Drucker
Mary Ellen Duffy
Matthew H. Ehrlich
William John Fallon
Anthony W. Falzon
Steven T.J. Farmer
Robert Fassberg
Diane Ferrone
Seth I. Fields
Julie Finn
Susan M. Fitzgerald
Adam L. Fleischmann
Jacalyn R. Fleming
Cory Evan Forman
Donna Gillin
Andrea Elaine Girolamo
Evan M. Gitter
Jan Gomerman
Jeanette Grabie
Tina Michelle Greco
Leonard Gretah
John S. Groarke
Jason B. Gurdus
Susan E. Hartmann
Brian Heid
Jennifer Ann Hernandez
Janine Howard
Sara M. Israeli
Beth N. Jablon
Michael Patrick Jones
Baljinder Kaur
Jessica Yoochin Kim
Matthew B. Kogan
Jeremy A. Kosin
Robert A. Koubek
Allison M. Kourbage
Marc A. Kramer
Allison Leigh Lampert
Marilyn S. Lauer
Gabriel A. Leventhal
Kenneth L. London
Alyssa N. Maloff
Kimberly Mancini
Lisa M. Marcus
Paul M. McMahon
Jennifer Menoudakos
Robert L. Mercaldi
Jeffrey Migdalen
William Miller
Nichole Krystal Mitchell
William Gustav Murphy
Tara Marie Onorato
James A. Pascarella
Nancy Pavlovic
Frank Salvatore Pintauro
Cheryl Marie Plambeck
Sanford A. Pomerantz
Judy Poznik
Geoffrey Noel Prime
Elan Raday
Richard C. Reid
Deborah E. Richardson Decuevas
David M. Roth
Kerren B. Rothman
Stuart G. Serota
Sharman Shabab
Daniel A. Shafer
Nathan Soufeh
Diane Stander
Angela T. Starr
Nehal M. Trivedi
John J. Ullrich
Meredith E. Unger
Maria Vardaros
Antoinette Violi
Michael P. Walsh
Melissa D. Wasley
Vanna E. Whitaker
Carolyn Lisa-ann Williams
Alyse Wolfson
Dalit Adele Yarden
Libby G. Zeiff

ELEVENTH DISTRICT
Ishak David Akyuz
Gil Amrami
Jodi H. Appel-Kaplan
Michelle T. Baginski
Christine Jean Benedetto
Bradford D. Burns
Lawrence J. Chanice
Todd Steven Cushner
Mario J. Derossi
Nita Dobroshi
Margaret Mary Driscoll
John Frangos
Michele Gaynor
Jeffrey A. Gershuny
Brian Stuart Gitnik
Fengli Guo
Jennifer Mary Hansen
Russell L. Hirschhorn
Kenneth S. Horton
Igor Kogan
Jerry S. Lettieri
Cynthia Lopez
Anna Loudaros
Lauren Lubell
Doreen Stacy Martin
Stephanie O. Montgomery
Sakol Muratovic
Donniel Ogorek
Margaret R. O'Halloran
David A. Osso
Michael Perna
Victor Manuel Pizarro
Nikolaos Preponis
Michelle Theresa Chin Quee
Aaron E. Rabinowitz
Loretta Ann Restivo
Marisel Rodriguez
Richard R. Rodriguez
George F. Russo
Isaac Torres
Maria Tzortzatos
Pasquale Viscusi

TWELFTH DISTRICT
Camille J.C. Agard
Shahabuddeen Abid Ally
Marie L. Blackman Lake
Penny Marie Bluford Garrett
Kristen Marie Bowes
Michael Lee Dowdy
Rebecca A. Ferrigno
Stacey Dionne Finley
Jacqueline Paige Flug
Camille Flynn
Elliot Gaztambide
Ameenah Karim
Tania Kregar
Jan Di. Kum
Adina Lewis
Marisol Martinez
Christopher Nelson
Brian Alan Reese
Valerie Rivera
Jason Adam Steinberger
Harold W. Suckenik

OUT-OF-STATE
Kristi Dawn Aalberg
Zhanat Z. Alimanov
Christian Serge Allard
Yelena Y. Antipova
Keren Arad-Leibovitz
Michael Anthony Arcati
Maria Teresa Arcaya
Mariana P. Ardizzone
Sabrina Shaheen Asher
Ary Atrushi
Victoria H. Babcock
Victoria Bach
Purvi Badiani
Yong-shim Bahk
Dianne Chipps Bailey
Rachael M. Baldeo
Donald R. Ballman
Edo Banach
Heidi-Hakone Louise Barrachina
Arun Kumar Barua
Elise Ruth Baudot
Casey Baum
Jeffrey Patrick Becherer
Pierre Beissel
Leeann Kathryn Bell
Yosi Ben Levi
Mona Luddy Benach
Nicole M. Benjamin
Don H. Bennett
Ira Scott Berg
Samuel C. Berger
Steven Aaron Berliner
Mohit Raj Bhatia
David Bilenko
Eric Keith Blumenfeld
Stephanie Ann Bortnyk
Denis Joseph Yvon Boulianne
John Louis Bowles
Jason C. Bramwell
Frederic Michael Brandes
Peter G. Brav
Michele Nance Breen
Luis Miguel Briola
Phaedra Britt
Ambreen Mary Am Brown
Stacey L. Brown
Joseph Anthony Brucchieri
Esteban C. Buljevich
Stephen Clark Bullock
Michael Patrick Butler
Frank Richard Butterfield
Kati Regina Bynon
Mary K. Campbell
Gabriela Carias Troconis
Brian Thomas Carr
Nichole Carroll
Michelle Venita Carter
Daniel G. Caserto
Anthony Joseph Cassese
Alicia Lynn Cate
Brian A. Caufield
Anastasia Joy Caviris
Seung-Jae Chang
Yijun Chao
Eirini C. Charisiadou
Pablo Charro
Joanne Cheeseman
James S. Chen
Yi-chun Chen
George Cherpelis
Lisa Chiang
David Alan Chipperson
Sungjoon Cho
Stacy Hui Hui Choong
Helen I- Chun Chou
Kuang-Tung Chuang
Nancy Anne Cifalino
Daniel Lewis Clark
Rejane Sultane Cohen-frey
Tara A. Colangione
Kevin Charles Condon
Sandra H. Copenhaver
Clinton John Cusick
Greg Anthony Dadika
Debra A. D'Agostino
Michael Dannenberg
Laily Darvish
Nora Eileen Davis

Thomas A. Day
Marie-Christine Anne De La Gorce
Philippine Manot De La Querantonnais
Thomas Joseph Deutsch
Karen Lynn Ditzler
Susan L. Donegan
Maria I. Dostoinova
Alyson Cynthia Douma
Axel N. Du Boucher
Huong Thuy Duong
Lee Anne Egnal
Cassie Rachel Ehrenberg
Douglas Ian Eilender
Linda S. Eliopulos
Mukaram Enifeni
Jose Castillo Escano
Paul J. Esheyigba
Afolabi Euba
Janet Ruth Fallon
Thomas A. Farinella
Grant Patrick Felgenhauer
James Louis Ferraro
Sabato Pellegrino Fiano
Andreea Filipciuc
Eric Peter Finamore
Mauro Andre Mendes Finatti
Marci Elizabeth Finkelstein
Craig Joseph Fleischer
Tommaso Foco
Henry E. Forcier
Matthew Regan Fowler
Elizabeth Anne Franklin
Melissa Abigail Freidenreich
Itay Frishman
Chai Ling Fung
Darian Morgan Futrell
Tara Justine Galbo
Anna-lisa Leimieux Gallo
Andrew Michael Gebelt
Gregor J. Geimer
Theresa M. Giannavola
Daniel Y. Gielchinsky
Matthew Michael Gilbert
Ryan E. Gilbert
Marc D. Goldberg
Allison L. Goldstein
Jonathan Simeon Goodgold
Eli Gottesdiener
Hannah Elizabeth Greenwald
Catherine J. Griffin
Angela Lee Grinstead
Matthew Ariel Grossman
Giselle Andrea Gutierrez
George Haines
Andrew Jerome Haliw
Brenda Marie Hamilton
Jodi Lynn Hammer
Anne Margaret Hammill
Sangik Han
Todd Michael Hand
Linda Caire Hargrove
James Longmire Harrison
Hidekazu Hayakawa
John Nolan Haynes
Erich Daynor Hemm
Daniel Brian Herbert
Ana Maria Hernandez
Sarah C. Herzog Crass
Bradley Jerome Hillis
Benjamin Joseph Holl
David Paul Honan
Brian Burgers Horan
Harold Steven Horwich
Heather M. Hutchinson
Hyunseok Hwang
Marisa Andrea Iozzi
Alexa Denise Isbell
Paula J. Ivory
Gary E. Jackson
Thomas Dean Jackson
Pratibha Jain
Jerome Walter Jakubik
Jae-yun Jang
Jisoo Jang
Louis F. Januzzi
Patricia Lynn Jarrach
Kevin Douglas Jarvis
Thomas James Jaworski
William H. Jeberg
Vernon Richard Johnson
Cheryl M. Samuel Jones
Timothy J. Jordan
Rayan Ramesh Joshi
Gaytri Devi Kachroo
Eric John Kadel
Manfred Dieter Kahl
Alan Stewart Kahn
Russell Richard Kaiser
Lana Audrey Kalickstein
Peter M. Kalton
Kenji Kamata
Raphael Kaminsky
Arti Kane
Shigeru Kaneko
Deborah Joyce Karet
Diana Kasdan
Jill Barrie Katz
Michelle Renee Katz
Edward Michael Keating
Debra S. Kelly
Alexander F. Kennedy
John Howerton Kenney
Katherine Leah Kettler
Lalla M. Khan
Alexander Khenkin
Robert A. Kiamie
Rebecca Lynn Kill
Sven Christopher Kill
Eugene Lee Kim
Haeng-sern Kim
Ihan Kim
Joo Yun Kim
Jun Ki Kim
Rina Kim
Roy B. Kim
Suzy Kim
Young-mo Kim
Samantha Margaret Kirby
Amy Rebecca Kirtland
Lily Kishinevsky
Theodore Allan Kittila
Howard Mitchell Klein
Michael Alan Klein
Khaled John Klele
Rose A. Kob
Daniel Casey Kobi
Kymberly Kochis
Umut Kolcuoglu
Bret Kantor Kossman
Sarah M. Kouider
Kelly Rana Koyama
Alexandra L. Kramer
Larry Stuart Kraslow
Jason H.P. Kravitt
David J. Kresman
Itzhak Krispin
Ivan Krmpotic
Jacob Kubert
C. Raj Kumar
Mary Lynne Kupchella
Arman Jirair Kuyumjian
Deborah Ellen La Mond
Gundel Iris Labak
Sara J. Langan
Daniel Robert Lapinski
Darrell Reed Larsen
Katherine Braun Lasberg
Kimberly A. Lavas
Jin Lee
Lana Jessica Euikyoung Lee
Sangho Lee
Sharon Maine Lee
Laura Jane Lefkowitz
James Michael Lennon
Huiwen Leo
Bruce William Lester
Ido Levin
Laura Levit-Watralov
Keren Levy
Paul Marc Levy
Daniel Raymond Lewis
Enrique Eduardo Liberman
Ayelet Lichtash
Brian D. Lieberman
Chang Sun Lieu
Eden Lee Lim
Marc Alexander Lindemann
Patrick Francis Linehan
Ross Matthew Lipson
Gayle Elizabeth Littleton
Philip Yu Fei Liu
Lisa D. Loftus-Otway
Frank Steven London
Piret Loone
David Alexander Lore
Adam Sigmund Lovinger
Robert William Lynn
Michelle Debora Maccagnano
William L. MacDonald
Ann Frances Macmurray
Hiroshi Maeda
Joshua Daniel Malkin
Shawn Robert Mallon
Nicholas Heron Mancuso
Scott Adam Marcus
Richard G. Martin
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Mitsutoshi Masuda
Romina A. Matlis
Mario Fernando Matus Sequeira
Marcella Tate Mcauliffe
Timothy Neil Mccabe
Jennie Marion Mccarthy
Richard James Mccormick
Eric Takeshi Mccrath
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Tanya Danyelle Mcduffie
Lisa Marie Mcfadden
Ryan A. McGonigle
Terrence Kevin Mcgrath
John Douglas Mckay
Monique Mcneil
Tracey K. Mcquaide
Mary Baker Mcwilliams
Creighton Roland Meland, Jr.
Cori A. Menkin
John Dennis Mercer
Noah Aaron Messing
Manuel Metzner
Patricia-anne Michitsch
George F. Miller
Jonathan Reilly Miller
Jenna Marie Minicucci
Eugenio Minoli
Chandra Jeannine Mitchell
Steven Nathan Mogel
Alisha D. Mohammed
Brajesh Mohan
Hector James Montalvo
Tara Chandra Montovani
Jaewan Moon
Sangil Moon
Michelle Moosally
Thomas J. Moran
Andrew Jaren Moss
Lisa Marie Motyka
Douglas Edward Motzenbecker
Danhai Mu
Harbhajan Kaur Mudhar
Yuki Mukaeda
Deepro R. Mukherjee
Michael Thomas Mullen
John Gerard Muller
Maha F. Munayyer
Nanci Ellen Murdock
Brian Patrick Murphy
Anthony John Musto
Kazumi Muto
Courtney Linn Myers
Jodi Lynn Nagel
Andre Christophe Namphy
Catherine E. Napolitano
Melissa P. Negrin
Laura Joy Nicholson
Fengguo Niu
Daniel Nossa
Svetlana Novik
Mansur M. Nuruddin
Ngozika Chineze Nwabulu
Kimberly Denise Ockene
Donnacha Erin O'Connor
Awele Frances Onyemenam
Jude Kenneth Maduka Orji
J. Matthew Owens
Stephen Alan Oxman
Nancy Ann Ozimek-pak
Thomas Julian Page
Christopher J. Palestro
Peter Hosea Paretsky
Thomas Jeffrey Pasuit
Kedric Lesean Payne
Erin E. Pendergast
Aaron Stephen Perl
Savitri Devi Persaud
Ingrid E. Peterson
Thomas Uwe Pfennig
Jason Richard Phillabaum
Ellison Marie Pidot
Grey Pierson
Greg Pilarowski
Mark Joseph Podlin
Keith Michael Poliakoff
Raymond Andrew Psonak
David Harris Quigley
Erin E. Quinn
Michelle Patrice Quinn
Robin Meredith Quittell
Andrea M. Rachiele
John A. Raimondo
Tara Alexandra Rainson
Sheila D. Rajabiun
Arun Gadahad Rao
Michael Todd Reese
Angela Renee Rehm
Asaf Reindel
Denise Johanna Remele-vezner
Aliza Faye Remer
Christina Stephanie Remolina
Elena Vladimirovna Reshetnikova
David Revel
Shawn Preston Ricardo
Catherine Michelle Riccards
Aurora Nalin Riccio
Malte Franz Alexander Richter
Joseph George Rinaldi
Michael J. Rishty
Lena I. Rising
Marc Robert-Nicoud
Joshua S. Roberts
Christopher John Rocss
Rebecca Roiphe
Joseph J. Rose
Kathleen Roseme
Kevin Drew Rosenberg
Robin L. Rosenberg
Dana Ayn Rosenthal
Andrew Mark Rosner
Jaimie Allyne Rothman
Laurence Melanie Rouzioux
Matthew Magrath Rubenstein
Alexander Rudoni
Jeffrey S. Rugg
Kimberly Kathleen Ryan
Tali R. Sadi
Christine Alice Martine Sales
Ian J. Saltmer
Jennifer Kristen Salyer
Zachary John Sanders
Sheryl Lynne Sandridge
Flavia Martins Sant'Anna
Eduardo Alberto Santiago-acevedo
Jocelyn Laura Santo

Anthony Emil Santoriello
Berat Asli Saracoglu
Aimee Sato
Wills Nichols Sautter
Donald M. Scalia
Noam Schechner
Terry Schiff
Anna Victoria Schissel
Paul F. Schlichting
Ava Lauren Schoen
Jeffery Darrel Schwartz
Brianna Tremaine Scott
Brion Aaron Scudder
Scott Kenneth Seelagy
Harold Seider
Timothy Semenoro
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Avon Lee Sergeant
Menachem Shalom
Alice Margaret Shanahan
Edward Wadsworth Sharon
Thomas Duross Shea
Shiva Sherafat
Eungyoung Shin
Chi H. Shum
James Akiva Silverglad
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Felix Skala
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Geoffrey D. Smith
Maurice Leighton Smith
Patrick Rittner Smith
Sean Edward Smith
Steven Barry Smith
Hyun-ung Song
William Martin Sothern
Marlene Soukavanitch
Holger Spamann
Annette Christina Spencer
Gregory Alan Spring
Colm A. Stanley
Meital Stavinsky
Craig Cryan Stephens
Naima Mera Stevenson
Andrew Michael Stone
Joy Danya Strasnick
Kirill P. Strounnikov
Salvatore Emilio Struzzulo
Erica Jean Summer
Robert J. Sweeney
Karen Shiu-ling Choi Szeto
James Tampellini
Benjamin Andrew Tan
Dorothy Acee Thomas
Kevin G. Thomas
Kimberly Ann Margaret Thomas
Fletcher Colin Thomson
Claudia Ruth Tobler
Charles Greighlan Grant Tolbert
Pei-ling Tong
Masahiro Torii
Joseph Eric Tornberg
Steven Anthony Torrini
Kelly Ann Toy
Joseph T. Tsai
Anna Ka Blk Tsang
Ido Tuchman
Kelvin Dwight Tuckett
Jane E. Tumminia
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Jessica Lynn Turko
Deborah Miriam Tyler
Jon Jeffrey Tyzbir
Kiyeshi Uchihara
Russell Brian Unger
Mathew Jon Urbina
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Gabriela Maria Vallejo
Heather Marie Van Aerssen
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Todd Davis Van Sicilen
Paul Arthur Van Wagenen
Matthew Phillip Venema
Urs Matthias Verweyen
John J. Veteri
Jan Vild
Vincent D. Visceglia
Ekaterini Vlahos
Hans-ueli Vogt
Georg Von Burkersroda
Carol Ann Vonurff
Alison Beth Vreeland
Kim Marie Wacek
Elizabeth Shannon Walsh
Thomas Gerard Walsh
Wai Yee Wan
Michelle Renee Wandler
Jing Wang
Kai-ling Wang
Shanyee Eric Wang
Michelle Elizabeth Warchol
Melissa Lea Wardlaw
Kevin C. Watkins
Charlotte Teresa Watson
Nicole Kara Watson
Stephanie Donn Weaver
Matthew Evan Weerth
Norbert Weinrichter
Jennifer Raina Weiser
Monica Marie Welt
Charles Edward Wern
Megan Elizabeth Wessinger
Shawn Ray White
Katherine Marie Wiedmann
Derek Anthony Wilkins
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The Legal Writer

The Pause That Refreshes: Commas—Part 2

By Gerald Lebovits

Part I of this column, in the *Journal*'s March-April edition, discussed comma-induced comas. Having paused for a month, punctuating *The Legal Writer* by 30 days, we continue.

Go which hunting. That vs. which? Is it "I am enveloped by litigation that troubles me" *or* "I am enveloped by litigation, which troubles me"? If all your litigation troubles you, use the nonrestrictive *which*, adding a comma before *which*. If one aspect of your litigation troubles you, replace the *which* with the restrictive *that*.

Restrictives define. Nonrestrictives don't. Because not everyone lives in a glass house, it is, "People who live in glass houses should not throw stones," *not* "People, who live in glass houses, should not throw stones." Conversely, because every person is sentient, it is, "People, who are sentient, appreciate being treated with dignity," *not* "People who are sentient appreciate being treated with dignity." *More restrictions*. Do not use commas to separate nouns from restrictive terms of identification: "Alexander the Great."

Are you independent? Use commas to set off independent clauses from preceding dependent clauses and to set off all but the shortest prefatory phrases. Add a comma after *up*: "After the oven blew up Bill sued. Without the comma, the oven is a homicide bomber that blew Bill up.

Runaway commas. Use semicolons or periods, not commas, to set off two independent clauses joined by conjunctive adverbs used as transitions: *accordingly*, *again*, *also*, *besides*, *consequently*, *finally*, *for example*, *furthermore*, *hence*, *however*, *moreover*, *nevertheless*, *on the other hand*, *otherwise*, *rather*, *similarly*, *then*, *therefore*, *thus*. It is a comma-splice run-on sentence if you do not do so. *Incorrect:* "The motion is frivolous, however, sanctions will not be awarded." *Correct:* "The motion is frivolous. However, sanctions will not be awarded." *Or:* "The motion is frivolous; however, sanctions will not be awarded."

Are you coordinated? Place a comma before a coordinating conjunction (*and*, *but*, *for*, *or*, *nor*, *so*, *yet*) when the coordinating conjunction precedes a second independent clause, unless the two independent clauses are short. If they are short, no comma is necessary unless you wish to emphasize the second clause. Correct use of comma before the two *and*s, from Justice Frankfurter: "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."[1] *Comma prohibited:* "The court attorney studied in the law library and drafted an opinion there." (One independent clause.) *Correct:* "[A] legal system is not what it says but what it does."[2] (One independent clause.) *Comma optional:* "He wrote and she researched." (Two short independent clauses joined by a coordinating conjunction.)

You can quote me on this. Commas can be used to introduce quotations. Use a comma before a quotation only (1) when the quotation is an independent clause and (2) when what precedes the quotation is inapposite to the quotation *or* to replace a *that* or a *whether* before the quotation.

An innie or an outie? In American usage, commas always go inside the quotation mark. It's not a matter of logic. It's a matter of usage.

Because I said so. Do not use a comma before *because* unless the sentence is long or complex.

Verbal hesitation. Do not use a comma before a verb. *Incorrect:* "When to use a comma, [omit the comma] befuddles law students." Do not use a comma between subjects and their verbs or between verbs and their objects. *Incorrect:* "The view that trial judges have agendas, [omit the comma] is not supported by case law."[3]

Use commas to set off independent clauses from preceding dependent clauses.

Compounding the felony. Do not use a comma after a compound subject. *Incorrect:* "Many court attorneys use e-mail, fax machines, and telephones, [omit the comma] nearly every day."

Doubly subjective. No commas between parts of a double subject. *Incorrect:* "The District Court, [omit the comma] and the Civil Court will be merged if the Unified Court System's proposal succeeds."

Serial killers. As with much in written English, the key is consistency. Always or never use serial commas before the final *and* or *or* in a series of three items or more. For serial commas, there is no "it depends." But the better practice is to use them. Forget what your sixth-grade teacher told you. Many believe that serial commas are unnecessary because, they contend, the *and* or *or* already separates the final two elements of a series. Others, like newspapers and

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