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Journal

ASSIGNED COUNSEL AT WORK: EXTRA MILES AT FIXED RATES

18-B

Inside

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ON THE COVER

Law guardians and 18-B panel lawyers help people in troubling situations. The file photographs on the right depict domestic violence and child abuse, some of the case types law guardians and 18-B panel lawyers accept. Law guardian Jeffrey Berkun of Albany is pictured in the photo on the left. *Photo by Joann Hoose.*

Cover design by Lori Herzing.

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The 18-B Experience

Court-Appointed Attorneys Face Legal and Financial Challenges

BY TAMMY S. KORGIE

Theresa Suozzi would rather not have spent the Fourth of July in a jailhouse. After all, there were celebrations to attend and fireworks to watch. Of course, her client didn't want to spend that day in jail, either—or any other day, for that matter. So Suozzi, as his court-appointed lawyer, spent a day meant to celebrate freedom preparing to fight for her client's freedom.

Suozzi serves on the 18-B panel in Albany County, working extra hours in addition to her regular job at Ackerman, Wachs & Finton in Albany.

"I believe in what I do," said Suozzi. "This is someone's life in my hands. I feel like a doctor because what I do affects their entire lives. [As an 18-B lawyer], you're going to go the extra mile. It's not about your reputation so much; it's like losing a patient. If your client goes away for 25 years to life because you messed up, or you didn't file the right motion, or find the right witness, then not only can they sue you and it can hurt your reputation, but you'll have that guilt on you for the rest of your life because you were lazy, or you weren't getting paid enough."

Suozzi does go the extra mile. She has driven clients to and from court to make sure they are there at the appointed hour. She has braved dangerous neighborhoods to knock on doors in search of witnesses. With her own money she purchased a dress shirt for a client who did not have and could not afford appropriate clothing for the courtroom. During an extended day at the courthouse, she has been known to buy lunch for clients who did not have enough money.

Assigned counsel, and law guardians as well, are certainly not expected to incur extra expenses such as buying lunch for the client. These sacrifices are paltry, however, compared to the financial hit assigned counsel and law guardians have been taking for years simply by accepting case assignments.

Doing the Math

In a January 2000 report titled "Assigned Counsel Compensation in New York: A Growing Crisis," the Office of Court Administration (OCA) demonstrated the financial loss an assigned counsel lawyer takes, using figures from the NYSBA's "Desktop Reference on the Economics of Law Practice in New York." The NYSBA study showed that in 1995 overhead costs for a single attorney in a law firm of five or fewer attorneys averaged approximately $55,000 per year. Adjusting that amount by 15% to estimate the average attorney's overhead costs in 2000 resulted in $63,250 in annual expenses. That amounts to average hourly overhead costs of $34.75 based on a 35-hour work week.

Therefore, a New York attorney with average overhead expenses who performs assigned counsel work actually loses $9.75 for every out-of-court hour performed, and $5.75 earned income for every in-court hour—and that is before taxes.

Last year, Peter Hedglon of Oneida did some figuring of his own and decided not to take on any more cases as a law guardian. He explained, "Serving as a law guardian is a financial burden, one that I bore without complaint for a number of years, bearable because of the opportunity to help children. However, as the state legislators, judges and all other public employees in the courtroom received raises in compensation, and as my second child was about to enter private post-secondary education, it came to the point where I could not justify the financial sacrifice in light of my family's needs and the insult to me of seeing all the public employees enjoying increases in their compensation."

Hedglon tracked his time and expenses as a law guardian in a bitterly contested divorce, in which the custody, visitation and support of four children were at issue. He began his service on September 21, 1998. Through June 5, 2000, he logged 144.1 hours on the case,

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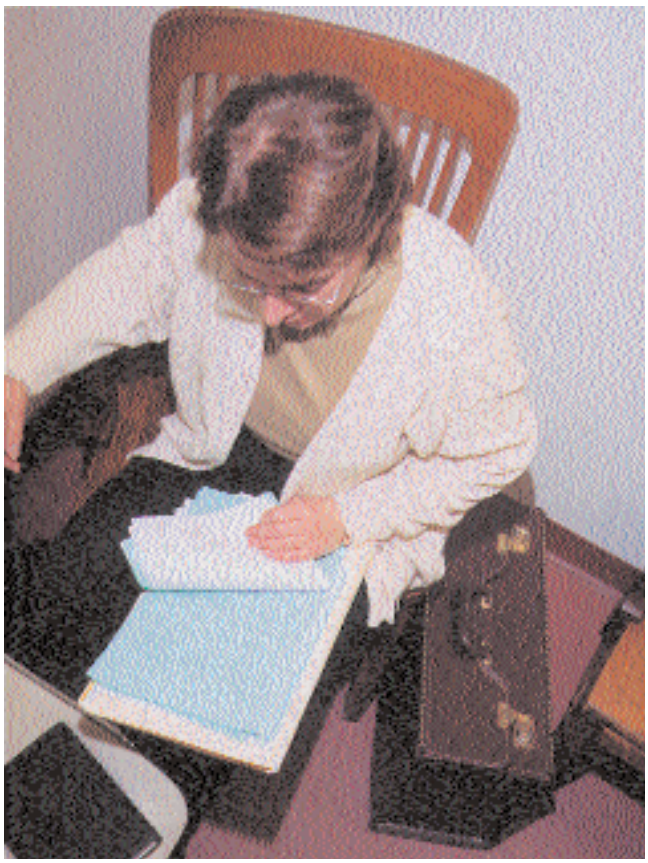

Law guardian Pamela Joern of Albany prepares for an appearance in Albany County Family Court. Low pay rates have contributed to a shortage of law guardians across the state.

Photo by Joann Hoose

and incurred reimbursable expenses of $68.09. During this period, there were 86 items of correspondence to and from the judge, attorneys, counselors and others. Hedglon received more than 50 items of correspondence from or on behalf of one parent, and at least 29 from the other parent, including minute-by-minute daily logs. He met with the children on seven occasions, and phone contacts were numerous. He appeared in court five times, with two of those appearances lasting most of the day. In addition, one parent changed lawyers twice and the other changed lawyers once. The case file was more than four inches thick.

Hedglon determined his approximate overhead for this case at $3,455.31. With the current compensation rates of $25 an hour for out-of-court work and $40 for each hour in court, he was paid a total $3,800 for his work, netting a pre-tax profit of $344.69, or $2.39 per hour.

John E. Carter of Albany, chair of the NYSBA's Children and the Law Committee, said, "There are very few things you can do in any profession that will impact a child's life the way law guardians do. They deal with kids at the most critical times of their lives. If half of marriages end in divorce, an enormous amount of children are exposed to a situation where the most important people of their lives are dissolving the most significant of relationships to a child."

That is one of the reasons law guardians have reacted on a visceral level, supporting and representing kids out of their own pocket, according to Carter. "These people are bearing the burden of representing the child, which society should bear. The situation is not of the children's making, and it is not of the lawyers' making—but they are the ones paying out of pocket to represent the children."

Hedglon said, "These are kids that desperately need someone to talk to, to advocate for them. It's very rewarding, because in cases such as divorce, you're dealing with these children who are completely blameless." He added, however, that with the current compensation scale, "law guardians do this at great personal financial sacrifice. I have two children in college this year, and I can't afford to lose money in the time I have to work."

Hedglon is not alone in his refusal to take on new cases at a financial loss. Many court-assigned lawyers for the Manhattan Criminal Court and Brooklyn Family Court, for example, have refused to take new cases in view of the rates being paid.

Where Will the Money Come From?

In addition to the low rates, compensation for each case has been capped: $800 for Family Court matters and non-felony defense work, and $1,200 for felony defense work. The state has covered law guardian expenses, but the counties have picked up the cost of 18-B work.

He appeared in court five times, with two of those appearances lasting most of the day. . . The case file was more than four inches thick.

The NYSBA House of Delegates has voted to support an increase in the hourly rate to $50 for misdemeanors and $75 for felonies, with equal adjustments for Family Court matters. Representation in cases with a potential for a sentence of life imprisonment would be compensated at $100 per hour.

Chief Judge Judith S. Kaye has proposed that rates increase to $75 an hour for felony and Family Court

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Background on Assigned Counsel Programs

County Law Article 18-B came about after the U.S. Supreme Court's decision in *Gideon v. Wainwright*.[1] In *Gideon,* the Court held that states must provide counsel to indigent criminal defendants charged with a felony. Following *Gideon*, the New York State Court of Appeals ruled that all criminal defendants in New York have a right to assigned counsel, not just those charged with a felony.

In 1965, the Legislature enacted County Law Article 18-B, requiring each county to provide and compensate assigned counsel. Counties could meet this requirement of providing counsel by creating an assigned counsel program or a public defender office, contracting with a legal aid society, or by combining these options.

Therefore, each county has its own system for assigning 18-B cases, and these systems may vary widely. One county may combine all three of these options, while another relies solely on an assigned counsel program. Often, in counties with both assigned counsel and a public defender office, an accused person is assigned a lawyer from a county's 18-B panel when the public defender has a conflict of interest. For example, if three people are co-defendants to an alleged crime, the public defender can represent only one of them.

18-B panel attorneys may also be appointed to represent adults in Family Court proceedings under section 262 of the Family Court Act. These costs are borne by the counties as well.

Law guardians represent minors in Family Court cases, such as abuse and neglect, family offense and child custody. They are not governed by Article 18-B, but are paid for by the state. Law guardian compensation is part of the Unified Court System's budget as stipulated by the Family Court Act. However, they are paid at the same rates as 18-B attorneys.

The original rates of compensation for appointed counsel were $10 per hour for out-of-court work and $15 per hour of in-court work. These rates were raised to $15 and $25 in 1977. In 1986, they were raised to $25 and $40, and have remained at this level.

1. 372 U.S. 335 (1963).

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cases, and $60 an hour for non-felony cases. She has also recommended that caps be eliminated.

Of course, money is an issue, and to cover an increase in fees, Judge Kaye suggested the use of mandatory surcharges. In her 2001 State of the Judiciary report, she wrote:

> I continue to believe that court-imposed fines and surcharges can be a significant funding source, but now make that proposal more attractive and make it much more urgently. Recently, the court system contracted with a private collection firm on a pilot basis to recover every cent of unpaid, sometimes long outstanding, fines and surcharges. I believe this effort to find, in effect, "new money" will prove successful. We will this year introduce legislation to expand the program Statewide and have those funds applied to help offset the cost of increased assigned counsel fees.

However, at a February forum co-hosted by Assemblywoman Helene E. Weinstein, D-Brooklyn, and the NYSBA's Children and the Law Committee, Weinstein said there is a question about whether that would be sufficient. These fines and surcharges now go to the state's general fund, so New York would have to do without this income or somehow replace it. In addition, there is the problem of asking counties to finance an 18-B pay raise.

Weinstein, who chairs the Assembly's Judiciary Committee, is part of the three-person task force appointed by Governor Pataki to resolve the problem of inadequate rates. The commission includes Senate Judiciary Committee Chair James J. Lack, R-Suffolk, and Director of Criminal Justice Katherine N. Lapp.

Weinstein said she is hopeful the commission will be able to achieve results this year. Until the issue is resolved, however, the crisis continues as more and more assigned counsel and law guardians refuse to accept new cases.

Some judges are not waiting for the Legislature to raise the rates, and instead they are using their administrative authority to order higher compensation for some attorneys. For instance, earlier this year three Dutchess County Family Court judges ordered compensation of $75 an hour for all court-assigned attorneys appearing in their courtrooms. In April, Marcy L. Kahn, a Supreme Court justice in Manhattan, ordered compensation at that same rate for two 18-B attorneys. The counties, however, are left to pay the bill.

Stephen J. Acquario, general counsel for the New York State Association of Counties, has said that county officials involved with assigned counsel recognize that existing fee structures have proved to be inadequate to attract qualified, competent and interested attorneys:

Clients of assigned counsel sometimes feel they are getting less than the best representation: "That's not a real lawyer, that's an 18-B lawyer."

The Association of Counties believes that the judiciary lacks authority to increase the hourly rates as is currently happening around the state, but supports the efforts to raise the hourly rates provided the counties are not responsible for the increased fees. County officials realize and recognize that there may have been agreements made 30 years ago whereby counties would be responsible for public defense services as was mandated by state. However, that was 30 years ago and the level of unfunded mandates, particularly Medicaid, necessitate the need for additional state assistance in public defense services.

He added that the association looks forward to continuing to work with the NYSBA, the governor's office, the Legislature and the OCA to bring about a satisfactory resolution to the current problem.

Working Hard Despite the Pay

A person in need of court-appointed representation might be comforted to know that such zealous attorneys as Suozzi exist. Certainly she is not alone in her work ethic, and there are attorneys who commit even more of their time to assigned counsel and law guardian work. With the current rate of pay for assigned counsel, however, it is difficult for any attorney to dedicate most of his or her practice to this type of work, especially in areas where the cost of living is higher.

"Whether we're paid well or not, we have to fight just as hard as if we were making $25,000 on that case," Suozzi said. "We put in probably the same amount of time as we would on a high-pay case, because if you don't you're very likely going to lose."

The attorneys in these cases do most of the investigation on their own, a task that is time-consuming. Suozzi described knocking on doors looking for witnesses, even spending a week near the scene of a shooting to find people with information.

"I took one of my client's friends with me, and since they trusted him, they would then talk to me," she said. "It's just a weird code. There is evidence that no one can find because [witnesses] won't talk to the police or are afraid of repercussions. You have to really convince them to come forward. It's more work than you expect."

Clients of assigned counsel sometimes feel they are getting less than the best representation. Suozzi said she has heard such comments as, "That's not a real lawyer, that's an 18-B lawyer."

"But that's not as bad as, 'At least they're real attorneys, and not the public defender,'" she said, adding that since clients know 18-B attorneys are paid by the hour, they believe their attorney will put in more hours than a public defender.

She said the bottom line is that clients know assigned counsel do not make as much money on these cases as they would with retained clients, and therefore some believe attorneys will work harder on a non-assigned case.

"But anyone with any pride will work just as hard," said Suozzi. If she didn't, she said she would be haunted the rest of her life. "That one innocent person—it could be your fault they are in jail."

Law guardians Jeffrey Berkun and Ruth Bridgham, both of Albany, discuss their caseload in a courtroom at the Albany County Family Court. Law guardians must be recertified every year.

Photo by Joann Hoose

Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation

By Judith A. La Manna

When it comes to civil litigation, it is not yet common in New York State for lawyers to think of mediation to assist them in the litigation process. This is unfortunate, as they are overlooking a valuable tool.

Mediation—using a neutral party to help those engaged in litigation to resolve the matter—can result in a faster, less costly resolution of one's clients' disputes, and, short of that, can help in developing or supporting an analysis of one's case and one's relative position before trial. And even when mediation does not result in a settlement by joint agreement, a preferred option in civil disputes, the mediation process more readily provides clients with a forum where they can safely air their emotional issues and have them addressed directly. Further, just the fact of the attempt, voluntarily, to settle by mediation can have a positive impact on the status of the parties with the court. The benefits are numerous and the problems, a few, are not insurmountable.

Resistance and Low Expectations

Parties who have been ordered by a court to try mediation initially resist the process. It is perceived as just another step in civil litigation, and, because settlement seems unlikely, a waste of time by all concerned. The parties anticipate that little will come of mediation, except several hours of time that could be elsewise used more fruitfully. Almost invariably, however, all of that changes once the parties have spent a little time in the mediation session. Attitudes change, position clarifications are made that would not have come up so soon, and even if settlement is not reached, most seem satisfied that they are walking away with some unexpected benefits.

Attorneys invariably complain that mediation is not compatible with the amounts of discovery and deposition that they have come to rely on heavily in civil cases. In court-ordered mediation, for example, rigid scheduling deadlines tend to compress the time available for discovery before the mediation time expires. The need for "enough" information is legitimate, if settlements are to take place. Parties to a dispute do not settle if they do not have a "comfort" level with their and their opponent's positions, and attorneys who have not gotten enough information, traditionally elicited through discovery, are usually reluctant to mediate, much less settle.

The need for "enough" information is also legitimate to make the mediation session meaningful. As a mediator, I regularly ask for all of the papers the parties have generated in their lawsuit, to review before the mediation session. The more I am able to review—to a point—the more informed I am going into the mediation session about the positions of the parties. That makes the mediation more time-efficient for all concerned.

The parties should not lose sight of the fact that avoidance of some discovery can actually be a bargaining tool in the mediation. Discovery takes a great deal of valuable time, is almost always costly to the parties in dollars, and scheduling of discovery can become logistically difficult. In addition to time and cost, a party may want to avoid discovery for other reasons, including client privacy, exposure to further suit, dragging out the litigation in time, etc.

In reality, court-ordered mediation deadlines still allow time for some selected discovery. Perhaps parties can forgo some of their "fishing expedition" depositions and over-broad interrogatories. Perhaps parties can fashion tightly drawn, timely discovery. Some discovery is good, a lot is not necessary. It is entirely possible keep

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Judith A. La Manna, an arbitrator and mediator since 1979, has extended her practice to include the mediation of civil litigation. Since 1982 she has been active with the Labor and Employment Section of the New York State Bar Association. She is a member of both the National Academy of Arbitrators and the Society of Professionals in Dispute Resolution. She is listed on the ADR panel for the U.S. District Court, Northern District. She is a graduate of LeMoyne College and received her J.D. from Syracuse University College of Law.

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costs and time limited and to address this valid need for information to make mediation more acceptable and useful.

Mediation Is a Good Thing

The primary benefit expected from mediation is a mutually satisfactory settlement by the parties. This does not always happen. Nevertheless, even without settlement, parties who use mediation will probably experience some of the lesser-anticipated benefits of the process.

The largest benefit of mediation, short of a settlement, is that mediation can give the parties a look at their case by the equivalent of a one-person jury.

For example, the mediation process addresses two of a client's non-legal needs in the dispute: a day in court and principle.

Mediation generally fills a client's need for a "day in court," the chance to tell her/his story and know that someone outside of the parties to the litigation is really listening and understanding. In mediation, it is permissible for a mediator to meet separately with plaintiff (or defendants) and hear about their suspicions, attitudes, hurt feelings, etc. This interaction can actually give a mediator credibility to urge settlement, especially in cases where a great deal has been lost but without remedy under the law. For example, I mediated a claim against an insurance company that refused to pay on a fire loss, a tremendous emotional misunderstanding and financial difficulty for the plaintiff, where the actual "insurable interest" was in question.

Clients also become entrenched, sometimes because of money but mostly because of "principle." Lawyers regularly find themselves trying to make such clients see the sense of a settlement, with some financial remedy, rather than a trial with only possible vindication but unlikely remuneration. Taking a civil case such as this through mediation can help to reinforce an attorney's recommendation to such an entrenched client that settlement would be a preferred option.

The largest benefit of mediation, short of a settlement, is that mediation can give the parties a look at their case by the equivalent of a one-person jury. In addition to any position summary memoranda, I want to see the Complaint, Answer, Reply, Motions, all the "papers" in civil litigation. I like to look at the discovery that has taken place. My review of that material is with an understanding of the law, civil disputes and a jury mentality, and as a neutral fact finder.

Questions asked by the mediator are questions that a jury is likely to have as well. For example, I can tell a plaintiff that a jury is going to want to know why the claimed contract breach happened and why his explanation and suspicions do not make sense. I can point out problems about witnesses made to testify and how they may not be as supportive in actual trial. I can make my "public reaction" responses. And if I am perplexed by their damage claims, I can only wonder how a jury might respond.

In mediation, it is common to use the respective weaknesses (and strengths) of the cases to urge settlement. When settlement does not happen in the mediation, the parties are left to consider this pre-jury, neutral look at their cases. It is not surprising to learn that those parties later settle, before trial, just about where the weaknesses had suggested was appropriate. In other cases, the mediation session helps to narrow the issues, settle some issues, clarify the actual claims and possibly define damages more realistically.

Electing to go to mediation is a true showing of good faith to the court. Most lawyers know that judges will urge them to settle some types of cases or cases with certain fact patterns. Taking one's own case through mediation before the judge says "settle it" can help to bolster the position of the parties with a court. Not only does this demonstrate a good-faith effort toward settlement, the court may also benefit from the mediation in that it helped the parties narrow the issues and claims of damages.

A Theory About Reluctance to Mediate

A problem with encouraging mediation in civil litigation is that it is alternative dispute resolution (ADR), a term that lately seems to be bandied about everywhere. ADR covers a variety of processes of resolving disputes in other than a litigation forum, including early neutral evaluation, summary jury trial, mini-trial, mediation, settlement conferences, the familiar small claims court and the unfamiliar special master process. However, when lawyers hear the term "ADR," it has a primary—and probably mostly negative—association with arbitration. Secondarily, it is mostly associated with employment matters.

It is understandable that the general concept of ADR is arbitration. Our legal journals advertise the availability of retired judges organized in business called "ADR-R-Us" or the like, who will apply ADR to legal disputes. Even though they may (and do) mediate, the appearance is that they are acting as "private judges." Judges

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Mediation Tips

Explain the mediation process to your client. Be sure to let your client know that *ex parte* conversations are common . . . so that the client won't worry, when it happens, that the mediator is "choosing sides."

Develop a "litigation tree" analysis for use during the course of the mediation . . . an analytical diagram showing the difference between the costs of litigation versus the costs of settlement.

Be sure that someone is present at the mediation who has full authority to settle. Find out if your client needs to have others available to him/her, to serve as a trusted sounding board to help make a settlement decision.

If your client is comfortable doing so, let the client participate directly.

Do not be aggressive, as such behavior only takes time from the issues in mediation.

Be positive in private caucuses with the mediator. Mediation involves compromise to achieve settlement, but people must feel they are going to get something out of it, and leave with a sense of having won. Whether the parties develop these feelings is highly dependent on the attitudes of their attorneys.

Analyze the opposing party's position before and during the mediation and educate your client about the strengths of the opponent's case. This injection of realism into the discussions will support the mediator's effort to do the same.

If you have settled in the mediation session, memorialize that settlement in some way before anyone leaves the room.

The suggestions are taken from "Ten Tips to Improve Employment Mediation" by Rosemary Townley, *ADR Currents Magazine*, June-August, 2000, p. 12, American Arbitration Association. (Reprinted with permission.)

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make decisions. Arbitrations end in decisions. It is a straight line, with mediation not apparent.

Lawyer resistance to arbitration is also not surprising. In arbitration, a neutral party presides over a more informal hearing and then issues a decision on the merits, and the decision is usually final and binding. In New York State, the arbitration statute strongly supports the finality of arbitration decisions.[1] Time limits on raising an appeal to vacate an arbitration award are very narrow, and the grounds are traditionally difficult to establish. In light of New York's arbitration statute, arbitration is an unlikely ADR choice.

Added to these circumstances is the fact that most of the public, lawyers included, think of arbitration narrowly, to apply only to employment matters. Classically, arbitration in labor cases involves determining rights under the grievance process in a collective bargaining agreement. In recent years, arbitration is taking place in employment in the context, for example, of pre-hire agreements to settle disputes in arbitration.[2] The legal literature thus far has not been flattering or welcoming of this "mandatory arbitration."[3]

So it is that mediation, "the other" ADR, is overshadowed by arbitration and the finality of that process, the reservations that lawyers have about compulsory arbitration, and the general and almost exclusive association of arbitration with employment matters.

Mediation, when it is considered, is also likely to be associated with its historical application in the employment context, and, more particularly, in organized labor relations. Mediation has been used in the public sector for decades to help unions and municipalities or other governmental agencies resolve their labor contract negotiations into mutually acceptable collective bargaining agreements. Less common now than in the past is the use of the mediation services of public agencies such as the Federal Mediation and Conciliation Service and the then-New York State Mediation Board to facilitate certain difficult contract negotiations in the private sector.

When mediation is being used in civil litigation, it has been embraced by the labor and employment law bar. In particular, it is used to address and attempt to settle statutory claims of employment, such as in employment discrimination and sexual harassment cases. The private nature of mediation helps to keep the issues and potentially embarrassing factual allegations and circumstances of such cases from being unnecessarily aired in public. Mediation is also being invoked in private employment agreements—sometimes as an agreed-to step before arbitration—to settle wrongful termination claims, severance package disputes, and even to address large-scale, professional-level class actions.

History has apparently led to a conclusion that as civil cases go, employment matters are signally compatible with alternative dispute resolution processes. But on closer examination it is clear that the elements of employment cases—(1) people, (2) some documentation and/or experience setting forth expectation of treatment of those people, and (3) a question about how they allegedly have actually been treated—are also the elements of just about all civil conflict. Logically it would

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Because a case usually goes to mediation early in litigation, the potential for settlement can come very soon after the dispute is joined.

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seem that the same systems that help employment conflicts can be useful to help resolve other civil conflicts.

Court-Ordered Mediation

Until recent years there has been no compulsion to use mediation for matters in civil dispute. The overwhelming number of cases on civil court dockets has changed that, and court-ordered mediation has begun to be a reality.

As early as 1983, ADR was authorized for use in the federal courts, via amendments to Federal Rule of Civil Procedure 16(c)(7) allowing use of "extra-judicial procedures," to help address the long delays on the civil calendars.[4] ADR programs began to appear in selected Districts, beginning in the 1990s, helped along in 1998 by the passage of the Alternative Dispute Resolution Act of 1998.[5]

A program was established in the U.S. District Court, Northern District of New York[6] and was increasingly used beginning in the late 1990s. As of January 1, 1998, ADR became mandatory for contract and tort cases. On January 1, 2001, non-prisoner civil rights cases and employment cases came under mandatory referral to ADR.

Under the ADR program in the Northern District, the parties involved in the covered type cases must submit to one of its three forms of dispute resolution: non-binding arbitration (LR 83.7-2), mediation (LR 83.11-3) or Early Neutral Evaluation[7] (LR 83.12-3). Parties with non-mandatory type cases may agree to use the process, as well.[8] A majority of the cases pass through mediation; those that go through Early Neutral Evaluation are not precluded from being mediated to settlement.

Once under direction to mediation (or Early Neutral Evaluation), the parties mutually select a neutral mediator/evaluator from a panel list of attorneys who have been certified by the Northern District Court for this process.[9] If the parties cannot agree on a neutral, the ADR clerk makes that selection. Or the parties may, of course, contract with a paid mediator who meets the approval of the court, based on the expertise of that mediator or for other interests of the parties. No less than five days before the scheduled mediation session, the parties must provide the mediator with a Mediation Memorandum of up to five pages, setting forth their positions. The Northern District Court expects good faith participation in this process, which is administered under strict timelines for completion. This, as are all mediations, is strictly confidential.

Thus far, the statistics are supportive of the use of ADR to reach settlements under this program in the Northern District. For September 1, 1999, through September 1, 2000, the settlement ratio rate was 26.5%. In fact, according to John Domurod, the chief deputy clerk of the court, the Northern District has the distinction among such federal court programs of being well ahead of the national average in its settlement success rate. Most satisfying is that the Northern District judges are all very positive about the program and that the reports from the parties to the court—both official and anecdotal—have been complimentary.

Conclusion

With only so many judges and courts to go around, matters of scheduling alone cause long delays in reaching trial. Once a case is tried, and, depending on the decision, there can be more delays caused by levels of appeal before a case is completed. Added to this is the overwhelming cost of litigation, financially and emotionally, and the risks that each side has because of weaknesses in its case. Prompt settlement in civil court is not likely. Mediation can save time and money for all concerned.

Mediation can be a winning option to employ in civil litigation, because it incorporates the intervention and assistance of a third individual neutral to the dispute. This is key to the settlement process. Because a case usually goes to mediation early in litigation, the potential for settlement can come very soon after the dispute is joined. And even if mediated later in the process, a settlement can obviate the time spent in trial and appeal. Also, as noted above, to the extent that the mediation helps to define the issues, that will also become a time saver later, at trial.

Smart attorneys are going to increasingly look to mediation to help them in the processing of the civil disputes that they handle. They can do nothing but gain from mediation and, in particular, would do well to avail themselves of the process early on, with just the smallest amount of discovery, perhaps, beforehand. Far better than leaving a court entirely unhappy and anticipating years worth of appeal and uncertainty, in the end, mediation will help everyone toward settlement. With a prompt settlement through mediation, parties to civil litigation can walk away from the dispute much sooner, at a lower cost financially and emotionally, a little bit unhappy, perhaps, but also a little happy.

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1. N.Y. Civil Practice Law & Rules art. 75.
2. *See*, *e.g.*, *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *reversed and remanded*, ____ U.S. ____, 121 S.Ct. 1302 (2001).
3. Jeffrey Robert White, *Mandatory Arbitration: A Growing Threat*, Trial Magazine at 32 (July 1999); Abraham Fuchsberg, Esq., *Mandatory Arbitration, an Editorial*, Trial Lawyers Quarterly, at 113, The New York State Trial Lawyers Institute, Vol. 30, No. 4, Vol. 31, No. 1 (2001).
4. *The Impact of the ADR Act of 1998*, Trial Magazine, Negotiation and Settlement Issue, at 30 (June 1999) *The New Federal Alternative Dispute Resolution Act*, The Washington Lawyer Magazine, at 28 (March/April 1999).
5. Public Law No. 105-315.
6. *See* Local Rules of the Northern District of New York, LR 83.7 through 83.7-8 (arbitration), LR 83.11-1 through 83.11-6 (mediation); and LR 83.12-1 through 83.12-10 (early neutral evaluation).
7. Early Neutral Evaluation (ENE) is defined under the Northern District's ADR program as "a process in which parties obtain from an experienced neutral, (an 'evaluator') a nonbinding, reasoned, oral evaluation of the merits of the case." LR 83.12-1(1).
8. The reader is encouraged to refer to the Local Rules about this process, including how the nonbinding arbitration is treated, application to withdraw from the program and other administrative requirements and party rights. This article is not intended to speak on behalf of the NDNY about this program, but merely to make the reader aware of its existence.
9. The NDNY Court is grateful for attorneys who volunteer to serve in this capacity. It conducts training annually and is presently seeking CLE credit from the NYS CLE Board for this service. For more information, contact John Domurod, the Chief Deputy Clerk of the NDNY Court at (518) 257-1809.

Evolution of Corporate Usury Laws Has Left Vestigial Statutes That Hinder Business Transactions

BY PAUL GOLDEN

The evolution of the law on usury in loans to corporations is comparable to the evolution of life itself: as time has passed, it has adapted to the surrounding environment, becoming more specialized and refined. However, evolutionary change is not always perfect, and can leave the useless side-by-side with the useful; the appendix in humans and wings on flightless birds are just two examples of vestigial biological structures.

Similarly, the New York usury statutes contain vestigial provisions. These sections are those that prohibit certain kinds of loans to corporations: General Obligations Law §§ 5-521(2) and (3) (hereinafter "GOL"). GOL § 5-521(2) prohibits certain loans issued to corporations if the primary collateral is a one- or two-family house, and GOL § 5-521(3) prohibits loans issued to corporations at a rate over 25%.

Time has proved these statutes to be not only useless, but economically unsound as well. Parties who need capital for a highly risky but legitimate enterprise have no access to a loan as a result of the prohibitions contained in these statutes. Even though it may be in society's interest to allow profit-motivated enterprises to receive loans at whatever rate the market will bear, these statutes deprive corporations of borrowed capital, and thus our society is deprived of certain potentially successful businesses. Moreover, lenders are undoubtedly reluctant to issue loans to a corporation if those loans are even potentially usurious under the law. This is so because the penalty for issuing a usurious loan is not only the loss of interest, but principal as well and, in some cases, a criminal sentence.[1]

Early History

To fully understand the current state of the law, and why these statutes still exist, one must first review history of the corporate exemption to usury laws. The law's overall approach to usury itself has never been perfectly fair or consistent, perhaps because of the original source material: the Bible. At least one state Supreme Court has used language that betrays this origin, stating that a usurious contract is "tainted with an evil . . . intent" and that the public policy prohibiting usury is "supported by Divine Authority."[2] However, that court might have been well advised to note that even the Bible itself is inconsistent about whether charging interest is morally acceptable.

Certain scriptures completely prohibit charging interest, deeming it immoral, while others permit the charge to foreigners; still others apparently approve of putting money into a bank to collect interest.[3] It therefore is at least arguable that because the Judeo-Christian law of usury is inconsistent, the secular law developed inconsistencies as well. But we cannot blame the Bible for all our problems in the area under discussion here; after all, the Bible did not specifically refer to loans to corporations. Modern society is truly the guilty party for creating an inconsistent law in this area.

Initially, the law on usury concerning loans issued to corporations was, at best, obscure. Then, in 1850, the Court of Appeals declared a certain instrument issued to a corporation as usurious in *Dry Dock Bank v. American Life Ins. & Trust Co.*[4] This must have been a shock to the business community, and it mobilized quickly. The same year that *Dry Dock Bank* was decided, New York became the first state to enact a widely followed statute that "no corporation shall hereafter interpose the defense of usury in any action."[5]

This was a comparatively innocent time. In fact, a year later, a committee appointed by the New York Legislature defended the use of bloodletting for medical purposes.[6] Yet even then the Legislature was sophisti-

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cated enough to realize that *Dry Dock Bank* impeded economic progress, because certain corporations needed access to loans at high interest rates. Even though that case was legislatively overturned, however, the new law did not indicate a guiding rationale supporting the statutory distinction between a loan to a corporation and one to a natural person.

Such a rationale was provided (at least briefly) 15 years later in *Rosa v. Butterfield*.[7] In that case the Court of Appeals decided whether a personal guarantor of a corporate loan could raise the usury defense. Holding that he could not, the Court noted that the act had been created to enable "corporations to borrow money more readily for the purposes of their business." It thus ruled that the guarantor could not raise the usury defense, or "the object [of the law] might be defeated by the inability to give collateral undertakings which should be free from the taint of usury." However, even though the intention of the statute had now been described, judges and lawmakers continued to have mixed responses to the corporate usury defense. As a result, the law continued to evolve in reaction to specific problems, leaving New York with inconsistent approaches to the issue.

New York became the first state to enact a widely followed statute that "no corporation shall hereafter interpose the defense of usury in any action."

In 1930, the Court of Appeals took up the subject again. In *Jenkins v. Moyse*,[8] it considered whether a lender could issue a loan to a corporation simply to avoid usury laws. In *Jenkins*, the plaintiff owned real estate which had a large mortgage debt, and he could get no further loan without incorporating. He thus created a "shell" corporation and quickly transferred the real estate to his corporation so that he could obtain a new mortgage. One year later, after evidently failing to make the required payments, the borrower argued that the corporate form was a mere "cloak and subterfuge" used by the lender to avoid the usury statute. He lost. The Court stated that the parties had simply followed the law "in order to accomplish a result which all parties desired and the law does not forbid," and thus held that a borrower could indeed incorporate for the sole purpose of "escaping usury." It distinguished this situation from one in which the corporate form was being used as a "cover for usury."

By way of explanation, the Court indicated in dicta that a corporation "may be disregarded where it is used as a cloak or cover for fraud or illegality. . . . The test of whether [a] loan is usurious is whether it was made to the [individual] plaintiff." However, the Court did not provide an example of such a circumstance, perhaps because it would have been hard-pressed to do so given the result in the case before it. More specifically, these comments seemed inconsistent with the result the Court reached. To the beholder, it seemed to be a clear example of a using a corporation to "cover" a loan to an individual that otherwise would have been usurious, and yet the Court held in favor of the lender. One might argue that the better test would have been whether the loan was actually to be applied to corporate business purposes as opposed to personal matters, but that was not expressed by the Court. In any event, the *Jenkins* case thus gave individuals little support to claim usury if they had been convinced to incorporate before accepting the loan.

The *Jenkins* decision had important ramifications. One trial court went so far as to dismiss a claim of usury regardless of the borrower's claim that the loan to the corporation had in reality been made to an individual, ruling that *Jenkins* stood simply for the proposition that "form prevails over substance."[9] This interpretation of *Jenkins* obviously could not stand; if it had, any lender with even a bare understanding of the law would need only to convince an individual borrower to incorporate, take a personal guarantee, and then establish an interest rate that would buckle the knees. Nevertheless, under *Jenkins* even judges who were unwilling to take this rather extreme view were left with little authority to consider whether the borrower needed the sums for investment purposes, in which case a high interest rate would appear fair, or whether he needed the sums for an emergency situation such as medical expenses, in which case the usurious rate might seem inequitable.

The Legislature Acts

The Legislature evidently realized that some tinkering was necessary, because under *Jenkins* the most important investment that most individual borrowers had—their homes—were being lost under the corporate exemption. In 1957, it decided that too many lenders were requiring needy borrowers to pledge their homes in exchange for high-interest corporate-shell loans. In specific response to this problem, lawmakers provided partial protection to home owners, reasoning that the state needed to prevent lenders from seeking and collecting "oppressive and usurious rates of interest for loans secured by mortgages upon such homes."[10]

The Legislature also expressed its objective that "home owners be encouraged to establish and maintain one and two family homeowning communities." The

statute, which is now codified in GOL § 5-521(2), reads in part that the corporate exemption from usury laws

> shall not apply to a corporation, the principal asset of which shall be the ownership of a one or two family dwelling, where it appears either that the said corporation was organized and created, or that the controlling interest therein was acquired, within a period of six months prior to the execution, by said corporation of a bond or note evidencing indebtedness, and a mortgage creating a lien for said indebtedness on the said one or two family dwelling.

Notwithstanding a noble intention, this statute is and was insufficient in that it provided a rigid bright-line test that did not allow the court to examine the purpose behind the loan. For example, if the dwelling was intended for three families, or if the corporation had been organized six months and one day prior to the execution of the loan, the law would provide no protection to the home owner—even if the loan had been taken by a desperate borrower to fund an expensive operation for a family member. Conversely, if an investor decided to purchase numerous two-family houses for investment purposes, each under a separate corporate name, and gave mortgages on each house above the usury rate, the investor could still potentially take advantage of the GOL § 5-521(2) usury defense, even though the statute's protections were not designed for such a situation.

Just as vestigial organs can occasionally create problems in a living body, vestigial laws are not always benign. Unfair results are possible.

Eight years later, this legislation was followed by another act that also was intended to protect borrowers. In 1965, the Legislature determined that if a corporation is given a loan at a rate exceeding 25%, the loan is, as a matter of law, usurious, and the lender has committed a criminal act under GOL § 5-521(3) and Penal Law § 190.40. The basis for allowing corporations to plead usury was the perceived influence of organized crime, reported in legislative history as follows:

> [L]oan-sharks with full knowledge of the present law, make it a policy to loan to corporations. The [New York State Commission's Investigation of the Loan-Shark Racket] also disclosed that individual borrowers were required to incorporate before being granted a usurious loan. This is a purely artificial device used by the loan-shark to evade the law—an evasion which this proposal would prevent.[11]

Unfortunately, no other significant rationale was expressed.

Whatever the additional thinking behind GOL § 5-521(3) might have been, its effects were simultaneously too narrow and overbroad. For example, the Legislature did not make clear why the statute did not prohibit a lender from charging a rate above the normal usury limit (now 16%[12]) so long as it did not exceed the criminal rate (25%), even if the lender had admittedly "forced" a borrower to incorporate as a condition for receiving the loan. The Legislature also did not explain why it would not provide an exception for loans to "actual," already-existing corporations from the prohibition contained in the statute, under any circumstances. This denied businesses access to funds at an interest rate above 25% for any reason—even if capital were needed for a very risky but wholly legal enterprise, in which case the rate might be a lender's legitimate business response to the risk. Perhaps the Legislature simply believed that only an "artificial" corporation would ever be willing to accept a loan at such a high rate, but as noted above, no explanation is to be found in the history.

One thing does seem to be clear, however. The Legislature evidently passed both GOL §§ 5-521(2) and (3) in response to *Jenkins*, which had placed limits on the courts' ability to determine whether a usurious personal loan had been issued under a corporate "cover." Unfortunately, the "bright line" rules it enacted to protect borrowers were essentially irrational when applied in the real world. Without court intervention, the law might have continued to evolve in this manner, burdening legitimate lenders with additional distinctions between "fair" and "unfair" loans that were difficult, or even impossible, to reconcile.

Case Law Points to a New Direction

In 1977 the Court of Appeals acted again, moving the law in a different direction, and in so doing came close to expressly overturning *Jenkins v. Moyse.* The Court was faced with a set of facts similar to those of *Jenkins*, but now there was a different result. *Schneider v. Phelps*[13] made it clear that courts could hold a loan usurious, despite the fact that it was issued to a corporate entity, and that it could look into the circumstances behind the transaction to make that determination.

In *Schneider*, the plaintiffs brought an action to foreclose a mortgage on real property. Plaintiffs had loaned a sum of money to a corporation, of which defendant was the sole shareholder. The defendant had personally guaranteed the payment of this mortgage, and also had secured the loan with a mortgage on her home. The case could not be resolved by reference to the General Obligations Law alone, because the corporation was not the owner of the property, rendering GOL § 5-521(2) inap-

plicable. Nevertheless, the Court held that there was an issue of fact concerning whether the loan was, in effect, issued to the corporation or to the sole shareholder, and denied summary judgment to the plaintiffs.

Schneider is important because it redefined the state's objectives in the area of usury: "to protect desperately poor people from the consequences of their own desperation." In addition, the Court held that it was important to draw a balance between "enforcing legitimate business obligations and . . . protecting impoverished debtors from improvident transactions drawn by lenders and brought on by dire personal financial stress."

The Court impliedly determined that the statute preventing corporations from claiming usury was insufficient to meet society's needs; the law was not a successful "adaptation" as Darwin might have put it. It held that "[i]t [had become] apparent that, in making loans to individuals, the usury laws could be easily avoided by the simple expedient of establishing a corporation and making the loan to directly to it instead of the ultimate individual user of the proceeds." *Schneider* thus stands for the proposition that form should not prevail over substance, and the lower courts therefore were directed to examine the factual question of "whether the loan was made to the individual for personal purposes or in furtherance of a profit-making corporate or personal enterprise."

Thus, even without a direct review of the statutes themselves, the *Schneider* case rendered both GOL §§ 5-521(2) and 5-521(3) irrelevant as a means of protecting individual borrowers. Courts now had the power to make a subjective determination of whether a loan transaction was a proper "escape" from usury laws, or an improper "cover" by a rapacious lender. That is, judges can and must examine whether a needy borrower has been unfairly "forced" to incorporate when the loan's proceeds actually were intended for personal obligations, or whether the loan was intended to finance a legitimate, profit-motivated enterprise. Given this practical approach, borrowers do not really need these specific statutes, which make certain kinds of corporate transactions unenforceable based on a rigid set of criteria that do not allow for the possibility of legitimate, but high risk, enterprise.

Indeed, the *Schneider* court further implied that these statutes were unnecessary through its discussion of the underlying use and reach of usury laws, the very sort of policy statement that the Legislature had failed to make:

> [L]enders are entitled, if they can, without sham transactions, to obtain the highest rate of interest for their money. . . . So long as the borrower is aware of the potential risk and acts in the belief that the ultimate profit justifies the risk undertaken, the free market in money operates without friction and there is no need for legislative or judicial interference.

The Court was attempting to bend the path of the law's evolution, giving freedom to lenders and borrowers to enter enforceable agreements regardless of the interest rate, as long as the transaction was fair.

Interestingly, however, and perhaps deliberately, the Court did not accurately describe the statutory law. There is no "free market" as it was described, because, if nothing else, the statutes significantly interfere with the loan market. An individual who borrows money at an excessive rate of interest, even if he does so because he reasonably believes the potential profit justifies the risk, still has the right to raise the defense of usury if he accepts the loan without using a corporate shell.

In addition, it is still true that even where loans are made to corporations and not to individuals, lenders are not entitled to obtain the "highest rate of interest for their money" without "legislative or judicial interference." A corporation that is using the funds for a highly risky but legitimate commercial enterprise can still raise GOL § 5-521(3), which forbids charging rates exceeding 25%, no matter what the purpose. The lender who does so will commit a crime, and will provide the corporate borrower with a usury defense that will enable it to avoid repayment.

Repeal Unlikely

New York is now burdened with two vestigial statutes, but, like such vestigial organs as the appendix in humans, they usually do not cause major difficulty. Life goes on, and in most cases the flaws are not sufficiently serious to require a "quick fix" to excise the problem. There is little evolutionary pressure to wipe out the appendix, and similarly, there is little societal pressure on the Legislature for repeal of the statutes. The less pressure for eradication, the less chance that eradication will occur.

For example, lenders who engage in large loan transactions enjoy certain absolute protections already, and thus will be less likely to lobby for repeal of the statutes. Any loan to any party over the sum of $2.5 million is untainted with usury, without regard to the circumstances of the loan or the rate of interest.[14] Further, post-*Schneider* courts have already begun to judicially overrule GOL § 5-521(2). In *Geddes Savings & Loan Assoc. v. Mishel*,[15] a mortgage was issued for the purchase of property that was to be developed for commercial uses, and the property also happened to contain a 65-year-old house. Thus, the loan technically fit the specifications of GOL § 5-521(2). However, the court held that because the mortgagor already had another home, and did not borrow money to buy a house "within the intendment" of the law, it refused to apply the statute.

Finally, there is little reason to think that the public at large would become interested enough to press for repeal. It is hard to imagine a legislator running on a campaign promise to repeal GOL § 5-521(2) or (3).

Conclusion

Notwithstanding the lack of interest in repeal, and the intervention of courts to fill in gaps in the law, these statutes cannot be ignored. And just as vestigial organs can occasionally create problems in a living body, vestigial laws are not always benign. Unfair results are possible.

As the *Schneider* court indicated, society is better off with free financial markets, so long as "desperate" borrowers are protected. Yet under GOL §§ 5-521(2) and (3), a lender has no right to issue a loan at a rate over 16% to a corporation that owns a one- or two-family house, even if the house had been built for investment purposes only. Nor can that lender issue a loan to a corporation at a rate exceeding 25% without committing a crime. Although a "creative" lender might find a way to make one of these loans without a technical violation, society does not benefit from encouraging the use of loopholes, nor, conversely, from penalizing less artful lenders who are unaware of such loopholes. It thus can be argued that eventually these statutes will have to change, or like unsuccessful adaptations in the natural world, disappear.

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1. N.Y. General Obligations Law § 5-511 (hereinafter "GOL"); N.Y. Penal Law §§ 190.40, 190.42.
2. *State v. Bynum*, 243 Ala. 138, 9 So.2d 134 (1942).
3. Ex. 22:25; Lev. 25:35-37; Deut. 23:19, 20, Psa. 15:5, Prov. 28:8; Jer. 15:10; Ezek. 18:8, 13, 17, 22:12; Neh. 5:1-13; Luke 19:11-26; Matthew 25:14-29.
4. 3 N.Y. 344 (1850).
5. This law, exempting loans which are issued to corporate borrowers from being subject to usury laws, is now codified in GOL § 5-521(1).
6. Jane Jacobs, Death and Life of Great American Cities, 12 (Vintage Books, 1961).
7. 33 N.Y. 665 (1865).
8. 254 N.Y. 319 (1930).
9. *Kings Mercantile Co. v. Cooper*, 199 Misc. 381, 100 N.Y.S.2d 754 (Sup. Ct., Queens Co. 1950).
10. 1957 N.Y. Laws ch. 968, § 1.
11. 1965 N.Y. Legislative Annual, at 50.
12. GOL § 5-501(1); N.Y. Banking Law § 14-a(1).
13. 41 N.Y.2d 238, 391 N.Y.S.2d 568 (1977).
14. GOL § 5-501(6)(b).
15. 89 A.D.2d 792, 453 N.Y.S.2d 517 (4th Dep't 1982).

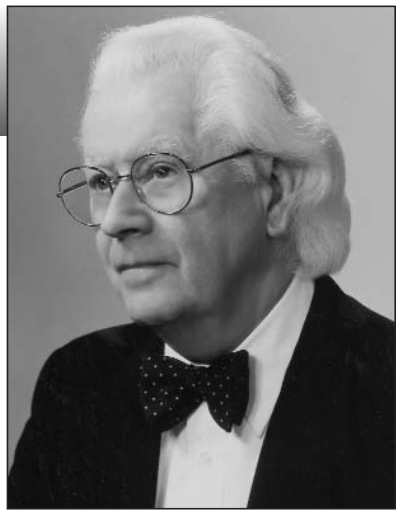
NEW YORK STATE BAR ASSOCIATION

A Tribute




William J. Carroll

23 Years of Service as Executive Director



Ave atque Vale

PAUL MICHAEL HASSETT

I am sure that anyone who has held this office has shared this experience: In the few weeks before taking office, one is overwhelmed at the thought of coming up with fresh ideas for the *President's Message* and the prospect of nine issues in twelve months is daunting to say the least. I have to admit, however, that once I was able to settle on a topic and let it ferment for an appropriate length of time, the actual preparation and editing of the article was actually very enjoyable. It is nonetheless a great relief (probably for you as well as for me) to say that there are some things that will have to remain unsaid, at least in this forum, since this is my last opportunity to address you as president.

I would like to have addressed a couple more substantive issues, but there was never enough time during the past year, if only because something more pressing or more timely always took priority. And now, with this last message off the mooring and under way, I must devote these last pages to some reflections on our association and on the position in it which I have been so privileged to enjoy. We all know how active our association is and how strong it has grown. Our membership total recently topped 70,000, an exciting milestone and a tribute to our Membership Department and Membership Committee but also to all of you who have worked so hard to make this organization relevant and attractive to the practitioners of our state. I have long known from my service in the House of Delegates and on the Executive Committee of the tremendous activity, evidenced by our 23 sections and dozens of committees and their reports and programs and legislative proposals that form the product of that activity. But one of the most pleasant duties of a president and president-elect is to attend section and committee meetings; in fact, it is a matter of considerable priority that one of the officers attend a meeting of each section, not just to show "the flag" but to have an opportunity to meet as many members as possible, listen to their concerns and answer their questions about the association and its activities. I have to admit that this is not really tough duty: In the course of the last two years I have been to some pretty exotic places and it is a part of this office that I will truly miss. Attendance at those meetings, however, exposed me to the impressive scope of section and committee programs and to the dedication of our members who produce them and who devote so much time to their presentation. I was truly humbled by the scope of our association's influence and proud to be acknowledged as its president.

I was also fortunate to be invited to annual dinners of county and local bar associations across the state and I was flattered with the reception I received—because of my position with this association, my presence was welcomed and appreciated. That appreciation again reinforced my perception of what our association means to lawyers in New York and beyond.

These opportunities to meet literally thousands of our members and the memory of the fellowship and camaraderie that I have shared will remain with me the rest of my life. They have reinforced my affection for lawyers everywhere, who are truly the most remarkable, friendly and interesting people one could ever hope to meet and the privilege of serving the lawyers of this state as president of our professional association has been an unparalleled honor for which I shall be ever grateful.

I will never forget the overwhelming sense of pride that we all had last July when the American Bar Association House of Delegates adopted what was essentially our position on the issue of multi-disciplinary practice. My predecessor, Tom Rice, and the indefatigable Bob MacCrate and his entire committee produced a truly remarkable study of the law governing lawyers in the United States and throughout the world and the over-

whelming clarity of their analysis convinced the ABA House to reject the recommendation of the ABA's own commission and to adopt ours instead. It was a day never to be forgotten and a tremendous milestone in the service of our association to the profession and to the public.

Finally, I must recognize the role of our outstanding professional staff in making our association the successful, efficient and influential entity that it is and in making its officers' efforts so productive and rewarding. I have long been aware of the talents of our staff but one gains an entirely new perspective when sitting in the president's chair. We have about 120 people on the staff in Albany and a quick glance at the current calendar of association events for a year, or even for a month, will convince you that the members could hardly manage an association this large and this complex without this considerable assistance. I am deeply indebted to everyone on the staff, and I fear that mentioning a few will risk leaving out many others. But a president deals with a few people whose dedication must be acknowledged: John Williamson and Beth Krueger, whose constant assistance is an absolute necessity; Kathy Heider and the whole Meetings Department staff; Kristin O'Brien and the Accounting Department; Tom Barletta and Ron Kennedy in Governmental Relations; Brad Carr, Frank Ciervo and everyone in Media Services—they are all friends whose assistance and support comes promptly, cheerfully and without question. One learns very quickly how thoroughly they can be relied upon and how important their contributions are to making the job manageable.

Bill Carroll's Retirement

And this staff in our great Bar Center works as efficiently and as effectively as it does because of the leadership of Bill Carroll. I have known for some time that Bill intended to retire and that I would be the last president privileged to serve with him. It all seemed so far distant at the time and even at the beginning of my term, the day was, of course, many months away and there was plenty of time to deal with the reality later. But now there are only days left and I am overwhelmed with a single thought: What in the world will we do without Bill Carroll? Bill's presence and spirit have permeated every aspect of our association. His keen intelligence, his inestimable experience, his genuine wisdom, all accompanied by his remarkable wit and good humor have helped all of us keep the ship on its proper course. His knowledge of our association and of our place in the world beyond is encyclopedic. He has unerring judgment about what we should and should not do and a gentle and frequently humorous way of making sure that we have the benefit of his many years of experience. His counsel and advice have been invaluable and his company has made the experience of a year as president a delight.

Watching Bill operate in his own environment quickly leads one to the realization that he has two entirely separate relationships: One with us, the members, who are his colleagues and those to whom he is ultimately responsible; and another entirely different relationship with his staff, who all ultimately are responsible to him. Both of those relationships are founded on mutual respect and genuine friendship. Bill is a friend of literally thousands of our members whom he knows by name and remembers what positions we held and when, and where we live and work. At the same time he is a friend to everyone on the staff and they all come into his office and sit down and chat, knowing that they have his full attention. Bill is the quintessential bar executive, and that shows in his relationship with his colleagues in the National Association of Bar Executives. He has been their president and has received their highest award for excellence. They genuinely acknowledge him as a role model and at the same time thoroughly enjoy his company. His colleagues treat him with a sense almost of reverence, tempered, of course, with chuckles about some outlandish shared experience.

And so, the time has come: Bill will move on to the next phase of his life and, as he goes, he takes with him our hope that it will be every bit as successful and as enjoyable as have been his 27 years with us. I have been privileged to have spent the last year with Bill at my side and I am but one of the 23 presidents who have shared that experience. In the pages that follow, many of the others record their tribute to Bill Carroll together with the wish of all of us that he will continue always to be our colleague and our friend.

Paul Michael Hassett can be reached at 1500 Liberty Building, Buffalo, N.Y. 14202.

Robert P. Patterson, Jr.
NYSBA President
1978-1979

As you probably know, Bill Carroll was elected to succeed John Berry as executive director of the New York State Bar Association during my year as president, 1978–79. I can remember well the discussion at the Executive Committee meeting. At that time, Bill had a very youthful appearance, a visage he still maintains, and the issue was whether he had the maturity to step into the shoes of John Berry, who had been executive director for 30 years. The Executive Committee unanimously concluded that, despite his youthful appearance, Bill had clearly demonstrated the capacity to fill John's shoes, and that he had shown an ability to deal with the peculiar and diverse personalities of presidents and other members of the Executive Committee through Sturm and Drang with fortitude and calmness.

When I consider the odd ducks, starting with me, who were president while Bill held the reins as executive director, the cheerfulness, thoughtfulness and energy he exhibited in his role, and the tremendous expansion of the association's scope and services which he managed to oversee during those years, my admiration for Bill abounds. The association had about 28,500 members in 1979 and has more than 67,000 today. The Bar Center was housed solely in One Elk Street in 1979. Today it also occupies Four and Six Elk and the addition to the north. During all these years and despite the tremendous increase in his responsibilities, I have never heard one complaint about Bill. Quite an achievement!

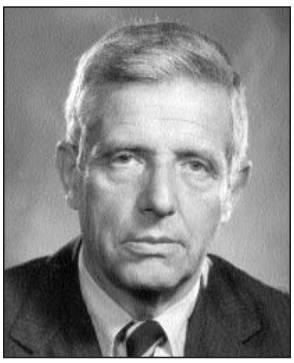
He is most deserving of the tributes he undoubtedly will receive. May he have a happy and healthy retirement.

Maryann Saccomando Freedman
NYSBA President
1987-1988

Although every president undoubtedly has had a unique experience with Bill, I think it is fair to say that, if there were degrees of uniqueness, my experience, as Bill's first female president, would be unprecedented. We both knew from the outset that the challenges of being the "first" would be many and varied. And they were! In most instances, I would not want the stories to be made public until the rule against perpetuities has expired. They are, however, recorded. But Bill need not worry. If anyone in the distant future is ever interested in reading about them, I assure you that Bill will be seen as a hero.

Throughout the year, Bill was sensitive to all of this. He put up with my venting and white rages (rare, of course) with grace, understanding, good humor and good sense.

I am hard-pressed to pick one event, one crisis or one project that was resolved or implemented during my term. There were so many. We dealt with the adoption of THE CODE, election law reform, the first comprehensive study of biotechnology, serious conflicts with OCA, the administrative adjudication procedures, the workers' compensation crisis, the premiere of "Empire of Reason," the new headquarters construction, increased automobile insurance limits, the resignations of a couple of legislator members resulting from our position on the ethics-in-government legislation, and much, much more. Bill's support and counsel were invaluable. He will be sorely missed.

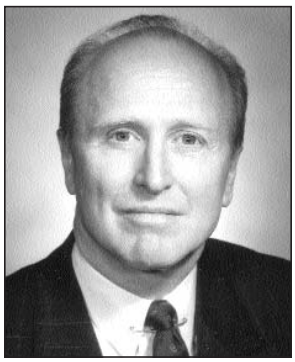


Charles E. Heming
NYSBA President
1986-1987

My term ran from July 1986 through June 1987. Together Bill and I faced a series of controversial issues, among them: (1) the appropriateness of lawyers in the state legislature representing clients before state agencies, (2) spiraling professional liability insurance costs which triggered tort reform proposals, (3) a major revision of the Code of Professional Responsibility, and (4) a proposed ban on tobacco advertising. Regardless of the subject, Bill was knowledgeable and supportive. Most important, he maintained his natural good humor, often in the face of provocation to do otherwise.

During his tenure, Bill has overseen major changes, from a huge growth in membership, to significant expansion of the Bar Center, to an array of technological changes within a short time frame. The technological changes occurred at a striking pace. Consider, for example, that the Bar Center acquired its first fax machine during my term.

I think it is fair to say that every NYSBA president cherishes the memory. I certainly do, and having served with Bill is a major factor in making this so.



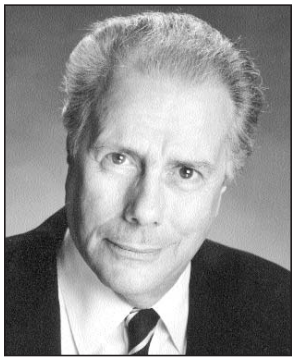
JOHN BRACKEN
NYSBA PRESIDENT
1992-1993

For the past 25 years in which I have been active in the New York State Bar Association, Bill Carroll is the only executive director I have known. My earliest contacts with him were when I served as president of the Suffolk County Bar Association and as a member of the NYSBA Nominating Committee. Those contacts increased each year and peaked when I served as president-elect and then as president of NYSBA. During those years we became, and continue to be, good friends. After all, we have a great deal in common: We share Fordham University as an alma mater, he having graduated from the college and I from the law school; both of us served as officers in the United States Marine Corps; we are almost contemporaries, although Bill is somewhat older; both are avid St. Louis Cardinal fans; and last, but not least, both of us love the New York State Bar Association.

During my tenure as president, I would fly from Long Island to Albany and meet Bill for breakfast at the Fort Orange Club at 7 a.m. He never complained and was always ready to discuss the issues and challenges that existed at that time. Those challenges consisted of the continuing conflict between Governor Cuomo and the Chief Judge, the resignation of the Chief Judge, the quest for implementation of a merit selection system for the judiciary, and the assault by Vice President Quayle upon the legal profession in the course of the presidential race.

Bill was always generous with his time, and his advice and counsel were always sound. Frankly, he was invaluable. From my perspective, Bill's judgment, knowledge and temperament were qualities that helped make my term in office a joy, and one I would repeat with great pleasure. When we attended American Bar Association meetings, he was a great friend and always knew the best haunts and dining establishments. Bill had a way of "bringing along" NYSBA leaders. I sometimes believe that he, in his typically understated way, actually trained us, and I believe he did a superior job.

Bill is a first-rate human being and the best executive director of any bar association in the United States. We will miss him sorely but wish him Godspeed, good health and continued success in whatever he does—and I hope my number never leaves his speed dial.



HENRY G. MILLER
NYSBA PRESIDENT
1984-1985

It was the late 1970s. I had the pleasure of joining with Ed Russell and Henry Smith, both of blessed memory, who were prepared to go to Agincourt and back, with Henry V if necessary, in order to make sure Bill Carroll succeeded John Berry. And he did. It was the wisest decision our association ever made.

Bill has made every president look good, and he's had to put up with a lot. When I became president, I wanted to tour the offices at the Bar Center. I presumptuously pointed out a paper cutter that didn't have a guard to my liking (I'm a tort lawyer). Bill, ever the gracious gentleman, just smiled at me and said, "Thank you, we'll make it safer."

A master diplomat, he has had to deal with all kinds of presidents. But you always knew you could get an honest answer from Bill. Discreet yes, but he'd share with you what had to be shared. The ex-Marine knew when battle lines had to be drawn for the good of the association.

I remember some private moments. Once, we both sneaked off, having had just about enough of bar associations for one night. We hid out in Brooklyn at the Academy of Music. I think we saw some Chekhov play. On nights like that, we'd exchange reminiscences and swap tales about our children, both of us having taken the same path to parenthood.

Many was the night I was privileged to sit at a table with him and Norma and some of the Fordham folks, sharing a story or two.

I hope when he moves on, he doesn't go too far. The greatest asset we can give his successor is access to a bit of Bill's wisdom.

Bill, we owe you an enormous debt. We'll be friends to the end.

M. Catherine Richardson
NYSBA President
1996-1997

I should have known the first time I saw Bill Carroll—the twinkle in his eye, the way he responded with historic perspective to questions raised by Executive Committee members, the interjected wit at just the right moment—that I'd love the guy. However, it was not just love at first sight. In the 14 or so years I've known Bill, I can say that I never left his company without renewed respect for his wealth of knowledge about our association and its members' needs, and his way of always being the best sounding board our leadership could have.

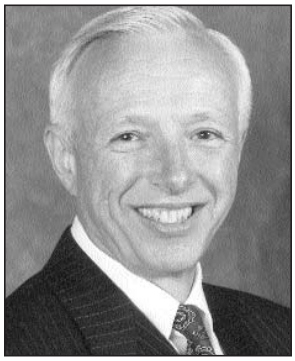
As each president who has served the association with Bill can tell you, Bill makes a president look good. He always asked the right questions, offered just the right information and encouraged you at the perfect moment.

It was a little over a month into my term when the TWA flight crashed off Long Island. A few weeks earlier, our House of Delegates had proposed a new provision to the Code of Professional Responsibility which, in essence, said a lawyer should not solicit business when he or she had reason to know that the prospective client's judgment would be clouded by a tragedy. I called Bill at 7:30 the next morning from the airport to consult on what we should do, if anything. I had in my mind the condemnation of lawyers who two months earlier had flocked to the Valujet crash in Florida. My instinct was to tell the victims' families that New York lawyers would not do that. By the time my flight arrived, the association's public relations firm had advised against NYSBA's president telling the association's members not to be "ambulance chasers." After our three-way conference call, Bill merely said something like "do what you think is right and we're ready to roll." The rest is history. We told the victims' families that they would not be solicited, and in cooperation with The Association of the Bar of the City of New York, we sent a team of lawyers to meet with the families to answer their questions, for which we received thank-you letters.

That is a typical example of how Bill operates. He is always there but never imposes his will. Then again, his sharp Irish wit can make you pause and reflect on your course of action.

It boggles my mind to think that one individual could work with 20+ different presidents whose desires, projects and styles have varied so much and still be considered by each his or her good friend. Maybe it's because he has loved his job. Maybe, Norma, it's because he eats fish only once a year. Maybe it's because he celebrates St. Patrick's Day with such enthusiasm. But, maybe, it's simply because he is one fine human being.

Bill,
May the road rise to meet you,
May the wind be always at your back,
May the rain fall gentle on your shoulders,
May the soft winds freshen your spirit,
May the sun shine warmly on your face
and until we meet again—
May God hold you in the hollow of Her hand.



ROBERT WITMER
NYSBA PRESIDENT
1994-1995

Being asked to write a few words about Bill Carroll brings back a flood of memories. I first encountered Bill when I was elected to the House of Delegates in 1978, the year he became executive director, but our real interaction began in 1984 when I joined the Executive Committee. I then began to observe firsthand Bill's personal and political skills, particularly when Henry Miller appointed me chair of the Bylaws Committee, which sought to cap the number of members in the House of Delegates. At most, it was a modest success, but with Bill's good counsel, we avoided blowing ourselves apart.

As is true for every president, I had the experience of being "joined at the hip" to Bill during my year of office and truly learned to appreciate his contribution to the association. His personal leadership and administrative skills, which have justly earned him national recognition, have contributed greatly to the development of the association's superb staff and NYSBA's reputation as the strongest and most vibrant state bar association in the country.

Of my many fond memories of working with Bill, a couple of the most prominent are the annual dinner of January 1995 and a strategic planning retreat we held later in the spring. For many years, the annual dinner had suffered a steady decline in attendance, and Bill and I both had been heard to utter that it was an event whose time had probably passed. However, caught up in the excitement following the November 1994 election, I thought I had a good chance of securing Governor Pataki as our dinner speaker within one month of his taking office. Bill was not quite as sanguine of my efforts, and with his wise counsel, we also booked journalist Catherine Crier as a speaker. After receiving confirmation from the governor's office that he would speak at the dinner, we redoubled our efforts to fill the house. But 24 hours before the dinner, we were notified that the governor's schedule had changed and that he would be unable to speak as scheduled. Following a series of frantic phone calls, we arranged to have him attend the reception before dinner. We saw the new governor and heard a fine address from Catherine Crier, but not exactly as planned. After that rollercoaster ride, the association quickly declared that to be the last annual dinner, and I am sure Bill breathed a huge sigh of relief.

Any organization whose leadership changes every year must have a strategic plan. We had developed some plans previously, and during my year in office, I was determined to have a full-blown strategic planning retreat with outside facilitators. Bill worked extensively with me on this project, which included bringing in the immediate past-president of the ABA, Bill Ide. We scheduled the first of two meetings at the Parker Meridien in New York City in February, and the second was to be held a couple months later. The first meeting was a great success, but it blew our entire budget. We then scheduled our next meeting at the LaGuardia Marriott, which was certainly adequate but not the Parker Meridien.

Of course, my most endearing and enduring memories regarding the association are of friends and fun, and Bill has been a central part of both. I'm not sure if it was his idea, but he certainly was a promoter of the "who's on first, what's on second" softball games at our summer meetings between teams that John Bracken and I captained. Those were wonderful times, and nothing could top the come-from-behind victory of our team in the first game with a grand-slam home run in the last inning by Guy Vitacco, Jr., off pitcher Bracken. Kate Madigan may still have the videotape for those of you who are interested.

This association owes much of its success to Bill Carroll, and I am grateful to have been a participant. Bill, and long-suffering Norma, deserve our very best wishes.

ANTHONY R. PALERMO
NYSBA PRESIDENT
1979-1980

Bill Carroll first came to the NYSBA in June 1974 as the director of continuing legal education. My significant professional relationship with Bill commenced in June 1976 when he was assigned as principal staff assistant to Action Unit No. 3 (Access to Legal Services), which I chaired, when that body was first organized. A short time later, on November 1, 1978, during my term as president-elect when Bob Patterson was president, Bill became executive director, succeeding the beloved John E. Berry, our association's first executive director.

From the beginning, Bill recognized the need for and pursued the goal of continuity of programmatic activity from one association year to another. Bill realized that every year was only one lap of an endless relay race, with each president receiving the baton from his or her predecessor, pursuing association goals—completing some activities, starting new ones and sowing seeds for yet others—and then passing the baton to his or her successor. In this regard, Bill encouraged and participated in regular planning meetings from the outset among Bob Patterson, Alexander Forger (my successor) and me. As a result of such collaborative leadership, the NYSBA presented a coordinated, long-term approach to numerous professional issues of local, statewide and national concern.

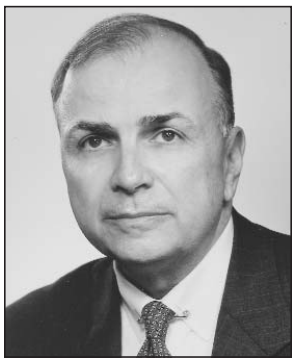
During 1979–80, when I was privileged to serve as president and just months after Bill took over as executive director, the NYSBA directed substantial resources and energies to such issues as court reform and reorganization; the Kutak Committee Report and then-proposed ABA Model Rules of Professional Conduct; implementation and development of the New York State Bar Leaders Conference and the creation of the Mid-Atlantic Bar Leaders Conference, which annually brings together presidents, presidents-elect and executive directors of the mid-atlantic states and the District of Columbia. Both conferences have survived and thrive today as excellent professional mechanisms, which greatly enhance the ongoing capacity of the NYSBA to communicate with bar leaders at all levels, where they can, and do, address legal issues confronting lawyers, the organized bar and society.

In 1978, the NYSBA selection committee, which investigated Bill's credentials for service as executive director, concluded that "he has had close relationships with all of the Sections, and as such has demonstrated general knowledge, technical competence and diplomacy, and that it is the general opinion of all concerned that he has done an excellent job." Today, nearly a quarter century after that recommendation, those who have personally observed Bill and his performance can honestly say that he has surpassed the selection committee's expectations.

Bill has been absolutely superb as NYSBA's executive director. In the words of George Gershwin: "Who could ask for anything more?" We are grateful for his extraordinary service, and we extend best wishes to Norma and Bill for good health and happiness in the future, in whatever endeavors they may pursue.

HENRY L. KING
NYSBA PRESIDENT
1988-1989

My experience with Bill Carroll during my tenure as president was truly remarkable. His support, intelligence and dedication never wavered. His leadership made me look good, for which I will always be eternally grateful. Thank you, Bill.



THOMAS O. RICE
NYSBA PRESIDENT
1999-2000

It's not easy when one Irishman is expected to say a few good things about another—especially when the other guy hasn't really left us. After all, Bill is only retiring. Kind words are usually reserved for some hopefully distant day of another kind, and then when a few restorative beverages might have worked their devilish magic and had their salubrious effect on the tongue. But what good is a custom if it can't be ignored, if "just a wee bit." Especially so when describing an authentically "good guy," or as would have been said in another day, "himself."

All the good and true things about Bill Carroll, others have said well: loyal (hardly any surprise there, Semper Fi incarnate), bright, witty, charming, discreet and enormously talented and gifted, yet humble. All in all, just Bill being "himself."

There is, however, something more about Bill that 23 of us who have worked closely with him will always cherish. Each of us came to understand and witness in this man the meaning of character.

In the intense, hectic and often overwhelming year that every president experiences, there is one constant. No matter the issue, whenever it arose, Bill's was a steady hand, always extended when and where needed. Selflessly sharing his wisdom, experience and insight, he never sought credit and always avoided public acknowledgment. His singular concern was and is the good of the profession, the association and its members and his staff.

At the risk of being trite, any success enjoyed as president, and all the mistakes avoided, were made possible because of Bill. Others had similar experiences. Such were our special privileges.

But others too benefited because of Bill. What this association has become and is becoming in no small measure is because of the professionalism of the staff in Albany. These exceptional people reflect the attitude and spirit of their leader and our colleague, Bill Carroll. The growth of the association and its ability to adapt to the ever greater demands of an evolving profession is a tribute to Bill's more than 20 years of service as executive director. Bill's legacy is the strength of our association. For that, we can't say "thank you" enough.

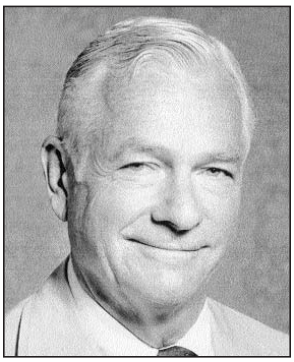
Bill has come a long way. The Upper West Side and The Bronx. Charlottesville. Vietnam. Washington. Home to New York and Albany. Now he continues his successful journey. As he does, we wish him more than well.

Bill, some very special folks made so much possible for "the likes of us." Surely they share now with your family, friends and admirers their gratitude for all that you are and continue to be. Perhaps we would say it differently than they, though we couldn't say it any better: "May the road rise before ye, lad."

JOHN YANAS
NYSBA PRESIDENT
1989-1990

Undertaking the daily responsibilities and demands of running a statewide professional organization is a daunting task, to say the least. For one following in the shoes of John Berry, a legend who served the New York State Bar Association for 30 years, there is imposed an additional burden to succeed and meet the high expectations of the organization's membership. Bill Carroll overwhelmingly met those challenges and carried the association to unprecedented achievements during his 23 years as executive director. The rise in membership from 28,500 to more than 67,000, the increase in the number of sections from 14 to 23, and the growth in the number of committees and action units reflect not only the ever-increasing burdens of the executive director's position, but also evidence the enormous success brought about during Bill's stewardship.

Despite working with ever-changing association officers and section and committee chairs, Bill was consistent in his response to whatever was asked of him. He always had a cheerful attitude and was well prepared and knowledgeable about matters pertaining to the association. Bill's advice and good judgment were of immeasurable importance to me during my term as president. I am delighted to have this opportunity to express my admiration for Bill and for what he has done to broaden the outstanding reputation this association enjoys throughout New York State and beyond.



HAL FALES
NYSBA PRESIDENT
1983-1984

Bill Carroll's office looks to the south onto the courtyard behind the New York State Bar Association's landmarked buildings on Elk Street and to the north over parts of Albany and the Hudson River. While sitting there as incoming president to discuss committee vacancies, I first realized Bill's extraordinary knowledge of the association, its structure, the issues important to its members and the means for achieving them. It took some time, however, for me to appreciate how much of this knowledge Bill freely confided, without ever pushing an agenda of his own or saying anything to advance a concealed agenda.

Bill could tell you what appeared to be association policy, who was behind it, whether and how it could be changed. He would give his views, if asked, about the wisdom of a particular change and the likelihood of successfully implementing such a change. He could advise on the persons or committees who likely would resist or reject a particular course, but he never said anything that, if repeated, would embarrass him. He didn't repeat anything that his instinct told him I wouldn't want repeated, but he was so mature and so sensitive to the feelings of others that conversation tended to flow along lines that anyone would be proud to acknowledge.

One of many examples of Bill Carroll's skill occurred when the association was developing its views on the proposed Model Rules of Professional Conduct. We, of course, had to present the proposed rules to our House of Delegates for discussion in order to mold the positions our delegates would take on the floor of the ABA House of Delegates. Bill, ably assisted by his staff, did a professional job of breaking the proposed rules into groups of propositions for our House to vote upon within the time frames set by the ABA and those dictated by our internal structure and meeting schedules. These propositions were so well thought out and organized that the House was able to establish its positions on these new, complex and controversial rules in two back-to-back sessions—completely, clearly and on time. Although our House of Delegates ultimately made the decisions, they would have been unable to do so had the preparatory work that Bill orchestrated not been of such an extraordinarily high caliber.

Bill also knew that for a bar association to succeed, its leaders and employees often must do seemingly mutually exclusive things. For example, people should have fun and yet keep focused on work important enough to justify the investment of valuable time; they should feel passionate about issues but should be able to argue without rancor and even advance the good-humored spirit of camaraderie that is the hallmark of this association. A master at riding these divergent horses, Bill always exhibited humor and grace.

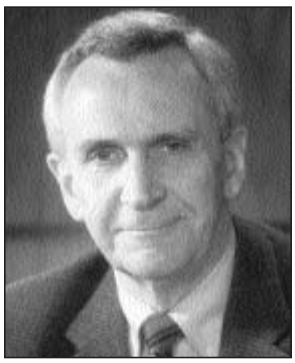
When John Berry retired, we thought the New York State Bar Association had suffered the irremediable loss of the world's best bar executive. Bill Carroll's advent proved we didn't have enough faith. He has surpassed all expectations. In almost a quarter century of service, he has not made a false step: "All he did done perfectly as though he had but that one trade alone."

I am totally nonplussed over the concept of your retirement. You are the Franklin D. Roosevelt of our association—a four-termer who seemingly should be with us forever but who hasn't yet played out his final term.

As you know, I have been involved with the ABA for many years and, given my many assignments with that organization, I have had occasion to deal frequently with executive directors of state bar associations throughout the country. You have been the crème de la crème of them all, and I literally have never met anyone who has ever voiced to me anything less. The guidance you provided during my presidency was invaluable, particularly given the political crises created by the Chief Judge's lawsuit against the executive and legislative branches and the pressures upon the association which that engendered, and given also my effort to redirect, in part at least, the association's responses to the needs of solo and small-firm practitioners. It was an important year, and your wise counsel and guidance were primarily responsible for whatever success my own efforts might have brought about.

You may be stepping down, but I hope you are not leaving. There is much to be done for our members and for the profession at large. Given your broad experience, your friendly personality, your unique ability to get things done and, in the process, to motivate others, I can think of no one better positioned to contribute to the future efforts of our association, albeit from a different perspective. I look forward to your participation for very many years to come.

You've been terrific. I hope you will continue to be. Best wishes.



ROBERT L. OSTERTAG
NYSBA PRESIDENT
1991-1992

How can you be retiring at such a young age? Why, you've just gotten started! 'Twas only yesterday we met in a restaurant chatting about CLE and bar associations, and now see what's happened—you're off following in the footsteps of John Berry. May you enjoy thoroughly the next 30 years of retirement, with my adopted daughter Norma, Tim and however expanded the family may become. You will, of course, miss New York in January, but then, there are always trade-offs.

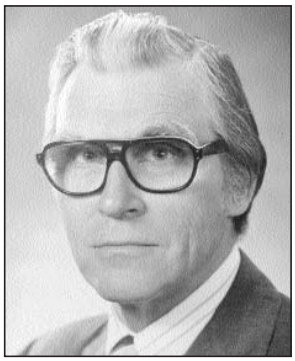
Although admonished to record humorous events and recollections, I feel quite constrained so as not to identify those whose actions were the source of humor. Though I do dare to mention Chief Judge Cooke, who took umbrage at my comments about New York geography: How far was Bath from Albany? Was Boston closer? He got even at the NYSBA dinner, though, reciting statistics for an hour or so.

During our time together, I recall fondly the camaraderie of the Russell and Smith days; the paper blizzard; "jokes" at the Century; the farewell to Leonard—preceding his reemergence for a 20th term; the somewhat lopsided vote on mandatory pro bono (God bless Edith); the fascinating Bar Foundation meetings and the endurance of its leadership; and the folding-chair dinners in overcrowded historic places, replete with raconteurs!

Through it all, Bill, you made it an enjoyable experience. You made us all seem intelligent and knowledgeable about association matters and kept pushing the revolving door, always graciously and warmly greeting the next innocent arrival, desperately in need of a mentor and friend. You truly deserve a special place in a paradise—far from the babble of lawyers—where you and Norma can lead the carefree life, content in the knowledge that for nearly 25 years you've been arranger, conductor, organizer and maestro of a disparate, independent-minded bunch of advocates, never wanting in self-confidence, whatever the issue or event.

Thanks for the memories, for your monumental contribution to NYSBA and the New York bar, for the many good times and, most importantly, for your guidance, counsel and warm friendship, which is very much cherished.

Fern, whose respect and affection for you equal mine, joins in sending you and Norma our love and wishes for good health and fun for years to come.



ALEXANDER D. FORGER
NYSBA PRESIDENT
1980-1981

JOSHUA PRUZANSKY
NYSBA PRESIDENT
1997-1998

No matter the style, personality or agenda of a NYSBA president, his or her tenure amounts to nothing more than a collaboration with Bill Carroll. With a soft touch and dry Irish wit, Bill is the compass to which we each turn during our period of leadership. Universally recognized by his peers as the outstanding bar leader in the country, Bill's ability to offer sound advice and to work closely with the diverse range of individuals who have led our association is nothing short of remarkable.

Bill represents the history and experience of NYSBA in practically every endeavor. What initially appears to be a unique crisis frequently emerges, with Bill's perspective, as a previously confronted issue, albeit in a novel form. Bill's take on the history and evolution of the matter often leads to its resolution. When such problems have faced our membership, Bill's unflappable demeanor has helped to contain the charged atmosphere surrounding an apparent crisis so that sober, carefully considered thought and eventual positive action have prevailed.

During my presidency, we entered many uncharted waters, including internal personnel changes, potential confrontations with each branch of state government, and a ground-breaking lawsuit against the federal government over the so-called Granny's Advisor Goes to Jail issue. Bill's counsel and encouragement guided our approach to each of these issues and their eventual successful resolution.

It is hard to imagine a president, the board, the Finance Committee, the staff or the organization itself operating without Bill's ever-present and steady hand. The seamless continuation of NYSBA's vital work will, however, be part of Bill's legacy.

I wish my good friend, Bill Carroll, together with Norma and Tim, many years of health and happiness as Bill leaves NYSBA and enters another phase of his life.

MAXWELL S. PFEIFER
NYSBA PRESIDENT
1995-1996

By the time I became president of the association in 1995, Bill was already a seasoned executive director. He had acquired the ability to adjust and work effectively and productively with presidents of varying styles and agendas—an immensely helpful attribute to the association presidents with whom Bill worked. He was an excellent administrator with a thorough knowledge of the association's operations. In addition, he had, through the years, assembled a capable staff which helped him conduct the affairs of the association in a most efficient manner.

Bill was the ideal sounding board during my tenure. He was always quite candid in stating his constructive opinions relating to proposals of mine, which from time to time I presented to him. As a result, various progressive and beneficial projects were effectuated.

An amusing anecdote involving Bill bears recounting here. I am a corned beef hash aficionado and am especially fond of the hash served at the Otesaga Hotel where we hold our summer meetings. I had been savoring that dish for the longest time. On the last morning of the meeting, I finally had the opportunity to have the chef prepare a special hash with all the trimmings. It was with great anticipation, therefore, that I sought to enjoy my long-awaited breakfast. Coincidentally, at about the same time, a member had come to Bill indicating that he had an important topic he wished to discuss. Bill suggested that they take up the matter with me; I was at that time seated in the dining room, poised to attack my favorite dish. They sought me out, and the member, Bill and I proceeded to confer for a period of time. I do not recall either the individual or the subject matter involved. What I do remember is that, at the conclusion of our conversation, I realized to my horror that I had completely devoured my prized corned beef hash breakfast without having had any awareness of what I had eaten. My cholesterol quota had been uselessly expended.

Bill, you shall never be forgiven for the part you played in this most lamentable episode.

Best wishes to you, Norma and the family for the future.

ARCHIBALD MURRAY
NYSBA PRESIDENT
1993-1994

Bill Carroll retires this year after serving the association well and ably as its executive director for 23 years. Bill is one of the longest-serving executive directors nationally, and with good reason. He is a man of extraordinary talent and ability, but blessed also with a wit and humility that made him a delight to work with during my presidency.

Bill could always be counted on for sound advice. His seemingly inexhaustible knowledge of the association, its committees, sections and people was a ready resource of inestimable value to me and the other presidents he served. Bill's guidance was fair and objective and given in a positive spirit. He was deferential to the plans and ideas that other presidents and I would raise and would then work with us to refine them and make them into a workable reality.

At all times, Bill's pleasant nature and legendary sense of humor served him well. He has a way of dealing with even the most difficult situations with a charm and grace possessed by few. He has a remarkable talent for bringing out the best in those who have been fortunate enough to work with him. Some of my fondest memories are of dinners with Bill as we prepared for upcoming meetings of the Executive Committee and House of Delegates. Work was discussed at length, but there was also plenty of time for discussions that ranged from world affairs and politics to all manner of sports. Time flew by, and with Bill's ease and charm, the work became light and pleasant.

Perhaps it is his genuine interest in others, or his seemingly easy ability to relate to people, but whatever the reason, we have been truly fortunate to have Bill as executive director for so many years. His was a gentle hand on the tiller, but one that guided the staff and the operations of the association unerringly in a positive and forward-moving direction. I know I was blessed to have had the privilege of working closely with Bill during my tenure and wish that others could have had the same experience. I truly feel fortunate to be able to number Bill among my close friends and wish him many happy, healthy and rewarding years in retirement.

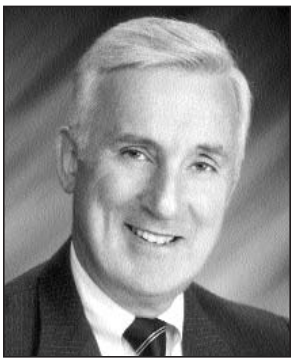
JUSTIN L. VIGDOR
NYSBA PRESIDENT
1985-1986

To borrow a well-known phrase, "All good things must come to an end." Bill Carroll is definitely a "good thing." Or, more accurately and more grammatically correct, Bill's 23-year tenure at the helm of the New York State Bar Association has been a "very good thing." The Bill Carroll era, now ending, has spanned almost 20 percent of our association's lifetime. Given the explosive growth, increased diversity and accelerated rate of change in the legal profession over those years, one might (and I will) say he has been our North Star during the most challenging years of our 124-year history.

Unlike NYSBA presidents, who flower for a year and fade away, Bill was the garden perennial, with an institutional memory of what we were and what we stood for. He linked president to president, issue to issue, the association to its members, and the profession to the judiciary—with patience, humor, sensitivity and finesse. During my term as president, several major issues that demanded our attention included court merger, court facilities, tort reform and changes to the Code of Professional Responsibility—all of which, oddly enough, in one form or another, engage the House of Delegates today. As the French say, "The more things change, the more they stay the same." Hence, the value of Bill's perspective, sense of proportion and his linkages.

Bill's openness, his talent for surrounding himself and the association's leadership with first-rate, professional staffers and his overall competence have earned him the enduring affection, respect and gratitude of every NYSBA president for over two decades. These same traits were obviously apparent to his colleagues nationwide when they elected him president of the National Association of Bar Executives.

We can be sure that this youthful retiree won't just settle into a rocking chair. We wish him and Norma long life, good health and much happiness as they begin life's new adventures. But, as the classics teach us, every heroic figure must have a tragic flaw. How can a sensible New York City guy like Bill be such a rabid St. Louis Cardinals fan?



JAMES C. MOORE
NYSBA PRESIDENT
1998-1999

When I think back on the 15 or so years during which I have known Bill Carroll well, my many thoughts tend to coalesce into one: What a pleasure and privilege it has been to have known and worked with that man. I can think of no instance in which I left his company unhappy or disappointed. And I can think of many visits or conversations with Bill from which I emerged with a better understanding of how to proceed and always with my outlook improved.

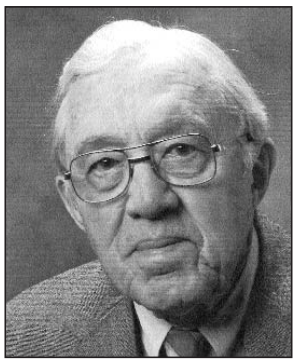
To those who have worked with Bill, it is axiomatic that his knowledge of the association's staff, its members, its programs and its finances is encyclopedic. But what we have valued more than his knowledge has been his intuition about where and how we should lead on important issues, whom we should call upon for leadership, and when we should move on from an issue or a program whose time has passed. I have always marveled too at the respect and admiration with which the staff in Albany and the association's members have regarded Bill. Without a doubt, that has been a reflection of the thoughtful and respectful manner in which Bill has treated each of us.

Something else that has enhanced my admiration for Bill has been his ability to be a counselor to, as well as a genuine friend of, each of NYSBA's presidents. And on those many occasions when our successes in truth arose from Bill's suggestions or planning, he never took the credit and always saw to it that we received the applause.

I also think it quite remarkable and not coincidental that it was during Bill Carroll's stewardship that the NYSBA achieved record membership levels, unparalleled financial soundness and a share of the New York lawyer population that is the envy of every other voluntary state bar association in the country. Nor should it surprise anyone that the nation's bar executives regard Bill both as a role model and as a good friend.

For me, fond memories of my years with Bill will include our (probably all too frequent) reminiscences about our military tours of duty in Vietnam (we were there at almost exactly the same time, but we didn't know or see each other until many years later), eating oversized steaks at Gallagher's Restaurant in New York City (try suggesting a fish entrée to Bill sometime!), talking seriously with Judges Kaye and Lippman about how to reform the courts and increase 18-B fees, and sitting in Bill's office late in the afternoon with John Williamson and Beth Krueger, trying to figure out how to expand or narrow the agenda for the next House of Delegates meeting.

I am certain that my friendship with Bill will continue for another 20 or 30 years. But it is difficult for me to imagine a friendship more satisfying or meaningful—at least to me—than the one we have enjoyed for the last 15 years.



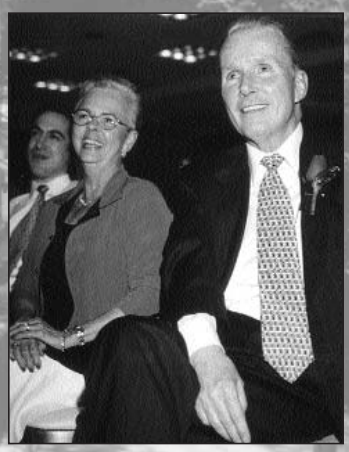
DAVID STERLING WILLIAMS
NYSBA PRESIDENT
1981-1982

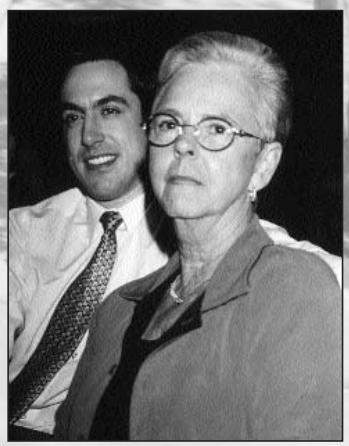
I have a number of fond remembrances of my presidency: the landmark report of Action Unit No. 5 on state over-regulation, being the guest of honor at a meeting of the Union Internationale des Avocats, and hosting a delegation of lawyers from Nigeria at the Bar Center. While those may be personal milestones for me, working with Bill Carroll was the highlight.

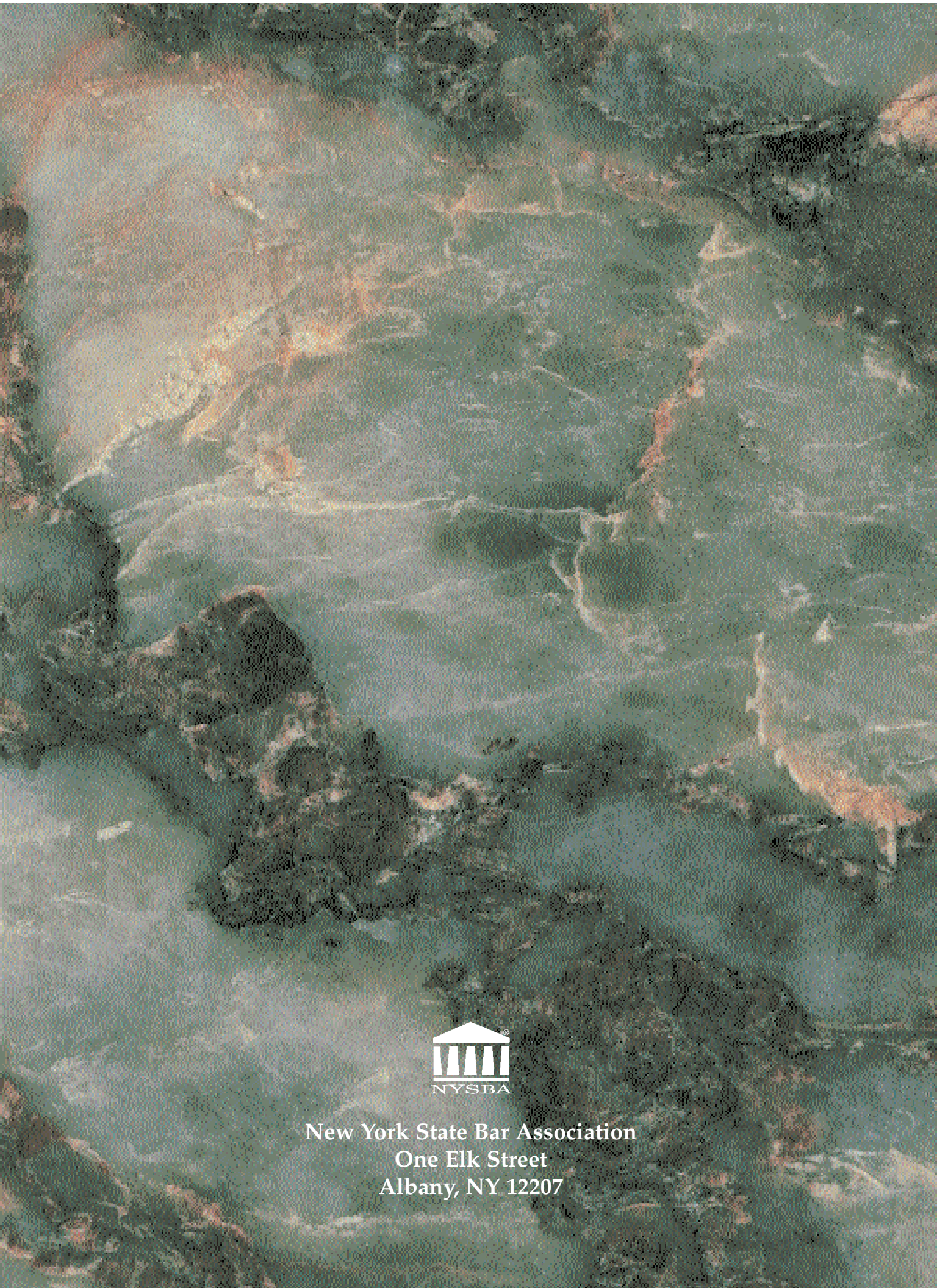
There are only two past presidents from Albany who have had the unique ability (because of geographic proximity) to see Bill more often than those others of us who have lead the Association. I got to know Bill about three years after he became Executive Director, certainly a long enough time for him to get a good grasp of what the job requires. His unimpeachable integrity is what struck me instantly as we began working side by side. The fact that we all hold him in such esteem is silent testament to that.

It is interesting for me to note the contributions that he has made to the Association and it has been an honor to work with him. He has always displayed the highest degree of professionalism and leadership. His skills are the ones we all seek to emulate and hope that we can achieve.

There is, however, one thing I can't figure out: He's retiring and I am still working. It must be that he worked harder!







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Best Interests of the Child Remain Paramount in Proceedings To Terminate Parental Rights

By Anne Crick and Gerald Lebovits

Except for going to jail, nothing interferes with personal liberty more than terminating a parent's right to a child. New York Social Services Law (hereinafter "SSL") § 384-b safeguards parents' due process rights, but its focus is on children's best interests. As SSL § 384-b(1)(a) provides, "the health and safety of children is of paramount importance."

The law of terminating parental rights includes recent statutory changes to SSL § 384-b and their application in current case law, as well as the interaction of termination proceedings with abuse and neglect proceedings under Article 10 of the Family Court Act (hereinafter "FCA").

The Decision to File

A petition to terminate parental rights (hereinafter "TPR") is filed on behalf of a foster child by a foster care agency to place the child in the agency's care and custody, thus freeing the child for adoption. The agency may have determined independently that the child's best interests would be served by freeing the child for adoption, or it may be under a court order to file or be compelled to file by statutory deadlines.

The Adoption and Safe Families Act (hereinafter "ASFA"), enacted federally in 1997[1] and implemented in New York in 1999,[2] is designed to achieve permanence for children who have been in foster care for extensive periods of time. ASFA encourages agencies to expedite children's departure from foster care by returning them to rehabilitated parents or by freeing them for adoption.[3] To this end, ASFA requires yearly permanency hearings for every child in foster care so that Family Court can monitor the agency's service plan and assess whether the agency and the parent are actively working toward reunifying parent and child.[4] If the court finds that the permanency goal of reunification is not in the child's best interests, it may order the agency to file a TPR petition.[5]

Statutory deadlines may also require an agency to file a TPR petition. ASFA created new deadlines by which an agency must file a TPR petition. The deadlines prevent children from languishing in foster care if the agency's diligent efforts fail to permit the safe reunification of parent and child. The agency must file if the child has been in foster care for 15 of the last 22 months; six months if Family Court previously entered an abandonment finding in an FCA Article 10 neglect case; or a year if the parent was convicted of a crime connoting severe or repeated abuse.[6] The agency need not file if the child is with a relative in kinship foster care or direct parental placement; the agency did not diligently offer the parent rehabilitative services; or the agency has a documented, compelling reason not to file, as when the permanency goal is not adoption or the child is over 14 and will not consent to adoption.[7]

ASFA's critics were concerned that the new deadlines would cause parental rights to be terminated unnecessarily or precipitously.[8] Sometimes 15 months is too short for a parent to be rehabilitated. In other cases, the parent has consistently visited and maintained a parent-

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Gerald Lebovits has been a principal court attorney in Supreme Court, Criminal Term, New York County, since 1986. He is an adjunct professor and Moot Court faculty advisor at New York Law School. He previously was with The Legal Aid Society, Criminal Defense Division, in Manhattan. He received a bachelor's degree from Carleton University and law degrees from Ottawa, Tulane and New York University law schools.

child bond with an older child that the agency is loath to break permanently—even if the agency knows that the child cannot be returned to the parent safely. The TPR deadlines can help break this stalemate and assist in safely returning the child home.

Parents who have been less than diligent about participating in rehabilitative services receive a wake-up call when a TPR is filed. With the time it takes to conclude a TPR, a respondent-parent can demonstrate at disposition rehabilitation achieved while the TPR is pending. In these cases, if reunification with the parent is in the child's best interests, the judge can suspend judgment, imposing conditions the parent must fulfill so that the child's permanency is achieved quickly.

Filing the Petition: How, What, Who?

TPR petitions are filed by the child's foster care agency. In New York City, if the Administration for Children's Services (hereinafter "ACS") placed the child directly into a foster home, ACS is the "foster care agency" and will file the TPR. A relative who has care and custody of the child may also file a TPR petition. If the agency has failed to comply with ASFA's deadlines or a court order to file the TPR by a certain deadline, the child's foster parent or the child's law guardian may file the TPR on the court's direction.[9]

One petition must be filed for each child, who must be under 18 when the petition is filed. Mothers and all legal and putative fathers must be named as respondents. Surrogate Court and Family Court have concurrent, original jurisdiction when both parents die or abandon the child. Family Court has exclusive original jurisdiction over all other cases.[10]

The foster care agency must attempt personal service on the parents. If that fails, the court may allow substituted service.[11] If the agency does not know where the parent is, the court may authorize publication notice if the agency submits an affidavit documenting its diligent efforts to find the parent.[12]

Notice must also be served on those who fit the statutory definition of "notice fathers," fathers of out-of-wedlock children who have no parental rights that must be terminated before adoption but who are entitled to receive a TPR petition.[13] Notice fathers may offer evidence about the child's best interests. In permanent-neglect cases they may participate only at disposition.[14] Although a notice father's rights need not be terminated, an agency that has a cause of action against a notice father should name him as a respondent rather than risk a later challenge to adoption.

The court will assign a law guardian for the child. In New York City, the law guardian will, absent a conflict of interest, be a staff attorney from The Legal Aid Society, Juvenile Rights Division. In counties that have no Legal Aid Society, the child's law guardian will be selected from the local assigned-counsel roster. The court makes every effort to assign the child the same law guardian who has been representing the child in the underlying neglect or abuse case and in the yearly permanency hearings.[15]

If the agency asserts in its TPR petition that diligent efforts should be excused as against the child's best interests, then the agency must prove this element at the TPR fact-finding hearing.

If one or more of the respondent-parents cannot afford counsel, the court will appoint one. But respondent-parents do not enjoy continuity of counsel. At the close of disposition of the neglect or abuse case, the respondent-parent's attorney is discharged. Every year, when the agency petitions to extend the child's placement in care, the respondent must again request legal representation. Recognizing the need for continuity, many judges will ask the original attorney to pick the case back up, but the attorney need not do so. And it is during these years that the parent is in most need of a zealous advocate to ensure that the agency is doing all it should to reunite parent and child.[16] By the time the TPR is filed, it may be too late for the attorney who is handling the TPR to affect the outcome of the case.

Diligent Efforts: To Plead or Not to Plead?

A cause of action that includes the agency's diligent efforts to reunite parent and child must be pled in detail, specifying efforts and time periods of the efforts.[17] Instead of pleading diligent efforts, the agency may assert that efforts should be excused as contrary to the child's best interests or that efforts have been previously excused by court order pursuant to FCA § 1039-b.

If the agency asserts in its TPR petition that diligent efforts should be excused as against the child's best interests, then the agency must prove this element at the TPR fact-finding hearing. For example, if the parent is abusive during visits, or if visits traumatize the child, the agency may be excused from attempting to strengthen the parent-child bond through visitation.[18] An agency's diligent efforts, however, include not only facilitating visitation but also providing rehabilitative services. Respondent-parents should argue that the agency cannot show how working to rehabilitate the

parent contravenes the child's best interests. Even if parent-child contact would harm the child, the respondent should argue, parent-caseworker contact would not be harmful. The respondent can further argue that if the agency had provided better rehabilitative services, perhaps visitation would have ceased being contrary to the child's best interests. These arguments explain why it is difficult to excuse diligent efforts when a TPR is filed.

Alternatively, the agency may assert that diligent efforts need not be pled because Family Court previously excused them under FCA § 1039-b. The petitioner in an Article 10 neglect or abuse case may file an FCA § 1039-b motion to excuse "reasonable" efforts to reunite parent and child. This motion may be filed any time after the neglect or abuse case is filed. A motion under FCA § 1039-b will be granted if the agency shows that the parent repeatedly or severely abused the child; that the parent was convicted of killing another child of the parent or attempting or conspiring to kill or soliciting the murder of the subject child or another child of the parent; that the parent was convicted of assault causing serious physical injury to the child or another child of the parent; or that a prior TPR ended the parent's rights to another child.

If the agency's motion is based on a prior TPR, the parent can defend by proving that parental reunification is in the subject child's best interests, that reasonable efforts will promote the child's health, and that reasonable efforts to rehabilitate the parent will likely succeed.

Some have suggested that the standard of proof at a hearing under FCA § 1039-b should be clear and convincing evidence, because a finding to excuse reasonable efforts may someday be used in a TPR proceeding, which must be proven to that standard.[19] However, FCA § 1039-b is contained in FCA Article 10, which requires only a fair preponderance of the evidence.[20]

An FCA § 1039-b motion may be filed any time after the neglect or abuse case is filed. The question therefore arises whether an agency may use the motion retroactively to excuse its past obligation to make efforts. In *Marino S.*, the most thoroughly reasoned case on point, Family Court held that a motion under FCA § 1039-b may be filed when the TPR is filed and may work retroactively to excuse unmade agency efforts.[21] The *Marino S.* court accepted the filing of an FCA § 1039-b motion but noted its redundancy with the court's ability to excuse diligent efforts in the fact-finding stage of the TPR.[22] The Appellate Division put the question to rest in *Fernando V.* by holding that an FCA § 1039-b motion may be filed concurrently with a TPR. The *Fernando V.* court went further by holding that terminating a parent's rights to a sibling excused lack of efforts to the subject child, although in that case all the TPRs were filed concurrently.[23]

In any event, the agency should file an FCA § 1039-b motion as soon as possible because the court need not grant the motion retroactively. The better practice in planning for a child's future is to get advance permission not to make reasonable efforts rather than to seek forgiveness later.

Choosing and Defending a Cause of Action

The four causes of action for terminating parental rights are abandonment, permanent neglect, parental mental illness or retardation, and severe or repeated abuse. By far the most common is permanent neglect, which covers most circumstances, including many encompassed by other causes of action.

Abandonment In an abandonment action, the agency must prove that the parent failed to maintain contact with the child and the agency for six months.[24] The agency must prove that the parent intended to forgo parental rights and obligations by failing to visit and communicate with the child or agency though able to do so.[25] The parent's subjective intent is irrelevant.[26] An action may be based on parental actions even if the parent intends to maintain parental rights.[27]

Unlike a permanent-neglect action, discussed below, the agency need not prove in an abandonment case that it tried to reunite parent and child, even if the agency can contact the parent.[28] Similarly, the agency need not prove that it tried to find a parent whose location is unknown.[29]

The ability to visit is presumed. If the agency proves lack of contact, the burden falls to the parent to prove inability to contact.[30] Ability to contact is presumed even if the parent is incarcerated or in another state. A jailed parent must maintain contact with the agency and child.[31] The parent's claim of not knowing the child's location is no defense absent proof the parent has made every effort to find the child.[32] A parent may prove an inability to visit and communicate by showing physical or financial inability or that the agency prevented or discouraged communication. If so, an abandonment action will fail. But insubstantial or sporadic contact will not defeat a finding of abandonment.[33]

The six-month period must immediately precede the petition's filing. If a parent fails to maintain contact with the child and agency for six months or longer, and the agency is planning to file a TPR petition based on abandonment, the parent can defeat the TPR by one meaningful contact with the child the day before filing. But if the child has been in care for a year, a TPR may still lie in permanent neglect.

Permanent Neglect For a permanent-neglect action to succeed, the agency must prove that the parent neglected the child for 12 consecutive months the child was in foster care. These 12 months can be for any year

the child was in care, not necessarily the year before the TPR is filed.[34] Thus, if a parent neglects a child the first year the child is in care but then works with the agency, the agency may still file a TPR if the child's best interests are served by adoption, perhaps because the child has bonded with the foster parent.

For the year of permanent neglect, the agency must prove that the parent failed to plan for the child's departure from foster care to a stable home or failed to maintain contact substantially and continuously or repeatedly with the child, although physically and financially able to do so. A parent's success in one of those two areas will not substitute for a lack in the other. A permanent-neglect case will succeed if the parent failed either to plan with the agency or to visit the child. The parent must maintain consistent and meaningful contact with the child. Sporadic or brief visits will not defeat a permanent-neglect action.[35]

A parent must work with the agency to plan for the child's departure from foster care. A parent may do so by arranging for the child to be discharged to a fit and willing relative. Generally, however, a parent is expected to plan for the child's future by cooperating with agency referrals for rehabilitative services so that the child may be returned home to the parent safely. The parent must participate in the services earnestly. As the Third Department has held, "Token participation in the program offered by the agency, without ameliorating the condition that led to the removal of the child from the parents' home, will not preclude a finding of failure to plan."[36]

The agency must prove that it diligently tried to strengthen the parent-child relationship. The agency must keep the parent informed of the child's well-being, offer services to resolve what caused the child to be in foster care, include the parent in planning for the child's departure from foster care, and arrange for parent-child visitation.[37] Because a permanent-neglect finding may lie in the parent's failure to visit the child or to plan for the child's departure from foster care, the agency must prove diligent efforts appropriate to the allegation against the parent. If the allegation is that the parent failed to plan, the agency must prove that it diligently encouraged the parent to plan. If the allegation is that the parent failed to visit the child, the agency must prove that it diligently encouraged visitation.

The agency's efforts are excused if Family Court previously granted a motion to excuse reasonable efforts under FCA § 1039-b. Diligent efforts are also excused if the agency shows at the TPR phase that these efforts would have been detrimental to the child's best interests.

Incarceration does not excuse a parent's failure to plan or the agency's failure to make reasonable efforts.[38] The incarcerated parent must provide a feasible plan for the child's discharge from foster care. The agency must take the incarceration into account in formulating the service plan and arranging visitation. But agency efforts are excused if incarcerated parents fail more than once to cooperate in planning or visiting.[39]

Diligent efforts are further excused if the parent fails to apprise the agency of the parent's whereabouts for six months.[40] If the agency does not know where the parent is, the agency cannot provide services or arrange visitation. This exception applies if the parent has contact with the child but not the agency, a circumstance seen most often in kinship foster-care cases when the parent visits the child in the relative's home and the neglect lies in failing to plan with the agency for the child's return.

The permanent-neglect cause of action is the most commonly used of the four causes of action. If a cause of action can be found in permanent neglect and another cause of action, permanent neglect is often easier to prove. Permanent neglect can be proved if the parent refuses to acknowledge severe or repeated abuse. A parent's failure to acknowledge severe or repeated abuse prevents meaningful rehabilitation and the child from being returned to the parent safely.[41] Similarly, if a mentally ill parent would be capable of caring for a child if compliant with medication but has a history of noncompliance, the agency may file on both mental illness and permanent neglect grounds.

Severe or Repeated Abuse For a TPR based on severe or repeated abuse, the agency must prove that the child has been in foster care for 12 months immediately before the petition is filed.[42] If Family Court enters an order pursuant to FCA § 1039-b that reasonable efforts are not necessary, the agency may file a TPR based on severe abuse immediately, but fact finding may not commence until after the child has been in care for one year. Evidence of facts and circumstances up to the date of the hearing are admissible.[43]

A finding of severe abuse under FCA Article 10 is admissible and relevant in a TPR for severe abuse. Article 10 petitions alleging abuse must contain a notice that a finding of severe or repeated abuse by clear and convincing evidence could constitute a basis to terminate parental rights in a subsequent proceeding under SSL § 384-b. An Article 10 order of fact finding that specifies that the determination was made on clear and convincing evidence is conclusive in a TPR proceeding.[44]

To show severe abuse, the agency may prove that the child was physically or sexually abused, that the parent was convicted of killing or attempting to kill another child in the parent's care, or that the parent was convicted of assaulting the child or another child in the parent's care.[45] For TPR cases arising from physical abuse, the agency must show that the child has suffered serious

physical injury because of the parent's reckless or intentional acts under circumstances evincing a depraved indifference to human life.[46] For cases arising from sexual abuse, the agency must show that the child was abused because the parent committed or allowed to be committed a sexual felony on the child.[47]

For cases arising from killing or attempted murder, the agency must show that the parent was convicted of murder or manslaughter of another child of the parent or attempted murder or manslaughter of the child, another child of the parent, or another child for whose care the parent was responsible,[48] or of soliciting, conspiring or facilitating the same.[49] For cases arising from assault, the agency must show that the parent was convicted of committing or attempting to commit assault in the first or second degree or aggravated assault against the child, sibling or another child for whose care the parent was responsible.[50]

In all cases of severe abuse, the agency must demonstrate that it diligently tried to rehabilitate the abusive parent and strengthen the parental relationship and that these efforts were and will likely be unsuccessful in the foreseeable future. The agency need not prove diligent efforts not in the child's best interests or if the court previously found under FCA § 1039-b that diligent efforts are not required.

For a TPR based on severe or repeated abuse, the agency must prove that the child has been in foster care for 12 months immediately before the petition is filed.

Proving repeated abuse is more difficult than proving severe abuse. The agency must prove three elements to establish repeated abuse: abuse of the subject child, prior abuse of the subject child or another child in the parent's care, and the agency's diligent efforts to rehabilitate the parent.[51] The agency must prove by clear and convincing evidence either the abuse of the subject child or the prior abuse. The other instance may be shown by a preponderance.[52] A prior finding under Article 10 is admissible, and a finding by clear and convincing evidence is sufficient for the subject child's abuse or the prior abuse.[53]

The agency may demonstrate the first element, that the subject child was abused, by demonstrating either physical or sexual abuse. Physical abuse is shown by proof that the parent caused the child physical injury that created substantial risk of death, serious or protracted disfigurement, protracted impairment of physical or emotional health, or protracted loss or impairment of a bodily organ.[54] Sexual abuse is shown by proof that the parent committed or knowingly allowed a felony sex offense on the child.[55]

The second element, a prior incident of abuse, is established by proof that within five years prior to the TPR filing, the parent inflicted or allowed to be inflicted physical abuse or a felony sex offense upon the subject child or another child for whom the parent was responsible. Alternatively, the agency may offer proof that within five years prior to the TPR filing the parent was convicted of a sexual felony against the subject child, a sibling of the child or any other child for whom the parent was responsible.[56]

As in an action for severe abuse, the agency must prove that it made diligent efforts to rehabilitate the parent and strengthen the parental relationship and that these efforts were unsuccessful and are unlikely to be successful in the foreseeable future. The agency need not prove diligent efforts not in the child's best interests or if the court previously found that diligent efforts are not required under FCA § 1039-b.

Mental Illness or Retardation The relevant period of time for a cause of action for parental mental illness or retardation is prospective rather than retrospective, as is the case for the other causes of action. The agency must prove that the parent is "presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child."[57] The child must have been in care for a year immediately before the petition is filed.

Mental illness is "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child."[58] Mental retardation is "sub-average intellectual functioning . . . with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child."[59]

For a mentally ill or retarded parent, the agency must prove that the child would be in danger of neglect if left in the parent's care. Proof is not of parental fault or actual harm to the child but rather potential harm. Evidence of past neglect of children in the parent's care is relevant but unnecessary.[60]

The judge must hear from a court-appointed psychologist or psychiatrist and may receive other psychiatric, psychological or medical evidence from the

agency or parent. If the parent cannot be examined, the expert may testify from information that affords a reasonable basis for expert opinion.[61] The court may also consider the child's special needs to determine whether a parent who suffers from mental illness or retardation can meet those needs.[62]

Fact Finding, Dispositions and Permanency

At the fact-finding hearing of a TPR, the foster care agency must prove its cause of action by clear and convincing evidence.[63] Only competent, relevant and material evidence is admissible, but privileged communications are admissible.[64]

All evidence of circumstances and events that occurred after the child came into care and before the TPR petition was filed is admissible. Only the petitioning agency, the respondent-parents and the child's attorney may participate. The child's attorney, the law guardian, will advocate for the child's subjective wishes unless the child is too young to participate in planning the case. If so, the law guardian will advocate for the child's best interests based on objective criteria.

If the court finds that the agency has failed to establish its cause of action, the TPR will be dismissed. If the court enters a finding, it will proceed immediately to disposition or adjourn for a full dispositional hearing. At disposition, the only issue is whether the child's best interests will be served by being freed for adoption.[65] No presumption exists that the child's best interests are served by being returned to the parents.[66]

If the TPR is for permanent neglect or severe or repeated abuse, there must be a full dispositional hearing. Dispositional hearings are not required for TPRs based on abandonment or mental illness or retardation.[67] If held, they are typically perfunctory and center not on whether the parent's rights should be terminated but on the child's best interests and the plan for effecting adoption, especially if more than one adoptive resource has come forward.

Evidence at the dispositional hearing may include all facts and circumstances up to the dispositional hearing. At disposition, notice fathers, relatives and foster parents may intervene.[68] When the TPR is for permanent neglect, the standard at disposition is preponderance. All material and relevant evidence, including hearsay, is admissible. When the TPR is for severe or repeated abuse, the standard at disposition is clear and convincing. Only material, relevant and competent evidence is admissible.[69]

In the end, the success or failure of achieving permanency for children rests not in statutory amendments but in the daily efforts of the caseworkers, parents, lawyers and judges.

At the close of the dispositional hearing, the court may dismiss the petition, suspend judgment or terminate parental rights. If the court terminates parental rights, the court may commit the child to the custody of the agency, the foster parent or a relative who already has care and custody of the child. The court does not have the discretion to commit the child to a nonparty's custody.[70] The court usually commits the child to the custody of the agency, which may then consent to the child's adoption.

If the court suspends judgment, it is usually for six months or a year. Judgment may be suspended when the parent's circumstances have changed since the TPR was filed and the court finds that reunification with the parent is possible in the near future and in the child's best interests. When that happens, it is most often because the child is with relatives and has maintained a parental bond. A suspended judgment will have conditions the parent must fulfill. If the parent fails to fulfill these conditions, the agency may move to vacate the order and need only prove the parent's failure and, if applicable, the agency's efforts to provide rehabilitation. The court may terminate parental rights on proof to a preponderance that the parent failed to comply with the suspended judgment.[71]

Permanency hearings must be held yearly for every child in foster care, starting a year after foster-care placement.[72] Hearings continue after the child has been freed for adoption for every child not in a pre-adoptive home and for every child in a pre-adoptive home for whom no adoption petition is filed.[73] The issues at post-TPR permanency hearings are the appropriateness of the service plan, the status of the adoption process, and anything else about establishing permanency for the child and promoting the child's best interests.

Conclusion

TPR law is complex and important for parents, children and the public. Although ASFA increased the number of TPR petitions, it did not increase the resources necessary to achieve permanency, including funds for rehabilitative services and decreased caseloads for caseworkers.[74] Nor did ASFA provide for more lawyers and judges to handle the increased number of TPR filings—"[s]kyrocketing caseloads . . . not likely to diminish,"[75] according to New York State Chief Judge Judith S. Kaye

and Chief Administrative Judge Jonathan Lippman, that have led to further backlog in an already overloaded system.[76]

In the end, the success or failure of achieving permanency for children rests not in statutory amendments but in the daily efforts of the caseworkers, parents, lawyers and judges, all of whom must strive to seek the best for children, who desperately deserve and need safe and stable lives.

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1. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).
2. 1999 N.Y. Laws ch. 7 statutory amendments to the N.Y. Family Court Act (hereinafter "FCA") and N.Y. Social Services Law (hereinafter "SSL"). *See generally* Cheryl Bradley, "Termination of Parental Rights in New York" in *New York Family Court Practice* ch. 4 (Merril Sobie ed., 1996); Janet R. Fink, *Implementing the Federal Adoption and Safe Families Act in New York, A Primer on the New Statute* 157, PLI Litig. & Admin. Prac. Course Handbk Ser. (Children's L. Inst. 1999).
3. Douglas H. Reiniger, "The Adoption and Safe Families Act/New York" in *Child Abuse, Neglect and the Foster Care System: Effective Social Work and the Legal System—The Attorney's Role and Responsibilities* 499, 502, PLI Litig. & Admin. Prac. Course Handbk. Ser. (2000) ("[T]he child is now the paramount concern. Agencies [must] engage in 'concurrent planning': from initial placement, social workers must simultaneously work . . . toward discharge . . . and adoptive planning. Efforts to recruit pre-adoptive homes and place foster children in pre-adoptive homes must [begin] as soon as a child is placed in foster care.").
4. SSL § 392; FCA § 1055.
5. FCA § 1055. In *In re Dale P.*, 84 N.Y.2d 72, 78, 614 N.Y.S.2d 967, 969-70 (1994), the Court of Appeals upheld a Family Court order directing the Commissioner of Social Services to file a TPR petition on behalf of a child not in foster care but directly placed in the care of a nonrelative custodian.
6. SSL § 384-b(3)(l)(i); Lauren Shapiro, *Adoption and Safe Families Act: New York State Implementation Law* 174, 180-81, PLI Litig. & Admin. Pract. Course Handbk. Ser. (Children's L. Inst. 1999) (explaining how ASFA altered agency determinations to file TPRs).
7. SSL § 384-b(3)(l)(ii); Alexander D. Lowe & Lisa Parrish, *Implementation of the Adoption and Safe Families Act: Part I—Guidelines for Permanency Reviews* 86, 94-99, PLI Litig. & Admin. Prac. Course Handbk. Ser. (Children's L. Inst. 2000) (detailing mandatory-filing requirement and outlining exceptions).
8. Interview with Edwina Richardson-Thomas, Esq., March 28, 2001. Ms. Richardson-Thomas, a County Law Art. 18-B attorney who specializes in TPR cases in Manhattan Family Court, chairs the Committee on Children and the Law of the Association of the Bar of the City of New York.
9. SSL § 384-b(3)(b); SSL § 384-b(3)(*l*)(iv).
10. SSL § 384-b(3)(d).
11. SSL § 384-b(3)(e).
12. Joseph R. Carrieri, *Practice Commentary to SSL § 384-b*, *McKinney's Cons. Laws of N.Y.*, *Book 52A*, at 334-37 (Supp. 2001) (explaining procedure and providing diligent-search checklist).
13. SSL § 384-c.
14. SSL § 384-c(3).
15. SSL § 384-b(3)(c).
16. Interview with Ms. Richardson-Thomas, *supra* note 8.
17. *In re Sheila G.*, 61 N.Y.2d 368, 373, 474 N.Y.S.2d 421, 422 (1984).
18. *In re Terry D.*, 53 A.D.2d 957, 957-58, 385 N.Y.S.2d 844, 845 (3d Dep't 1976).
19. *See, e.g.*, Fink, *supra* note 2, at 164 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence to terminate parental rights)).
20. FCA § 1046(b); *In re Custody & Guardianship of Marino S., Jr.*, 181 Misc. 2d 264, 277-81, 693 N.Y.S.2d 822, 832-34 (Fam. Ct., N.Y. Co. 1999).
21. *See Marino S.*, 181 Misc. 2d at 277-81, 693 N.Y.S.2d at 832-34; *but see In re Jordy O.*, 182 Misc. 2d 42, 44, 696 N.Y.S.2d 654, 655-56 (Fam. Ct., N.Y. Co. 1999).
22. *See Marino S.*, 181 Misc. 2d at 280-81, 693 N.Y.S.2d at 833-34.
23. *See In re Commitment of Fernando V.*, 275 A.D.2d 280, 282, 712 N.Y.S.2d 537, 539 (1st Dep't 2000), *lv. denied* (N.Y. Feb. 20, 2001).
24. SSL § 384-b(4)(b).
25. SSL § 384-b(5)(a).
26. SSL § 384-b(5)(b).
27. *In re Vanessa F.*, 76 Misc. 2d 617, 621, 351 N.Y.S.2d 337, 343 (Sur. Ct., N.Y. Co. 1974).
28. SSL § 384-b(5)(b); *In re Anonymous*, 40 N.Y.2d 96, 103, 386 N.Y.S.2d 59, 63 (1976); *In re John T.*, 260 A.D.2d 642, 642, 688 N.Y.S.2d 697, 698 (2d Dep't 1999).
29. *In re Julius P.*, 63 N.Y.2d 477, 482-84, 483 N.Y.S.2d 175, 177-78 (1984).
30. *In re Howard R., Jr.*, 258 A.D.2d 893, 894, 685 N.Y.S.2d 369, 370 (4th Dep't), *lv. denied*, 93 N.Y.2d 816, 697 N.Y.S.2d 563 (1999); *In re Chaka F.*, 220 A.D.2d 310, 310, 632 N.Y.S.2d 552, 552 (1st Dep't 1995).
31. *In re Lakeside Family & Childrens Servs. ex rel. Angel Takima C.*, 242 A.D.2d 536, 537, 662 N.Y.S.2d 74, 75 (2d Dep't 1997).
32. *In re Anthony M.*, 195 A.D.2d 315, 316, 600 N.Y.S.2d 37, 39 (1st Dep't 1993).
33. *In re Alex "MM."*, 260 A.D.2d 675, 676, 688 N.Y.S.2d 707, 709 (3d Dep't 1999); *In re Michael W.*, 191 A.D.2d 287, 287, 595 N.Y.S.2d 30, 30-31 (1st Dep't 1993).
34. SSL § 384-b(7).
35. *In re Joseph ZZ.*, 245 A.D.2d 881, 883, 666 N.Y.S.2d 827, 831 (3d Dep't 1997), *lv. denied*, 91 N.Y.2d 810, 670 N.Y.S.2d 404 (1998).
36. *In re Jesus JJ.*, 232 A.D.2d 752, 754, 649 N.Y.S.2d 61, 64 (3d Dep't 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).
37. SSL § 384-b(7)(f).
38. Joseph R. Carrieri, *The Rights of Incarcerated Parents*, N.Y.L.J., Jan. 12, 1990, at 1, col. 1.
39. *In re Custody & Guardianship of Sasha R.*, 246 A.D.2d 1, 5-6, 675 N.Y.S.2d 605, 607-08 (1st Dep't 1998).
40. SSL § 384-b(7)(e); *In re Vincent Anthony C.*, 235 A.D.2d 283, 283, 652 N.Y.S.2d 289, 290 (1st Dep't 1997) (holding diligent efforts excused for entire 12-month period).

41. *Jesus JJ.*, 232 A.D.2d at 754, 649 N.Y.S.2d at 63 (granting TPR for failure to plan based on father's refusal to acknowledge sexual abuse).
42. SSL § 384-b(4).
43. Shapiro, *supra* note 6, at 181.
44. SSL § 384-b(8)(d); Fink, *supra* note 2, at 169-70.
45. SSL § 834-b(8)(a). Note that one parent's murder of the other parent is not a ground to terminate parental rights in New York. For an argument that it should be, see Lillian Wan, *Parents Killing Parents: Creating a Presumption of Unfitness*, 63 Albany L. Rev. 333 (1999).
46. SSL § 384-b(8)(a)(i).
47. SSL § 384-b(8)(a)(ii).
48. SSL § 384-b(8)(a)(iii)(A).
49. SSL § 384-b(8)(a)(iii)(B).
50. SSL § 384-b(8)(a)(iii)(C).
51. SSL § 384-b(8)(b).
52. SSL § 384-b(8)(c).
53. SSL § 384-b(8)(e).
54. SSL § 384-b(8)(b)(i)(A).
55. SSL § 384-b(8)(b)(i)(B).
56. SSL § 384-b(8)(b)(ii).
57. SSL § 384-b(4)(c).
58. SSL § 384-b(6)(a).
59. SSL § 384-b(6)(b).
60. *Compare In re Harlem Dowling-Westside Ctr. for Childrens & Family Servs. ex rel. Ebony Shaquiera C. v. Marion L.C.*, 264 A.D.2d 845, 845, 695 N.Y.S.2d 590, 591 (2d Dep't 1999), *appeal dismissed*, 94 N.Y.2d 890, 706, N.Y.S.2d 77 (2000), *with In re Michelle H.*, 228 A.D.2d 440, 440-41, 643 N.Y.S.2d 646, 646-47 (2d Dep't 1996).
61. SSL § 384-b (6)(e); *In re Donald LL.*, 188 A.D.2d 899, 901, 591 N.Y.S.2d 876, 877 (3d Dep't 1992).
62. *In re Dale T.*, 236 A.D.2d 744, 744-45, 654 N.Y.S.2d 45, 45-46 (3d Dep't 1997) (terminating rights of retarded mother unable to care for abused son).
63. SSL § 384-b(3)(g); *Santosky v. Kramer*, 455 U.S. 745 (1982).
64. SSL § 384-b(3)(h).
65. *In re Guardianship of Star Leslie W.*, 63 N.Y.2d 136, 147, 481 N.Y.S.2d 26, 32 (1984).
66. *Id.* at 147-48, 481 N.Y.S.2d at 32.
67. *In re Alex "MM."*, 260 A.D.2d 675, 676, 688 N.Y.S.2d 707, 709 (3d Dep't 1999) (abandonment); *In re Tyesha W.*, 259 A.D.2d 349, 349, 687 N.Y.S.2d 16, 17 (1st Dep't 1999) (mental illness); *In re Joyce T.*, 65 N.Y.2d 39, 46, 489 N.Y.S.2d 705, 710 (1985) (mental retardation).
68. SSL § 384-b(11).
69. SSL § 384-b(8)(f); *Marino S.*, 181 Misc. 2d at 201 n.7, 693 N.Y.S.2d at 834 n.7.
70. *In re Jennifer A.*, 225 A.D.2d 204, 206, 650 N.Y.S.2d 691, 692 (1st Dep't 1996) (finding that parent permanently neglected child and overruling Family Court's decision to discharge child with nonparty maternal aunt), *lv. denied*, 91 N.Y.2d 809, 670 N.Y.S.2d 403 (1998).
71. *In re Ericka LL.*, 256 A.D.2d 1037, 1037-38, 683 N.Y.S.2d 323, 325 (3d Dep't 1998).
72. FCA § 1055.
73. FCA § 1055-a; SSL § 392.
74. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 Fam. & Concil. Cts. Rev. 25, 31 (2001) (reviewing ASFA's history, purpose and impact); Sean D. Ronan, *No Discretion, Heightened Tension: The Tale of the Adoption and Safe Families Act in New York State*, 48 Buffalo L. Rev. 949, 966-67 (2000).
75. Judith S. Kaye and Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 Fam. & Concil. Cts. Rev. 144, 144 (1998).
76. Ronan, *supra* note 74, at 966.

Chronicle of a Career

BY MIRIAM M. NETTER

Dear Ms. Fontana:

I'm so happy with the way the case for my wife is going. . . . Mary was the best and I loved her and miss her so much. If the doctor did what he should of, she would be alive today. I want you to know you are the greatest. I'm glad and proud you are my lawyer. Just like the man in the deli told me a year and a half ago, call her. He said you were the best and I know that now. I will highly recommend you to others in need of a good lawyer. Thank you so very, very much for all you've done. Please call if you need me for anything. Take care. Be well.

Dear Lucille:

Words cannot express our sincerest appreciation and gratitude for the enormous amount of time and energy you and your staff have devoted over the years (to our case). Although the outcome of your tremendous efforts and hard work was not a rewarding or expected one, we felt the need to thank you for all you've done.

Lucille Fontana keeps close at hand these notes and scores of others just like them, most handwritten, that she's received over the years from thankful clients. She views them not as way to raise her stock in the firm or to be used as a quick pick-me-up when her ego gets bruised, but as a constant reminder of why she became a lawyer.

Lucille Fontana entered law school in the late 1970s, already a good 10 years older than many of her classmates and with a toddler and a baby to care for. Her "later-in-life" career decision meant even more juggling of schedules and priorities. But, she graduated first in her class from Pace University School of Law in 1981 and has gone on to a distinguished career with the White Plains law firm of Clark, Gagliardi & Miller.

Last January, she was honored by her peers with the New York State Bar Association's 2001 Award for Attorney Professionalism.

As the Women's Bar Association of the State of New York wrote in advancing her nomination,

> Lucille Fontana is well-known for her outstanding skills as a litigator and a zealous advocate on behalf of her clients. And if that were it, she'd only be fulfilling the obligations we are all called to meet as officers of the court. But, Lucille is truly deserving of this award not just for her legal talent, but for her extraordinary compassion, her more than generous mentoring of fellow attorneys, young and old, and her exemplary ethical conduct.

If the chronicle ended there, you'd have a feature about a woman who made it to the top of her profession and still managed to stay a nice person. But Fontana's story doesn't end here.

Lucille Fontana

Last November in accepting Pace University School of Law's Distinguished Graduate Award she delivered a speech that captured the attention of everyone, including cynical, veteran colleagues. It sums up Fontana's character, and ethical balance:

> The practice of law is both noble and honorable. . . . We are required to put our client's interest before our own and to avoid anything that would conflict with those interests. But, while we are nobly charged with zealous representation, we must always remember that our clients are not above all else. Paramount to them is the law. As lawyers we are in the thick of the human condition and the pressure to win is relentless. I think that there is actually a real peace that descends upon us when we accept that there are certain parameters: that ethically there is only so much that we can do.

The Committee on Attorney Professionalism administers the Attorney Professionalism Award. The award honors a member of the New York State Bar Association who has clearly demonstrated a commitment to professionalism through service to clients, promoting public respect for the legal system in the pursuit of justice, exemplary ethical conduct, competence and sound judgment, integrity and civility.

For more information, contact Terry Brooks at 518-463-3200 or tbrooks@nysba.org.

The award presented to Fontana read in part:

> Your gracious willingness to help advance the stature and quality of the profession of law . . . superb representation of your clients, coupled with compassion and caring is appreciated by all. You are held in high esteem for your outstanding professionalism and admired for your zealous advocacy, integrity, civility and sensitivity—treating everyone with respect and courtesy.

It's easy for the public to cling to negative media representations of lawyers who bend rules to win, reinforced by comedians going for easy laughs. Perhaps it's more convenient for "them" to view Lucille Fontana as just an anomaly in a profession otherwise dominated by unethical sharks. Or the truth might just be that in an age where stereotypes are supposed to have disappeared from our personal and societal landscape, maybe, when it comes to lawyers it's acceptable to paint the entire profession with one negative broad brush.

Fontana is quick to respond, however, that she is a kind of "everywoman" of the profession.

> What I've tried to do in my practice is to represent the noblest traditions of the bar and in that respect, I'm far from being alone. Look around and you'll find that the vast majority of our colleagues, who'll never make the headlines or have their 15 minutes of fame on CNN, are truly professionals who abide by the rule of law and treat their clients with dignity and respect.

A member of the Westchester County and Women's Bar Associations, Fontana chairs the NYSBA's Committee on Tort Reparations and is a member of the state bar's Finance Committee. She frequently lectures on tort reparations issues.

NYSBA welcomes 22 new Sustaining Members to ranks

We wish to extend our sincere gratitude to the following 22 individuals who have recently become new Sustaining Members of the New York State Bar Association. Sustaining Members are a distinguished group of 442 members who provide the Association with extra financial support to help NYSBA maintain its leadership position as the voice of New York attorneys.

The new sustaining members include:

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Isabel Miranda of Princeton, N.J.
David M. Schraver of Rochester
Stephen J. Silverberg of Garden City
Pamela M. Sloan of New York
and Jeffrey M. Tolin of Los Angeles, Calif.

Sustaining Membership is $400 per year for in-state members and $200 for out-of state members. For more information on how to become a Sustaining Member, please call the Membership Department at 518-487-5571.

Sustaining Member Honor Roll

Sustaining Members are a distinguished group of 442 leaders who provide the Association with extra financial support to help the NYSBA maintain its leadership position on behalf of the legal profession. We deeply appreciate all the contributions made by these dedicated individuals.

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Robert Abrams of Lake Success
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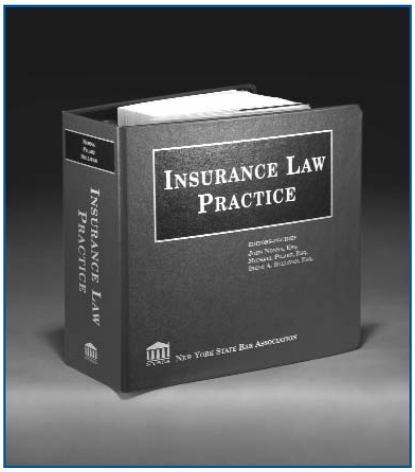

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Correction

The following is a correction to **Example 7** in the ***Examples of Rollover Rules*** item that appeared on page 30 of the March/April edition of the *Journal*:

The reference to "Steven's death" in paragraph 7 should have read "Douglas's death." In addition, the final paragraph should have read as follows:

The next year, the Applicable Divisor would be 57, calculated using the Single Life Expectancy Table for Ray's age (25) in the year after Cynthia's death. The Required Minimum Distribution to Ray that year would thus be $512,919 ÷ 57 = $8,999. The following year, the Applicable Divisor would be 56. In each subsequent year, the Applicable Divisor would be one less than it was the previous year until all the funds were exhausted.

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