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NEW YORK STATE BAR ASSOCIATION

Journal

Remembering Mr. Flavin

The Origins (and Unintended Consequences) of Online Legal Research

by Gary D. Spivey

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Construction Site Personal Injury Litigation — New York Labor Law §§ 200, 240(1), 241(6) (2006)

Perhaps no single scheme of statutory causes of action has initiated more debate. This text provides a road map through this at-times confusing area of law. Includes a summary of key case developments.
PN: 4047 / **Member $80** / List $110 / 440 pages

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Estate Planning and Will Drafting in New York, 2006 Revision

Provides a practical overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Includes numerous sample wills and checklists.
PN: 4095 / **Member $125** / List $160 / 822 pages

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Journal

CONTENTS

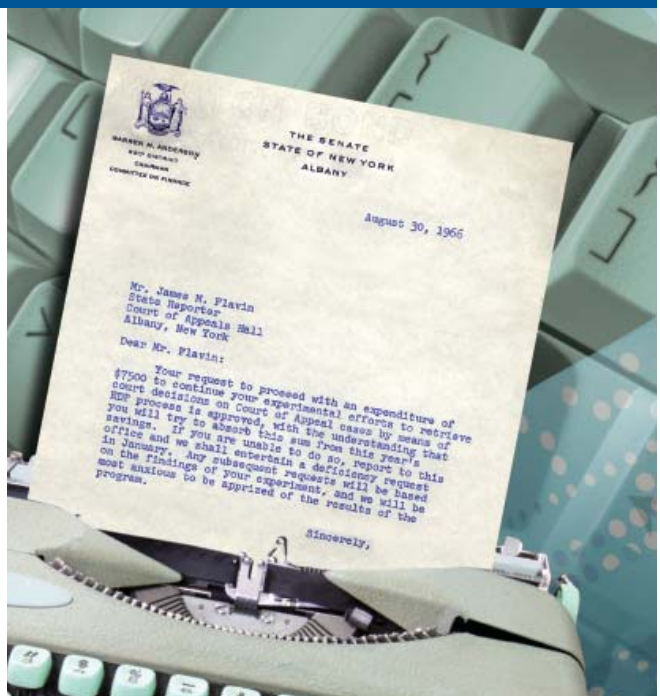
FEBRUARY 2008

REMEMBERING JAMES M. FLAVIN

The Origins
(and Unintended Consequences)
of Online Legal Research

BY GARY D. SPIVEY

10



Cover photo of James Flavin, courtesy of the Flavin family. Letter on file at New York State Law Reporting Bureau.

DEPARTMENTS

5 President's Message
8 CLE Seminar Schedule
20 Burden of Proof
BY DAVID PAUL HOROWITZ
47 Computers & the Law
BY DAVID P. MIRANDA
49 Presentation Skills for Lawyers
BY ELLIOTT WILCOX
50 Empire State Counsel
52 Attorney Professionalism Forum
54 Language Tips
BY GERTRUDE BLOCK
58 New Members Welcomed
61 Classified Notices
61 Index to Advertisers
63 2007–2008 Officers
64 The Legal Writer
BY GERALD LEBOVITS

CARTOONS © CARTOONRESOURCE.COM

26 Eugene C. Gerhart (1912–2007), Jackson Biographer
BY JOHN Q. BARRETT

30 Saving Clients From Themselves
Immigration Compliance Is Less About Immigration Law Than Good Legal Advice
BY JOHN R. BUNKER

35 2007 Criminal Law Legislation
BY BARRY KAMINS

42 New York State Consumer Protection Law and Class Actions in 2007 – Part I
BY THOMAS A. DICKERSON

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PRESIDENT'S MESSAGE

KATHRYN GRANT MADIGAN

74,000 Strong and Growing!

At the end of 2007, our Association reached a long-awaited milestone. Having watched with a growing sense of unease our relatively stable membership hovering at, or just above, 72,000 over the last three years, I am delighted to report that we are now 74,000 members strong! Kudos to our Bar Center staff, Committee and Section leaders and especially the Association Membership Committee for setting the stage for the formal "kick off" of our 2010 Membership Challenge on January 1, 2008.

This vital, multi-year strategic initiative has required substantial collaboration with our staff and volunteer bar leaders at all levels to ensure that our Association will have a stable and growing membership base, securing our legacy over the long term as the voice of the profession in New York. As noted in my message in the September issue of the *Journal*, the growth of a diverse membership and leadership is fundamental. I am now even more confident that we will meet or exceed this Membership Challenge and by December 31, 2010 we will have:

1. Increased Section membership by 10%;
2. Increased law student membership by 10% *each year*; and
3. Increased overall Association membership by 5%.[1]

The "silent phase" of the Challenge began in the fall of 2006 and the early part of 2007 with a series of group meetings with our 23 Section Chairs or their designees. Past NYSBA President, and Vice Chair of our Committee on Diversity and Leadership Development, Tom Levin and I reviewed each Section's membership profile as well as their 2005 Diversity Report Card, urging Sections to think strategically about growing membership and diversity[2] in their Section generally and within their leadership.

These themes were reinforced during our May 2007 Section Leaders Conference and throughout this year, at the 14 Section Meetings that President-Elect Bernice Leber and I were privileged to attend, as well as on the new Section leadership listserve, through our innovative online Section Resource Center and first-ever Section Audio Conferences on membership. In December, more than 20 Section leaders attended a Section Membership Training at the offices of Patterson & Belknap in New York City to share best practices.

Naturally, our Membership Committee has undertaken a leading role in the Challenge, and we are indebted to the creative leadership of the Chair, Claire Gutekunst, and her dedicated Committee – in particular Steve Younger, who is chairing the Subcommittee on the 2010 Membership Challenge. The support of Executive Director Pat Bucklin and her staff, especially Membership Director Pat Wood and Marketing Director Rich Martin, as well as Lisa Bataille and Megan O'Toole, has been essential.

The 10% per year Law Student Challenge is ambitious but eminently doable. We have developed a comprehensive Law Student Membership Strategy, which has already begun to bear fruit. Our goal is to establish a presence on every law campus in New York State, each with a NYSBA student representative who can more effectively promote the programs and services we offer that uniquely serve the law student, from our online law student newsletter to brown bag "real world" lunches with seasoned practitioners to strengthening our ties with law school deans.

None of this would be possible without the active support of President-Elect Bernice Leber and President-Elect designee Mike Getnick. My term as your President will end on June 1. And while I will continue my commitment to membership that began back in 1979 when I was first appointed to the Membership Committee, this multi-year strategic plan will require the continuing stewardship of Bernice and Mike, our leadership and staff. And every one of our members. Each of you, our 74,000 members, joined and has remained a member of our Association because you "get it." You understand the value and relevance, the opportunities for greater meaning, service and leadership that membership in the New York State Bar Association provides. We need you to help us meet our membership goals. I urge each member to reach out to one non-member attorney, expressing the tremendous value of NYSBA membership and encouraging that attorney to join. I look forward to celebrating with you yet another membership milestone in 2010. Our future as the voice of the New York lawyer depends on it. Let the Challenge begin! ■

KATHRYN GRANT MADIGAN can be reached on her blog at http://nysbar.com/blogs/president.

1. I initially set this goal at 10%, but was urged to rein in my unbridled enthusiasm by lowering it to a more achievable goal of 5%. I remain optimistic that we will get within "shouting distance" of a 10% increase in NYSBA membership by 2010.

2. My next President's Message will report on our progress on our diversity initiatives.

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NYSBACLE

Partial Schedule of Spring Programs *(Subject to Change)*

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The New Era of Worksite Enforcement: Representing the Endangered Employer
Fulfills NY MCLE requirement for all attorneys (8.5): 1.0 ethics and professionalism; 2.5 skills; 5.0 practice management and/or professional practice
February 26 New York City

Update on the NYS Long Term Care Restructuring Initiative (telephone seminar)
+Fulfills NY MCLE requirement (2.0): 2.0 professional practice
February 27 All cities

Twelfth Annual New York State and City Tax Institute
+Fulfills NY MCLE requirement (8.0): 1.0 ethics and professionalism; 7.0 skills, practice management and/or professional practice
IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.
March 5 New York City

The Basics of Public Sector Law
Fulfills NY MCLE requirement for all attorneys (5.5): 1.0 ethics and professionalism; 1.5 skills; 3.0 practice management and/or professional practice
March 6 Rochester
March 12 Albany
March 18 New York City

Bridge the Gap 2008: Crossing Over Into Reality
Fulfills NY MCLE requirement for all attorneys (16.0): 3.0 ethics and professionalism; 6.0 skills; 7.0 practice management and/or professional practice
IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.
(two-day program)
March 12–13 New York City

Introductory Strategies on Ethics and Civility in Everyday Lawyering
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism
April 4 Albany; Buffalo; New York City
April 18 Melville, LI
April 25 Rochester

Practical Skills Series: Family Court Practice: Support, Family Offense Proceedings and Ethics
Fulfills NY MCLE requirement for all attorneys (7.5): 2.0 ethics and professionalism; 3.0 skills; 2.5 practice management and/or professional practice
April 8 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Women on the Move 2008 – Clarity, Focus and Action
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 skills; 1.5 law practice management; 1.0 professional practice
April 9 Syracuse

A Day in Discovery: Win Your Case Before Trial with Jim McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): .5 ethics and professionalism; 6.5 skills
IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.
April 17 Tarrytown
April 18 New York City

Election Law
(half-day program)
April 17 Syracuse
April 23 Buffalo
April 25 Tarrytown
May 7 New York City
May 14 Albany
May 16 Melville, LI

Advanced Equitable Distribution: Valuing and Dividing Professional Practices and Closely-Held Businesses
+Fulfills NY MCLE requirement (4.0): 4.0 practice management and/or professional practice
(half-day program)
April 25 Tarrytown
May 9 Rochester
May 16 Melville, LI
June 13 Albany
June 20 New York City

Insurance Coverage
April 29 Albany; New York City
May 1 Buffalo
May 2 Syracuse
TBD Long Island

Meet the Third Department Justices
(program, 3:00 pm–5:00 pm; reception, 5:00 pm– 6:00 pm)
April 30 Albany

DWI on Trial VIII
Fulfills NY MCLE requirement for all attorneys (10.5): 7.5 skills; 3.0 professional practice
IMPORTANT NOTE: NYSBA CLE seminar coupons and complimentary passes cannot be used for this program.
May 1–2 New York City

All programs are 9:00 a.m.–5:00 p.m. unless otherwise indicated. Registration begins 1/2 hour before each program.
+ Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Long Term Care
May 2 New York City
May 9 Albany
May 16 Rochester

Out the Door, But Not Over the Hill – Options for the Mature Lawyer
(half-day program)
May 6 Albany
May 14 New York City
May 21 Hauppauge, LI

Practical Skills Series: Basics of Intellectual Property Law
Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice
May 8 Buffalo; Hauppauge, LI; New York City; Syracuse

Immigration Law Update 2008
May 13–14 New York City

Getting Ready in New York: Public Health Emergency Legal Preparedness
May 15 New York City

Practical Skills Series: Basic Tort and Insurance Law Practice
Fulfills NY MCLE requirement for all attorneys (6.5): .5 ethics and professionalism; 2.5 skills; 3.5 practice management and/or professional practice
May 20 Albany; Buffalo; Melville, LI; New York City; Syracuse; Westchester

+Fourth Annual International Estate Planning Institute
(one and a half-day program)
May 27–28 New York City

+Escrow Accounts (telephone seminar)
(program: 12:00 noon–1:30 pm)
June 4 All Cities

+Law Firm Billing (telephone seminar)
(program: 12:00 noon–1:30 pm)
June 11 All Cities

+Financing a Law Firm (telephone seminar)
(program: 12:00 noon–1:30 pm)
June 18 All Cities

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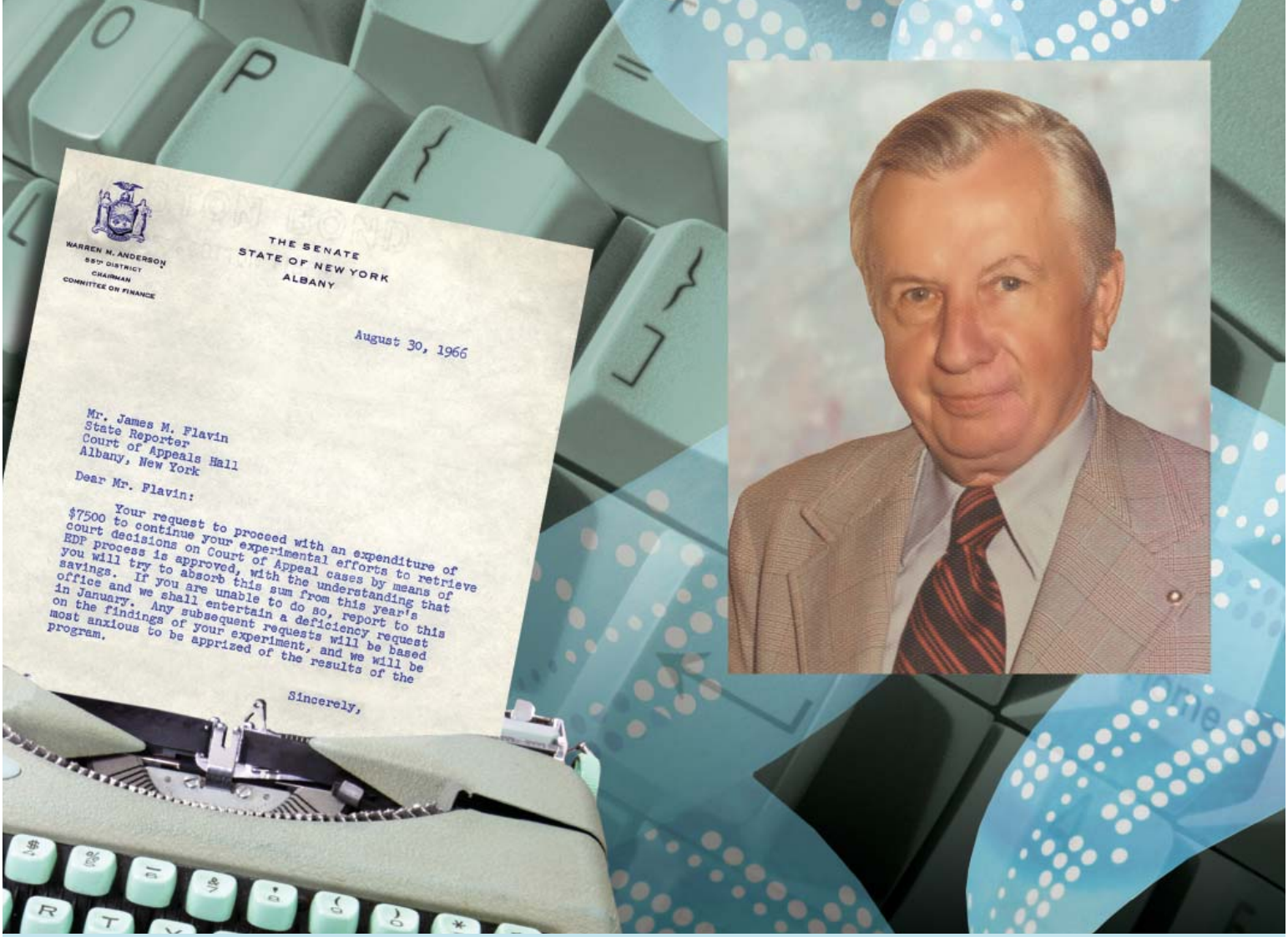


James M. Flavin (1908–1984) was a graduate of Syracuse University and its College of Law. He served as State Reporter from 1953 to 1976 and simultaneously was Clerk of the Court of Appeals from 1972 to 1974. Flavin chaired the New York State Bar Association Committee on Electronic Legal Research from 1969 to 1973 and later was chair of the American Bar Association Committee on Technology and the Courts. (Photo courtesy of the Flavin family.)

Letter from Warren M. Anderson, chairman of the New York State Senate Committee on Finance, approving $7,500 expenditure for work on electronic case retrieval system. (Letter on file at New York State Law Reporting Bureau.)

Gary D. Spivey (gspivey@courts.state.ny.us) is a graduate of Indiana University (Bloomington) and its School of Law. He has served as State Reporter and head of the New York State Law Reporting Bureau since 1999. He is a member of the Board of Editors of the *Journal*.

Remembering James M. Flavin

The Origins (and Unintended Consequences) of Online Legal Research

By Gary D. Spivey

The year 2008 marks the centennial of the birth of James M. Flavin, the father of online legal research in New York. It provides an opportunity to recall his pioneering efforts and their modern day impact, some aspects of which he did not intend and may not have welcomed.

Flavin was New York's 21st State Reporter, the head of the state agency – the New York State Law Reporting Bureau (LRB) – responsible for the official publication of the decisions of the New York courts. For a period, he also served as Clerk of the Court of Appeals.

Throughout much of his 23-year tenure as State Reporter, Flavin exhibited a strong interest in technology as a tool for the distribution of the Official Reports, an interest he further championed as chair of the New York State Bar Association Committee on Electronic Legal Research.

He also was an advocate for selective publication of decisions, arguing that much of what was published was of little value and burdened the profession with unnecessary costs. Ironically, it was Flavin's success in promoting the power of the computer to deliver legal information that opened the floodgates to the publication of an even greater number of decisions.

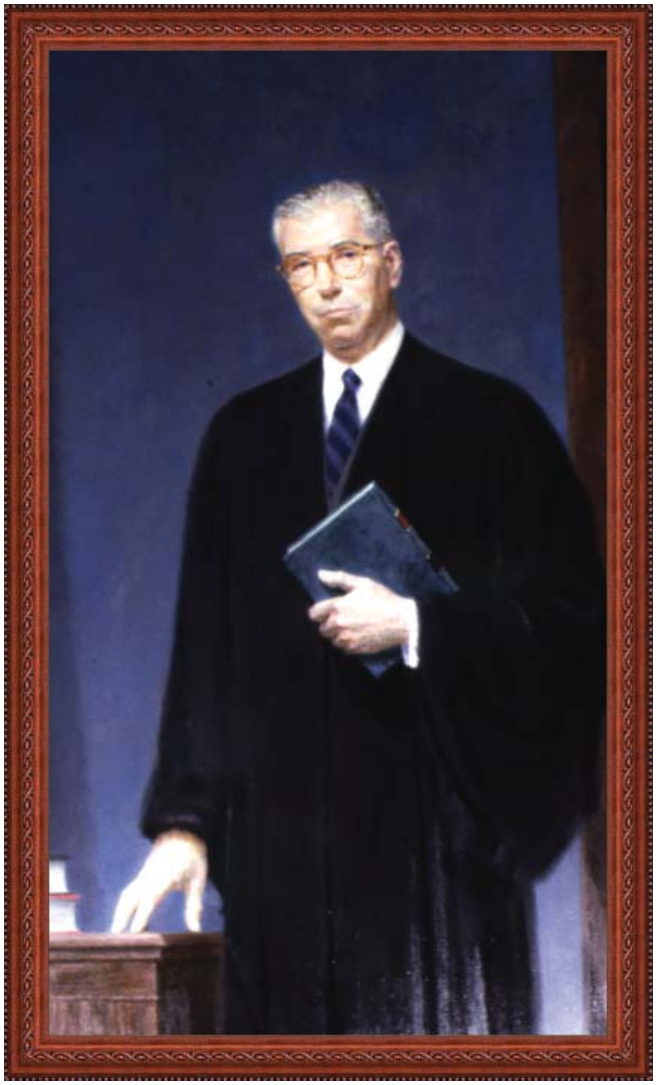
Advocacy of Selective Publication

Flavin's advocacy of selective publication of decisions[1] must be understood in the context of his time.

Decisions were available only in printed books, and Flavin was concerned about the cost to the bar of purchasing and shelving those books. At the time, the primary means of finding relevant decisions in those books was through the digest or subject matter index method of research. If a decision was not classified under the appropriate topic, it could not be found. Flavin argued that many decisions were so insubstantial that they could not be classified to a subject matter index. More fundamentally, he believed that many decisions were simply unworthy of publication because they were not useful to the bar.

Appellate Division Decisions

Flavin took particular aim at the memorandum decisions of the Appellate Division. In those days, more than half of the memorandum decisions were motion decisions on such matters as motions for leave to appeal, motions for a stay or motions for reargument. Another quarter were decisions dismissing appeals or unanimously affirming the decisions below without opinion. Only the remainder



Hon. Stanley H. Fuld recognized the potential benefits of computer-assisted legal research and provided strong support for Flavin's initiatives. (Portrait courtesy of Court of Appeals Collection.)

contained a writing affirming, reversing or modifying the decision below.

Arguing that "one of the best tests of the advisability of publishing a decision is whether it can be indexed in the subject matter index,"[2] Flavin observed that only 20% of the memorandum decisions

> contained material of sufficient weight to justify being included in the subject matter index. The remaining 80% included a great number of decisions affirming judgments without opinion and, in addition, a great number of opinions on motions of an incidental or subsidiary nature.[3]

To Flavin, this analysis made clear that "approximately 80% of the reported Appellate Division memoranda decisions now required to be included in the Official Reports are of such scant utility that their continued inclusion in the material released for publication cannot be justified."[4]

This was not a problem that the State Reporter could solve, Flavin noted, since then, as now, the LRB was required to "report . . . every cause determined in the appellate divisions of the supreme court, unless otherwise directed by the court deciding the cause."[5] Rather, he argued, "The remedy lies in the several departments of the Appellate Division making available for publication anywhere only those decisions which contain law which can be indexed under a subject matter index or which affect a published opinion of the court appealed from."[6]

Whether or not as a direct result of his advocacy, Flavin's views largely prevailed. The Appellate Division departments for the most part gradually began to segregate their decisions on appeal from their motion decisions and to provide only the former for publication. Later, the practice of rendering unanimous affirmances without opinion fell into disfavor – including a short-lived statutory prohibition[7] – and was less frequently followed. Consequently, from that time forward, most of the decisions provided for publication contained a writing that could be classified to a subject matter index.

Lower Court Decisions

Flavin also favored limiting the number of published trial court opinions. He won the Judicial Conference's support for the formation of a "Committee on Opinions" on which Court of Appeals Judge Stanley H. Fuld, Justices of each department of the Appellate Division, and Flavin sat. The committee was established "to examine the problem raised by the growing number of opinions and decisions which are published in the State of New York."[8]

The committee concluded that "it is essential, in the interest of sound reporting – particularly in the light of diminishing library space – that publication be limited to those cases which have usefulness as a precedent or which are important as a matter of public interest (*cf*. Judiciary Law, § 431)."[9] The cited statute then, as now, permitted the LRB to publish any lower court opinion "which the state reporter, with the approval of the court of appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest."

The Administrative Board of the Judicial Conference and the Appellate Division departments approved a set of rules proposed by the committee.[10] These rules affirmed the State Reporter's authority to withhold from publication any opinion that the Reporter determined not to be acceptable, subject only to an appeal of the Reporter's determination to the committee. In its comments to the rules, the committee stated:

> [O]pinions dealing with matters which are essentially of interest only to the attorneys and parties involved should not be presented for publication; and opinions covering legal matters which are of relatively incidental interest or which involve primarily factual or

> discretionary matters . . . should not be submitted for publication.[11]

The new rules apparently had the desired effect. Flavin wrote:

> After the adoption of new rules for the selection of opinions for publication, the Judges themselves began sending in to us fewer and fewer opinions which they regarded as suitable for publication. The result is that we do not find that we have to mark many opinions as "not acceptable."[12]

Proponents of selective publication were quick to note that withholding an opinion from publication did not render it inaccessible, since a copy of an unreported opinion could be obtained at a slight cost from the clerk of the court. They discounted the difficulties of obtaining copies in this manner from uncooperative clerks who could deny access and were unconcerned that such a denial conflicted with the principle that court decisions were public property that should be available on request. Their attitude was:

> I don't quite understand this public property argument, or the fuss about getting an opinion from the clerk. The reason the opinions are unreported is that there is no need for lawyers to have them.[13]

The proponents also had little sympathy for the argument that requiring attorneys to obtain copies from the clerk gave an advantage to larger firms with the resources to undertake such a collection effort, regarding that advantage – if any – as only one of many inevitable advantages of size and wealth.[14]

Whether Flavin shared all of these views is unknown, but there can be little doubt that he rejected the counter-argument that

> [i]t is more inconvenient to find that one leading case is not reported than to have twenty unimportant cases in the books. With a proper system of indexing it is possible for a reader to skip those cases which he does not need, but there is no way in which he can conveniently consult an important case which has been omitted.[15]

Even if Flavin had been willing to agree that it was preferable to publish some unimportant cases rather than risk omitting one important case, he would not have conceded the existence of "a proper system of indexing." While individual volumes of the Official Reports contained a Digest-Index for that volume, there was no official cumulative Digest-Index spanning all volumes, and the cost of producing such a multi-volume work was prohibitive.

In fact, it was that problem that led Flavin to consider a totally new way of finding the law.

Origins of Online Research

Frustrated by the difficulty of creating an official printed digest of New York cases, Flavin began in the early 1960s to consider the possibility of retrieving cases from a computer database.

His research led him to Stephen E. Furth, an International Business Machines (IBM) manager who inspired Flavin with the vision that "the time might come when a court's opinion would be delivered from the judge's typewriter to the computer"[16] and facilitated a visit by Flavin to the American Bar Foundation, which was conducting a joint study with IBM on legal information retrieval.[17]

Frustrated by the difficulty of creating an official printed digest of New York cases, Flavin began in the early 1960s to consider the possibility of retrieving cases from a computer database.

Flavin also came to know John F. Horty, director of the University of Pittsburgh Health Law Center, who had demonstrated at the 1960 annual meeting of the American Bar Association "the first example of a text-searching system that provided word-proximity searching."[18] Horty visited Albany for discussions about law retrieval with Flavin and Judge Fuld, who was the Court of Appeals liaison to the Law Reporting Bureau. Judge Fuld was said to be "very interested" in the subject[19] and both as liaison judge and later as chief judge, provided strong support for Flavin's efforts.

At about the same time, Flavin became aware of what has been described as "the first computer-based bibliographic search service provided on a regular basis by a commercial organization."[20] Law Research Service, Inc. had introduced a service that allowed attorneys to submit research questions to its staff, which would then formulate search queries and run them against a UNIVAC III database consisting of the headnotes from the New York Official Reports. The full text of relevant decisions identified through this process would be printed from microfilm of the Official Reports and sent to the attorney.

A significant problem with this service was that it violated the state's copyright in the headnotes and other editorial matter prepared by the LRB. Furthermore, the then-current version of Judiciary Law § 438, vesting copyright of such matter in the Secretary of State and authorizing the Secretary to license to others the right to publish

the copyrighted material "in an annotated edition" of the law reports, was, as the Attorney General concluded, "not broad enough to be applied to the instant situation."[21]

The Attorney General wrote that he was "not unaware of the potential value of the service in question as a time-saving aid in the search for legal precedent."[22] Similarly, Flavin advised Judge Fuld that neither he, the Attorney General nor the Secretary of State wanted to "hinder" Law Research Service, Inc. in its "attempt to use the Univac machine in law research," but "felt that there was no alternative under the statute" but to "warn" the company that "the Secretary of State had an obligation to protect the State's copyright."[23]

The solution was a statutory amendment drafted by Flavin and approved by the Court of Appeals and Secretary of State. It removed the language restricting the use of the licensed copyrighted material to publication in an "annotated edition" of the law reports. The amended statute simply provided that the right to use the copyrighted matter could be granted "under such terms as [the secretary] and the chief judge of the state of New York may determine to be for the best interests of the state."[24] In addition to resolving an immediate problem, this change would be of even greater significance in the future development of online legal research in New York.

IBM Pilot

A 1964 contract between the state Legislature and IBM to develop an electronic legal retrieval system for researching statutes[25] paved the way for Flavin to initiate his experimentation with case law research.

He requested that the Court of Appeals approve an experiment under which editorially selected keywords from three volumes of Court of Appeals decisions would be fed into the IBM computer system utilized by the Legislature to determine the retrieval capabilities of that system as applied to case law.[26] A contract between Flavin and IBM "to test a pilot case retrieval system for New York State Court of Appeals cases" was approved by the Court.[27]

Flavin approached the experiment with an open mind and some skepticism. He wrote that

> our main interest is to keep abreast of the times, to get acquainted with the systems that are being developed, and the people who are developing them, and to be ready to use a system which is found to be practicable. . . . [W]e feel it will be a long, long time before a completely automatic system is developed, if it is ever developed.[28]

This initial experiment, which Flavin determined was "not broad enough to give us a conclusive answer as to the practicability of this system"[29] was abandoned in favor of a different approach – searching the full text of the decisions rather than merely the keywords. "I had always believed that the proper method would be the full text method with the addition of selected [editorial] material,"[30] Flavin wrote. While that approach initially had been deemed impracticable because of the cost of converting the text of the decisions to machine-readable form, "[w]e have just learned that with the 'scanning' method the cost can be materially reduced – at least by half."[31]

Data Scan Project

The scanning initiative gained momentum with the New York State Senate's approval of a $7,500 expenditure to pursue the concept.[32] Flavin then entered into a contract for the scanning of 17 volumes of the New York Reports by use of a Philco scanner.[33]

The state of the technology did not permit scanning directly from the text of the printed books. Instead, the text had to be re-typed and the typewritten sheets fed into the scanner. After only six volumes had been scanned, Flavin concluded that "the scanning process left something to be desired" and turned his attention to a new methodology for converting text to machine-readable form.[34]

IBM Datatext/Aspen/Data Corp. Projects

Under the new approach, an IBM 2741 workstation (a modified IBM Selectric typewriter connected to a telephone line) was provided to the Law Reporting Bureau for transmitting the text of New York Reports volumes to the remote IBM Datatext System.[35]

Again, the text had to be re-typed from the books, but no typewritten sheets were produced under this process. Instead, the keystrokes were transmitted to the IBM system in New York City, where a magnetic tape was produced for loading onto the State's computer system.

Describing the project to the Executive Committee of the New York State Bar Association (NYSBA), Chief Judge Fuld said:

> [D]espite all the thinking and effort that have already gone into the subject of case law research, no really satisfactory system of legal information retrieval has yet been devised. And we in the Court of Appeals – through the State Reporter, Mr. James Flavin – are engaged in an experiment in the hope that we may effect a more efficient and meaningful procedure of retrieving relevant decisions.[36]

There was, he observed,

> no doubt that the computer can be of invaluable aid in the area of research and in the compilation, storing and retrieval of vast quantities of pertinent reference material. Most importantly, it offers the potential of rescuing us, our libraries and our law clerks from today's avalanche of print.[37]

Flavin's goal was to convert at least 12 more volumes, in addition to the six scanned volumes, but after less

CONTINUED ON PAGE 16

Q: At 10 P.M., who do you want hanging out with you at the office?

A: Collier, Larson, Moore, Nichols and Weinstein. Oh, and a strong cup of coffee.

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Continued from Page 14

than two years he cancelled the IBM contract in favor of a system that John Horty suggested was a "more efficient way[] of doing the same job."[38] By then, Horty had founded Aspen Systems Corp., a company which offered a service for searching statutory and regulatory information. Flavin had been seeking legislative funding for a proposal under which Aspen would convert the unscanned volumes for a fee and make the database available as part of its service.[39] Horty offered to prepare a volume of the Official Reports as an informal test.

At the same time, Flavin was considering a similar offer from Data Corp., the predecessor of Mead Data Central (which would become today's LexisNexis). For a fee, the company would convert the unscanned volumes and build a test database that could be queried by the LRB staff.[40]

tered by the Board of Regents to study electronic retrieval of legal information.[43] Both Flavin and Judge Fuld served on its board.

Like Flavin, the LCELR had recognized the need to build a database of sufficient size for testing document retrieval, but had found the cost of data conversion to be daunting. Its president, Thomas Plowden-Wardlaw, had written, "The cost of creating such a data bank under present methods of punching cards, typing and scanning, Datatext, etc. is so great as to constitute a formidable bottleneck in the development of such a bank, whether for experimental or ultimate commercial use."[44] An arrangement with Data Corp./Mead promised a solution to this dilemma.

Data Corp. quickly recommended a framework that eventually would be implemented: an "initial agreement [that] would provide a working arrangement to enable

As chair of the Committee on Electronic Legal Research, one of Flavin's first acts was "to try to persuade the people and the visitors to do something about putting the New York cases on the computer."

Neither the Aspen nor the Data Corp. proposal came to fruition, but Flavin's growing familiarity with Data Corp. – and his appointment to a leadership role within the New York State Bar Association – had set the stage for a new and ultimately successful strategy.

MDC/NYSBA Project

When Flavin became chair of the Bar Association Committee on Electronic Legal Research, one of his first acts was to call a meeting "to try to persuade the people and the visitors I have invited to do something about putting the New York cases on the computer."[41] The visitors included the former president of the Ohio State Bar Association, which already had an agreement with Data Corp. (acquired during this period by the Mead Corp., soon to be renamed Mead Data Central) to create a database of Ohio cases.

The result was a resolution recommending that "the Bar Association negotiate with Mead Corp. a form of agreement to put New York cases and other legal materials in an appropriate computer readable medium for the purpose of electronic retrieval."[42] The committee also recommended that the Bar Association negotiate with the state to obtain a license to use the copyrighted material from the Official Reports (the path to such a license having been cleared by the earlier amendment to Judiciary Law § 438). Negotiations would be conducted by Flavin's committee in cooperation with the Lawyers' Center for Electronic Legal Research (LCELR), an institution char-

us to research and then plan a viable program" and "a second agreement – a long term operating contract under which we would execute the program with you."[45]

Flavin and Plowden-Wardlaw soon visited Data Corp./Mead in Dayton, Ohio, where they reached agreement on a concept that subsequently would be formalized in written contracts:

1. Data Corp./Mead would assume the total financial obligation to put the cases on the computer and sell the service.
2. The Bar Association would be the contracting party and would sponsor the service.
3. The Bar Association would obtain the right to use the copyrighted material and would pass those rights on to Data Corp./Mead.[46]

After intensive negotiations, an initial agreement was reached between Mead Data Central (MDC), the successor of Data Corp., and the Bar Association. It provided that MDC would create a demonstration database and undertake a study of the attitudes of the New York bar toward MDC's system. The Bar Association agreed to obtain a license for use of the copyrighted elements of the Official Reports and to assign the license to MDC. At the conclusion of the study period, MDC would determine whether it was economically feasible to offer a fully operational system. If so, the parties would enter into an operating agreement.[47]

Chief Judge Fuld and the Secretary of State quickly gave their approval of a license for the use of the

copyrighted elements of the Official Reports. The Bar Association and MDC acknowledged that "part of the income from the sale of such computerized service should be contributed toward the cost of the publication of such Official Reports of the State of New York as are included in the service."[48] Accordingly, while there was no charge to MDC during the study period, the license provided that, under an operating agreement to provide the service on a permanent basis, the State would receive a usage royalty, with a minimum of $10,000 and a maximum of $50,000 per year.

Near the conclusion of the first year of the study, the opinions from all volumes of New York Reports 2d (covering Court of Appeals cases) had been marked up by the LRB for conversion to machine-readable form, converted by MDC and loaded onto the demonstration database. Demonstration terminals had been installed at MDC's New York City office, at the Erie County Bar Association in Buffalo, at the State Bar Association office in Albany and, at the request of Chief Judge Fuld, at Court of Appeals Hall. Flavin reported that MDC had met its obligations under the initial agreement and recounted the following incident:

> One of the members of the committee asked that the computer find any cases in the New York Second Series with the word "freeholder." Upon objection that the word was used so seldom that synonyms ought to be requested, the committee member who made the request said he was adamant that he wanted only the word "freeholder," and that he had made a very careful page by page search of the New York Second Series and knew that there was only one case and that was in the first volume of the New York Second Series where the word "freeholder" appeared. To his astonishment the computer found not one but three cases with the word "freeholder."[49]

The study then was expanded by adding all volumes of the Appellate Division Reports 2d.[50] Within months, MDC gave notice to the NYSBA that "MDC has determined that it is economically feasible to make available to the bar in the State of New York its computerized, on-line legal information retrieval system on a permanent, fully-operational basis."[51] An operating agreement between MDC and NYSBA soon followed. It provided that MDC would make the New York Reports 2d, Appellate Division Reports 2d and Miscellaneous Reports 2d available on its system within one year of the agreement.[52] The MDC system – consisting of New York and Ohio case law and statutes and federal tax law – became publicly available under the name "LEXIS" on April 2, 1973.[53]

Aftermath

Growth of Online Services

The publication of New York decisions on LEXIS set in motion the modern age of computer-assisted legal research. Soon, other publishers would enter the market, but – ironically – it would be many years beyond the Flavin era before the LRB published its own official compilation.

> Prescient though he was, Flavin could not have foreseen the future ubiquity of online legal research.

The impediment to publishing an official version was statutory – the Judiciary Law provided for the publication of the Official Reports only in printed form.

Authorization for electronic publication of the Official Reports came in a 1988 statutory amendment providing for publication "in any medium or format" in addition to print, including "microfiche, ultrafiche, on-line computer retrieval data base, and CD-ROM."[54]

After a decade in which the LRB focused on development of a CD-ROM product, this authority to publish online was exercised in 1999 when the Second series of the Official Reports was published on Westlaw (NY-ORCS file). The First series was added in 2001. And Flavin's quest for an alternative to a printed digest came full circle with the publication of the Official Reports electronic digest – a technological cumulation of the Digest-Indexes in the individual volumes – in 2003.

In 2004, the Third series came online at the introduction of that new series. The Official Reports continue to be published on Westlaw pursuant to a competitively bid publishing contract awarded to Thomson/West. In addition, the LRB offers a Web site (http://www.nycourts.gov/reporter), launched in 2000, providing free public access to a database of current and archival decisions.[55]

Demand for Greater Access

Prescient though he was, Flavin could not have foreseen that the future ubiquity of online legal research – fueled by the expansion of the online services, the invention of the personal computer, the emergence of the Internet and the development of powerful new search engines and search algorithms for finding, sorting and ranking information – would spur an insatiable demand for access to an ever-expanding body of legal information, including case law. He could not have predicted that lawyers in solo practice and small firms would be empowered by the new technology to seek access to the same information resources that formerly were available only to larger firms and corporate and government law departments. Nor could he have imagined that a new generation of technology-savvy citizens would assert their entitlement to online access to information about their government, including its courts and their decisions.

These trends were recognized in the 2004 report of Chief Judge Judith S. Kaye's Commission on Public Access to Court Records, which recommended that "[if] a

court case record . . . is public, and is therefore accessible to the public in paper form at the courthouse or County Clerk's office, the same record should, as a general matter, be publicly accessible on the Internet if it is filed in or converted to electronic form."[56] The Commission further recommended that "[i]n implementing Internet access to case records, priority should be given to assuring that court calendars, case indices, dockets and judicial opinions of all courts are available."[57]

The Unified Court System has endorsed and commenced implementation of these recommendations with pilot projects in Manhattan and Broome County.[58] These pilots expand upon existing public access initiatives, including the eCourts service (https://iapps.courts.state.ny.us/caseTrac/jsp/ecourt.htm), which currently provides the text of more than a quarter-million trial court decisions dating back to 2001.

Effect on Selective Publication

These developments have sounded the death knell to calls for greater selectivity in the publication of decisions.

The new electronic search tools have become the modern equivalent of a "proper system of indexing"[59] that makes it possible to filter out unimportant cases in search of the important ones, and their emergence provides persuasive force to the argument that it is preferable to publish some possibly unimportant decisions rather than risk omitting an important one.

Furthermore, to the extent that support for selective publication was based on the constraints of print publishing – the cost of purchasing and shelving books – that rationale is no longer controlling in the electronic environment. In any event, the increase in the quantity of decisions rendered annually by the courts since Flavin's time – quadrupling the number of Appellate Division memorandum decisions and multiplying the number of trial court decisions even more – has reached a point where all the decisions worthy of publication, even under Flavin's strict standards, can no longer be accommodated in a reasonable number of printed volumes per year.

In short, the print medium is diminishing in significance, and its limitations can no longer govern the determination of what should be published. As Chief Judge Judith S. Kaye put it in announcing the implementation of the recommendations of her Commission on Public Access to Court Records:

> In a society where paper is becoming obsolete, and electronic transmittal of information is often the norm, more and more people each day expect to gather information and conduct their daily business on the Internet. The courts must adapt to this modern reality and consider new means to provide better public access.[60]

Accordingly, while the coverage of the printed Official Reports remains essentially unchanged from Flavin's day, the LRB now publishes online a greatly expanded number of decisions:

- In addition to publishing both in print and online all of the opinions and memorandum decisions of the Appellate Division, the LRB now publishes online all of the motion decisions of those courts (about 30,000 per year) – the very type of decisions that Flavin lobbied to remove from the printed reports.
- The number of lower court opinions published annually in the printed Miscellaneous Reports remains about 600, the same as in the Flavin era, but many additional opinions now are published online. That number is expected to reach 10,000 in 2008. Still governed as it is by the requirement that published opinions be of at least arguable precedential usefulness or public importance, the LRB exercises a high degree of selectivity even in the online publication of lower court opinions – less than 10% of the decisions posted on the Unified Court System's eCourts service are selected for publication – but the exercise of selectivity for online publication is far more liberal than Flavin probably would have approved.

Conclusion

On this centennial of his birth, Flavin deserves our praise for his early recognition of the potential of performing case law research by use of a computer and for his leadership in the creation of the first computer-assisted legal research system for the New York bar. He also should be credited for establishing the criteria for selective print publication that are followed to this day. Whether over time he would have concluded that the rationale for selective publication was less applicable in the new electronic research environment cannot be known. Given that his interest in computerized research arose from a desire to find an alternative to a printed digest, and thereby to make the body of case law more accessible, it is possible that the development of new means of electronic access would have softened his opposition to more comprehensive publication. In any event, it is safe to assume that he would have examined the issue with the same open, inquiring and skeptical mind that he demonstrated so impressively in his pioneering exploration of online research. ■

1. James M. Flavin, *Decisions and Opinions for Publication*, 12 Syracuse L. Rev. 137, 137 (Winter 1960) ("Flavin, *Decisions for Publication*").
2. *Id.* at 138.
3. *Id.* at 138–39. He also noted that less than 20% had been cited in later reported decisions.
4. *Id.* at 139.
5. N.Y. Judiciary Law § 431.
6. Flavin, *Decisions for Publication*, at 146.
7. Discussed in Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5522:3.

8. Announcement by James M. Flavin, dated Feb. 1963 (on file at LRB).

9. *Id.*

10. Now codified at 22 N.Y.C.R.R. part 7300.

11. 22 N.Y.C.R.R. § 7300.6.

12. Letter from James M. Flavin to Prof. Morris L. Cohen, University of Pennsylvania Biddle Law Library, dated June 25, 1963, as quoted in Comment, *Discretionary Reporting of Trial Court Decisions: A Dialogue*, 114 U. Pa. L. Rev. 249, 255 n.34 (1965) ("Comment, *Discretionary Reporting*").

13. Comment, *Discretionary Reporting*, at 251.

14. *Id.* at 252.

15. A.L. Goodhart, *Reporting the Law*, 55 L.Q. Rev. 29, 33 (Jan. 1939) ("Goodhart").

16. James M. Flavin, *Computerized Legal Retrieval in New York*, in ABA Standing Committee on Law and Technology, Automated Legal Research at 49 (1972).

17. Letter from Stephen E. Furth to James M. Flavin, dated Dec. 20, 1963 (on file at LRB).

18. Charles P. Bourne & Trudi Bellardo Hahn, A History of Online Information Services, 1963–1976, at 230 (2003) (hereinafter Bourne and Hahn).

19. Letter from James M. Flavin to John F. Horty, dated Feb. 20, 1964 (copy on file at LRB).

20. Bourne & Hahn at 237.

21. 1964 Ops. Atty. Gen. 43, 44.

22. *Id.*

23. Letter from James M. Flavin to Hon. Stanley H. Fuld, dated Sept. 16, 1964 (copy on file at LRB).

24. L. 1965, ch. 467, amending Judiciary Law § 438.

25. Agreement between State of New York and International Business Machines Corp., dated Feb. 19, 1964 (copy on file at LRB).

26. Letter from James M. Flavin to Hon. Stanley H. Fuld, dated May 14, 1965 (copy on file at LRB).

27. Agreement between James M. Flavin and International Business Machines Corp., dated June 28, 1965 (copy on file at LRB).

28. Letter from James M. Flavin to Richard F. Jones, Reporter of Decisions, Supreme Court of Washington, dated Mar. 18, 1966 (copy on file at LRB).

29. Letter from James M. Flavin to Richard F. Jones, Reporter of Decisions, Supreme Court of Washington, dated June 22, 1966 (copy on file at LRB).

30. *Id.*

31. *Id.*

32. Letter from Warren M. Anderson, Chairman of New York State Senate Committee on Finance, to James M. Flavin, dated Aug. 30, 1966 (on file at LRB).

33. Agreement between James M. Flavin and Data Scan Inc., dated Sept. 30, 1966 (on file at LRB).

34. Letter from James M. Flavin to Layman E. Allen, Jurimetrics Journal, dated July 11, 1967 (copy on file at LRB).

35. Agreement between James M. Flavin and International Business Machines Corp., dated July 10, 1967 (on file at LRB).

36. Address to Executive Committee, New York State Bar Ass'n, Jan. 25, 1968, in Stanley H. Fuld, *Computers in the Law*, 40 N.Y. St. B.J. 230, 233 (June 1968).

37. *Id.* at 231.

38. Letter from John F. Horty, Aspen Systems Corp., to James M. Flavin, dated Apr. 19, 1969 (on file at LRB).

39. Letter from James M. Flavin to Dr. Howard F. Miller, New York State Assembly Ways and Means Committee, dated May 2, 1968 (copy on file at LRB).

40. Letter from Ralph E. Welsh, Data Corp., to James M. Flavin, dated March 19, 1969 (on file at LRB).

41. Letter from James M. Flavin to Leon S. Wilson, Director of Administrative Procedure, State of New Jersey, dated Oct. 2, 1969 (copy on file at LRB).

42. Memorandum from James M. Flavin to Executive Committee of the New York State Bar Ass'n, dated Dec. 1, 1969 (copy on file at LRB).

43. The LCELR later became the National Center for Automated Information Retrieval (NCAIR).

44. Thomas C. Plowden-Wardlaw, *The Lawyers' Center for Electronic Legal Research*, L. & Computer Tech. (Oct. 1968) 9, 11.

45. Letter from William F. Gorog, Data Corporation, to James M. Flavin and Thomas C. Plowden-Wardlaw, dated Jan. 16, 1970 (copy on file at LRB).

46. Letter from James M. Flavin and Thomas C. Plowden-Wardlaw to NYSBA President Stuart N. Scott, dated Feb. 2, 1970 (copy on file at LRB).

47. Agreement between New York State Bar Ass'n and Mead Data Central, dated Jan. 5, 1971 (copy on file at LRB).

48. Grant of right to publish copyrighted matter pursuant to section 438 of the Judiciary Law to New York State Bar Association and Mead Data Central, Inc., by the Secretary of State of the State of New York, made on the 29th day of April, 1971 (copy on file at LRB).

49. Report by James M. Flavin to NYSBA Executive Committee, dated Nov. 24, 1971 (copy on file at LRB).

50. Letter, agreement from Jerome S. Rubin, MDC, to John Berry, NYSBA, dated Dec. 28, 1971 (copy on file at LRB).

51. Letter, Notice to New York State Bar Ass'n from Mead Data Central, Inc., dated Apr. 7, 1972 (copy on file at LRB).

52. Operating Agreement between York State Bar Ass'n from Mead Data Central, Inc., dated June 30, 1972 (copy on file at LRB).

53. Bourne & Hahn at 300. Under a July 1972 agreement, NCAIR, the successor to LCELR, assisted MDC in defining the federal materials to be included in LEXIS and sponsored LEXIS with respect to those materials. *A Proposal for a Subscription to LEXIS*, draft dated Jan. 3, 1973, at 3-4 (on file at LRB).

54. L. 1988, ch. 137, codified at Judiciary Law § 434(5)(b).

55. Gary D. Spivey, *Public Access to Court Decisions Expanded*, 78 N.Y. St. B.J. (Jan. 2006) p. 32.

56. Commission on Public Access to Court Records, *Report to the Chief Judge of the State of New York* at 5 (Feb. 2004) (http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf) (accessed Aug. 28, 2007).

57. *Id.* at 13.

58. Press Release, New York Unified Court System, *New York Courts to Make "Virtual" Case Files Available on the Internet* (July 6, 2006) (http://www.courts.state.ny.us/press/pr2006_15.shtml) (accessed Aug. 28, 2007).

59. Goodhart at 33.

60. Press Release, New York Unified Court System, *New York Court Records To be Posted on the Internet* (Feb. 25, 2004) (http://www.nycourts.gov/press/pr2004_21.shtml) (accessed Aug. 28, 2007).

"I'll have a better sense of the case we have after I consult my astrologer."

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

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"Can't We Just Talk?"

Readers of last issue's column were alerted[1] to the fact that on November 27, 2007, the Court of Appeals reversed the decisions of two appellate divisions, in three cases,[2] and held that a plaintiff may be compelled to furnish a HIPAA-compliant authorization permitting, but not compelling, a treating physician of the plaintiff to be interviewed by defense counsel.[3] Six judges signed the opinion authored by Judge Read, while Judge Pigott issued a dissenting opinion.

In arriving at its holding, the Court framed the issue in terms of a party's right, *via* "informal discovery," to interview witnesses as part of trial preparation. The Court relied almost exclusively upon two of its prior opinions: its seminal decision in *Niesig v. Team 1*,[4] and its return to *Niesig*, earlier in 2007, in *Siebert v. Intuit*.[5] Issues unique to treating physician interviews, the physician-patient privilege and HIPAA, were addressed only after the Court determined that interviewing treating physicians *qua* witnesses is part of traditional trial preparation. The Court then examined whether the physician-patient privilege or HIPAA imposed a bar, or otherwise limited such interviews.

Trial Courts Say Yes, No, and Maybe

A little history is in order. For a number of years the question of whether a trial court could compel a plaintiff to furnish defense counsel with a HIPAA-compliant authorization permitting defense counsel to interview one or more of the plaintiff's treating physicians bedeviled trial courts throughout the state.[6] The debate in the trial courts involved only post-note of issue interviews because the consensus was that the interviews were not permitted pre-note of issue, based upon a 1988 Second Department decision, *Zimmerman v. Jamaica Hospital, Inc.*[7]

Trial court decisions were all over the map, ranging from those ordering the exchange of the authorizations without conditions;[8] to those ordering the exchange, providing defense counsel furnished disclosure to the plaintiff's counsel of notes and other writings emanating from the interviews;[9] to those that denied the exchange outright, reasoning that nothing in Article 31 of the CPLR or the Uniform Rules contemplated, let alone compelled, the exchange of such authorizations.[10]

Appellate Divisions Say No

The Second Department weighed in first and, in unanimous decisions in *Arons v. Jutkowitz*[11] and *Webb v. N.Y. Methodist Hospital*,[12] held that neither Article 31 nor the Uniform Rules included a provision authorizing defense counsel to meet privately with a plaintiff's treating physicians. The court was unable to find statutory or regulatory authority to compel a plaintiff to execute an authorization permitting such an interview, explaining that this was the reason for the long-standing rule that interviews prior to the filing of the note of issue are prohibited, and this reasoning extended to the post-note of issue period. "These limits on disclosure are imposed 'not because of the physician-patient privilege, which is generally waived by bringing a malpractice action, but by the very design of the specific disclosure devices available in CPLR article 31.'"[13]

Acknowledging the broad power of a trial court to supervise disclosure, the Second Department issued a reminder to the bench that the supervision by the trial court must be in accordance with Article 31 and the Uniform Rules. Citing to prior rulings, the court noted that neither Article 31 nor the Uniform Rules "authorize private, ex parte interviews as a disclosure device. Rather, compulsion of such unsupervised, private and unrecorded interviews plainly exceeds the ambit of article 31."[14]

The Second Department concluded by issuing another reminder: stringent limitations are placed on a court's authority to order post-note of issue disclosure. "[A]fter the filing of a note of issue, a court's authority to allow additional pretrial disclosure is limited to a party's demonstration of 'unusual or unanticipated circumstances.' In the absence of additional statutory authority, the 'courts should not become involved in post-note of issue trial preparation matters and should not dictate to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted.'"[15]

Three months after the decisions in *Arons* and *Webb*, a divided Fourth

Department, by a three-to-two decision in *Kish v. Graham*,[16] reached the same conclusion. The majority in *Kish* articulated four reasons for barring the practice:

> First, there are no provisions in the law permitting such informal disclosure. Second, formal discovery procedures are in place that would allow an "on the record" discussion with such witnesses in the presence of counsel for the opposing party. Third, we are concerned here with witnesses with privileged medical information, not merely witnesses who will testify to nonprivileged facts. Thus, the established case law that permits equal access to fact witnesses does not apply here. Although a person's relevant medical history is placed at issue when an action is commenced by or on behalf of that person, access to that medical history is not without boundaries. Unsupervised interviews with treating physicians in an ex parte setting may result in the intentional or inadvertent revelation of a person's irrelevant medical history. For example, information concerning a sexually transmitted disease may be intentionally or inadvertently revealed during a discussion of the treatment of lung cancer.
>
> Fourth, and perhaps most importantly, we can conceive of no reason for allowing a practice that concededly is not permitted prior to the filing of a note of issue to be permitted after the note of issue is filed.
>
> * * *
>
> As the Second Department succinctly wrote, "compulsion of such unsupervised, private and unrecorded interviews plainly exceeds the ambit of [CPLR] article 31."[17]

The two dissenting Fourth Department justices viewed the issue differently:

> We conclude that post-note of issue interviews of fact witnesses, whether physicians or lay witnesses, constitute trial preparation rather than discovery. We agree with the Second Department and the majority in this case that such interviews are not covered under the CPLR article 31 discovery provisions, but we note that CPLR article 31 does not authorize trial preparation interviews with any nonparty witnesses. Thus, the fact that CPLR article 31 does not authorize such interviews is irrelevant to the issue here, *i.e.*, whether interviews of nonparty fact witnesses are permissible in preparation for trial. It is beyond question that a defense attorney may interview an eyewitness to a motor vehicle collision in preparation for trial without resorting to CPLR article 31 discovery devices. While physicians are, indeed, different because of their obligation to protect the confidentiality of their communications with patients, we perceive no basis to treat the physician witnesses differently from other fact witnesses once the plaintiff waives the physician-patient privilege. Indeed, the Court of Appeals in *Koump* specifically stated that a party should not be permitted to assert the privilege in order to prevent the other party's access to evidence.[18]

The dissenters addressed each of the four concerns raised by their colleagues:

> Having concluded that there is no legal impediment to such trial preparation interviews, we respond to the majority's "compelling" reasons for prohibiting such interviews with what we perceive to be even more compelling reasons for permitting them. First, as noted above, the absence of any formal rule permitting such interviews is irrelevant; there are no formal rules permitting trial preparation interviews of any nonparty witnesses. In response to the majority's second and fourth reasons for prohibiting such interviews, we note that formal discovery techniques, while certainly available to attorneys, are not only more expensive, inconvenient, and burdensome than informal ones, but they also would have the effect of significantly interfering with the practice of medicine. To require a physician to submit to depositions or interrogatories rather than merely being asked a question by a defense attorney could significantly impact that physician's availability to practice medicine. Instead of communicating with an attorney during a 10-minute telephone call, a physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories. Inasmuch as the plaintiff has waived the physician-patient privilege, we see no need to require such burdensome procedures for physician witnesses when they are not required for other witnesses.
>
> The majority expresses deep concern over the possibility that a physician may reveal information beyond the scope of the authorization. The authorization, however, can be limited to the information relevant to the mental or physical condition at issue, and we see no reason to assume that physicians will not adhere to those limits. Furthermore, we note that an authorization permits, but does not require, a physician to provide the requested information. Finally, the authorization, even if ordered by a court, remains voluntary in the sense that the plaintiff has voluntarily commenced the action in which her decedent's medical condition is at issue and has waived the physician-patient privilege. While the action is pending, the plaintiff cannot use the physician-patient privilege as a sword and a shield.[19]

Court of Appeals Says Yes

Arons, *Webb* and *Kish* were consolidated on appeal. After chronicling the facts and history of the three

cases before it, the Court of Appeals began its analysis, under the heading "Informal Discovery of Nonparty Treating Physicians,"[20] with an extensive review of *Niesig* and *Siebert*.

Emphasizing the importance of "informal discovery," the Court concluded that nonparty treating physicians should not be treated any differently from the former and current employees of a corporate party whose interviews were at issue in *Niesig* and *Siebert*, subject to the limitations imposed by those two decisions:

> We see no reason why a nonparty treating physician should be less available for an off-the-record interview than the corporate employees in *Niesig* or the former corporate executive in *Siebert*. As an initial matter, a litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue." This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim."[21]

The Court followed, and credited, the reasoning of the dissenters in *Kish*:

> [T]here are no statutes and no rules expressly authorizing – or forbidding – ex parte discussions with *any* nonparty, including the corporate employees in *Niesig* and the former corporate executive in *Siebert*. Attorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation. Article 31 does not "close off" these "avenues of informal discovery," and relegate litigants to the costlier and more cumbersome formal discovery devices. As the dissenting Justices pointed out in *Kish*, choking off informal contacts between attorneys and treating physicians invites the further unwelcome consequence of "significantly interfering with the practice of medicine": "[i]nstead of communicating with an attorney during a 10-minute telephone call, a physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories."[22]

A plaintiff's concerns that defense counsel would overreach during interviews and obtain information beyond the scope of the limited waiver of the medical privilege was subservient, in the Court's opinion, to the benefits of "informal discovery": "This is the same 'danger of overreaching' that we rejected explicitly in *Niesig* and implicitly in *Siebert*, finding it to afford no basis for relinquishing the considerable advantages of informal discovery."[23]

The Court relied upon its assumption, set forth in *Niesig*, that interviewing attorneys would "comport themselves ethically":

> Again, we "assume that attorneys would make their identity and interest known to interviewees and comport themselves ethically." In *Siebert*, where the executive was privy to information for which the attorney-client privilege had not been waived, we considered the risk of improper disclosure adequately addressed where the attorney conducting the interview prefaced his questioning with admonitions designed to prevent this from happening, and there was no reason to believe that privileged information had, in fact, been disclosed. Here, the danger that the questioning might encroach upon privileged matter is surely no greater than was the case in *Siebert* since the subject matter of the interview or discussion – a patient's contested medical condition – will be readily definable and understood by a physician or other health care professional. In sum, an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation.[24]

The Court agreed that "the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it. While interviews may still take place post-note of issue, at that juncture in the litigation there is no longer any basis for judicial intervention." Thus, absent "unusual or unanticipated circumstances," HIPAA-compliant authorizations must be demanded by defense counsel, and any necessary motion practice to compel the exchange of authorizations must be completed, prior to the filing of the note of issue.

What the majority of the Court did not explicitly say, but what the decision makes clear, is that the previously accepted restriction limiting nonparty treating physician interviews to the post-note of issue phase of litigation would no longer apply, something Judge Pigott pointed out in his dissent.[25] So long as the mandates of HIPAA are satisfied, the interview of a plaintiff's treating physician can be conducted at any time.

After a lengthy review of HIPAA, the Court had no difficulty in determining that HIPAA did not act to bar treating physician interviews:

> [T]here can be no conflict between New York law and HIPAA on the subject of ex parte interviews of treating physicians because HIPAA does not address this subject. Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. As a practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain

> a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order.[26]

The Court also struck those provisions in the trial court orders in *Arons* and *Webb* directing "defense counsel to hand over to his adversary copies of all written statements and notations obtained from the physician during the private interviews, any audio or video recordings or transcripts, and interview memoranda or notes (excluding the attorneys' observations, impressions or analyses). Imposition of these conditions was improper."[27]

In a footnote, the Court made the following statement:

> We take no issue with those portions of the *Arons* and *Kish* orders that required defense counsel to identify themselves and their interest, to limit their inquiries to the condition at issue, and to advise physicians that they need not comply with the request for an interview. We believe that the execution of a valid authorization and the fact that the physician, under HIPAA, is permitted, but not required, to grant the interview will address these concerns in the future.[28]

The tenor of Judge Pigott's solitary dissent was set in his opening sentence: "Our holding today grants defense counsel the unprecedented ability to compel a plaintiff, who has placed his or her mental or physical condition in controversy, to execute authorizations allowing defense counsel to speak to his or her treating physicians outside the formal discovery process and without the plaintiff being present."[29]

After reviewing the disclosure available pursuant to the CPLR and Uniform Court Rules, Judge Pigott continued: "Our holding today substantially modifies this carefully crafted scheme by allowing one party to unilaterally obtain, in a manner not authorized by Article 31, information about an adverse party's medical condition."[30]

Judge Pigott found the majority's reliance on *Niesig* and *Siebert* misplaced:

> Our holdings in *Niesig* and *Siebert* focused primarily on the definition of a party for purposes of discovery. *Niesig* involved the narrow issue of whether counsel could, without running afoul of Disciplinary Rule 7-104(A)(1), conduct informal, ex parte interviews of non-managerial, non-controlling employees of an opposing party who witnessed an accident; *Siebert* addressed the narrow issue of whether counsel could conduct an informal, ex parte interview of a former employee of an opposing party. Neither *Niesig* nor *Siebert* involved a party's invocation of Article 31 to obtain the informal interviews, nor did the parties in those cases need the assistance of the opposing party. In neither instance was the protection of medical records and information implicated.[31]

In Judge Pigott's view, the need for defense counsel to seek judicial intervention in order to obtain the needed HIPAA-compliant authorization

> takes the matter out of the realm of informal discovery and into the realm of formal disclosure, which is supervised by the trial courts. Because trial courts are constrained to limit their supervision of disclosure to those devices delineated in Article 31, it likewise follows that Article 31 must provide some basis for the relief. Given the fact that the Legislature has narrowly limited a litigant's obligation to execute authorizations to those situations where an adverse party is seeking copies of medical records, and nothing more, it is my view that defendants here are not entitled to authorizations to conduct informal, ex parte interviews with plaintiffs' treating physicians during pretrial discovery.[32]

Finally Judge Pigott objected to the circumvention of the note of issue's significance in marking the end of discovery:

> Under our holding today, however, defense counsel would be permitted to obtain court-ordered, HIPAA-compliant authorizations at any time and use them at any time both prior to and after the filing of a note of issue and certificate of readiness. Although defendants refer to such informal interviews as "trial preparation," they are really nothing more than post-note of issue discovery, which is expressly prohibited by the Uniform Rules unless the party seeking the discovery can demonstrate "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice."[33]

A plaintiff's concerns that defense counsel would overreach during interviews was subservient, in the Court's opinion, to the benefits of "informal discovery."

Conclusion

While the majority of the Court is sanguine that defense counsel will conduct themselves in accordance with the parameters of the *Arons* decision, only time will tell whether the unsupervised and largely unfettered access permitted defense counsel to inter-

view plaintiffs' treating physicians will "streamline discovery and foster the prompt resolution of claims,"[34] one of the stated goals in *Niesig* quoted by the *Arons* court. Only time will tell too whether *Arons* will be the last word on this issue, or simply the opening salvo of an ongoing struggle to regulate this and other permutations of "informal discovery." ■

1. Print scheduling did not permit a discussion of this issue in the last column.

2. *Arons v. Jutkowitz*, 37 A.D.3d 94, 825 N.Y.S.2d 738 (2d Dep't 2006); *Webb v. N.Y. Methodist Hosp.* 35 A.D.3d 457, 825 N.Y.S.2d 645 (2d Dep't 2006); *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 (4th Dep't 2007).

3. *Arons v. Jutkowitz et al.*, 2007 NY Slip Op. 9309, 2007 WL 4163865 (2007).

4. 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990).

5. 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007).

6. *See, e.g.*, *"HIPAA . . . Help!,"* N.Y. St. B.J. (June 2005) p. 20.

7. 143 A.D.2d 86, 531 N.Y.S.2d 337 (2d Dep't 1988); *see also Levandes v. Dines*, 153 A.D.2d 671, 544 N.Y.S.2d 864 (2d Dep't 1989).

8. *See, e.g.*, *Smith v. Rafalin*, 6 Misc. 3d 1041(A), 800 N.Y.S.2d 357 (Sup. Ct., N.Y. Co. 2005).

9. *See, e.g.*, *Keshecki v. St. Vincent's Med. Ctr.*, 5 Misc. 3d 539, 785 N.Y.S.2d 300 (Sup. Ct., Richmond Co. 2004).

10. *See, e.g.*, *Brown v. Horbar*, 6 Misc. 3d 780, 792 N.Y.S.2d 314 (Sup. Ct., N.Y. Co. 2004).

11. 37 A.D.3d 94, 825 N.Y.S.2d 738 (2d Dep't 2006).

12. 35 A.D.3d 457, 825 N.Y.S.2d 645 (2d Dep't 2006).

13. *Arons*, 37 A.D.3d at 97.

14. *Id.* at 100 (citation omitted).

15. *Id.* at 100–01 (citation omitted).

16. 40 A.D.3d 118, 833 N.Y.S.2d 313 (4th Dep't 2007).

17. *Id.* at 123–24 (citations omitted).

18. *Id.* at 128–29 (citation omitted).

19. *Id.* at 129.

20. 2007 NY Slip Op. 9309, 2007 WL 4163865 (2007).

21. *Id.* (citations omitted).

22. *Id.* (citations and footnote omitted) (emphasis in original).

23. *Id.*

24. *Id.* (citation omitted).

25. "Under our holding today, however, defense counsel would be permitted to obtain court-ordered, HIPAA-compliant authorizations at any time and use them at any time both prior to and after the filing of a note of issue and certificate of readiness." *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at n.6.

29. *Id.*

30. *Id.*

31. *Id.* (citations omitted).

32. *Id.* (citation omitted).

33. *Id.* (citation omitted).

34. *Id.*

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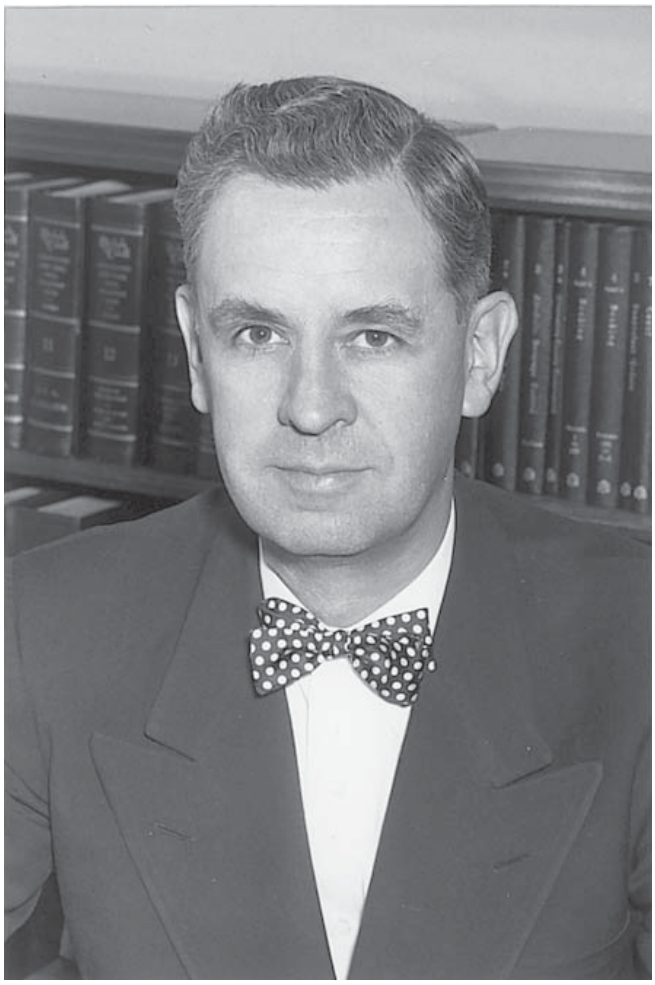

Eugene C. Gerhart (1912–2007), Jackson Biographer

By John Q. Barrett

In October 1946, Justice Robert H. Jackson was newly back in the United States and again working at the Supreme Court after more than a year's absence to serve as the chief prosecutor of Nazi war criminals in Nuremberg.

On October 28, 1946, Justice Jackson traveled to Atlantic City, New Jersey, for the American Bar Association's annual convention. That evening, he spoke to the ABA and the general public, including national and international press. His address, titled "The Legal Profession in a World of Paradox," was a hopeful account of his experiences with legal systems and lawyers across Europe, including in Germany, and with colleagues from the Soviet Union.[1]

Justice Jackson's October 1946 trip to Atlantic City was, aside from his speaking engagement, his first real respite after a crazy, grueling month capping 17 previous months of Nuremberg's intense work. Jackson had, at the start of October, returned from Nuremberg to Washington. He made an immediate trip to Buffalo, New York, to give a major speech[2] and then returned to Washington for the start of the Supreme Court's term. He prepared and participated in many oral arguments and worked on Court cases, including some that were deadlocked and being reargued for him to supply the deciding vote. He met in numerous Court conferences with fellow Justices to discuss and vote on cases. He also worked on his first opinions of the new term.

Justice Jackson's Nuremberg work also continued during October 1946. He met with War Department and State Department colleagues and communicated regularly with his former prosecutorial office and staff, as prisoners' appeals were rejected in Germany and then as their executions were carried out. During that month,

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Jackson wrote his final Nuremberg report to President Truman, met privately with him and others to discuss Nazi war crimes and other matters regarding Germany, and formally resigned his appointment as chief prosecutor.[3] He also prepared his Atlantic City speech and, after the Supreme Court adjourned on Monday, October 28th, traveled with his wife, Irene, to the ABA meeting there.

Because the Supreme Court was in recess for the remainder of that week, and because Jackson enjoyed gatherings with fellow lawyers, and because he needed a break, he stayed in Atlantic City, at the Claridge Hotel, for more than three days. He rested, but he also attended ABA section meetings and functions. On Thursday, October 31st, Jackson attended the ceremony at which the ABA awarded its annual Erskine M. Ross essay contest prize. Jackson met the winner, a 34-year-old lawyer from Binghamton, New York, named Eugene C. Gerhart. Jackson was impressed by Gerhart's essay[4] and by the young man himself who was a graduate of Princeton University (1934) and Harvard Law School (1937), had served in 1934 as a secretary to World Court judge Manley Hudson in Geneva, Switzerland, had practiced law in New Jersey, had served during World War II in the United States Navy and, most recently, had opened his own law office in Binghamton.[5]

Eugene Gerhart, who was at least equally impressed with Justice Jackson, followed up on their meeting. Gerhart wrote to Jackson and they began to correspond. He saw Jackson a little more than a year later, when they both attended the New York State Bar Association's annual meeting in New York City; they had breakfast together at the University Club.

As their acquaintance developed, Gerhart disclosed that he wanted to write Justice Jackson's biography. Jackson was skeptical – he regarded himself as a life still in progress, he was uncertain about the significance of such an undertaking, and he was unwilling, as a sitting Justice, to talk very much about Supreme Court matters. But Jackson also liked Gerhart. Indeed, Jackson certainly saw something of himself in this young, talented, ambitious, upstate New York lawyer who was inclined toward language, ideas and writing.

Justice Jackson agreed to cooperate and Gerhart commenced to work on interviewing, researching and writing about Jackson's life and career. Over the next seven years, Gerhart interviewed Jackson at least 10 times. Gerhart began writing, and he eventually sent Jackson draft chapters and received his comments on the work in progress.

In spring 1954, Justice Jackson suffered a serious heart attack, and he died suddenly that fall. This unexpectedly early conclusion to Jackson's life affected Gerhart personally. It also significantly diminished that era's interest in Robert H. Jackson. Once people pass on, it takes years and perspective, including the context created by later

developments and lives, before history really can identify giants in their lasting stature and greatness.

Eugene Gerhart, to his great credit, nonetheless persevered during the mid-1950s in his work on Robert H. Jackson. In 1958, Gerhart published his Jackson biography.[6] In 1961, he published a second book, focused on Jackson's Court work.[7] And as the years have passed since Jackson's time, Gerhart's writing about his friend and hero has been read widely and increasingly treasured. Gerhart's own knowledge, his perspective as a witness and his writing are important parts of why Robert H. Jackson has received history's attention and growing appreciation.

Happily, Eugene Gerhart lived a very long, productive and healthy life. He remained a – *the* – lawyer of Binghamton and its region, founding the firm that is today Coughlin & Gerhart LLP. He also continued to write, including one book published during Justice Jackson's lifetime[8] and five published thereafter.[9] Eugene Gerhart also was for many years Editor of the New York State Bar Association *Journal* and a member of the Board of Editors of the *American Bar Association Journal*.

Throughout his life, Eugene Gerhart was animated by his knowledge and memories of Robert H. Jackson. In 2000, he contributed a speech about Jackson to the 100th anniversary celebration of the Jamestown (NY) Bar Association.[10] On May 1, 2001, Gerhart was the inaugural speaker at the newly created Robert H. Jackson Center in Jamestown.[11] Its Web site includes a video of Gerhart discussing, in his Binghamton law office in June 1999, the qualities he admired in Justice Jackson.[12] In 2004, Gerhart published a final Jackson tribute essay.[13] He also became one of the Jackson Center's generous leading benefactors.

Eugene Clifton Gerhart died on Saturday, October 27, 2007, at age 95. He was learned, literate and wise, a lawyer's lawyer, a true gentleman and a trailblazer. I am very grateful that I had the opportunity to be his student and friend, and that I get to walk in some of his footprints. ■

1. Jackson's speech, as published in 33 Am. Bar Ass'n J. 24–27 & 85–89 (Jan. 1947), is available as a PDF file at www.roberthjackson.org/documents/Lawyers%20Today.pdf. Contemporaneous press coverage included Kalman Seigel, *U.S.-Soviet Barrier Held Deep-Seated*, N.Y. Times, Oct. 29, 1946, at 8.

2. Justice Jackson delivered this speech, *The Nürnberg Trial: Civilization's Chief Salvage from World War II*, at the University of Buffalo's Centennial Convocation on October 4, 1946. It is available as a PDF file, as published in Vital Speeches of the Day, at www.roberthjackson.org/documents/The%20Nurnberg%20Trial.pdf.

3. Jackson's final report, which he delivered to President Truman on October 7, 1946, is available as a PDF file at www.roberthjackson.org/documents/Final%20Report%20to%20the%20President.pdf.

4. *See* Eugene C. Gerhart, *Labor Disputes: Their Settlement by Judicial Process*, 32 Am. Bar Ass'n J. 752–56 & 801–08 (Nov. 1946).

5. As to the last point, see Eugene C. Gerhart, *Going It Alone*, 32 Am. Bar Ass'n J. 397–400 (July 1946).

6. *See* Eugene C. Gerhart, America's Advocate: Robert H. Jackson (Indianapolis, IN: The Bobbs-Merrill Co., Inc., 1958).

7. *See* Eugene C. Gerhart, Supreme Court Justice Jackson: Lawyer's Judge (Albany, NY: Q Corp., 1961).

8. *See* Eugene C. Gerhart, American Liberty and "Natural Law" (Boston, MA: The Beacon Press, 1953) (Foreword by Roscoe Pound).

9. *See* Eugene C. Gerhart, Lawyer's Treasury: An Anthology Selected by the Board of Editors from Articles . . . . Representative of the Best to Appear in the Forty-Year History of the American Bar Association Journal (Indianapolis, IN: The Bobbs-Merrill Co., Inc., 1956); Eugene C. Gerhart, Quote It! Memorable Legal Quotations: Data, Epigrams, Wit, and Wisdom from Legal and Literary Sources (New York, NY: C. Boardman Co., 1969); Eugene C. Gerhart, Arthur T. Vanderbilt, The Compleat Counsellor (Albany, NY: Q Corp., 1980); Eugene C. Gerhart , Quote It II: A Dictionary of Memorable Legal Quotations (Buffalo, NY: William S. Hein Co., 1988); Eugene C. Gerhart , Quote It Completely!: World Reference Guide to More than 5,500 Memorable Quotations from Law and Literature (Buffalo, NY: William S. Hein & Co., 1998).

10. *See* Eugene C. Gerhart, *A Tribute to a Great American Lawyer* (delivered on his behalf, June 7, 2000, at Chautauqua Institution, Chautauqua, NY), *available at* www.roberthjackson.org/Man/theman2-6-4/.

11. *See* Eugene C. Gerhart, *America's Advocate* (delivered May 1, 2001, at the Robert H. Jackson Center, Jamestown, NY), *available at* www.roberthjackson.org/Man/SpeechesAbout_AmericaAdvocate.

12. *See* www.roberthjackson.org/Center/videolist.

13. *See* Eugene C. Gerhart, *The Legacy of Robert H. Jackson*, 68 Albany L. Rev. 19–22 (2004), *available as a PDF file at* www.roberthjackson.org/documents/Gerhart%20(final).pdf.

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Saving Clients From Themselves

Immigration Compliance Is Less About Immigration Law Than Good Legal Advice

By John R. Bunker

Too many New York lawyers believe immigration law offers neither sufficient luster nor lucre. Yet, according to the last census, New York ranks third among states in terms of estimated undocumented alien population.[1] Irrespective of one's personal feelings about illegal immigration, this much is apparent: employing unauthorized aliens violates the law. The potential gravity of these violations may not be sufficiently clear to employers or New York attorneys.

Many lawyers, for instance, may not realize that knowingly employing 10 unauthorized aliens in a 12-month period is not only a felony punishable by up to five years' imprisonment,[2] it also serves as a RICO predicate felony punishable by an additional five years' imprisonment, fines and even forfeiture.[3] Clients who own franchised businesses may not appreciate that a guilty plea or conviction for hiring illegal workers may be cause to terminate their franchise agreements.[4] If the client has borrowed against his or her home to secure financing for a franchise business, loss of franchise rights could constitute an event of default under borrowing instruments.

Immigration and Customs Enforcement (ICE) has seen an explosion in activity in recent months. Media accounts in this instance have not been exaggerated. From a total of 24 criminal arrests in 1999, ICE made 742 arrests in 2007 through July 31 alone – an increase of 3100%.[5] These arrests cut across industries and geography, as the following headlines from recent ICE news releases establish:[6]

- Company executives sentenced for hiring illegal alien workers (San Diego, CA);
- Wichita company and its officers plead guilty to knowingly hiring illegal aliens (Wichita, KS);
- Company president, 10 others, charged in worksite probe of Arizona drywall and stucco firm (Tucson, AZ);
- Guilty plea in government's probe of immigration violations at IFCO Systems (Albany, NY);
- Three executives of national cleaning company indicted for harboring illegal aliens and evading taxes (Grand Rapids, MI);
- 55 illegal aliens working for state janitorial contractor arrested by ICE (Tallahassee, FL);
- Employers in Arkansas, Kentucky and Ohio hit with criminal charges in connection with illegal alien employment schemes (Washington, DC);
- ICE executes federal criminal search warrants at Koch Foods and arrests more than 160 on immigration charges (Cincinnati, OH).

These arrests should make clients sit up and take notice. Lawyers should be advising their clients of the dramatic consequences for violations, which many believe would be the equivalent of a traffic ticket. Some employers have been told that until the Department of Homeland Security (DHS) generates "no-match" letters, employers have no duty to act. For employers who may already have constructive knowledge of a potential illegal employment situation, *this advice could not be more wrong*.[7] For the client who thinks there might be a problem, there already is a problem. Attorneys, however, can provide the fix, and more important, they can demonstrate to their clients how an immigration compliance program is pennies on the dollar.

The Law

The Immigration and Nationality Act (the "Statute" or the "Act") makes it unlawful "to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment."[8] The Code of Federal Regulations defines "unauthorized" as meaning "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General."[9] Significantly, the Act makes it unlawful "*to continue to employ* the alien . . . knowing the alien is (or has become) an unauthorized alien with respect to such employment."[10]

Knowledge holds the key. Many employers figure that they can disavow knowledge of a worker's immigration status. This misguided policy can have catastrophic results. As the recent final rule promulgated by the Department of Homeland Security (DHS) provides, "[t]he term knowing includes not only actual knowledge. Constructive knowledge is knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[11]

As alluded to above, one recent, if ill-understood development merits particular attention. A Final Rule issued by DHS concerns employers' receipt of "no-match" letters, letters that give an employer prima facie constructive knowledge of a potential immigration problem.[12] Under new "safe harbor" guidelines, an employer who in every other respect complies with DHS safe harbor provisions can, by prompt remedial action, avoid a finding of constructive knowledge based upon receipt of such a letter.

Compliance in this sense, however, will not launder constructive knowledge gleaned from other sources. The safe harbor merely prevents the no-match letter from being used as evidence. "If in the totality of circumstances, other independent evidence exists to prove that an employer has constructive knowledge, the employer may still face liability."[13] The safe harbor, thus, has virtually *no import* to the employer with constructive knowledge of a problem. "DHS may find that the employer had constructive knowledge from other sources."[14]

These sanctions have teeth. A scheme of non-exclusive penalties allows for civil fines[15] (ranging from up to $2,200 for a first offense, to up to $11,000 after two offenses) as well as criminal fines of up to $3,000, and six months' imprisonment.[16] It must be emphasized that the Statute imposes these fines *per alien*; these sums can multiply with breathtaking speed.

A criminal violation will be found where the employer engages in a "pattern or practice" of infractions. "The term pattern or practice means regular, repeated, and intentional activities, but does not include isolated, sporadic or accidental acts."[17] Lest the client get too comfortable, however, the lawyer must stress that *constructive* knowledge is the threshold; the Statute sets the bar low. Moreover, the Act treats *continuing* to employ the alien with constructive knowledge of unauthorized status as violating the Statute.

Many employers figure that they can disavow knowledge of a worker's immigration status. This misguided policy can have catastrophic results.

The government will rightly treat as more egregious the offense of hiring aliens with *actual* knowledge of their illegal status. "Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both."[18]

This type of aggravated employment – prohibited under a section of the Act directed at "harboring" aliens – carries with it another even more serious sanction: RICO. As most lawyers are at least vaguely aware, Congress enacted the Racketeer Influenced and Corrupt Organizations statute[19] as a means to combat organized crime.[20] Among the many predicate offenses supporting a RICO prosecution are "any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens)" and viola-

tion of 18 U.S.C. § 1546 "relating to fraud and misuse of visas, permits, and other documents."[21]

The prospect of RICO prosecution should grab the client's attention at several levels. Of obvious interest are the criminal penalties: up to 10 years' imprisonment, near-boundless fines, and even forfeitures.[22] The RICO statute also provides for a "civil investigative demand,"[23] something a good lawyer can explain to the client will be neither painless nor cheap. Lastly, RICO also has a civil component, allowing private causes of action for plaintiffs injured by RICO defendants.

The flat-out awfulness of defending a civil RICO class action cannot be overstated, yet it remains relatively unpublicized despite its excruciating potential for expense and embarrassment. What's more, a number of these class actions have recently survived 12(b)(6) motions.[24] Visionary pleading by the plaintiffs' bar has alleged in these cases that a scheme of illegal hiring depressed the wages of legitimate workers. In such cases, a civil RICO action not only provides for attorney fees, but also treble damages – including alleged wage differentials for scores, if not hundreds, of workers dating back years. Given the costs of beating back such an action, the defendant-employer is likely to take cold comfort in the admonition that "[w]hether [the] Plaintiff can prove these allegations is a subject for discovery and a motion for summary judgment."[25]

Suitably frightened, the client may be tempted to "fire 'em all." This creates a raft of different, but still dangerous problems. The Immigration and Nationality Act prohibits "Unfair Immigration-related Employment Practices."[26] Section 1324b prevents an employer from discriminating against employees based upon impermissible criteria such as country of origin, foreign appearance or accent. Violating this section leads not only to civil fines – up to $10,000 for a second offense – but statutory attorney fees and a statutory private right of action.[27]

Beyond criminal prosecution and civil fines, employers of illegal aliens who rely on government contracts may find themselves out of business. Executive Order 12989 permits employers of illegal aliens to be debarred from government contracts.[28] The threshold for debarment, buried within the order, is "not in compliance"; debarment requires no criminal prosecution. Significantly, once DHS or the Justice Department determines a contractor is not in compliance, that ruling cannot be reviewed.[29]

Sidebar: The Franchisee

Of particular interest to the thousands of small businesses in New York is a boilerplate feature of franchise agreements that provides for termination of the agreement upon a conviction or guilty plea which impacts the goodwill of the franchise itself. A recent decision in the United States District Court for the Northern District of Georgia should emphasize to attorney and client alike just how high the stakes are.

In *Karimi v. BP Products North America, Inc.*,[30] the court denied a preliminary injunction sought by a gas station owner who contested the termination of his franchise agreement by the franchisor. The franchisee had pled guilty to the misdemeanor offense of continuing to employ unauthorized aliens. The court found that "Plaintiff's conviction of knowingly continuing to employ unauthorized aliens is an event that is relevant to the franchise relationship."[31] Furthermore, "by employing illegal aliens, in violation of federal law, the [franchisee] breached . . . three provisions of the [Dealer Supply Agreement]."[32] The court ultimately found for the franchisor, declaring, "*the knowing employment of illegal aliens by a franchisee, particularly when that illegal act has become the subject of a criminal conviction, is a significant act that 'detracts from and disparages the franchiser's public image.'*"[33]

With the government's ability to promote high-profile arrests, franchisees should be prepared to feel the effects of increased ICE worksite enforcement. As franchisees often conduct operations from multiple locations, this may add extra dimensions to the dangers. First, while the franchisee itself may be a relatively small operation, the franchise's brand name, whether it be a hotel, restaurant or gas station, may make an ICE arrest a newsworthy headline. Second, where a franchisee has multiple locations an inspection in one location can lead to inspections of all the owner's other operations. Third, should an ICE inspection yield unauthorized workers at multiple locations, the specter of "pattern or practice" and the resulting criminal sanctions may come to haunt the franchise owner.

Last, and decidedly not least, the personal ramifications of losing the franchise could be still more catastrophic. For the small business, financing and promissory note terms likely consider a loss of franchise rights as an act of default. Will the owner have pledged his or her home as security for a loan to purchase a fast food restaurant? Could hiring unauthorized workers lead to a business owner losing his or her home? These really are the stakes, and the lawyer's job is to explain them to the client.

Crafting an Immigration Compliance Program

Both DHS and the case law stress the importance of good-faith efforts to remedy existing unlawful immigrant hiring situations.[34] Instituting an immigration compliance program can save the client hundreds of thousands of dollars in fines and litigation costs – not to mention averting criminal prosecution resulting in jail time. The firm should take charge of an internal investigation and craft and implement a viable compliance program. For the law firm, as it helps the client, the lawyers help themselves.

The firm's billable hours can be substantial, yet offer a demonstrable net savings to the client.[35]

A good starting point for developing such a program should be, of all things, the Federal Sentencing Guidelines. These guidelines, too lengthy to quote in full, nonetheless set out the kind of measures that an employer should implement, such as having a responsible individual oversee day-to-day compliance, evaluating the program periodically for overall effectiveness, communicating the program's requirements to appropriate employees, etc.[36]

The commentary to these guidelines also offers valuable insight as to what effects the employer's own conduct will have on its program's overall effectiveness. "An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program."[37] Moreover, "[h]igh-level personnel and substantial authority personnel of the organization [should] be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[38]

The technical aspects of the program should be straightforward. If the client acknowledges a suspicion that some employees "might" have immigration issues, the attorney should independently verify the Social Security numbers of *all* employees. This can be done by cross-referencing the employees' names and social security numbers against the Social Security Administration's electronic database.

The lawyer should stress and insist upon confidentiality at all times. While the underlying data (such as names and Social Security numbers) may be discoverable by the government, attorneys may generate privileged work product in the form of reports and recommendations that should be guarded closely.[39] Once the lawyer completes the investigation and prepares a report of findings, the active elements of the compliance program can be put in motion. This will require all employees whose names and Social Security numbers fail to match to re-verify their information or face termination. The policy must be applied evenly, across all job descriptions and locations, including management.

Without fostering implausible "best case" scenarios, the lawyer should impress upon the client that DHS retains the ultimate discretion to prosecute criminal violations. The agency has itself declared, "DHS fully considers all of an employer's attempts to verify employment authorization status and to employ only authorized workers in determining whether to pursue sanctions. All . . . good-faith efforts militate against such sanctions."[40] As has been noted elsewhere, "[a]n 'effective program to prevent and detect violations of law' may produce dramatic reductions in . . . penalties."[41]

Conclusion

The United States government has made immigration enforcement a high-profile priority. Rogue employers can expect rough justice. Many employers already have at least an inkling that they may have immigration problems, yet they either fail to appreciate the seriousness of the penalties, or naively believe they can wait and see what happens. A worthy lawyer should be looking out for both the client and the law firm. By convincing a recalcitrant client of the risks, the lawyer serves both ends well. ■

1. Based upon 2000 Census data. It must be mentioned that these data estimate New York's undocumented population at 489,000. These same data, however, are based upon a total estimate of just under 7 million illegal aliens in the United States. *See* http://www.statemaster.com/graph/peo_est_num_of_ill_imm-people-estimated-number-illegal-immigrants#source. Other unofficial published estimates put the figure as high as between 20 million and 38 million. *See, e.g.*, http://www.chron.com/disp/story.mpl/metropolitan/mason/5189638.html. Even extrapolating from a commonly cited figure of 12 million undocumented aliens, New York's own population would likely exceed a million undocumented aliens.

2. *See* 8 U.S.C. § 1324(a)(3)(A).

3. *See* 18 U.S.C. § 1961 *et seq.*

4. *See, e.g., Karimi v. BP Prods. N. Am., Inc.*, 2006 U.S. Dist. LEXIS 25665 (N.D. Ga. May 2, 2006).

5. "Arrests by U.S. Immigration and Customs Enforcement for criminal violations have increased from 24 in FY 1999 to a record 716 in FY 2006. There

have been 742 criminal arrests since the beginning of FY 2007 (through July 31), and there is anecdotal evidence that companies are taking notice and adjusting their business practices to follow the law." <http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm>.

6. <http://www.ice.gov/pi/investigations/worksite/newsreleases.htm>.

7. *See* DHS Final Rule (DHS Docket No.2006-0004), enacted at 8 C.F.R. § 274a ("DHS Final Rule"). "With or without this rule, employers who have constructive knowledge that certain employees are unauthorized aliens should terminate employment or risk sanctions from DHS." *Id*. at 42.

8. 8 U.S.C. § 1324a.

9. 8 C.F.R. § 274a.1(a).

10. 8 U.S.C. § 1324a(a)(2).

11. Codified at 8 C.F.R. § 274a.1(*l*)(1).

12. *See generally* DHS Final Rule.

13. *Id*. at 23.

14. *Id*. at 13.

15. 8 C.F.R. § 274a.10(b). These fines are exclusive of civil fines for "paperwork" violations – i.e., failing to properly maintain Form I-9's for each employer – failures that may be met with fines of up to $1,100 for each document not properly maintained. *See* 8 C.F.R. § 274a.10(b)(2).

16. 8 U.S.C. § 1324a (f)(1).

17. 8 C.F.R. § 274a.1(k).

18. 8 U.S.C. § 1324(a)(3)(A).

19. 18 U.S.C. § 1961 *et seq.*

20. "It is the purpose of this Act . . . to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Congressional Statement of Findings and Purpose, Pub.L. 91–452, § 1.

21. 18 U.S.C. § 1961.

22. *See* 18 U.S.C. § 1963.

23. *See* 18 U.S.C. § 1968.

24. *See, e.g.*, *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2007 U.S. Dist. LEXIS 38882 (E.D. Tenn. May 29, 2007) (denying employer's motion to dismiss civil RICO action brought by employees alleging scheme to depress wages by hiring illegal immigrants). *See also Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (reversing district court's finding plaintiff employees lacked standing to pursue RICO claims); *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006) (following *Zirkle Fruit*); *Hernandez v. Balakian*, 480 F. Supp. 2d 1198 (E.D. Cal. 2007) (employees' complaint alleging depressed wages as a result of hiring illegal aliens survived motion to dismiss); *Brewer v. Salyer*, 2007 U.S. Dist. LEXIS 36156 (E.D. Cal. May, 17, 2007) (same).

25. *Brewer*, 2007 U.S. Dist. LEXIS 36156 at *43.

26. *See* 8 U.S.C. § 1324b.

27. *See* 8 U.S.C. § 1324b(h).

28. *See* Executive Order No. 12989. Feb. 13, 1996, 61 F.R. 6091, as amended Ex. Ord. No. 13286, Sec. 19, Feb. 28, 2003, 68 F.R. 10623.

29. *See id.* at § 4(b)

30. 2006 U.S. Dist. LEXIS 25665 (N.D. Ga. May 2, 2006).

31. *Id*. at *10.

32. *Id*. at *7.

33. *Id*. at *9 (emphasis added).

34. *See, e.g.*, DHS Final Rule at 28 ("DHS fully considers all of an employer's attempts to verify employment authorization status and to employ only authorized workers in determining whether to pursue sanctions. All of these good faith efforts militate against such sanctions."); *New El Rey Sausage Co., Inc. v. INS*, 925 F.2d 1153, 1159 n.6 (citing with approval ALJ's observation that New El Rey could have taken several steps including contacting a lawyer).

35. Not withstanding other penalties which might otherwise be mitigated, such as "paperwork violations," actual jail time or prospective litigation costs, consider the following hypothetical:

A chain of restaurants employs over 500 people, 100 of whom turn out to be unskilled workers such as dishwashers, busboys and kitchen staff whose names and Social Security numbers fail to match with the Social Security Administration database. Assume that an ICE probe were to uncover the situation. The employer (for a first offense) faces $2,200 per unauthorized employee for civil fines, as well as $3,000 per unauthorized employee for a "pattern or practice." One hundred employees at $5,200 each could result in $520,000 in fines alone.

An effective compliance program should root out these employees and provide for their termination. Were the government to step in before such measures could be completed, the simple step of engaging counsel to investigate and remedy the situation would be considered by DHS as evidincing good faith. Even if penalties were imposed, even a 50% reduction would save the client over a quarter-million dollars.

36. 18 U.S.C. Appx. § 8B2.1.

37. *Id.*

38. *Id.*

39. *See* William E. Knepper & Dan A. Bailey, Liability of Corporate Officers and Directors, § 17.07[2] (7th ed. 2004). "Such an inventory may disclose previously unknown violations, which cannot be swept under the rug and which may lay out a road map for adverse parties to follow in suits against corporate officials." *Id*.

40. DHS Final Rule at 28.

41. Knepper & Bailey, *supra* note 39 at § 17.07[1].

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2007 Criminal Law Legislation

By Barry Kamins

This article reviews changes in the Penal Law, Criminal Procedure Law and several related statutes that were enacted in the last legislative session and signed into law by the Governor. What follows is an overview of the changes; the reader is encouraged to read the new statutes to appreciate their nuances and complexities.[1]

Sex Offender Management and Treatment Act

In its past session, the New York State Legislature enacted a number of procedural changes to its criminal statutes. Clearly, the most dramatic change was the passage of the Sex Offender Management and Treatment Act (SOMTA) to address the dangers posed by recidivist sex offenders.[2] This legislation was a response to a recent New York Court of Appeals decision[3] rejecting the state's attempt to use the involuntary civil commitment procedures in Article 9 of the Mental Hygiene Law to detain sex offenders following incarceration periods. The new law affords sex offenders procedural safeguards that the Court found lacking in the prior commitment process.

The legislation creates a new Article 10 of the Mental Hygiene Law, which is premised on a finding that certain sex offenders have mental abnormalities predisposing them to engage in repeated sex offenses.[4] To address this problem, the legislation provides either continued custodial detention or strict post-release supervision under certain circumstances. Both the detention and the supervision can last for the remainder of the sex offender's life.

Nineteen other states have enacted similar legislation and approximately 2,700 men are being held involuntarily in civil commitment programs around the country. In upholding the constitutionality of civil confinement statutes, the United States Supreme Court has ruled that such confinement is lawful if a sex offender is "mentally abnormal" and dangerous.[5] The Court later held that the state must be able to prove that such offenders have serious difficulty in controlling their behavior.[6]

New York's legislation applies to all persons convicted of felony sex offenses under Article 130 of the Penal Law. In addition, it applies to the newly created crime of a "sexually motivated felony." An individual is guilty of a sexually motivated felony when he or she, in whole or part, commits one of 24 designated non-sex crimes for the purpose of sexual gratification.[7] Thus, if a defendant commits the crime of Arson in the First Degree and the arson is sexually motivated, the defendant has committed a sexually motivated felony and is subject to the civil commitment law. Only defendants serving state prison sentences are subject to the law. Thus, defendants sentenced to local jail terms or probation are not vulnerable.[8] The law also applies to all defendants serving state prison sentences who were sentenced *prior* to April 13, 2007,

for any felony sex offense under Article 130 of the Penal Law, or any designated non-sex crime that, by clear and convincing evidence, was sexually motivated.

The new law provides numerous procedural steps that must precede any finding that a sex offender should be civilly committed. First, at least four months prior to the anticipated prison release of a sex offender, the Department of Corrections must notify the Office of Mental Health and the Attorney General.[9] A committee of professional personnel will preliminarily review the file to determine if the offender should be referred to a "case review team" for further evaluation. The statute is silent on what factors the committee should use in determining that further evaluation is necessary. Although an inmate may have a scheduled release date from prison, once the case is subject to review for possible civil management the inmate's release can be postponed if the Attorney General files a securing petition with the court.

If the committee refers the case for further review, the offender (now known as the respondent) is notified and the matter is sent to a case review committee consisting of 15 members who are appointed by the Commissioner of the Office of Mental Hygiene.[10] Any three of these members may sit as a team to review a particular case. If the case review team determines that the respondent is a sex offender requiring civil management, it must notify the respondent and the Attorney General. The notification must be made within 45 days of the notice of the offender's anticipated release.[11] It must be accompanied by a written report from a psychiatric examiner that includes a finding concerning whether the respondent has a "mental abnormality," which is defined in the statute.[12] If the case review team recommends that the Attorney General file a civil management petition, it is in the Attorney General's discretion whether to do so. If a petition is filed it must be done within 30 days[13] in the Supreme Court or County Court in the county where the respondent is incarcerated.[14] If the case review team determines that the respondent does *not require* civil management, then no petition will need to be filed.

Should a petition be filed by the Attorney General, the respondent is entitled to court-appointed counsel. No bail is permitted during civil management petition proceedings. Within 30 days from filing a petition, the court must conduct a probable cause hearing. If there is probable cause to believe that the respondent requires civil management a trial is ordered.[15] If probable cause is not established, then the petition is dismissed and the respondent is released. The trial must be conducted within 60 days of a probable cause determination.[16]

The offender may choose a trial by a jury of 12 jurors or a bench trial, and may ask to remove the trial to a county in which he or she was sentenced. The court, however, can deny the application, upon application of the Attorney General. At trial, the burden is on the Attorney General to establish by clear and convincing evidence that the respondent suffers from a mental abnormality.[17] That abnormality must be a condition or disorder that affects the volitional capacity of the individual in a manner that predisposes him or her to commit a sex offense – that is, one that results in serious difficulty controlling such conduct. The verdict of the jury must be unanimous.[18] If the jury is unable to reach a unanimous verdict, the court must schedule a second trial within 60 days.[19] If a second jury is unable to reach a unanimous verdict, the court must dismiss the petition. If a unanimous jury or a judge finds that the respondent suffers from such an abnormality, then it is the *court's* ultimate responsibility to determine the respondent's fate: confinement or intensive supervision.[20]

After submitting additional evidence, the court must determine by clear and convincing evidence whether the respondent has a mental abnormality involving such strong predisposition to commit sex offenses and an inability to control the behavior. Upon making such a finding, the respondent must be confined to a secure treatment facility. If the court does not so find, it must order the respondent to submit to strict and intensive supervision by the Division of Parole. This supervision may include electronic monitoring, polygraph testing and residence restrictions. A respondent may appeal from either decision by the court.

It should be noted that both the period of confinement and the period of supervision are indefinite and may, theoretically, last for the remainder of the sex offender's life. Civilly committed sex offenders have an ongoing right to court-appointed counsel and can challenge their continued confinement once a year.[21] Offenders under strict supervision may move for termination of supervision or modification of conditions once every two years. If an offender violates a condition of strict supervision, the Attorney General may file a petition for confinement or modification of the terms of supervision.

Procedural Changes

The Legislature enacted a number of other procedural changes affecting criminal law. A new law liberalizes the ability of a judge to determine that a child under the age of 14 is a "vulnerable witness," thus allowing the child to testify by two-way, closed-circuit television.[22] This provision was originally enacted to provide child witnesses with an alternative to in-court testimony when that experience would be mentally or emotionally harmful to the child. The amendment no longer requires a prosecutor to demonstrate "extraordinary circumstances" in order to utilize this procedure and only requires a prosecutor to establish that the child would suffer "serious" harm, rather than severe mental or emotional harm.

Two new procedural changes will affect defendants who are on probation. First, rules for transferring

Probation from one jurisdiction to another have been tightened.[23] When a probationer resides in another jurisdiction within the state, the sentencing court will now be required to transfer the supervision of the probationer to the Probation Department in the other jurisdiction. In addition, a sentencing court can no longer retain jurisdiction over the probationer for purposes of re-sentencing in the event of a violation of probation. Second, a pilot program has been authorized in four counties outside of New York City in which Probation authorities would have the legal authority to issue temporary detainer warrants for high-risk probationers who have been convicted of sex offenses or family offenses.[24] This would allow Probation Officers to bring a probationer to jail for temporary detention even when a court is not in session. The pilot program is scheduled to sunset on March 31, 2010.

Drunk Driving Laws

In the past session, the Legislature created several new crimes effectively addressing serious and continuing social problems. In an effort to toughen the drunk driving laws, the Legislature created two new crimes: Aggravated Vehicular Homicide and Aggravated Vehicular Assault.[25] These crimes were created in response to the particularly grisly death of a seven-year-old girl who was killed while returning from her aunt's wedding in Long Island. Interestingly, there is currently no crime of "Vehicular Homicide" (although there is a crime of Vehicular Manslaughter), and thus it might be a misnomer to create a crime that appears to increase the penalties of a nonexistent crime. It seems the Legislature used the word "homicide" in the title of the crime to stress the seriousness with which it treats this important subject.

In any event, the new crime of Aggravated Vehicular Homicide is a Class B felony and is punishable by up to 25 years in prison. A person is guilty of Aggravated Vehicular Homicide when he or she engages in reckless driving under the Vehicle and Traffic Law, commits the crime of Vehicular Manslaughter in the Second Degree and one of six aggravating factors is present. These factors include the following: a blood-alcohol level of .18% or more at the time the car is operated; the defendant causes the death of more than one person; the defendant causes the death of one person and serious physical injury to another person; the defendant's license is suspended pursuant to various drunk driving laws; or the defendant has previously been convicted of intoxicated or impaired driving within the prior 10 years. The new crime of Aggravated Vehicular Assault (Class C felony) increases the penalties of Vehicular Assault by the presence of similar aggravating factors.

Anti-Trafficking Laws

Another new crime addresses sex and labor trafficking. New York now joins 29 other states and the federal government in attempting to combat human trafficking. The United States Department of State has estimated that 14,500 to 17,500 people a year are brought into the United States and then used for forced labor, involuntary domestic servitude or sexual exploitation. Trafficking also originates domestically, and the Office of Children and Family Services recently estimated that over 2,500 children in New York State are exploited for purposes of commercial sexual activity each year. Although federal laws punish human trafficking, they are usually invoked only against the largest trafficking rings rather than smaller operations such as sweatshops and brothels.

> New York's new anti-trafficking law is one of the strongest such measures in the country.

New York's new law is one of the strongest anti-trafficking measures in the country. It addresses the problem in three significant ways. First, it creates new crimes specifically targeting methods used by traffickers to exploit their victims. Second, it provides delivery of social services to trafficking victims who are currently ineligible to receive such services. Finally, it creates a task force to improve training to help prosecutors and police recognize trafficking situations.

The legislation creates two new crimes: Sex Trafficking, a Class B felony, and Labor Trafficking, a Class D felony.[26] A person is guilty of Sex Trafficking when he or she intentionally advances or profits from prostitution by using any of five methods to compel or induce a victim to engage in prostitution. These methods include providing the victim with certain drugs; using materially false or misleading statements; withholding or destroying documents, including passports or immigration papers; or requiring that prostitution be performed to repay a real or purported debt. In addition, the crime is committed if the trafficker coerces the victim by threatening physical injury or death; deportation or unlawful imprisonment; the exposure of secrets; or a variety of other possible harmful acts. The new crime of Labor Trafficking targets the language of sex trafficking and prevents an individual from forcing a victim into labor servitude.

Other changes have been made to the Penal Law and Criminal Procedure Law addressing sex and labor trafficking. The crime of Promoting Prostitution in the Third Degree has been amended to preclude "prostitution tourism," in which a person in New York knowingly sells

travel-related services for the purposes of prostitution services in another jurisdiction.[27] International sex trafficking is an enormous problem and each year thousands of young women are trafficked across international borders for the purpose of commercial sexual exploitation. In addition, the new legislation provides that a trafficking victim shall not be deemed to be an accomplice of the trafficker.[28] This provision relieves prosecutors of the evidentiary burden of corroborating the victim's testimony in a criminal prosecution. The new law also authorizes wiretapping a trafficker's telephone[29] and adds Sex Trafficking and Labor Trafficking to the list of felonies designated as criminal acts for purposes of prosecuting Enterprise Corruption.[30] Finally, Patronizing a Prostitute has been elevated from a Class B misdemeanor to a Class A misdemeanor.[31]

A second component of the anti-trafficking legislation provides social services for trafficking victims.[32] These services may include emergency temporary housing, health care, mental health counseling, drug addiction screening and treatment, language and translation services, job training and placement assistance. The Office of Temporary and Disability Assistance (OTDA) may also coordinate with the federal government to help victims obtain special visas to remain in this country to testify against traffickers.

Under the third component of the legislation, the Interagency Task Force on Human Trafficking is created and will be co-chaired by the Commissioners of the Department of Criminal Services and OTDA.[33] The task force is responsible for collecting data on the extent of trafficking in New York, establishing training programs for law enforcement personnel and evaluating the state's progress in preventing and prosecuting trafficking. The Task Force must report to the Governor and Legislature by November 1, 2008, and the Task Force's term expires on September 1, 2011.

Service Animals

The Legislature also enacted new offenses relating to service animals. A recent survey indicated that 89% of disabled individuals who used service animals had experienced some type of harassment, interference or attack by individuals or uncontrolled animals. A new crime, Interference, Harassment or Intimidation of a Service Animal, is a Class B misdemeanor and an individual is guilty of this offense when he or she makes it impractical or dangerous for a service animal to perform its responsibilities.[34] One is guilty of Harming a Service Animal in the Second Degree, a Class A misdemeanor, when a person causes physical injury to or the death of a service animal.[35]

Expanding Existing Crimes

In the past session, the Legislature enacted numerous measures that will expand both the definition of and the penalties for existing crimes. For example, the crime of Disseminating Indecent Material to Minors[36] has been expanded to include the communication of indecent material by *words*, as well as by graphic or visual images. However, the amendment was unnecessary because the Court of Appeals recently interpreted the prior statute as including the use of words.[37] The crime of Unlawful Surveillance has been expanded to include the use of a cellular phone to take photographs.[38] The Legislature also addressed the problem of cemetery desecration. It expanded the crime of Cemetery Desecration by making it a crime to *steal* property from a burial place in addition to damaging property.[39] A new crime of Aggravated Cemetery Desecration was created.[40] A person is guilty of this crime, a Class E felony, if he or she removes a body part or any object from a casket or crypt. This crime will address a rash of thefts in cemeteries upstate, in which individuals have removed cemetery markers, statues, uniforms and Civil War relics from the graves of war veterans.

The recent legislative session focused its attention on a growing problem of unlawful sexual interaction between inmates and employees at correctional facilities. Accordingly, the Penal Law was amended, expanding the definition of "employee" to broaden the scope of individuals who can be prosecuted. Previously, only those who worked at an institution could be prosecuted. Under the amendment, any person who enters the facility as an employee of a government agency or as a volunteer is prohibited from engaging in any sexual activity with an inmate.[41] This will include employees of the Department of Education, employees of the Department of Health and Mental Hygiene, contractors, maintenance crews, medical staff and food service workers.

Finally, the Legislature has expanded the enterprise corruption statute and money laundering statutes to add Trademark Counterfeiting to the list of crimes that may form the basis for prosecution.[42] While it has been recognized for some time that the production and sale of counterfeit goods is a growing problem, the fact that those involved in street-level distribution of these goods are also known to engage in violent criminal activity has been overlooked. By amending the Penal Law, the Legislature has given law enforcement the tools needed to target the larger criminal networks engaged in fraud and violence.

Crime Victims Legislation

Each year the Legislature enacts measures addressing concerns of crime victims and this year was no exception. With respect to domestic violence cases, one amendment expands a judge's ability to revoke an individual's firearm license when the individual has previously violated an Order of Protection by causing physical injury to another.[43] In addition, a new law allows victims of domestic violence to move out of their residence in

order to ensure their safety without breaking a lease agreement.[44] The victim must establish that, if he or she remains in the premises, there is a substantial risk of physical or emotional harm to the victim or the victim's child and that the landlord has refused to permit a termination of the lease.

Victims of certain sex crimes have received increased benefits under a new law authorizing a court to issue a pre-trial order compelling a defendant to undergo HIV testing.[45] Previously, a court could only issue this type of order *after* a defendant had been convicted. Under the new law, a victim can request a pre-trial order if the sex offense includes sexual intercourse, or oral or anal sexual conduct. The victim must submit a written application within six months of the date of the crime and file it prior to, or within, 48 hours of the filing of an Indictment or Superior Court Information. The results of the testing cannot be disclosed to the court and can only be given to the victim or, upon request, to the defendant. Any information obtained during a hearing on the application for an order cannot be used in a civil or criminal proceeding. Interestingly, had the Legislature not enacted this bill, New York State would have lost federal funds for failing to comply with the provisions of a statute known as Federal Grants to Encourage Arrest Policies.

Victims will also benefit from a new law that authorizes a court to issue a Temporary Order of Protection when a defendant is remanded.[46] This addresses situations in which defendants violate Temporary Orders of Protection while in custody by making telephone calls or sending harassing or threatening mail to a victim. In addition, under an amendment to the Penal Law, municipalities and other providers of emergency response services can now seek restitution for their costs in responding to a false report of a bomb or hazardous substance.[47]

Finally, victims of identity theft will benefit from a new law requiring the law enforcement agency having jurisdiction over the identity theft offense to make a police report of the matter, provide the victim with a copy of the report at no charge and begin an investigation.[48] Police reports are the first step in helping identity theft victims clear their names and recover from identity theft. Victims need these reports to document the crime and to notify credit bureaus that, upon request, must block the reporting of inaccurate information about the victim. When a copy of a police report is provided to them, the three largest nationwide credit reporting companies (Experian, Equifax and TransUnion) must place an extended fraud alert in the victim's credit file for seven years. Additionally, the alert entitles the victim to free credit reports.

Collateral Consequences of Criminal Convictions

This year, the Legislature addressed an area that it had not focused on previously: collateral consequences of criminal convictions. Two new laws give added protection to applicants for jobs and current employees with a criminal record. Under one law, employers can no longer ask prospective employees about prior non-criminal convictions (violations) or youthful offender adjudications.[49] Under a second new law, employers cannot discriminate against current employees with convictions predating their employment and where the convictions are unrelated to the job and do not constitute a threat to safety.[50] Previously, such protection had only been afforded to applicants for employment but not current employees.

Another bill will greatly assist the re-entry of individuals who leave prison. Previously, individuals who entered local or state prisons had their Medicaid benefits terminated and they were required to reapply for these benefits upon their release. Frequently, there was a significant time period before the reinstatement of benefits and individuals were without medical care, drug treatment and mental health services. A new law mandates that Medicaid benefits be *suspended*, but not terminated, upon incarceration and that the benefits be immediately reinstated upon release.[51] Finally, one new law actually *reduces* privileges to ex-offenders. Persons convicted of violent felony offenses or Class A-1 felonies can no longer obtain a firearm license even if they receive a Certificate of Relief from Disabilities or a Certificate of Good Conduct.[52]

In the area of sex offender registration, the Legislature responded to reports from numerous police agencies that sex offenders throughout the state are failing to register or update their registrations. As a result, the penalty for failing to register has been increased to a Class E felony for the first offense, and a Class D felony upon the second offense.[53]

The Legislature enacted a new law, the Freedom to Report Terrorism Act, that will protect individuals who report crimes or suspicious behavior.

Vehicle and Traffic Law

A number of new laws were enacted that will affect motorists violating the Vehicle and Traffic Law. For the past 20 years there has been a pilot program in seven counties[54] in which an ignition interlock device has been utilized to combat drunk driving. Once installed, this device permits a car to be started only after an alcohol analysis of the operator's breath. If the analysis indicates a blood-alcohol level that is above the legal limit, then the car will not start. A new law extends the program state-wide, and courts will now be able to require the use of an ignition interlock device as a condition of probation.[55] The law also permits the device to be installed on any car the probationer owns or operates. Individuals who are issued conditional driver's licenses and who are on Probation will be issued licenses indicating that the car must contain such an ignition device. Finally, a new law increases the penalties for snowmobiling while intoxicated when the offender is on the private property of others.[56]

Inmates

Several new laws affect prisoners. Inmates serving determinate sentences for drug offenses are now eligible for early parole release for the purpose of deportation.[57] This change affects hundreds of individuals who were sentenced to determinate sentences pursuant to the 2004 and 2005 Drug Reform Acts.

A second bill, not yet signed by the Governor, will affect approximately 8,000 mentally ill inmates currently within the New York State prison system.[58] Frequently, mentally ill inmates are disciplined by being placed in solitary confinement. Studies have shown that such treatment causes inmates to engage in acts of self-mutilation and to commit suicide at a rate three times higher than inmates in the general prison population. The new law requires mental health clinicians to evaluate individuals who exhibit signs of mental illness. If the inmate meets one of numerous criteria, the inmate must be assigned to a residential mental health treatment program jointly operated by the Office of Mental Health and the Department of Corrections.

Freedom to Report Terrorism Act

The Legislature enacted a new law that will protect individuals who *report* crimes or suspicious behavior. In November 2006, six Muslim imams were removed from a U.S. Airways flight awaiting takeoff after a number of passengers and crew onboard reported to authorities what they believed to be suspicious behavior. After receiving these reports, airport security and federal air marshals agreed that the actions were suspicious enough to warrant removing the imams from the plane. The men were detained and ultimately released, but later sued U.S. Airways. They are seeking the names of the passengers who reported their activities.

In response to that incident, the Legislature enacted the Freedom to Report Terrorism Act.[59] Pursuant to this statute, a person who acts in good faith and reports the allegedly suspicious behavior of another person shall be immune from civil and criminal liability. The person making the report must have a reasonable belief that such suspicious behavior constituted or is indicative of an act of terrorism. It is interesting to note that the statute also protects an individual who reports allegedly suspicious behavior that is indicative of a *crime* as long as the report is based upon a reasonable belief. It remains to be seen how this statute will interact with civil actions for false arrest or malicious prosecutions.

Minor or Technical New Laws

A number of minor or technical new laws were enacted in the past session. Suffolk County became the 23rd county in which defendants can appear for non-substantive proceeding by video conferencing in lieu of a personal appearance.[60] The crime of Failure to Disclose the Origin of a Recording in the First Degree is now a "designated offense" for which an eavesdropping or video surveillance warrant may be issued.[61] Criminal Mischief is now a crime for which criminal courts and Family Court may exercise concurrent jurisdiction when committed between members of the same family or household.[62] The current ticket scalping law has been repealed and there are no longer restrictions on the maximum resale price of tickets.[63] However, it is a Class A misdemeanor for "ticket speculators" to sell tickets and the statute still precludes the resale of tickets within 1,500 feet of sites with seating capacities of at least 5,000 individuals. Finally, a technical amendment to the crime of Non Support of a Child provides that a prior conviction for either the second or first degree offense within the preceding five years elevates the crime to a Class E felony.[64]

1. A discussion of several new laws can also be found in the Criminal Law Column, N.Y.L.J., Oct. 11, 2007.

2. N.Y. Mental Hygiene Law art. 10, §§ 10.01–10.17; ch. 7, eff. 4/12/07 (MHL).

3. *State of N.Y. ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607, 825 N.Y.S.2d 702 (2006) ("*Harkavy I*"). In a later case, *State of N.Y. ex rel. Harkavy v. Consilvio*, 8 N.Y.3d 645 (2007) ("*Harkavy II*"), the Court held that a second group of sex offenders were also improperly committed under Article 9 of the Mental Hygiene Law. While the Court noted that the new legislation addressed the procedural flaws identified in *Harkavy I*, it did not rule on the propriety of the standards enunciated in SOMTA.

4. MHL § 10.01; ch. 7, eff. 4/13/07.

5. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

6. *Kansas v. Crane*, 534 U.S. 407 (2002). The new legislation tracks that language. *See* MHL § 10.03(i).

7. See MHL § 10.03(f) for a list of specified offenses. A "sexually motivated" felony does not subject the defendant to increased incarceration; however, as noted, it subjects the defendant to the civil commitment law.

8. MHL § 10.03(a), (g); ch. 7, eff. 4/13/07.

9. MHL § 10.05(b); ch. 7, eff. 4/13/07.

10. MHL § 10.05(e); ch. 7, eff. 4/13/07.

11. MHL § 10.05(g); ch. 7, eff. 4/13/07.

12. MHL § 10.03(i); ch. 7, eff. 4/13/07. A court has recently ruled that a sex offender has no right to counsel at the initial psychiatric interview that is conducted to aid the review team in determining whether the offender is in need of civil management. *State of N.Y. v. Davis*, 17 Misc. 3d 433, 842 N.Y.S.2d 705 (Sup. Ct., Bronx Co. 2007). The issue of when the right to counsel attaches is one of the issues in *Mental Hygiene Legal Service v. Spitzer*, a challenge to the constitutionality of the statute, pending in the Southern District.

13. MHL § 10.06(a); ch. 7, eff. 4/13/07.

14. MHL § 10.06(a), (b); ch. 7, eff. 4/13/07.

15. MHL § 10.06(g); ch. 7, eff. 4/13/07.

16. MHL § 10.07(a); ch. 7, eff. 4/13/07.

17. MHL § 10.07(d); ch. 7, eff. 4/13/07.

18. In August, a jury in Washington County heard the first civil confinement trial under the new law and found that the offender did not suffer from a mental abnormality requiring civil confinement. He was released from custody. Later that month, an offender finishing a 16-year prison sentence in Greene County became the first offender to be civilly confined, after waiving a probable cause hearing and trial and consenting to indefinite civil confinement.

19. MHL § 10.07(e); ch. 7, eff. 4/13/07.

20. MHL § 10.07(f); ch. 7, eff. 4/13/07.

21. MHL § 10.09(a); ch. 7, eff. 4/13/07.

22. N.Y. Criminal Procedure Law § 65.10; ch. 548, eff. 8/15/07 (CPL).

23. CPL § 410.80; ch. 191, eff. 9/1/07.

24. CPL § 410.92; ch. 377, eff. 7/18/07

25. Penal Law §§ 125.14, 120.04-a; ch. 345, eff. 11/1/07.

26. Penal Law §§ 230.34, 230.36, 135.35; ch. 74, eff. 11/1/07.

27. Penal Law § 230.25(1); ch. 74, eff. 11/1/07.

28. Penal Law § 230.36; ch. 74, eff. 11/1/07

29. CPL § 700.05(8)(b); ch. 74, eff. 11/1/07.

30. Penal Law § 460.10(1)(a); ch. 74, eff. 11/1/07.

31. Penal Law § 230.04; ch. 74, eff. 11/1/07.

32. N.Y. Social Services Law art. 10-D; ch. 74, eff. 11/1/07 ("Soc. Serv. Law").

33. Soc. Serv. Law § 483-ee; ch. 74, eff. 11/1/07.

34. Penal Law § 242.05; ch. 582, eff. 11/1/07.

35. Penal Law § 242.10; ch. 582, eff. 11/1/07.

36. Penal Law 235.25; ch. 8, eff. 3/19/07.

37. *People v. Kozlow*, 8 N.Y.3d 554, 838 N.Y.S.2d 800 (2007).

38. Penal Law § 250.40; ch. 291, eff. 11/1/07.

39. Penal Law §§ 145.22, 145.23; ch. 353, eff. 7/18/07.

40. Penal Law §§ 145.26, 145.27; ch. 376, eff. 11/11/07.

41. Penal Law § 130.05(3)(e), (f); ch. 335, eff. 11/1/07.

42. Penal Law §§ 460(1)(a), 700.05(8)(b); ch. 568, eff. 11/1/07.

43. CPL § 530.14; ch. 198, eff. 8/3/07.

44. CPL § 530.12(g); N.Y. Real Property Law § 227-c; ch. 571, eff. 11/1/07.

45. CPL § 210.16; ch. 571, eff. 11/1/07.

46. CPL §§ 530.12, 530.13, ch. 137, eff. 7/3/07.

47. Penal Law § 60.27(13); ch. 519, eff. 8/15/07.

48. N.Y. Executive Law § 646; ch. 346, eff. 7/18/07 ("Exec. Law").

49. Exec. Law § 296(16); ch. 639, eff. 11/1/07.

50. N.Y. Correction Law § 751; ch. 284, eff. 7/19/07 ("Corr. Law").

51. Soc. Serv. Law § 366(1-a) ch. 355, eff. 4/1/08.

52. Corr. Law § 701(2); ch. 235, eff. 10/16/07.

53. Corr. Law § 168-t; ch. 373, eff. 8/17/07.

54. Albany, Erie, Nassau, Onondaga, Monroe, Westchester and Suffolk.

55. Penal Law § 65.10(k-1); ch. 669, eff. 10/27/07.

56. N.Y. Parks, Recreation & Historic Preservation Law § 25.24; ch. 311, eff. 11/1/07.

57. Exec. Law § 259-i (2)(d); ch. 239, eff. 7/18/07.

58. Corr. Law § 137(6); S. 333-B approved by both houses and sent to the Governor for signature; eff. 18 months after it is signed into law.

59. Penal Law § 490.01; ch. 651, eff. 8/28/07.

60. CPL § 182.20; ch. 29, eff. 5/14/07.

61. CPL § 700.05(8)(b); ch. 570, eff. 11/1/07.

62. CPL § 530.11(1); Family Court Act § 812 (1); ch. 541, eff. 11/13/07.

63. N.Y. Arts & Cultural Affairs Law art. 25; ch. 61, eff. 5/31/07.

64. Penal Law § 260.06; ch. 310, eff. 11/1/07.

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New York State Consumer Protection Law and Class Actions in 2007 – Part I

By Thomas A. Dickerson

The year 2007 saw significant changes in consumer law.[1] Part I of this article will discuss recent developments in several consumer law areas and Part II shall discuss recent developments in New York State consumer class actions.

Many cases in 2007 involved deceptive and misleading business practices,[2] Property Condition Disclosure Statements, New Car Lemon Law arbitration, home inspector licensing, home improvement contractor licensing, new home housing merchant implied warranty, electronic funds transfers, identity theft, debt collection practices, debt collector licensing and price gouging.

In addition, there has been a dramatic increase in the use of mandatory arbitration, class action waivers,[3] forum selection[4] and choice-of-law clauses in consumer contracts. In particular, this included agreements entered into over the Internet[5] and a much-needed effort by some courts to analyze entry into consumer agreements and the appropriate standards of proof regarding the disposition of disputes arising from the same, which include summary judgment motions made by credit card issuers;[6] confirmation of arbitration awards;[7] deceptive lending practices in home equity loan mortgage closings;[8] middle term price changes in fixed price contracts;[9] and improper debt collection methods.[10]

Real Property Disclosure Forms

Notwithstanding New York's adherence to the doctrine of caveat emptor in the sale of real estate, "impos[ing] no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment,"[11] there have been two significant developments in protecting real estate purchasers. First, as stated by the courts in *Ayres v. Pressman*[12] and *Calvente v. Levy*,[13] any misrepresentations in the Property Condition Disclosure Statement, mandated by Real Property Law § 462, provide a separate cause of action for defrauded home buyers, which entitles a plaintiff "to recover his actual damages arising out of the material misrepresentations set forth on the disclosure form notwithstanding the 'as is' clause contained in the contract of sale."[14] Second, the court in *Simone v. Homecheck Real Estate Services, Inc.*, has set forth that "when a seller makes a false representation in a Disclosure Statement, such a representation may

be proof of active concealment . . . the alleged false representations by the sellers in the Disclosure Statement support a cause of action alleging fraudulent misrepresentation in that such false representations may be proof of active concealment."[15]

Educational Services

In *Drew v. Sylvan Learning Center Corp.*,[16] the parents enrolled their school-age children in an educational services[17] program promising "The Sylvan Guarantee. Your child will improve at least one full grade level equivalent in reading or math within 36 hours of instruction or we'll provide 12 additional hours of instruction at no further cost to you." After securing an $11,000 loan to pay for the defendant's services for eight months of thrice weekly, one-hour tutoring sessions, the parents were shocked that "based on the Board of Education's standards, it was concluded that neither child met the grade level requirements"; and the plaintiffs' daughter was retained in second grade.[18]

The court found that (1) fraudulent misrepresentation occurred, noting that no evidence was introduced "regarding Sylvan's standards, whether those standards were aligned with the New York City Board of Education's standards, or whether Sylvan had any success with students who attended New York City public schools"; (2) a violation of N.Y. General Business Law § 349 (GBL) occurred, citing *Brown v. Hambric*,[19] *Cambridge v. Telemarketing Concepts*[20] and *People v. McNair*,[21] in that the "defendant deceived consumers . . . by guaranteeing that its services would improve . . . children's grade levels and thereby implying that its standards were aligned with the Board of Education's standards"; and (3) unconscionable actions occurred ("There is absolutely no reason why a consumer interested in improving her children's academic status should not be made aware, prior to engaging Sylvan's services, that these services cannot, with any reasonable probability, guarantee academic success. Hiding its written disclaimer within the progress report and diagnostic assessment is unacceptable.")

Mandatory Arbitration Clauses

In *Ragucci v. Professional Construction Services*,[22] the court enforced a prohibition in GBL § 399-c against using mandatory arbitration clauses in certain consumer contracts and applied it to a contract for architectural services.

> A residential property owner seeking the services of an architect for the construction or renovation of a house is not on equal footing in bargaining over contractual terms such as the manner in which a potential future dispute should be resolved. Indeed, the plaintiffs in this case played no role in drafting the subject form agreement. Moreover, a residential property owner may be at a disadvantage where the chosen forum for arbitration specializes in the resolution of disputes between members of the construction industry.[23]

The petitioners in *Baronoff v. Kean Development Co., Inc.*,[24] had entered into construction contracts with the respondent to manage and direct renovations of two properties. The agreement contained an arbitration clause that the respondent sought to enforce after the petitioners terminated the agreement by refusing to pay the balance due. The court, in "a case of first impression," found that GBL § 399-c barred the mandatory arbitration clause and, further, that the petitioners' claims were not preempted by the Federal Arbitration Act. "While the [FAA] may in some cases preempt a state statute such as section 399-c, it may only do so in transactions 'affecting commerce.'"[25]

New Car Lemon Law

In *DaimlerChrysler Corp. v. Spitzer*, the Court of Appeals, noting that "the Legislature enacted the New Car Lemon Law [GBL § 198-a] 'to provide New York consumers greater protection than that afforded by automobile manufacturers' express warranties," found that "we do not read the repair presumption as requiring a consumer to establish that the vehicle defect continued to exist until the trial or hearing date . . . once a consumer has met the four-repair threshold the presumption arises regardless of whether the manufacturer later remedies the problem."[26]

Home Inspections

In *Carney v. Coull Building Inspections, Inc.*,[27] the home buyer alleged that the defendant, a licensed home inspector, "failed to disclose a defective heating system" that was subsequently replaced with a new "heating unit at a cost of $3,400.00," although the "defendant pointed out in the report that the hot water heater was 'very old'" and "has run past its life expectancy." In finding for the plaintiff the court noted that, although the defendant's damages would be limited to the $395 fee paid[28] and no private right of action existed under the Home Improvement Licensing Statute, Real Property Law § 12-B, the plaintiff did have a claim under GBL § 349 because of the defendant's "failure . . . to comply with Real Property Law § 12-B by not including important information on the contract such as the "inspector's licensing information.'"[29]

Repair Shop Labor Charges

Tate v. Fuccillo Ford, Inc.[30] was a case involving the installation of a re-manufactured transmission without the consumer's consent. In *Tate*, the court found that the "defendant's policy of fixing its times to do a given job . . . based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing

labor costs is 'a deceptive act or practice directed towards consumers and that such . . . practice resulted in actual injury to a plaintiff.'"

Credit Cards

In *People v. Applied Card Systems, Inc.*,[31] a case involving misrepresentations concerning availability of certain pre-approved credit limits, the court found that the "petitioner successfully established his claims pursuant to (GBL §§ 349 and 350)" and modified the damages awarded.

Electricity Rates

Emilio v. Robison Oil Corp.[32] involved a contract to provide electricity. There, the court found that "the act of unilaterally changing the price in the middle of the term of a fixed price contract has been found to constitute a deceptive practice . . . therefore, the plaintiff should also be allowed to assert his claim under (GBL § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract."

Mortgage Closings

In *Bonior v. Citibank, N.A.*,[33] a case involving a home equity mortgage closing, the court found that the lenders had violated GBL § 349 by (1) failing to advise the borrowers of a right to counsel, (2) the use of contradictory and ambiguous documents containing no prepayment penalty clauses and charging an early closing fee, (3) failing to disclose relationships with settlement agents and (4) document discrepancies.

Food Expiration Dates

In *Food Parade, Inc. v. Office of Consumer Affairs*,[34] a majority of the Court of Appeals stated that

> [m]any consumer goods bear expiration dates, as required by law. In the case before us, a supermarket displayed a number of products bearing expired dates. We must decide whether this is a deceptive trade practice within the meaning of the Nassau County Administrative Code [§ 21-10.2]. . . . We hold that offering such products for sale is not deceptive unless the retailer alters or disguises the expiration dates. Without doubt, the Legislature may prohibit and punish the sale of certain outdated or stale products. We cannot, however, fit such sales or displays into the code's "deceptive trade practice" proscription.[35]

Tax Advice

In *Mintz v. American Tax Relief*,[36] a case involving rendering of tax advice, the court held that "the second and sixth mailings unambiguously state that recipients of the [post] cards 'can be helped Today' with their 'Unbearable Monthly Payment Plan(s)' and that defendant can stop wage garnishments, bank seizures and assessment of interest and penalties. These two mailings . . . make explicit promises which . . . cannot be described as 'puffery' and could . . . be found to be purposely misleading and deceptive."[37]

Home Contractor Licensing

Homeowners often hire home improvement contractors to repair or improve their homes or property. Home improvement contractors must, at least, be licensed by the Department of Consumer Affairs of New York City, Westchester County, Suffolk County, Rockland County, Putnam County and Nassau County to perform services in those counties.[38] In *Flax v. Hommel*,[39] the court held that "[s]ince Hommel was not individually licensed pursuant to Nassau County Administrative Code § 21-11.2 at the time the contract was entered and the work performed, the alleged contract . . . was unenforceable."

New House Warranty

GBL § 777 provides, among other things, for a statutory housing merchant warranty for the sale of a new house (but not a custom house).[40] In *Farrell v. Lane Residential, Inc.*,[41] after a seven-day trial, the court found the developer had violated GBL § 777-a regarding various defects, and awarded the cost to cure the defects ($35,952) as damages. Although the plaintiffs sought damages for the "stigma [that] has attached to the property,"[42] the court denied the request for a failure to present "any comparable market data."

In *Emilio*, the court found that "the act of unilaterally changing the price in the middle of the term of a fixed price contract has been found to constitute a deceptive practice."

Electronic Funds Transfers, Identity Theft

In *Household Finance Realty Corp. v. Dunlap*,[43] a mortgage foreclosure proceeding arising from the defendant's failure to make timely payments, the court denied the plaintiff's summary motion because it was undisputed that "the funds were available in defendant's account to cover the preauthorized debit amount," noting that the Electronic Funds Transfer Act (EFTA)

> was enacted to "provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems." Its purpose is to "assure that mortgages, insurance policies and other important obligations are not declared in default due to late payment caused by a system breakdown."

> As a consumer protection measure, section 1693j of the EFTA suspends the consumer's obligation to make payment "[i]f a system malfunction prevents the effectuation of an electronic fund transfer initiated by [the] consumer to another person and such other person has agreed to accept payment by such means."[44]

In *Kudelko v. Dalessio*,[45] the court declined to apply GBL §§ 380-s and 380-*l* retroactively to an identity theft scheme, which provide a statutory cause of action providing damages (actual and punitive) for identity theft, but did find that a claim for fraud was stated and the jury could decide liability, if appropriate.

Debt Collectors

In *Centurion Capital Corp. v. Druce*,[46] the plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of the City of New York § 20-489 and, because the plaintiff was not licensed, its claims against the defendant had to be dismissed. In addition, the defendant's counterclaim asserted that the plaintiff violated GBL § 349 by "bringing two actions for the same claim," but the court found both as being "sufficient" to state a GBL § 349 cause of action.

Price Gouging

GBL § 396-r prohibits price gouging during emergency situations. In *People v. My Service Center, Inc.*,[47] the court addressed the charge that a "gas station [had inflated] the retail price of its gasoline" after the "abnormal market disruption" caused by Hurricane Katrina in the summer of 2005. "[T]his Court finds that respondent's pricing patently violated GBL § 396-r . . . given such excessive increases and the fact that such increases did not bear any relation to the supplier's costs. . . . Regardless of respondent's desire to anticipate market fluctuations to remain competitive, notwithstanding the price at which it purchased that supply, [this] is precisely the manipulation and unfair advantage GBL § 396-r is designed to forestall." ■

1. Many of these are discussed in *Consumer Law: The Judge's Guide to Federal and New York State Consumer Protection Statutes. See* www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml *and* www.nycourts.gov/courts/9jd/taxcertatd.shtml. For previous years, see, e.g., Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, N.Y. St. B.J. (Sept. 2004), p. 10; Dickerson, *Class Warfare: Aggregating and Prosecuting Consumer Claims as Class Actions – Part I*, N.Y. St. B.J. (July/Aug. 2005), p. 18; Dickerson, *Class Warfare: Aggregating and Prosecuting Consumer Claims as Class Actions – Part II*, N.Y. St. B.J. (Oct. 2005), p. 36.

2. See dissenting opinion of Judge Graffeo in *Food Parade, Inc. v. Office of Consumer Affairs*, 7 N.Y.3d 568, 574–75, 825 N.Y.S.2d 667 (2006):

> This Court has broadly construed general consumer protection laws to effectuate their remedial purposes, applying the state deceptive practices law to a full spectrum of consumer-oriented conduct, from the sale of "vanishing premium" life insurance policies . . . to the provision of infertility services. . . . We have repeatedly emphasized that [GBL § 349] and section 350, its companion "apply to virtually all economic activity, and their application has been correspondingly broad. . . . The reach of these statutes provide(s) needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State."
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> In determining what types of conduct may be deceptive practices under state law, this Court has applied an objective standard which asks whether the "representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances," taking into account not only the impact on the "average customer" but also on "the vast multitude which the statutes were enacted to safeguard – including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."

3. *See* Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, 2007, 4.03(5); Estreicher & Bennett, *California Court Creates Class Arbitration Waiver Test*, N.Y.L.J., Nov. 8, 2007, p. 4.

4. *See, e.g., Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 816 N.Y.S.2d 620 (2006) (Minnesota forum selection clause enforced citing *Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 640 N.Y.S.2d 479 (1996) ("[f]orum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes"); *Strujan v. AOL*, 12 Misc. 3d 1160 (N.Y. Civ. Ct. 2006) (Virginia forum selection clause not enforced); *Studebaker-Worthington Leasing Corp. v. A-1 Quality Plumbing Corp.*, N.Y.L.J., Oct. 28, 2005, p. 21, col. 2 (Sup. Ct., Nassau Co.) ("[T]he forum selection clause lacks specificity as it does not designate a specific forum or choice of law for the determination of the controversies that may arise out of the contract. Therefore, enforcement of the clause would be unreasonable and unjust as it is overreaching").

5. *See Sayeedi v. Walser*, 15 Misc. 3d 621, 835 N.Y.S.2d 840 (N.Y. Civ. Ct. 2007) (no personal jurisdiction over Missouri resident arising from sale of automobile over e-Bay to New York resident); *see also* Dickerson, *The Marketing of Travel Services Over the Internet and the Impact Upon the Assertion of Personal Jurisdiction: 2004*, N.Y.S.B.A. Torts, Ins. & Compensation L. Section J., vol. 33, no. 2, Summer 2004, p. 28.

6. *Citibank (S. Dakota), NA v. Martin*, 11 Misc. 3d 219, 807 N.Y.S.2d 284 (N.Y. Civ. Ct. 2005).

7. *MBNA Am. Bank, N.A. v. Nelson*, 15 Misc. 3d 1148, 841 N.Y.S.2d 826 (N.Y. Civ. Ct. 2007); *MBNA Am. Bank, NA v. Straub*, 12 Misc. 3d 963, 815 N.Y.S.2d 450 (N.Y. Civ. Ct. 2006).

8. *Bonior v. Citibank, N.A.*, 14 Misc. 3d 771, 828 N.Y.S.2d 765 (N.Y. Civ. Ct. 2006).

9. *Emilio v. Robison Oil Corp.*, 28 A.D.3d 418, 813 N.Y.S.2d 465 (2d Dep't 2006); *see People v. Wilco Energy Corp.*, 284 A.D.2d 469, 728 N.Y.S.2d 471 (2d Dep't 2001).

10. *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 805 N.Y.S.2d 175 (3d Dep't 2005).

11. *Simone v. Homecheck Real Estate Servs., Inc.*, 42 A.D.3d 518, 520, 840 N.Y.S.2d 398 (2d Dep't 2007).

12. 14 Misc. 3d 145, 836 N.Y.S.2d 496 (N.Y.A.T. 2007).

13. 12 Misc. 3d 38, 816 N.Y.S.2d 828 (N.Y.A.T. 2006).

14. 14 Misc. 3d 145.

15. 42 A.D.3d at 520; *see McMullen v. Propester*, 13 Misc. 3d 1232, 831 N.Y.S.2d 354 (Sup. Ct., Yates Co. 2006).

16. 16 Misc. 3d 836, 842 N.Y.S.2d 270 (N.Y. Civ. Ct. 2007).

17. *See, e.g., Andre v. Pace Univ.*, 161 Misc. 2d 613, 618 N.Y.S.2d 975 (N.Y. City Ct. 1994), *rev'd on other grounds* 170 Misc. 2d 893, 655 N.Y.S.2d 777 (N.Y.A.T. 1996) (failing to give basic computer course for beginners); *see also Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (settlement of class action involving education misrepresentations).

18. *Drew*, 16 Misc. 3d at 837.

19. 168 Misc. 2d 502, 638 N.Y.S.2d 873 (N.Y. City Ct. 1995).

20. 171 Misc. 2d 796, 655 N.Y.S.2d 795 (N.Y. City Ct. 1997).

21. *People v. McNair*, 2005 WL 2780976 (Sup. Ct., N.Y. Co. Sept. 12, 2005) ("deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy . . . thereby entitling the parents to all fees paid (in the amount of $182,393.00); civil penalties pursuant to GBL 350-d of $500 for each deceptive act or $38,500.00 and costs of $2,000.00 pursuant to CPLR § 8303(a)(6)").

22. 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005).

23. *Id.* at 50.

24. 12 Misc. 3d 627, 818 N.Y.S.2d 421 (Sup. Ct., Nassau Co. 2006).

25. *Id.* at 631.

26. 7 N.Y.3d 653, 657, 662, 827 N.Y.S.2d 88 (2006); *see In re Gen. Motors Corp.*, 33 A.D.3d 1149, 1150, 824 N.Y.S.2d 180 (3d Dep't 2006) ("Lemon Law does not require a consumer to prove that a defect exists at the time of an arbitration hearing in order to recover under the statute").

27. 2007 WL 2119740 (N.Y. Civ. Ct. 2007).

28. *See Ricciardi v. Frank*, 163 Misc. 2d 337, 620 N.Y.S.2d 918 (N.Y. City Ct. 1994), *modified*, 170 Misc. 2d 777, 655 N.Y.S.2d 242 (N.Y.A.T. 1996) (holding civil engineer liable for failing to discover wet basement).

29. *Carney*, 2007 WL 2119740.

30. 15 Misc. 3d 453, 831 N.Y.S.2d 304 (Watertown City Ct. 2007).

31. 41 A.D.3d 4, 834 N.Y.S.2d 558 (3d Dep't 2007) (holding that "solicitations were misleading . . . because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the conditions described").

32. 28 A.D.3d 418, 813 N.Y.S.2d 465 (2d Dep't 2006).

33. 14 Misc. 3d 771, 828 N.Y.S.2d 765 (N.Y. Civ. Ct. 2006) (finding "the most serious is that the equity source agreement and the mortgage are to be interpreted under the laws of different states, New York and California respectively").

34. 7 N.Y.3d 568, 825 N.Y.S.2d 667 (2006), *aff'g* 19 A.D.3d 593, 799 N.Y.S.2d 55 (2d Dep't 2005).

35. *Id.* at 570. *See also Stop & Shop Supermarket Cos, Inc. v. Office of Consumer Affairs*, 23 A.D.3d 565, 805 N.Y.S.2d 95 (2d Dep't 2005) ("A supermarket's mere display and sale of expired items is not a deceptive trade practice under Nassau County Administrative Code § 21-10.2(b)(1)(d)").

36. 16 Misc. 3d 517, 837 N.Y.S.2d 841 (Sup. Ct., N.Y. Co. 2007).

37. *Id.* at 523.

38. CPLR 3015(e).

39. 40 A.D.3d 809, 810, 835 N.Y.S.2d 735 (2d Dep't 2007).

40. *Sharpe v. Mann*, 34 A.D.3d 959, 823 N.Y.S.2d 623 (3d Dep't 2006) ("While the housing merchant implied warranty under [GBL § 777-a] is automatically applicable to the sale of a new home, it does not apply to a contract for the construction of a 'custom home,' that is, a single family residence to be constructed on the purchaser's own property").

41. 13 Misc. 3d 1239, 831 N.Y.S.2d 353 (Sup. Ct., Broome Co. 2006).

42. *Putnam v. State of N.Y.*, 223 A.D.2d 872, 636 N.Y.S.2d 473 (2d Dep't 1996).

43. 15 Misc. 3d 659, 834 N.Y.S.2d 438 (Sup. Ct., N.Y. Co. 2007).

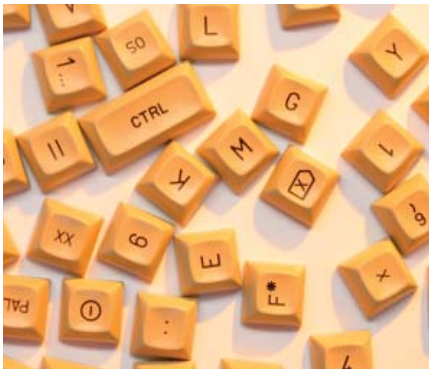
44. *Id.* at 664.

45. 14 Misc. 3d 650, 829 N.Y.S.2d 839 (N.Y. Civ. Ct. 2006) (finding that "[i]dentity theft has become a prevalent and growing problem in our society with individuals having their credit ratings damaged or destroyed and causing untold financial burdens on these innocent victims. As stated above the New York State Legislature, recognizing this special category of fraudulent conduct, gave individuals certain civil remedies when they suffered this harm").

46. 14 Misc. 3d 564, 828 N.Y.S.2d 851 (N.Y. Civ. Ct. 2006).

47. 14 Misc. 3d 1217, 836 N.Y.S.2d 487 (Sup. Ct., Westchester Co. 2007).

BY DAVID P. MIRANDA



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Doctrine of Conversion Applies to Electronic Property

In a case of first impression, the New York Court of Appeals held that records and data stored electronically on a computer, or otherwise, shall be treated the same as tangible property when the remedy of conversion is sought.[1] The issue came before the Court of Appeals, as a certified question from the Second Circuit Court of Appeals, asking "whether the common-law cause of action of conversion applies to certain electronic computer records and data."[2]

The Court, in a unanimous opinion written by Judge Graffeo, held that records stored on a computer are indistinguishable from printed documents and are subject to a common law claim of conversion. The Court found there is no compelling reason to prohibit conversion for a misappropriation of intangible property. Because such information is of value regardless of the format in which the information is stored, protections of the law should apply equally to both forms, tangible and intangible, physical and virtual.[3]

The issue arose when plaintiff Louis Thyroff, an insurance agent for defendant Nationwide Mutual Insurance Co., was terminated as an agent and Nationwide repossessed Thyroff's computer system, denying further access to the computer, the electronic records and data it contained. Thyroff commenced an action in U.S. District Court against Nationwide asserting several causes of action, including a claim for conversion of his business and personal information stored on the computer. The district court held that the complaint failed to state a cause of action with respect to the conversion claim. The plaintiff appealed to the Second Circuit Court of Appeals, and Nationwide argued that a claim for conversion cannot be based on the misappropriation of electronic records and data because New York did not recognize a cause of action for the conversion of intangible property.

In its analysis the Court of Appeals provides a historical summary of the "ancient doctrine" of conversion dating back to the Norman conquest of England in 1066.[4] The Court thoroughly studies the historical roots and principles behind the common law in its effort to apply it to current technology.[5]

The Court notes that under the traditional construct, conversion was viewed as the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.[6] Thus, the general rule was that "an action in conversion will not normally lie when it involves intangible property" because there is no physical item that can be misappropriated.[7] However, the Court's review of historical precedent reveals the common law has evolved over time to broaden the remedies available for the misappropriation of personal property, recognizing certain instances where an intangible property right can be united with a tangible object for conversion purposes. The Court refers to its 1983 decision in *Sporn v. MCA Records*, which held that "a plaintiff could maintain a cause of action for conversion where the defendant infringed on the plaintiff's intangible property right to a musical performance by misappropriating a master recording – a tangible item of property capable of being physically taken."[8]

The Court also notes the precedent of expanding conversion to encompass different classes of property, such as shares of stock, motivated by "society's growing dependence on intangibles."[9] It is the strength of the common law, the Court declares, "to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society."[10] The Court adds "that time has arrived" for the expansion of conversion to encompass computers, electronic data and digital information,[11] recognizing that "society's reliance on computers and electronic data is substantial, if not essential. Computers and digital information are ubiquitous and pervade all aspects of business, financial and personal communication activities."[12] The realities of the digital age are such that a manuscript of a novel has the same value whether it is saved in a computer's memory, or printed on paper, and the same principles apply to information that the plaintiff stored on a computer. The Court points out that even its own opinion is drafted in electronic form, stored in a computer's memory and disseminated to the judges of the Court via e-mail. The Court is unable to find any reason in law or logic why the "process of virtual creation should be treated any differently

from production by pen on paper, or quill on parchment. A document stored on a computer hard drive has the same value as a paper document kept in a file cabinet."[13]

The decision of New York's Court of Appeals ensures that the tort of conversion will "keep pace with the contemporary realities of widespread computer use"[14] in our digital age, and serves to remind us of the wisdom, flexibility, and evolving nature of our common law principles. ■

1. *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 832 N.Y.S.2d 873 (2007).
2. *Id.* at 284.
3. *Id.* at 283.
4. *Id.* at 286 (citing Ames, *The History of Trover*, 11 Harv. L. Rev. 277, 278 (1897)).
5. Judge Graffeo also recently provided a similar thorough historical analysis of the development of the common law of copyright in *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 797 N.Y.S.2d 352 (2005).
6. *Thyroff*, 8 N.Y.3d at 288–89.
7. *Id.* at 289 (citing *Sporn v. MCA Records*, 58 N.Y.2d 482, 489, 462 N.Y.S.2d 413 (1983)).
8. *Id.* at 289–90 (citing *Sporn*, 58 N.Y.2d at 489).
9. *Id.* at 291.
10. *Id.*
11. *Id.*
12. *Id.* at 291–92.
13. *Id.* at 292.
14. *Id.*

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

The Present Tense: Make It Happen *Right Now!*

No matter how exciting the next Super Bowl is, the game won't unleash the same emotional impact if you watch it on the DVD they'll release a few weeks after the game. Why? The plays will be the same. The players will be the same. The coaches will be the same. Why will you care less about the replay than you did about the live event?

The difference between the two is ***suspense.***

When you watch something unfold for the first time, it has a sense of urgency and excitement: "Will it end safely?" "Will they survive?" "What's going to happen next?" But when you watch the replay, you already know the outcome, so it loses that emotional impact. Even if you had been in a coma during the actual Super Bowl and were the only person on the planet who didn't know which team won, the DVD wouldn't have the same sense of excitement as the live event, because you'd know that the outcome was already determined. Nothing would be left to chance. Nothing could be changed. The events would be set in stone. There wouldn't be any ***suspense.***

That same lack of suspense diminishes our courtroom presentations, too.

Start by thinking about the last time you heard an opening statement. If it was a typical opening, the lawyer probably spoke in the past tense. In court, we speak in the past tense because we're describing events that have already happened. The events you describe in court may have happened weeks, months, or *years* before. You'll have lived with the case for that entire time. When you stand to deliver your opening, you already know all of the ins and outs of the case. You know all the details. You already know the conclusion . . . *but your jury doesn't!* This is the first time they've heard the events.

To bring your cases to life, try switching your language to the present tense. Done effectively, your jury will feel that things are happening ***right now.*** Here is a small portion of an opening statement written in the present tense. To get the full effect of the technique, read the sample aloud:

"You're standing on the corner of Indiantown Road and Central Boulevard, next to the Mobil station. It is very early Tuesday morning – almost 3 o'clock in the morning. To your left, stopped at a red light, sits Officer Ron Jones, a 16-year veteran of the Jupiter police department. In a few moments, his life will be changed forever. . . .

"Overhead, you see the eastbound lights on Indiantown Road change from green . . . to yellow . . . to red. Officer Jones begins moving forward. That's when you see the Ford Expedition driving eastbound. The driver of that large Expedition doesn't stop for the red light. He doesn't slow down. He drives into the intersection at almost 65 miles per hour – nearly 20 miles per hour faster than the speed limit posted to your right.

"Officer Jones doesn't have a chance to swerve. There's no way for him to avoid the oncoming SUV. The front left corner of the Expedition slams into the passenger side of his patrol car. You hear the sound of metal slamming into metal. His patrol car spins completely around – a 360 degree turn. Shattered glass flies in all directions. Finally, both vehicles run out of energy and come to a complete stop in the middle of the intersection.

"Approaching the driver of the Expedition, you smell the strong odor of alcohol coming from his breath. . . ."

Did you feel like all of the events were happening ***right now?*** Every sentence was in the present tense:

- "Overhead, you ***see*** the eastbound lights on Indiantown Road ***change*** from green . . . to yellow . . . to red."
- "The front left corner of the Expedition ***slams*** into the passenger side of his patrol car."
- "You ***hear*** the sound of metal ***slamming*** into metal."

To use the present tense in your next courtroom presentation, read through your draft and look for any phrases written in the past tense. Shift the language so that the events are happening ***right now.*** Put your jurors in the scene. Take them there. Let them watch the action unfold. Let them feel the suspense: "Will it end safely?" "Will they survive?" "What's going to happen next?" Use the present tense effectively, and your jury will perk up, pay more attention, and experience ***exactly*** what your client experienced. ■

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"We are honored to recognize our members who have made a commitment to 'do the public good' by rendering 50 hours or more of free legal service to the poor. These individuals have provided an important public service to the poorest, the most vulnerable and the weakest in our society. They deserve the designation 'Empire State Counsel' as they have done their part to help New Yorkers in need while enhancing the public's perception of our profession." – Mark H. Alcott, NYSBA President 2006–2007

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

A former client of mine (a woman of some means) had moved to another state, but we had kept in touch, and I gave her some friendly advice about her activities and lifestyle. She now informs me that she has been diagnosed as bi-polar, and she is being held in a state mental institution. A guardian has been appointed by the court of that state to take control of her property and assets.

She has been getting money from a trust set up in New York by her late father, pursuant to which an annuity was created to give her monthly payments for life. She called me on the phone to ask if she could direct the Nebraska insurance company to send future monthly payments to me. I would set up a New York escrow account to be turned over to her at an appropriate later time. Would this be considered an evasion of the foreign state order which specifies that her assets and property be taken over by the guardian? I think future payments which originate in Nebraska pursuant to a New York trust and which never reach the foreign state may be excluded. Can I presume she has the apparent capacity to direct her annuity payments? Is my giving of telephone advice possibly be considered practicing law in the foreign state? I am uneasy about what may be be considered an attempt to thwart the order of a foreign court.

Sincerely,
Concerned Counselor

Dear Concerned Counselor:

You raise some thorny questions. It is perfectly all right to give friendly advice gratis on the telephone, but do not purport to advise on the laws of another state where you are not admitted.

While the future annuity payments under the New York trust are not yet part of this lady's property, any future dividends or payments due are valuable assets. The foreign court's order therefore would presumably support the guardian's direction to the annuity company to make future payments to him, rather than to a New York bank account or escrow account. Perhaps more important, you really do not know your former client's true psychiatric state. If she has been, or shortly may be, adjudicated an incompetent, how will you be able to justify carrying out her instructions, even if the foreign court has no jurisdiction over you?

If and when the guardianship is terminated, you can then act as her fiduciary. But good intentions alone will not keep you from trouble. The short answer is, "when in doubt, don't."

The Forum, by
Edward J. Greenfield
J.S.C. (ret'd)
New York City

We received the following comments from the Gender Equity Task Force of the New York State Bar Association, regarding Ken Standard's and Carrie Corcoran's response to "A Besieged Firm Leader," published in the Attorney Professionalism Forum, November/December 2007 Journal.

Historically, legal employers have been steadfastly and notoriously reluctant to change the way business "has always been done" despite a growing outcry from associate attorneys struggling to balance their professional and personal lives. "It will affect our bottom line" is the oft-repeated refrain, offered to justify employers' resistance to altering the traditional workplace structure.

Requests for flexible work schedules, more varied networking opportunities, and alternate methods of determining compensation have generally been ignored, or granted in theory, but not enforced in practice. As the ranks of entry-level attorneys become increasingly more diverse, and women represent over 50% of the attorneys in the "pipeline" of new graduates, the refusal to consider such requests for change has disparately impacted women and minority attorneys. The predictable result has been a dramatic under-representation of women in the partnership ranks and the exodus of women and minorities from the profession altogether.

In recent years, as Generation "X" and "Y" law graduates have entered the workforce in increasing numbers, attrition rates have skyrocketed, as has the corollary cost of recruiting and training new lawyers to replace those who leave in search of greener pastures.

The reason for this phenomenon is simple: the values and traditional lifestyles of those at the top of the legal field contrast starkly with those of recent law graduates, both men and women. Yet, the economic impact of the high associate turnover alone has been insufficient to cause legal employers to re-evaluate the way that things have always been done.

Over the past year, however, the economic impact of their failure to adapt to changing times has been brought

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed here, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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home to legal employers, as their long-time corporate clients demand more diverse legal teams reflective of their own organizations. At last, the potential loss of these core clients, combined with the increased costs associated with high attrition rates, has caused many employers to sit up and take notice. Those poised at the upper echelons of the legal field would be well advised to embrace change – and take advantage of the newfound flexibility offered by technologic advancements. Rather than seeking ways in which to avoid complying with clients' demands for diversity, perhaps it is high time to re-evaluate whether the inflexible workplace environment is due for a major overhaul. Your clients will be satisfied, your associate attorneys will be newly content, thus reducing the costs created by high attrition rates, and your profit margins will increase. Turn your clients' request on its head and you might just realize that their demand for diversity doesn't create a new problem; it solves an existing one.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am litigation counsel to a business client that has expressly directed me to settle whenever possible, and as early as possible. Management is so strongly averse to litigation that, in my experience, this company will take a substantial loss rather than litigate – even when it is clearly in the right.

Unfortunately, in attempting to implement my client's policy I frequently have been confronted with opposing counsel who will resist any suggestion of settlement. On occasion, my suspicion that certain lawyers are refusing to discuss settlement because they simply want to maximize their own billings has been confirmed by the attorneys themselves. Of course, when we get before a judge, the judge also attempts to expedite a settlement, but such efforts can be thwarted by counsel who insist that their client believes right is on his side. Counsel demands "justice," even when the weakness of the client's case is apparent to everyone.

I believe Ethical Considerations, if not Disciplinary Rules, are being violated in such circumstances, but am unsure as to what I can do. I also would like to know what the court's responsibilities are when it is clear that a lawyer is not serving the interests of his or her client, but is perpetuating litigation for the lawyer's own benefit. Finally, how do I explain this predicament to my own client, who is also being prejudiced by the other attorney's behavior?

Sincerely,
Doing a Slow Burn

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: As a recent graduate of law school who is seeking employment, I have been told by an older lawyer that I am incorrectly using the verbs lie and lay. I know there used to be a rule about those two verbs, but does it still exist? It seems to me that nobody distinguishes them anymore.

Answer: Yes, there still is a rule, and, yes, almost no one observes it any more. That "older" lawyer who corrected your usage must have been substantially older to have alerted you to its presence. The words *lie* and *lay* have become a shibboleth that entitles you to membership in a small, elite group. But that membership may convey advantages other than a sense of superiority, so here is an explanation about the rule.

Beginning with the easy part of the explanation, there is no problem with the intransitive verb *lie* when it means "tell a falsehood." That *lie* is a regular verb with a normal past tense and perfect tense, both ending in *-d*: for example, "He lied today and he has lied before." The transitive verb *lay* is also a regular verb with a normal past and perfect tense. For example, you can *lay* a book on the table, you *laid* it there yesterday, and you may have *laid* the book on the same table last Tuesday.

Lay means "to place or to bring to a position." It also has a number of other meanings (for which see a dictionary), but it always requires an object. (You must lay *something*; you cannot just *lay down* or *lay still*.)

The confusion between the two verbs, the transitive *lay* and the intransitive *lie* occurs because *lie* is an irregular verb, whose past tense is *lay*, so the past tense of *lie* looks exactly like the present tense of *lay*. To increase the confusion, the past tense of *lie* is *lain*, which differs only in its final letter from the past tense of *lay*.

The result of this similarity in spelling and in meaning is that most people do not distinguish the two verbs. By a large majority, even well-educated people choose *lay*, ignoring the irregular verb *lie*. At this law school, when the weather is pleasant, one hears plans of "laying out in the sun." (In fact, the phrase *in the sun* is redundant, for the phrase *laying out* by itself is understood to mean "lying in the sun.")

The predominance of the incorrect use of *lay* as both a transitive verb and as an intransitive verb is not new. In fact, *lie* and *lay* have a common ancestor in the Old English verb *licgan*. But during the Middle English period, modern *lie* had become *lien*, while modern *lay* had become *laien* – perhaps having confused English speakers ever since the 11th century!

Rochester attorney Louis D'Amanda, who has retired, recently shared an anecdote on the subject of *lie* and *lay* recalled from his trial work. He wrote that when his adversary misused the verb *lay* while questioning Attorney D'Amanda's witness, D'Amanda would object to the form of the question and then lecture the opposing lawyer on the transitive-intransitive distinction between *lie* and *lay*. Finally, Attorney D'Amanda would quote H.K. Fowler's comment that the confusion between the two words is "very common in uneducated talk."

Attorney D'Amanda added, "This generally embarrassed counsel in front of his client. It would be a shame to think that this mild knee-capping antic is no longer available."

Question: Isn't it incorrect for a lawyer who is not a member of the corporate law department of a corporation, but who was hired by the human resources department as a vice-president of compliance, to send out memoranda and e-mails both internally and externally, identifying himself as "Esq."?

Answer: The honorific *Esq.* has elicited many questions on subjects about which I felt qualified to answer, but this question seems to be a matter of professional etiquette, so only the opinion of other lawyers is pertinent. If readers have an opinion, feel free to send it in.

I do, however, feel qualified to recount a story that has some relevance. It seems that while a small ship was cruising far from shore, a beautiful young woman became ill, and the ship's captain called for a doctor to care for her. A young veterinarian, having observed this woman previously on board, thought that perhaps he could be of assistance and decided to respond. When he arrived at her stateroom to offer his services, however, he found that he was too late. It seemed that a psychiatrist, a podiatrist, and a Ph.D. professor of education were already in attendance.

From the Mailbag:

Sometime ago a reader questioned me about the meaning of the phrase "in the event," which he has frequently seen in articles in *The New Yorker* magazine. The quotation he cited for this particular usage was, "The tangled diversity of faith is, in the event, no obstacle for Hitchens." It appeared in the May 21, 2007 issue at page 79. I answered that unless the phrase was a variant usage of "in any event," I could not guess without seeing the larger context in which it appeared. The questioner then wrote to *The New Yorker* magazine for an explanation, but reports he has received no response. Perhaps other readers can help. ■

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

Don't use periods for acronyms. To create an acronym, take the first letter from a series of words to form a pronounceable word that stands for something. *Examples:* "AIDS" and "NATO." "AIDS" stands for Acquired Immune Deficiency Syndrome. "NATO" stands for North Atlantic Treaty Organization. Because you can pronounce acronyms as words, you don't need periods.

Use periods for abbreviations. Abbreviations are different from acronyms; you pronounce each individual letter in an abbreviation. *Examples:* U.S.A., N.A.A.C.P., N.C.A.A., F.B.I. Newspapers and magazines omit the periods from common abbreviations to save space. If your readers are familiar with the abbreviation, don't use periods.

In American usage, always put periods inside quotation marks. *Incorrect:* Judge Joe said, "I want order in the courtroom". *Correct:* Judge Joe said, "I want order in the courtroom."

2. Question marks. Use a question mark at the end of a direct question, or one to which you expect an answer. *Examples:* "When does the courthouse close?" "Who's your next witness?"

Don't use a question mark for an indirect question or declaration. *Example of indirect question:* "I wonder whether I'll finish the trial this week." *Example of declaration:* "Albany is New York's capital."

Put a question mark at the end of a sentence if a question is embedded in the sentence. *Examples:* "We can get to the courthouse, can't we, if we take the Brooklyn Bridge?" "I wonder: will Joe run for office?"

Don't use a question mark for a polite request. *Examples:* "Would everyone in the courtroom please check in with the court officer." "Please send me a copy of the opinion."

Don't use a question mark for a command. *Example:* "Would you write the brief now, please."

Don't put a question mark at the end of a sentence that begins with "whether." "Whether" is a statement, not a question. *Correct:* "Whether the defendant's conviction should be reversed is the only issue before the court."

Put a question mark inside quotation marks if the question is in the original. Put it outside if it's not in the original. *Example of a question mark in the original:* The judge asked, "How long will you cross-examine this witness?" *Example of a question mark not in the original:* Does the judge always need to say, "Counselor, let's move it along"?

If the sentence and the quoted material are questions, don't use two question marks. *Incorrect:* Did I just say, "May I use your telephone to call my client?"? *Correct:* Did I just say, "May I use your telephone to call my client?"

When a question ends with a series of brief questions that are follow-up questions to the main question, each follow-up question should begin with a lowercased letter and end with a question mark. *Example:* "Who's responsible for this mistake? the associate? the partner? the paralegal?"

Question marks denote uncertainty: "Judge Abe wrote two (?) opinions today."

Place question marks inside parentheses when asking a question: "Judge Z's opinion (when did she learn to write so well?) is stellar."

Rhetorical questions, or questions a writer asks for which the writer doesn't expect an answer, should end with a question mark. *Example:* "How else should we end the brief, after all?" But avoid using question marks unless you're quoting. Good legal writers answer questions, not ask them.

3. Exclamation points. Use an exclamation point at the end of a command, emphatic declaration, or interjection. *Examples of commands:* "Stop!" "Quiet in the courtroom!" *Examples of emphatic declarations:* "Wow!" "His direct examination was brilliant!" "*Examples of interjections:* "Excuse me!" "Cheers!"

Put an exclamation point inside the quotation mark if the exclamation point is in the original. Put an exclamation point outside if the exclamation point is not in the original. *Example of an exclamation point in the original:* The judge said, "Stop screaming at the witness!" *Example of an exclamation point not in the original:* The partner told her to rewrite her brief because it was "ungrammatical and incomprehensible trash"!

Exclamation points may accompany mimetically produced sounds: "All night long, I heard the dogs woof! in my neighbor's apartment." "The dog went Grr!, and I left the room."

Avoid exclamation points in legal writing. They tell readers that you're exaggerating or screaming at them. Use exclamation points for informal writing, like birthday wishes to a loved one or the occasional informal e-mail. Instead of using exclamation points to intensify your writing, use concrete nouns and, even better, vigorous verbs.

4. Colons. Colons press readers forward. Use a colon after a salutation in formal writing. *Example:* "Dear Ms. Doe:" Use a comma, not a colon, after a salutation when writing to friends. *Incorrect:* "Dear Joe:" *becomes* "Dear Joe,"

Separate hours from minutes with a colon. *Example:* "2:15 p.m." Separate book titles from subtitles with a colon. *Example:* "Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts." Separate chapter from verse with a colon. *Example:* "Thou shall not kill."

Good punctuation makes you feel, hear, and understand language.

CONTINUED ON PAGE 56

Exodus 20:13 (King James). Use a colon to introduce a definition. *Example:* "Lawyer: An individual with a briefcase who can steal more than a hundred men with guns."[1] Use a colon to replace "is" or "are." *Example:* "The diagnosis: terminal double-speak."

Use a colon after an independent clause — defined as a clause that has a subject, a verb, and can stand on its own as a sentence — to (1) introduce lists, (2) introduce an illustrative quotation, or (3) show that something will follow. *Example of an independent clause introducing a list:* "The defendant asserted three defenses: insanity, extreme emotional disturbance, and self-defense." But consider the following example: "The attorney determined that his client's best defenses included insanity, extreme emotional disturbance, and self-defense." You don't need a colon after "included"; the preceding clause isn't an independent clause. *Example of an independent clause introducing a quotation:* The court ruled against the petitioner: "Doe proved she's the real tenant." *Example of an independent clause showing that something will follow:* "The Civil Court instituted a new rule: Guardians ad litem must complete a case summary form." Colons signal that clarifying information will follow.

"Parentheses are (usually) too informal for legal writing."

Unless what follows is a quotation, a colon may not follow a dependent clause, defined as a clause that can't stand on its own as a sentence. *Incorrect:* "The area codes she calls most often are: (212), (718), (917), and (646)." *Correct:* "The area codes she calls most often are (212), (718), (917), and (646)." *Correct:* His advice was: "Be confident but not over-confident." *Better:* His advice: "Be confident but not over-confident."

Uppercase the first word after a colon when an independent clause follows the colon. *Examples:* "The judge gave her a useful suggestion: Evaluate a case before you accept a client." "The judge made one finding: The defendant failed to prove her insanity defense." Don't capitalize after a colon when a dependent clause follows the colon. *Examples:* "The judge gave her a useful suggestion: to evaluate the merits of a case before accepting a client." "The judge made one finding: defendant's failure to prove her insanity defense." If more than one independent clause follows the colon, begin each independent clause with a capital letter: "Andrea was acquited for two reasons: First, the People failed to prove that she committed the crime beyond a reasonable doubt. Second, the jurors didn't find the People's witnesses credible."

Colons always go outside quotation marks. *Example:* She described her legal career as a "roller-coaster ride": some successes, some failures, and everything in between.

Spacing: Use two spaces after a colon in typing and one space in publishing.

5. Semicolons. Don't confuse colons with semicolons. Colons press readers forward. Semicolons slow readers down.

Use semicolons to connect closely related independent clauses. *Example:* "In straightforward cases, the judge issues a decision in three days; in complicated cases, it's 30 days." Don't use semicolons — use commas — to connect dependent clauses to independent clauses. *Incorrect:* "While we were waiting in court; the defendant attacked the prosecutor."

Use semicolons to avoid run-on sentences. Use semicolons, not commas, to separate two independent clauses if the second independent clause begins with a conjunctive adverb ("accordingly," "again," "also," "besides," "consequently," "finally," "for example," "furthermore," "hence," "however," "moreover," "nevertheless," "on the other hand," "otherwise," "rather," "similarly," "then," "therefore," "thus"). *Example:* "In straightforward cases, the judge issues a decision in three days; therefore, litigants don't have to wait for justice." Use a semicolon to separate two independent clauses if the second independent clause has a conjunctive adverb somewhere in the sentence, usually after the subject. *Example:* "The judge told his law clerk to evaluate the merits of the case; he therefore told his law clerk to prefer logic to emotion."

Use semicolons in lists that contain internal commas or an "and" or "or." *Example of a list with an internal comma:* "On trial for embezzlement were Lawyer A of Queens, New York; Lawyer B of White Plains, New York; and Lawyer C of The Bronx, New York." *Example of a list containing "and":* "For the firm's holiday party, please buy roast beef and turkey sandwiches; red and white wine; and diet and regular soda." *Example of a list containing "or":* "Check-in at 9:30 a.m. in Parts A or B; at 11:30 a.m. in Parts C or D; or at 2:15 p.m. in Parts E or F." It's acceptable in lists to use two or more semicolons in the same sentence.

Use semicolons to replace commas and coordinating conjunctions ("and," "but," "for," "nor," "or," "yet"). *Example (replacing "but"):* "The respondent didn't agree with paragraph seven of the stipulation; he agreed with everything else." *Example (replacing "or"):* "Arrive at the courthouse by 9:30 a.m.; your case will be dismissed at 10:30 a.m."

The first letter after a semicolon is lowercased, unless the word is a proper noun. *Examples:* "John Doe takes a week to pick a jury; James Roe, his partner, takes an hour to pick a jury." "The attorney takes a week to pick a jury; his partner takes an hour to pick a jury."

Use a semicolon between string citations. *Example: Plaintiff v. Defendant*, 999 U.S. 999 (2009); *Plaintiff v. Defendant*, 98 U.S. 890 (2008). Use commas, not semicolons, within a parallel citation. *Incorrect: Plaintiff v. Defendant*, 99 N.Y.3d 123; 100 N.E.2d 100; 500 N.Y.S.2d 799 (2009).

Put semicolons after and outside parentheses. *Example:* "Lawyer F lost the case (his tenth loss in 12 months); this year he might not get a bonus."

When a semicolon follows an abbreviation with periods, it's acceptable to put a semicolon after a period. *Example:* "The witness testified that in 1993 he received his B.A.; he graduated from SUNY Plattsburgh."

Semicolons always go outside the quotation mark. *Example:* The judge told the defendant,"I want to make sure you never get out of jail"; thus, he sentenced the defendant to life without parole."

Spacing: Put one space after a semicolon.

6. Parentheses. Parentheses direct readers to additional and slightly different information. They also set off explanations, interruptions, or phrases that obscure the main text. *Examples:* "Parentheses are (usually) too informal for legal writing." "Settle this case (trust me!)."

Parentheses introduce abbreviations and acronyms. *Example:* The New York City Police Department (NYPD).

Use parentheses for citations in official New York State (Tanbook) style.[2] *Example:* "Because the landlord knew about the subtenant's presence, the court found no illusory tenancy. (*Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009].)" Use parentheses to explain ambiguous citations following citations, according to the Bluebook.[3] Use brackets, according to the Tanbook.[4] *Bluebook example: Plaintiff v. Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep't 2009) (finding that plaintiff was not "closely related" to victim). *Tanbook example:* (*Plaintiff v Defendant*, 99 AD3d 500, 501 [3d Dept 2009] [finding that plaintiff was not "closely related" to victim].)

Enclose your parentheses. *Incorrect:* "1)." *Becomes:* "(1)." Unenclosed parentheses are difficult to read.

If the parentheses appear at the end of a sentence, punctuate after the final parenthesis. If the parentheses contain an independent clause, punctuate inside the final parenthesis. *Example of parentheses at the end of a sentence:* "Lawyers must read carefully (and write carefully)." *Example of an independent clause inside parentheses:* "Lawyers must read carefully. (They must also write carefully.)"

Use double parentheses in a sentence or sentence citation. *Correct Bluebook example: Plaintiff v. Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep't 2009) (citing *C v. D*, 999 U.S. 999 (2007)).

Parentheses de-emphasize. To emphasize, use "em" dashes ("—").

7. Brackets. In a quotation that contains a factual, spelling, or usage error, use "[sic]," meaning "thus," after the error. If the context makes it clear that the mistake was in the original, don't add "[sic]." *Correct:* "The attorney subjected [sic] to the exhibit's admission in evidence." The author meant to write "objected," not "subjected." Use "[sic]" sparingly. Overusing "[sic]" suggests you're insulting or embarrassing the original quotation's author. Consider using brackets to correct the quotation.

Use brackets in a quotation to show alterations or additions to a letter or letters in a word. *Examples:* "Clearly" *becomes* "Clear[]." "Proof" *becomes* "Pro[ve]." "Clearly" *becomes* "[c]learly." "Clerly" *becomes* "Cle[a]rly." *Consider the following original text in a judicial opinion:* "For the above-mentioned reasons, the court finds that Defendant has no proof to substantiate her affirmative defense." *Alteration example (end of a word):* The court determined that Defendant did not "pro[ve] . . . her affirmative defense." *Alteration example (capitalizing):* The court made the following finding: "[T]he court finds that Defendant has no proof to substantiate her affirmative defense." *Addition and alteration example:* "[T]he court f[ou]nd[] that Defendant ha[d] no [documentary or testimonial] proof to substantiate her affirmative defense."

Never add within quotation marks long bracketed text after a quotation. *Incorrect:* The court found that Defendant failed "to substantiate her affirmative defense [by a preponderance of the credible evidence]."

Overusing "[sic]" suggests you're insulting or embarrassing the original quotation's author.

According to the Tanbook, use brackets to add information like years and names of courts.[5] *Example:* (*Plaintiff v Defendant*, 50 AD3d 50, 50 [4th Dept 2009].)

Brackets go inside parentheses.[6] *Tanbook example:* (*Plaintiff v Defendant*, 50 AD3d 50, 50 [4th Dept 2009].)

Add a space between parentheses and brackets. *Example of spacing between parentheses (Bluebook example): Plaintiff v. Defendant*, 55 N.Y.S.2d 55, 56 (2d Dep't 2009)_(finding that plaintiff had no exclusive control over instrumentality). *Example of spacing between a parentheses and a bracket (Bluebook example):* Judith S. Kaye, *Inaugural Hon. Joseph W. Bellacosa Distinguished Jurist-in-Residence Lecture*, 81 St. John's L. Rev. 743 (2007) [hereinafter *Lecture*]. *Example of spacing between two brackets (Tanbook example)*: (*Plaintiff v Defendant*, 99 NY3d 100, 101 [2009]_[finding that plaintiff had no exclusive control over instrumentality].)

In the next issue, the Legal Writer will continue with more punctuation. ■

1. Mario Puzo, The Godfather 52 (1969). Original quotation: "A lawyer with his briefcase can steal more than a hundred men with guns."

2. New York Law Reports Style Manual (Tanbook) R. 1.2(a), at 2 (2007), *available at* http://www.nycourts.gov/reporter/New_Styman.htm (html version) and http://www.nycourts.gov/reporter/NYStyleMan2007.pdf (pdf version) (last visited Dec. 11, 2007).

3. The Bluebook: A Uniform System of Citation R. 10.4, 10.5, 10.6, at 89–92 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

4. Tanbook R. 1.1(a), at 2.

5. *Id.*

6. *Id.*; R. 1.2(c)(2), at 3.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

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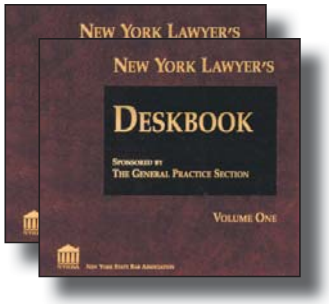

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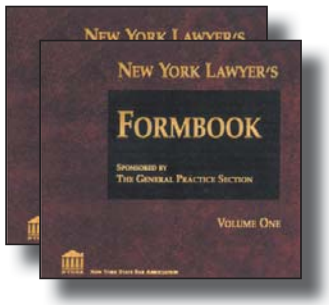

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TitleVest	2
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BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I

In six of the last seven columns, the Legal Writer covered legal writing's do's, don'ts, and maybes. The last two columns discussed grammar. We continue with seven punctuation issues and, in the next two columns, eight more. This three-part series addresses periods, question marks, exclamation points, colons, semicolons, parentheses, brackets, commas, hyphens, quotation marks, apostrophes, dashes, slashes, ellipses, and accent marks.

Punctuation refers to symbols that organize and give structure to writing. Punctuation lets you change the inflection of your voice and give meaning to your words.

Punctuation helps speed up or slow down language. *Example of speeding up language:* "The associate won her first trial today." In this example, the reader reaches the end of the sentence without stopping for any punctuation. The period tells you when to rest. *Example of slowing down language:* "The associate, fresh out of law school, won her first trial today." The commas in this example cause the reader to slow down twice before reaching the end of the sentence. Commas tell you when to breathe.

Punctuation lets writers emphasize some words and de-emphasize others. *Example:* "Mr. Roe — a professional and diligent attorney — argued the motion." *Or:* "Mr. Roe argued the motion. (He's a professional and diligent attorney.)"

Punctuation tells readers when to feel emotion. *Example:* "Wonderful!"

Punctuation tells readers when to pay attention. *Example:* "When will he be released from jail?"

Punctuation clarifies. Consider this classic example: "Woman without her man is nothing." Depending on how you punctuate, the sentence will have different meanings. *Example 1:* "Woman: Without her, man is nothing." *Example 2:* "Woman, without her man, is nothing." The punctuation you use and where you put it will alter how readers will interpret what you write.

Good punctuation makes you feel, hear, and understand language. Bad punctuation is confusing and off-putting.

1. Periods. Three punctuation marks end a sentence: periods, question marks, and exclamation points. Lawyers don't use enough periods. Thoughts without periods are lengthy and convoluted.

Use periods at the end of a declarative sentence. A declarative sentence states an argument, fact, or idea. It doesn't require the reader to take action or answer. *Examples:* "Some writers don't know how to punctuate." "If you know how to punctuate, you'll be seen as a good writer."

Use periods at the end of commands. *Examples:* "Submit your briefs by Friday." "Evacuate the courtroom quietly."

Use periods at the end of a citation before a new sentence. *Incorrect:* "*Landlord v. Tenant*, 100 A.D.3d 21, 22, 111 N.Y.S.2d 41, 42 (4th Dep't 2007) In *Tenant*, the court applied the rule against perpetuities." *Correct:* "*Landlord v. Tenant*, 100 A.D.3d 21, 22, 111 N.Y.S.2d 41, 42 (4th Dep't 2007). In *Tenant*, the court applied the rule against perpetuities."

Use periods, not question marks, after indirect questions. *Examples:* "The judge asked me why wasn't I ready for trial." "My client wanted to know why he paid the filing fees." "She asked whether I could argue the motion."

Use one period, not two, when the sentence ends in an abbreviation. *Incorrect:* "I reached the courthouse at 9:30 a.m.." *Correct:* "I reached the courthouse at 9:30 a.m." If the sentence ends in a question mark or an exclamation point, use a period after the abbreviation. *Examples:* "How was your trip to Washington, D.C.?" "Court begins at 9:30 a.m.!"

Abbreviated American and British weights and measures end in periods. *Examples:* "qt." for "quart" and "pt." for "pint." Don't put periods after degrees and metric abbreviations. *Examples:* "C" for "Centigrade," "cm" for "centimeter," "cms" for "centimeters," and "F" for "Fahrenheit."

Put a period at the end of an abbreviated title, even if the title isn't a true abbreviation. *Example:* "Ms." Put a period at the end of an abbreviated title, even if the last letter of the abbreviated title wouldn't end with a period were it unabbreviated. *Incorrect:* "Dr Smith." ("Dr Smith" is correct in British usage.) *Correct:* "Dr. Smith." *Other examples:* "C.P.A." "D.D.S." "Hon." "Jr." "M.D." "Mr." "Ph.D." "Sen."

Add no space between periods when using initials. *Incorrect:* "Mary Smith, J. D." *Correct:* "Mary Smith, J.D." *Incorrect:* "J. O. Doe." *Correct:* "J.O. Doe." *Exception:* Use spaces if the person prefers them: "John D. B. Jones."

CONTINUED ON PAGE 55

Periodicals

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