JANUARY 2008
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NEW YORK STATE BAR ASSOCIATION

Journal

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BY JUDITH S. KAYE

Cover artwork contributed by Taylor, age 7, a child adopted from foster care.

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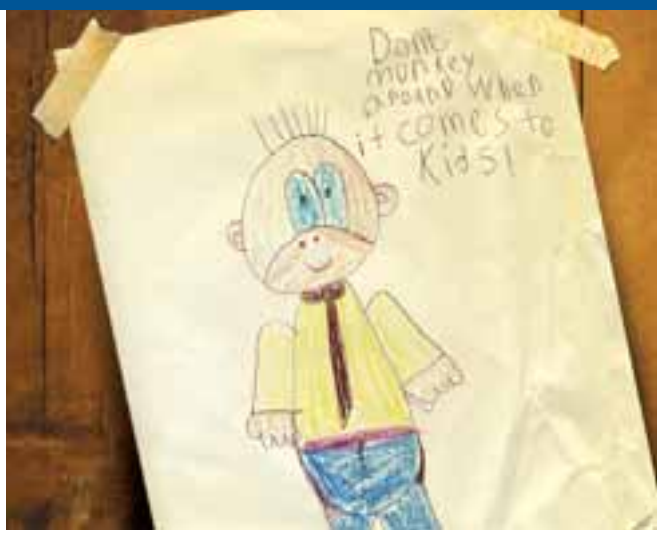

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KATHRYN GRANT MADIGAN

Breaking the Cycle for Our Youth at Risk

A very wise woman once said – "If we don't stand up for children, then we don't stand for much." That wise woman is none other than our national champion for children, Marian Wright Edelman, who joins us as a contributing author for this extraordinary issue of the *Journal* "Our Children, Our Future." Fifteen years ago, Marian wrote an article for another special issue of the *Journal*, titled "Poor Children in the Decade of the Child," during Bob Ostertag's term as President of NYSBA. Few of you will be surprised to learn that the driving force behind that special issue in 1992, and again today, is our charismatic and visionary Chief Judge, Judith Kaye.

Last January, Judge Kaye regaled the House of Delegates with her remarks in what has become a much-anticipated House tradition. She spoke eloquently about the problems children and families face in our court system, which she has characterized as the "most vexing, frustrating and seemingly insoluble issues" she has confronted. Despite her pioneering efforts and many innovative and successful systemic initiatives, the reality in our Family Courts is decidedly grim. Nearly a quarter of our dockets affect the families in New York, including child-related issues, domestic violence or matrimonial matters. Our state is in desperate need of more Family Court Judges as the volume of annual filings now exceeds an unprecedented 700,000. And with only 127 full-time Family Court Judges statewide. After concluding her remarks to the House, Judge Kaye turned, looked me right in the eye and said, "Kate, I do hope that during your year as President, you will make our children and our families a focus of your year, and a theme of your Presidential Summit." How could I say no?

What Judge Kaye tapped, was a long-term commitment that I have had for children, particularly adolescents, that began during my own teen years, when I coached a girls little league team and refereed girls basketball. I learned a compelling lesson about the importance of teaching girls the lessons that boys traditionally accessed through sports – a sense of fairness, teamwork, the self esteem that comes from achievement, the rules of the game.

That interest in reaching out to adolescent youth continued during my undergraduate years at the University of Colorado. I received a grant for an internship at an innovative residential treatment program for juvenile girls, which formed the basis for my senior thesis "Girls in Trouble: The Denial of Equal Protection in the Juvenile Justice System." My thesis examined the gender-based, protectionistic tendencies of our justice system and the troubling statistics that girls are far more likely to be incarcerated for status offenses, such as truancy, running away, parental conflict, or "being in danger of leading an immoral life," which was a statutory standard in Colorado back then.

Upon admission to the bar in New York, I became a Law Guardian in Family Court where for many years, in addition to my full-time practice, I handled a wide variety of PINS, juvenile delinquency and foster care matters, as well as representation of child sex abuse victims. And while my practice today is focused on yet another vulnerable population, our frail elderly, I have never forgotten the frustration and the sheer enormity of the obstacles our children and families confront every day in our court system.

I would like to report that we have made significant progress since my 1975 thesis but we have not. Our young girls still confront a sexual double standard. Children of color also suffer disproportionately in our system today. They are more likely to be placed, and remain longer, in foster care. Minority youth are more likely to be incarcerated in both the juvenile and criminal justice system. Most alarmingly, one out of every three black males born in 2001 will serve time in a federal or state prison.

We all know that truism – about our children being our future. But do we really own that? Our track record on that score is sobering. Let's take two examples. Childcare. In 1971 Richard Nixon vetoed a comprehensive childcare bill that would have enabled the United States to join nearly every industrialized nation with a national childcare policy. We know that ages zero to four are key to a child's future emotional, social and intellectual development and yet stable, quality childcare is unattainable for many of our families. Since the 1980s more than

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

two-thirds of American mothers work outside the home. Yet we continue to pay those who park our cars and who care for animals in our zoos more per hour than those who care for our most precious resource – our children. Unlike most other countries, we provide significant childcare assistance only to the very poor, in welfare-to-work programs; most have long waiting lists. Far too many parents are a sick child away from losing their jobs and returning to the welfare rolls. And many welfare mothers, once employed, will lose the childcare subsidy that enabled them to work in the first place. Most of our middle-class families are completely shut out, despite the rising costs of childcare and the compelling evidence that family-friendly workplace policies, including corporate support for childcare, can help drive the economic development engines in our communities. An editorial in the *New York Times* in October noted that childcare is controversial, a political "hot potato" that has been "swift boated" by social conservatives. How can that be?

Another example is Head Start, one of the Great Society programs of the Johnson era. We know it works. Extraordinarily well. We also know that for every dollar we spend on Head Start we, as a society, save at least $7 in the costs associated with crime and delinquency, high school drop-outs and increased welfare costs. Yet, since its inception, we have been unable to provide funding for more than half of the children who are eligible.

No matter what your practice setting or focus, I urge you to take the time to consider the thoughtful analysis and creative insight provided by our distinguished authors in this exceptional issue of the *Journal.*

I also invite you to become part of the solution to the challenges we face in meeting the needs of our youth today by participating in a special, free plenary Presidential Summit at our Annual Meeting in New York City on January 30, 2008. The first part of the summit will focus on "Breaking the Cycle for Youth at Risk," including the Ratification of the UN Convention on the Rights of the Child, which has been ratified by 193 countries. The United States along with Somalia remain as the only two nations a party to the UN that have not ratified this vital agreement.

Moderated by Judge Kaye, our panel will include immediate past American Bar Association President, Karen Mathis, whose national Youth at Risk initiative has been dedicated to improving the odds of our youth in realizing their potential. We will be joined by Geoffrey Canada, yet another inspiring voice and contributing author in this issue of the *Journal*, as we explore strategies for reducing Family Court and criminal justice involvement, particularly for inner-city youth; mentoring and coaching programs for adolescents; youth in foster care; and the continuing role of the legal community in these critical issues. We will also examine the most recent research on adolescent brain development and the very real differences between the way that juveniles and adults process information and make judgments, warranting more developmentally appropriate standards of competence and treatment.

As I noted in my first President's Message, a society is measured by the way in which it cares for its poor, its elderly and its children. To quote Marian Wright Edelman yet again, "the question is not whether we can afford to invest in every child; it is whether we can afford not to." ■

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(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.5): 3.5 of practice management and/or professional practice
February 14 New York City

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

Twelfth Annual New York State and City Tax Institute
March 5 New York City

Public Sector and Employment Law
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 of ethics and professionalism; 6.0 of skills; 7.0 of 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

Ethics and Civility
(half-day program)
April 4 Albany; Buffalo; New York City
April 18 Melville, LI
April 25 Rochester

Practical Skills – Family Court Practice
April 8 Albany; Buffalo; Melville, LI; New York City: Rochester; Syracuse; Westchester

Women on the Move
(half-day program)
April 9 Syracuse

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

Equitable Distribution of Professional Practices and Closely Held Businesses
(half-day program)
April 25 Tarrytown
May 9 Rochester
May 16 Melville, LI
June 13 Albany
June 20 New York City

Immigration Law Update 2008
(two day program)
May 8–9 New York City

DWI on Trial VIII
(two day program)
May 13–14 New York City

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

† **Fourth Annual International Estate Planning Institute**
(one and one-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

Practical Skills – Basics of Bankruptcy Practice
June 18 Albany; Melville, LI; New York City; Syracuse

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Don't
monkey
around when
it comes to
Kids!
Taylor

Judith S. Kaye is Chief Judge of the State of New York. She is the Issue Editor for this special edition of the *Journal*.

Issue Editor's Introduction

By Judith S. Kaye

High on the list of significant junctures in my own life is the day, 17 years ago, that I acceded to the importuning of my predecessor Chief Judge and agreed to co-chair his recently formed Permanent Judicial Commission on Justice for Children. My resistance was well founded: I had been a commercial litigator before the miracle of my appointment to the Court of Appeals; I had spent little time in the field of family law; and I had no sense of what might be considered "justice for children." Today, chairing that Commission, and supporting in every way I can initiatives to advance justice for children, are at the very core of my professional life.

I began with this egocentric message because I hope not only that you will find this *Journal* issue of interest but also that it will stimulate your own desire to work toward improvement in the lives of our children. It's their future, to be sure. But it's your future, and our nation's future, too.

In the ensuing pages you will find all the statistics, and all the support, for what our own good sense already tells us – that thousands of children right here in our midst are being denied their birthright as Americans. They have no safe, permanent home, no one who loves and believes in them, no real chance at a constructive, productive, happy life. I've heard that you can pretty much foretell a child's dismal future from the zip code into which he or she is born.

That they are "our children" is no overstatement, and I mean this in more than a "brother's keeper" sense. The State, through the courts, literally has custody of the 27,390 children today residing in foster care. More than a thousand of those children each year age out of foster care to "independent living." How comfortable do you feel about children – particularly children with no support system – living "independently" at 18, 19, 20 or 21? No wonder that many of them soon are homeless, unemployed, incarcerated, even dead. Thousands more children every day are in our courts, victims of abuse, neglect, family dysfunction and bitter family dissolution. Some are there on delinquency charges; and some young teenagers are there to be tried and imprisoned as adult felons.

With presumably many years of life ahead for these children, doesn't it make sense for us to devote serious time to finding, and supporting, meaningful early interventions? It's their future, but ours too.

Even after 17 years heading the Permanent Judicial Commission on Justice for Children, I struggle for a precise definition of "justice for children." When it comes to bettering the lives of our children there's hardly a bad idea.

When the remarkable Ellen Schall (now Dean of the Wagner School) and I, as co-chairs, took the reins of the Commission, we solicited suggestions from a wide group of experts, narrowed the Commission's focus to children zero to three, and pushed for improvements in early intervention health services (formerly secured through Family Court, of all places) and centers in the courts where children could be safely and constructively occupied while their caregivers tend to court business. Today our agenda is full of collaborative programs for the zero-to-three population, and we have enlarged the spotlight to include adolescents. There are so many good ideas.

> "Never doubt that a small group of thoughtful, committed people can change the world. It is the only thing that ever has."
>
> — Margaret Mead

Again, my purpose is less to boast about us than to encourage you to join us. There's *so much* that can be done to achieve justice for children, so much that lawyers in particular can do, whether as highly informed citizens asking questions and influencing policymakers; as mentors, or foster or adoptive parents; or as CASAs, pro bono volunteers or community activists. I hope that this publication draws you in, that it stimulates you to think of more ways to be helpful, and that you will act on the impulse and become part of the solutions.

Finally, my thanks to the Bar Association, especially to President Kate Madigan for a State Bar Week showcase program on the important subject of Children and Families, and to *Journal* Editor David Wilkes for the pleasure of assembling this special issue, as well as serving on his Board. My thanks to our terrific authors for what they have done and what they have written; to the wonderful people who have tirelessly educated me in children's issues, particularly Jan Fink, and former and current Commission Executive Directors Sheryl Dicker and Kathleen DeCataldo; and – always – to the judges on the front lines of these vexing issues. ■

Artwork created by Natalie, age 12, a participant in the Chautauqua County Foster Care Youth Art Contest.

Eliot Spitzer is New York's 54th Governor. Prior to being elected Governor, Spitzer served for eight years as New York State Attorney General. Governor Spitzer is a graduate of the Woodrow Wilson School at Princeton University and Harvard Law School, where he was an editor of the Harvard Law Review. The Governor may be contacted at http://www.ny.gov/governor/contact.

Investing in Our Children: A Key to a Prosperous New York

By Eliot Spitzer

As Governor of New York, I am honored to contribute to this special edition of the New York State Bar Association *Journal* dedicated to children's issues.

Each day, over 650 children are born in the State of New York. Some of these children will have the opportunity to reach their full potential. But far too many never will. Indeed, if we allow the status quo to prevail, far too many of the children born today will never discover their talents because they will languish in failing schools. Far too many of today's children will have their potential cut short by chronic illnesses because they will be among the 400,000 children in our state who currently lack health insurance and therefore lack access to critically important primary and preventive care. Far too many will never experience the joy of intellectual achievement because their minds will be consumed with the troubles that often accompany economic insecurity: poor housing, hunger, or an unsafe school, home or neighborhood.

Because innovation has become the driving force of job creation in the global economy, human capital – the intellectual creativity and versatility of a nation's workforce – has emerged as the most important natural resource that a nation can have. New York is well-positioned to compete favorably in the global economy. We have the highest concentration of universities in the United States, including the world's largest public university system. Our state is home to more Fortune 500 companies than any other state. New York City contains the largest center of high-technology employment in the nation. But it is only through our investment in future generations of New Yorkers – ensuring that they have the opportunity to acquire the knowledge and skills they need to compete – that we can truly prosper in the highly competitive global economy.

When I took office, as part of my vision for One New York,[1] I announced an ambitious agenda that included initiatives to significantly enhance the lives of our children and prepare them for the future. In participation with local governments, educators, advocates and members of the Legislature, my Administration has begun to reform our education and health care systems to ensure that the needs of children previously left behind are met, and to design programs to provide New York families with economic security. We are off to a good start, but have significant work to do.

Reforming New York's Education System

Pre-Kindergarten Through 12th Grade

We began reforming education by ending the 14-year-old Campaign for Fiscal Equity litigation, and thereby taking the fate of school funding out of the courts. Indeed, we

made the single largest investment in education in New York's history. In one year alone, state funding for schools was increased by 10%, or $1.8 billion.

Knowing that a single infusion of resources would do little to effectuate long-term change, we reformed the way education will be funded going forward. Working with the Legislature and education advocates, we broke the entrenched "shares system" and adopted a new "Foundation Aid" formula designed to distribute state aid to school districts based on educational need, not political gain. As a result, our historic increases in funding are targeted to reach the school districts that need it most.

To ensure that funding is used in ways designed to best help students, the 56 school districts that receive the most new funding and have at least one underperforming school are required to enter into "Contracts for Excellence." These contracts must describe the specific reforms and investments a school district plans to make with its increased state funding. In addition, these districts are required to use certain funding on programs and activities designed to improve student achievement, including smaller class sizes, longer school days or years, and teacher quality initiatives.

We also began a four-year process to implement universal pre-kindergarten and full-day kindergarten throughout the state. Already, 172 school districts have taken advantage of funding that was made available, and are offering their children pre-kindergarten for the first time.

Higher Education

To compete in the new global economy, New Yorkers need more than an effective primary education system. They need a higher education system that will prepare them to be successful in whatever field they choose to pursue. Therefore, we are taking a fresh look at our higher education system to identify necessary reforms.

To that end, I established the Commission on Higher Education[2] to conduct a review and analysis of New York's colleges and universities, with particular emphasis on public higher education and the State University of New York (SUNY) and City University of New York (CUNY) systems. This analysis will include an assessment of: (1) the degree to which public primary and secondary education adequately prepare students to enter and succeed in college; (2) the mission of the state's community colleges, including the proper balance between preparing students to enter four-year institutions and helping students obtain high-value jobs; (3) the reasonable costs of an education for students in SUNY and CUNY degree programs, and the available sources and amounts of financial aid for students who need assistance to meet such costs; and (4) the types and amounts of financial support provided by the State to private colleges and universities and their students, and the rationale for such programs.

The Commission's recommendations in each of these areas will frame our efforts going forward to assure that New York's higher education system is designed to best serve our students, our communities and our state.

Access to Health Care, Health Insurance and Nutritious Food

Perhaps the most significant step in my plan to achieve universal health insurance for all New Yorkers was our initiation of efforts to ensure that all of the state's children have access to health insurance coverage.

> "I keep your promises in my shoe,
> so I'll remember them and
> you will, too. I keep your promises
> near my sole, and if you break them,
> my sole breaks whole."
>
> *– R.A. Abused former foster child, age 12.*

Children's Health Insurance

Over 400,000 of New York's children lack health insurance coverage – more than the population of Rochester, Binghamton and Albany combined. Without health insurance, children do not receive primary and preventive care, including vaccinations and developmental screening, which is so critical to staving off or treating serious conditions and illness. We have no chance of competing in the global economy when tens of thousands of our children risk having their opportunities dramatically curtailed by illness or chronic disease. While we have experienced a certain measure of success in our efforts, the battle to secure health insurance for New York's children continues.

Child Health Plus is New York's component of the State Children's Health Insurance Program (SCHIP), a federal program that allows states to provide health insurance coverage to uninsured children whose family incomes are too high to qualify them for Medicaid. At the dawn of my Administration, I proposed, and the Legislature enacted, an expansion of Child Health Plus to children in families with incomes between 250% and 400% of the federal poverty level, subject to federal financial participation.[3] However, the U.S. Department of Health and Human Services (HHS) rejected the expansion on grounds that it did not comply with new rules issued by HHS on August 17, 2007. The new rules, which were arbitrarily issued without a public comment period and which unlawfully conflict with the statutory authority that created SCHIP, made it impossible for New York to expand income eligibility for Child Health Plus beginning September 1, 2007 as planned.

SCHIP was set to expire on September 30, 2007. Congress reached a bipartisan compromise on new legislation which would have extended and expanded SCHIP and would have nullified the August 17 rules. Despite overwhelming popular support for the legislation, President Bush vetoed it. As of this writing, SCHIP has been temporarily extended at current federal funding levels, but it is unclear whether New York will be able to proceed with the expansion authorized by the Legislature under any permanent SCHIP reauthorization that may be enacted.

I have worked with other state governors and with New York's congressional delegation to lobby the Bush Administration for reversal of the August 17 rules and, joined by several other states, commenced litigation against HHS in federal court to seek such relief. We are also proceeding with our administrative remedies regarding the federal denial of the expansion. I will continue pursuing all avenues available to secure affordable health insurance for all of New York's children.

Healthy Schools

While it is crucial to ensure that children have access to primary and preventive care, made possible by adequate health insurance, it is equally important to address the factors that contribute to childhood illness. My Administration has pursued a number of public health initiatives in this regard, but one of the most significant is our attack against childhood obesity. Childhood obesity is associated with very serious health problems such as heart disease, cancer, osteoarthritis, asthma, and Type II diabetes – a condition which until recently was seen only in adults. Obesity in children has grown so exponentially over the last several years that one out of every four children in this state is obese.

I have proposed legislation that would help combat childhood obesity and promote healthy lifestyles for children across New York. My "Healthy Schools Act"[4] would require the State Education Department, working with the Department of Health, to promulgate regulations establishing nutritional and dietary standards for foods and beverages sold, served or offered in elementary and secondary schools. The standards would set limits on cholesterol, sodium, fat, sugar, and calories, and would ban artificial trans fatty acids; moreover, no soda or candy could be sold in schools. Additionally, districts would be required to develop local school wellness policies to ensure community involvement in considering ways to create healthier schools, such as increasing opportunities for physical activity during the school day.

These measures are important because they help promote healthier learning environments, allowing children to focus on learning the skills necessary to compete in today's innovation economy – without the distraction of sugar and caffeine. They also offer a significant weapon in the fight against childhood obesity and the chronic diseases associated with poor nutrition.

The New York State Council on Food Policy

Finally, to address hunger in New York and elsewhere and to increase access to affordable, fresh, nutritious food, including fresh fruit and vegetables, especially for children, I established the Council on Food Policy.[5] The Council will develop and recommend a state food policy that seeks to ensure the availability of an adequate supply of affordable, fresh, nutritious food to state residents.

Economic Security Agenda

In addition to our efforts on education and health care, we have also worked to implement what I have called an Economic Security Agenda to strengthen and grow New York's shrinking middle class. Over the last decade, the gap between New York's rich and poor has widened so much that we now lead the nation in this disparity. Far too many working New Yorkers are neither firmly established in the middle class nor firmly supported by the full array of programs that make up our social safety net. For these hardworking yet struggling families, a single unexpected crisis – an illness, a sudden layoff, an injury at work or a sick child, can quickly pull them down into poverty.

The effect of economic insecurity on children is enormous. Our strategy for fighting economic insecurity is being carried out on many different fronts. We have already made progress by enacting the largest property tax cut in New York's history and targeting it to those who need it most; by dedicating hundreds of millions in funding to preserve affordable housing units; by implementing our "Working Families Food Stamp Initiative" to enroll an additional 100,000 working families into the Food Stamp Program, enabling us to draw down $200 million in federal funds; by strengthening worker rights; and by implementing a "block by block" strategy to reclaim struggling neighborhoods, especially in upstate cities.

We established the Keep the Dream Mortgage Refinancing Program, a $100 million program run by the State of New York Mortgage Agency (SONYMA). The program is designed to help eligible households with certain high-risk mortgages avoid possible foreclosure. The program enables families with adjustable rate, interest-only or other unconventional mortgages to refinance with the help of SONYMA and obtain a 30-year or 40-year fixed-rate mortgage at competitive interest rates. This will provide at-risk households with affordable and predictable monthly payments for the full term of the mortgage, preventing families from losing their homes.

We enacted a New York City childcare tax credit.[6] This tax credit is designed to assist low-income families with young children. It provides personal income tax relief

for families who pay childcare expenses for children under the age of four, and have gross household incomes under $30,000 annually. An estimated 49,000 families will qualify for the credit, most of whom would be eligible to receive a city tax credit of up to $1,000. The tax credit is effective immediately and applies to taxable years beginning January 1, 2007.

Additionally, we introduced Paid Family Leave legislation, which passed the Assembly but has not yet passed the Senate.[7] Under the federal Family and Medical Leave Act (FMLA), businesses of 50 or more employees must provide up to 12 weeks' leave to their workers who need to take care of a recently born or adopted child, or care for a loved one. FMLA leave, however, is unpaid, and many cannot take advantage of it for financial reasons. Under this proposal, the State's existing disability insurance system, which provides $180 per week for individuals compelled by disability to leave their work temporarily, would be extended to cover employees who stay at home to bond with a child or care for a sick relative. This would allow more parents to spend time away from work to be with their children, to the great benefit of both children and parents alike.

Our goal is to close the gap between wealthy and poor by bringing those lower on the economic ladder up, and by protecting those middle-class New Yorkers who are in danger of falling down.

Conclusion

We have good reason to be proud of the successes we have had in beginning to reform education and health care, and building a foundation for economic security, but there is more to do. Therefore, I established a "Children's Cabinet,"[8] to ensure that our children's agenda is implemented successfully. The Children's Cabinet, comprised of the commissioners of state agencies that interface with children, will oversee the development and implementation of reforms required for the success of New York's children.

I remain committed to my initial vision of creating One New York with a vibrant education system that demands accountability and rewards excellence; a health care system that serves the needs of patients first, not institutions; and a thriving economic climate that offers opportunity to all. If we are successful in these efforts, we will move closer to the day when we can pass the torch to the strongest generation of New Yorkers in our history. ■

1. Annual Message to the Legislature (2007) at 9-17.
2. N.Y. Comp. Codes R. & Regs. tit. 9, § 6.14 (N.Y.C.R.R.) (executive order [Spitzer] No. 14).
3. 2007 N.Y. Laws ch. 58.
4. 2007 Governor Program Bill (GPB) No. 25R.
5. 9 N.Y.C.R.R. § 6.13 (executive order [Spitzer] No. 13).
6. 2007 N.Y. Laws ch. 484.
7. 2007 GPB No. 28R introduced as A. 9245 (Silver 2007).
8. 9 N.Y.C.R.R. § 6.16 (executive order [Spitzer] No. 16).

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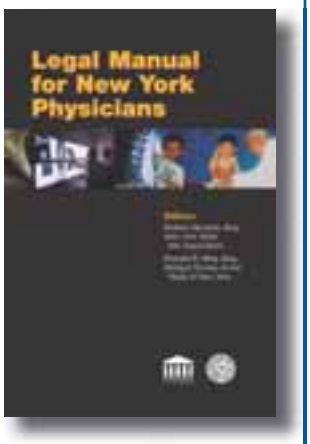

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Artwork created by a child in one of the Family Court Children's Centers.

Justice Jacqueline Winter Silbermann is the New York State Deputy Chief Administrative Judge for Matrimonial Matters. Justice Silbermann graduated cum laude from Bryn Mawr College and Fordham University School of Law. She has received numerous awards including the Harlan Fiske Stone Memorial Award, Benjamin N. Cardozo Award, Louis Capozzoli Gavel Award, New York Women's Bar President's Award, and the Doris Hoffman Memorial Award from the Women's Bar Association of the State of New York.

Child Custody in Contested Matrimonials

By Jacqueline W. Silbermann

As a matrimonial trial judge, as Administrative Judge at 60 Centre Street in Manhattan, and as the statewide Deputy Chief Administrative Judge for Matrimonial Matters, I view divorce proceedings from several unique vantage points. Rearing children before, during, and after divorce is one of the most sensitive issues facing litigants and matrimonial judges in custody disputes. In presiding over such proceedings, my primary interest is the well-being of the litigants' children, where the matrimonial judge must determine what is in the "best interests" of the child.

Clearly, the best interest of the child would be to remain in an intact family, barring situations such as domestic violence and abuse. By the time the family has appeared in my courtroom, however, the intact family has dissolved. Thus, I view my role, in all my hats, as one of assisting families in the restructuring of their lives with as little discomfort to the children as possible.

Although many litigants and their attorneys favor "joint custody," the law of New York as decided by the Court of Appeals in *Braiman v. Braiman*, is that the award of joint custody is insupportable where the parties are "so severely antagonistic and embattled and that such an award could only enhance family chaos."[1] The Court of Appeals did note that joint custody may be appropriate as a voluntary alternative for relatively stable parents behaving in a mature and amicable fashion. Unfortunately, by the time they seek judicial assistance, the parents usually are entrenched and embittered, often having accused one another of serious vices and wrongs to meet the pleading threshold if the grounds for the divorce involve cruelty or other fault. While the law has not changed in the decades since *Braiman* was decided, the judiciary has pursued other ways to ameliorate the harm custody litigation inflicts on children.

Chief Judge Judith S. Kaye's involvement in matrimonial reform efforts began even before she became Chief Judge, when she served on then-Chief Judge Wachtler's Committee to Examine Lawyer Conduct in Matrimonial Actions, chaired by Justice E. Leo Milonas. From that committee emerged the Matrimonial Rules designed to streamline the divorce process. These rules have reduced the average time it takes to resolve a matrimonial case by more than half. Never complacent, Chief Judge Kaye has noted, "but still divorce takes too long and costs too much: too much money, too much agony." As a result, we have explored innovative methods to lessen litigation and address these concerns, especially the emotional toll that litigation takes on the family and the child. I take this opportunity to share some of them with you.

The Parenting Plan

Making the process less adversarial and formulating custody arrangements that give each parent a significant and responsible role in the lives of their children is a major goal in my offices. Historically, custody issues

were framed in terms of possession of the child and the "noncustodial parent" was given some amount of time for "visitation." In 2005, we implemented the use by matrimonial judges, statewide, of a document titled the "Parenting Plan."

The Parenting Plan intentionally uses neutral terms such as "parenting time" rather than "visitation," and "primary residence" instead of "physical custody" or "legal custody." One strategy embodied in the Parenting Plan is the establishment of "zones of decision making," rather than awarding all decision making to one parent, as an effective way to keep a parent from feeling invisible in the child's life. The Parenting Plan sets forth a proposed access schedule and a proposal for decision making: one for day-to-day decisions and one for major decisions. In training seminars, the judges who hear custody cases are counseled to discourage parents from equating a good Parenting Plan with the number of hours or minutes they have with the child, and to help them acknowledge that, as in any family, children need to have time with friends, to be by themselves and to do things away from either parent.

Plan for Success

It is also useful to get a history of what life was like before the family disintegrated: who did homework with the child, bathed the child, prepared meals, took the child to school, to the doctor, to religious services, or to sports activities. Even the most contentious litigants often can agree upon what has worked in the past, and then formulate a stipulation with the assistance of the court. A plan structured and mutually agreed to by the litigants is more likely to succeed. If the parties can agree on the terms, the document is signed by each of them and becomes their Parenting Plan, removing the uncertainty for both parents and, most important, for the child at the very earliest stage of court involvement.

In March 1999, a pilot program utilizing social workers to assist families in custody, visitation, and relocation disputes was launched in the Supreme Court in Kings, Nassau, Suffolk, Richmond, New York, and Westchester Counties. The position requires a Master's Degree in social work and/or counseling and additional professional training, experience and credentials, including but not limited to family therapy practice or other mediation credentials.

The family counseling and case analyst (FCCA) receives custody case referrals directly from Supreme Court matrimonial judges and actively conferences the case with the parties, often in multiple sessions. As familiarity and confidence in the program and the individual social worker are established, these meetings may be conducted without legal counsel present, upon the approval of both counsel.

Because divorce is a family crisis and situations can be complex, the FCCA provides assessment and parental education, acts as a liaison with other systems and professionals to integrate interaction with parties, their counsel, the court, law guardians, drug and alcohol counselors, psychologists, psychiatrists, Child Protective Service caseworkers, school teachers, CASA (court appointed special advocate) or other supervised visitation programs, forensic evaluators and other extra-judicial resources. The FCCA works with the litigants to craft viable resolutions based on the family's unique needs, which counsel then reviews for incorporation in an overall settlement.

Artwork created by Margaret, age 7, a student at Lowville Academy and Central School.

The success of this program, over the past eight years, has resulted in greater utilization of FCCAs by the matrimonial judges and the bar. Significantly, the program resolves one of the most traumatic aspects of divorce, at the inception of the case, avoiding antagonistic confrontation in open court. Expansion of this pilot program to courts across the state continues to be one of my top initiatives.

Recently, initiatives using mediation to assist in resolving custody disputes have been implemented in various counties, including Nassau, Erie, Orange and New York. The goal is to resolve issues involving children in a less adversarial fashion. In New York County, judges are able to order one 90-minute session of mediation, with voluntary sessions to follow if the parties agree. The program initially focused on post-judgment disputes regarding custody and visitation, but it has expanded to include pre-judgment custody disputes.

Children Come First

In late 2006, Nassau and Erie Counties were selected to participate in a new Model Custody Part called "Children Come First." These parts have a Family Services Coordinator to screen cases and provide various services, such as parent education programs, case conferencing, focused and comprehensive evaluations, and the development of a Parenting Plan. In each of these counties, the former FCCAs have been elevated to Parenting Coordinators, utilizing their conflict resolution skills and also overseeing the Model Part. In Nassau County, the initial FCCA pilot was so well received by the bar that a new FCCA was hired to provide social work services to those litigants not selected for the Children Come First part.

The Parent Education Program

The Parent Education Program was launched in 2001, with appointment of a Parent Education Advisory Board chaired by the Honorable Evelyn Frazee. The Board, charged with developing a comprehensive approach to parent education in New York, has developed a curriculum to provide parents with information and strategies to supplement and enhance their parenting skills; to create and maintain supportive parent-child relationships; to provide a stable, supportive home environment; to promote healthy parental functioning and psychological well being; and perhaps most important, to protect children from ongoing conflict between parents. Certified programs, now located throughout the state, allow parents to gain a greater understanding of what their children are experiencing during the divorce process.

Certification of Forensic Experts

Forensic evaluators often are appointed to assist the court in reaching custody determinations. As Deputy Chief Administrative Judge, I have proposed a certification process requiring minimum qualifications for forensic experts. Such a process will ensure that our standards are current with professional standards and that forensic experts have the requisite minimum education, experience and training to provide the courts with effective assistance.

My office provides annual educational seminars to the judges and lawyers handling matrimonial cases, offering such topics as psychological and developmental issues relevant to custody and parental access planning. This training introduces them to the available diagnostic tools that can help them address the myriad psychological, sociological and pharmacological issues relating to the mental health and well-being of the family. Mental health experts and veteran matrimonial judges train newer judges in how to appropriately conduct an interview of a child (Lincoln Hearing). Copies of *A Mental Health Glossary of Selected Terms for Judicial Use During Child Custody Cases*, prepared by Sandra Kaplan, MD, and Rona Muntner, PysD., of North Shore University Hospital, are provided to the matrimonial judges at these seminars, and are available to the bar and the public at our Web site www.courts.state.ny.gov/ip/matrimonial-matters/. The Web site also includes the Parenting Plan and other forms referenced in this article.

Assigned Counsel Pursuant to Judiciary Law § 35

The recognition that the access to one's child is fundamental and paramount to the well-being of the child and each parent, prompted the enactment of Judiciary Law § 35(8) this past year. This section provides legal representation to either parent seeking custody or parental access, upon a finding of financial eligibility, where that party would have been entitled to such representation in Family Court. Upon such a finding, the court may appoint counsel with the costs to be borne by the Office of Court Administration. Access to effective legal representation for each parent in a custody dispute hopefully will reduce acrimony and litigation as the parties are better informed of their legal rights and responsibilities and better equipped to use the court resources described in this article.

Collaborative Family Law Resource Center

New York State will soon be the first in the nation to have a Collaborative Family Law Resource Center. Collaborative family law refers to a dispute resolution process in which the parties and their attorneys sign a consent agreement setting forth the parameters of the attorneys' representation and ground rules to assist them in the resolution of their dispute. This process may include a third-party expert, as agreed to by the parties, with specialized training to act as a third-party neutral to identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

Collaborative law differs from traditional mediation, as there is a suspension of court intervention in the dispute while the parties engage in collaborative family law discussions. There will be specific training and qualifications for attorneys seeking to participate; a roster of qualified attorneys; an agreement to comply with the rules of the Center; a time frame for the process; and an understanding that, should the parties fail to reach an agreement for any reason, the case will be returned to the court, and the representation of the collaborative attorneys, which is limited in scope to non-litigation matters, must cease. If an agreement is reached through the collaborative law process, as with any matrimonial action, the settlement may be incorporated into the divorce judgment.

Conclusion

It has been my highest priority, in all of my judicial capacities, to remove children from the center of custody and parental access litigation, to protect them to the fullest extent possible from the pernicious effects of such litigation, and to reduce the level of hostility and aggression in custody disputes. In many cases, the only thing the parents still have in common is love for their children. The Parent Education Program, the Parenting Plan, the FCCA social worker pilot program, the Court-Sponsored Mediation program, the Children Come First Model Custody Initiative and the Collaborative Family Law Resource Center, all were designed to build upon that common interest. The success of these initiatives depends upon the willingness of concerned parents, lawyers, judges, social workers and experts to remain focused on the need to protect the children from the toxic fallout of custody litigation. ■

1. *Braiman v. Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449 (1978).

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Artwork created by Pheobe, age 7, a student at Lowville Academy and Central School.

Judge Michael A. Corriero presides over Manhattan's Youth Part, a court set aside within the adult court system to deal exclusively with the cases of 13-, 14-, and 15-year-olds who are charged with the most serious and violent crimes. Judge Corriero is an alumnus of St. John's University School of Law and St. John's University. He is the author of a book titled *Judging Children as Children: A Proposal for a Juvenile Justice System*, published by Temple University Press, September 2006.

The authors wish to acknowledge the contributions of Kathleen Landaverde, Yasmin Safdie and Michelle Haddad in the preparation of this article.

Portions of this article were excerpted from *Judging Children as Children: A Proposal for a Juvenile Justice System* by Michael A. Corriero. Copyright © 2006 Temple University. Used by permission of Temple University Press.

Advancing Juvenile Justice Reform in New York

A Proposed Model

By Michael A. Corriero, with Alison M. Hamanjian

On June 29, 2007, Connecticut Governor M. Jodi Rell signed legislation that raised the age of criminal responsibility from 16 to 18, permitting certain juveniles under 18 to be transferred to adult court only after a juvenile court hearing. In taking this significant step, Connecticut recognized that treating all children under 18 as adults is inconsistent with sound public policy and current scientific research demonstrating the cognitive differences between adults and adolescents. It also represents the latest sign that America is on the brink of a counter-reformation in its approach to juvenile justice – a reformation that signals a return to the founding principles underlying the creation of the first juvenile court.

Just over a century ago, the first juvenile court was established in Chicago, Illinois. The concept of a separate court for juveniles presided over by a firm yet compassionate and understanding judge whose goal was to provide individualized treatment and services for children in trouble with the law was unique for its time. Conceived as the first problem-solving court, it was emblematic of a broader national progressive movement to protect the poor and vulnerable from the negative aspects of the rapid progress of our democratic and industrialized society.

In the first decades of the 20th century, this concept of a humane and practical approach to adjudicating the delinquency of minors, so that they would not be foreclosed from opportunity to participate constructively in society, spread rapidly throughout the nations of the world and became an established feature of modern democratic justice systems.

In the last 30 years of the 20th century, however, dissatisfaction grew with the juvenile court concept in terms of its capacity to adequately cope with juvenile violence – a concern that threatened the very existence of the court as a separate and viable institution. A few sensational cases of juvenile violence and the proliferation of guns,

drugs and gangs in the poorest neighborhoods of our nation drove state legislatures to revisit the way in which children accused of participating in serious crimes were adjudicated.

New York was among the first to "reform" its juvenile justice system. In 1978, an extraordinary case of juvenile violence, a gubernatorial election and public frustration with the juvenile justice system resulted in enactment of New York's Juvenile Offender Law.[1] Before then, the cases of all children under 16 were prosecuted in New York's Family (Juvenile) Court.

The Juvenile Offender Law authorized the wholesale movement of an entire category of children to the adult court on no more a sophisticated basis than their reaching a threshold age of 13 and accused of the crime of murder; the age of 14 and accused of the crime of robbery, assault and other newly characterized "juvenile offender" offenses – without regard to a child's individuality, potential or extent of involvement in the underlying crime. As a result, the cases of 13-, 14- and 15-year-olds were now to be *automatically* prosecuted in the adult courts and, equally significant, subject to mandatory imprisonment and the lifetime stigma of a felony record upon conviction.

The only way mandatory imprisonment could be avoided was for a judge to exercise discretion to grant the legal equivalent of a second chance by declaring the youth a "youthful offender"; this was often a difficult choice given the presumptive punitive response contemplated by the law.[2] At the time, New York became one of only three states, along with Connecticut and North Carolina, that prosecuted children as young as 13 in adult courts.

When New York's Juvenile Offender Law was first enacted its mandatory nature was virtually unprecedented. Juveniles throughout the nation were generally subjected to prosecution in adult court only after a hearing in juvenile court, during which a juvenile court judge was required to examine factors enumerated in the Supreme Court case of *Kent v. United States*.[3]

Such factors included the youth's age and social background, prior delinquency records, the nature of past treatment efforts and the availability of programs designed to treat a juvenile's behavioral problems. The Juvenile Offender Law prevented judges from taking these critical individual factors into account *before* prosecution in the adult court, and it did not provide adequate resources to deal with the special needs of young offenders. It represented a dramatic shift in policy from rehabilitative justice for juveniles to punishment and retribution.

New York's Juvenile Offender Law presaged a growing American trend to criminalize juvenile delinquency. Since 1978, virtually every state in the nation passed laws that placed more young people in the criminal court, instituted harsher sanctions, and in some instances allowed adults and youths to be incarcerated in the same facilities by lowering the age of criminal responsibility and broadening the circumstances under which they could be prosecuted in adult court.[4]

> "The sad truth is nearly half the world's children are living in poverty not because of benign neglect, but because too many governments are making deliberate, informed choices that hurt children. And too many people are letting those choices be made without challenge."
> *– Carol Bellamy*

Many states, faced with what they contended was a wholly new kind of juvenile offender, began to view the principles at the core of the old system, the treatment orientation and the concern for offender privacy, as not merely outmoded but dangerous.[5] As violent crime continued to rise, other states began to mimic New York's rigid approach to juvenile offenders. From 1992 through 1997, all but three states changed laws to facilitate the prosecution of children in the adult court.[6]

I believe this approach leads us in the wrong direction because, as recent research has demonstrated, it ignores critical differences between children and adults, does not prevent juvenile crime or secure protection of the public, and unnecessarily criminalizes children.

The Juvenile Offender Law impacts not only children who are dangerous because of the violent acts they personally commit but also children on the periphery of offenses. Consider the case of Loretta:

Loretta, a 14-year-old African-American girl, was traveling to school on the subway one morning with a classmate. Sitting across from them was another student also on her way to school. The student was wearing an attractive pair of gold earrings. Loretta's classmate, who was 15 years old, bigger than Loretta, and with a reputation as a bully, noticed the earrings and decided to have them. She stood up and walked over to the girl. Loretta followed. "Give me your earrings," demanded the bully. The student ignored her. She repeated the demand. The student tried to move away but was blocked by Loretta. Again, the bully menacingly demanded the earrings. The student continued to ignore her. As the train neared a station, Loretta's classmate suddenly reached down and ripped the earrings from the girl's pierced ears. As the doors opened onto the subway station, they attempted to flee from the train. Fortuitously, a policeman was standing on the platform. He saw the young girl screaming and holding her ears. He stopped Loretta and her classmate as they tried to run. Loretta was charged as an accomplice in

the robbery and prosecuted along with her classmate as an adult pursuant to the Juvenile Offender Law.

When Loretta first appeared before me, I was told that she had never been in trouble before and that she was a talented dancer attending one of New York City's schools for the performing arts. I asked a court representative from an alternative to incarceration program to interview Loretta, who was being held in detention. A few days later, the program representative returned to court. She told me that she wanted to work with Loretta but that Loretta had serious problems. She had asked Loretta a typical "social worker question" to get a sense of who she was and her relationship to the community: "Loretta, if you could change three things in your life, what would you change?" Loretta replied that she would change her country, her family and her sex – her country because she believed America was a racist society, her family because her mother was a crack addict and she never knew her father, and her sex because she believed young women were vulnerable to physical and sexual abuse.

How well does the Juvenile Offender Law respond to the issues presented by Loretta? Does it provide the flexibility of dispositions that could link Loretta to appropriate services? How likely is Loretta to receive adequate rehabilitative services in an adult criminal court setting?

In 2005, the movement to restore the redemptive quality of justice for children in trouble with the law won a significant victory in the Supreme Court case of *Roper v. Simmons*.[7] This decision signified the tangible beginning of the counter-reformation in juvenile justice policy. An unprecedented coalition of advocacy groups composed of physicians, behavioral scientists, child advocates and lawyers came together to successfully challenge Missouri's juvenile death penalty statute. Although *Roper* dealt with the constitutionality of executing minors under 18, the Court's rationale provides a compelling argument for the proposition that children under 18 should be within the jurisdiction of a juvenile court and subject to individualized treatment. In *Roper*, the Supreme Court recognized the developmental differences of minors under 18 as an accepted societal factor in determining the appropriate treatment of juvenile offenders, thereby officially acknowledging the conclusions of behavioral scientists as to the diminished capacity and culpability of adolescents.

The juvenile justice reforms of the latter part of the 20th century were enacted with little empirical evidence of their effectiveness. Columbia University professor Jeffrey Fagan, in his aptly titled article "This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency,"[8] analyzes the effects of statutes that permit the prosecution of juvenile offenders in an adult court, concluding that, rather than deter crime, they have had the opposite effect. This is so, he contends, because incarceration interferes at a critical point in a child's normal developmental transition from adolescence to adulthood. It leads to the acclimation of a violent lifestyle, which reflects the culture of prison life and it culminates in long-term economic disenfranchisement through the stigma of felonization. Professor Fagan concludes that "whatever the symbolic gains from sentencing adolescents as adults, these gains are discounted if not reversed by increased public safety risks of substantial punishment of juveniles as adults."[9]

> "Unless the investment in children is made, all of humanity's most fundamental long-term problems will remain fundamental long-term problems."
>
> – UNICEF, "*The State of the World's Children*" (1995)

Laws that provide for the automatic prosecution of juveniles in adult courts fail because they are too broad in application, encompassing many whose needs could be better met, consistent with public safety, within the juvenile court: for example, children with no significant prior delinquency record or children on the periphery of offenses and whose level of culpability rests solely on the law of accomplice liability. For those children who are dangerous, these laws also fail because they do not provide adequate sentencing flexibility or sufficient rehabilitative services while incarcerated.

State and federal governmental leaders are beginning to recognize the destructive consequences of policies that unnecessarily expose young offenders to lifelong criminalization, not only in human terms but also in economic costs. As experience with the so-called "get tough" legislation has grown, the direct impact of these laws on federal, state and local budgets, as well as their perceived disproportionate impact upon racial minorities, has increased pressure on political leaders to rethink their approach to crime prevention.[10]

New York has a rich history as a leader in raising the standards of justice for its citizens. Therefore, it is ironic that in the realm of juvenile justice, we are fast becoming isolated in our approach to juvenile wrongdoing.

New York can improve the way in which it addresses juvenile crime by adopting a model of juvenile justice that incorporates the following four core principles: (1) the development and implementation of a statutory strategy of prosecution that serves to identify more precisely dangerous, violent and chronic juvenile offenders; (2) the development of "punishments" that are primarily intended to educate an offender; (3) a system of prosecution and punishment of juveniles that is flexible enough to recognize and accommodate juveniles who have the capacity to change their behavior by participating in alternative-to-incarceration programs; and (4) the development of mechanisms to remove the stigma of a felony conviction from those juveniles convicted in the adult criminal court but who have demonstrated after a sufficient period of time that they have conformed their behavior to society's standards.

Although the judgments of state legislatures have differed in distinguishing childhood and adulthood in terms of fixing criminal responsibility and determining appropriate sanctions, most states recognize the age of 18 as the age of majority in civil contexts. The model I propose would extend that recognition, in light of the vulnerability and malleability of adolescents, and in keeping with the four core principles that I have discussed, to require all youth under 18 to be prosecuted in the juvenile court. A youth under 18 years of age could be transferred to the adult court, but only after a due process judicial hearing in which such a child was found not to be amenable to the programs or sanctions available in the juvenile court, or that the public's interest would be best served by prosecution in the adult court.

I would further recommend that no youth under 14 years of age be transferred to the adult court unless it can be established by clear and convincing evidence that he or she is competent to understand and assist in the proceedings.[11] Such a system would be consistent with American Bar Association standards as well as national and international norms.[12]

A judicial waiver or transfer system would ensure that no child is prosecuted as an adult without a judicial hearing that carefully examines the child's level of maturity, past history, role in the offense and amenability to treatment. Juvenile court judges are uniquely qualified to perform this task because they have witnessed many of these children enter the dependency system as infants in abuse and neglect proceedings, as children navigating the foster care system, as persons in need of supervision, and as respondents in delinquency proceedings.

In order to implement such reform, New York should establish a commission whose purpose would be to develop legislation that would result in the expansion of the Family Court's delinquency jurisdiction to children under the age of 18 with a provision that would allow for the transfer of certain cases to the adult court only after a due process judicial hearing, as well as a reinvestment in the resources and capacity of the Family/Juvenile Court.[13] To prepare for this new category of young offenders, efforts to improve court diversion and pre-trial detention practices such as those suggested by the Annie E. Casey Foundation, as well as efforts to increase the number of Family Court judges and support personnel, must be a part of the legislative plan.[14] The commission would be required to submit its final report and recommendations for appropriate legislation and funding to the New York State Legislature within a reasonable deadline.

Our children deserve a system of justice that not only holds them accountable for their behavior but also protects and nurtures those who can learn from their mistakes and become productive citizens. The long-term goal is to create a model juvenile justice system that unites the juvenile court and criminal court in a common strategy – the rehabilitation of juvenile offenders. This can be accomplished in a system that provides for the individualized treatment of all offenders under 18 years of age.

1. N.Y. Penal Law § 10.00(18).

2. Although § 180.75(4) of New York's Criminal Procedure Law permits the removal of an action against a juvenile offender to the Family Court, these provisions have proved to be largely ineffective and impracticable.

3. *Kent v. United States*, 383 U.S. 541 (1966).

4. *See* Franklin E. Zimring, American Youth Violence (Oxford University Press, 1998). *See also* Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & Pol'y 223 (1996).

5. *See* Zimring, *supra* note 4.

6. *See* P. Torbet, P. Griffin & H. Hunt, Jr., Juveniles Facing Criminal Sanctions: Three States that Changed the Rules, U. S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (2000).

7. *Roper v. Simmons*, 543 U.S. 551 (2005).

8. 16 Notre Dame J.L. Ethics & Pub. Pol'y 1 (2002).

9. *Id.* at 28. *See also* Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 Youth Violence & Juv. Just. 21, 28–29 (2004).

10. *See* Michael Jacobson, How to Reduce Crime and End Mass Incarceration, Downsizing Prisons (New York University Press, 2005).

11. Requiring that no juvenile under 14 years of age be transferred to adult court without a specific finding of competence is consistent with recommendations of experts in the field of child psychology who have found that "current knowledge about adolescent development raises strong doubts about the capacities of youths 13 and younger . . . to assist effectively in their own defense and to make self-interested decisions." *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youth Offenders*, in Youth on Trial: A Developmental Perspective on Juvenile Justice 89 n.31 (Thomas Grisso & Robert Schwartz, eds., 2000).

12. *See* IJA-ABA Juvenile Justice Standards, Standard 1.1 (relating to transfer between courts); *see also* United Nations Convention on the Rights of the Child.

13. *See* Final Report, Connecticut Juvenile Jurisdiction Planning and Implementation Committee (Feb. 12, 2007).

14. *See* David Steinhart, Pathways to Juvenile Detention Reform: Planning for Juvenile Detention Reform – A Structured Approach (The Annie E. Casey Foundation, 1999).

2006–2007 Youth Justice Board in front of the New York County Family Court.

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Preparing Young Citizens for Democracy

By Jacqueline Sherman and Dory Hack

Distilling his study of American democracy, Alexis de Tocqueville observed that it "is hard to make the people take a share in government; it is even harder to provide them with the experience and to inspire them with the feelings they need to govern well."[1] The words frame an essential challenge for civic education today, especially for the judicial branch. Given that young people cannot participate in government by voting or serving on juries, and given a certain natural cynicism, how do we help them develop the kinds of knowledge and skills they need to become active citizens?

Dozens of exceptional programs across New York State's justice system are currently attempting to meet Tocqueville's challenge. For over 30 years, the State Bar Association's Law, Youth and Citizenship Program has promoted superior citizenship and law-related education in schools throughout the state. The New York State Learning Standards[2] require schools to teach students the values and responsibilities of citizenship. Mock trials and debate teams engage youth intellectually and build skills essential to participation in the give and take of democratic institutions; service learning projects and art-based activism provide additional avenues for youth participation.

In recent years, two new models have emerged that seek not only to educate young people about the judicial branch, but also to involve them in grappling with thorny, real-life problems – youth courts and the Youth Justice Board. Both provide young people with knowledge and experience that will inspire them to take a share in government *and* govern well.

Red Hook Youth Court

The Red Hook Youth Court in Brooklyn is one of nearly 100 youth courts across New York State.[3] As youth court members, teens learn how the justice system works, how to use sanctions to address illegal behavior, and how they can have a positive influence on their peers. They step into the roles of judge, jury and advocate to hear real cases (referred by courts, police precincts and schools) involving truancy, vandalism and assault. Youth court members use their unique insights to craft sanctions that emphasize community restitution and engagement. The justice system is no longer some distant authority – young people essentially become co-producers of justice.

Naraya's[4] story illustrates how youth courts have the power to turn a negative incident into an opportunity for positive change. Naraya approached her interview with Shante Martin, the Red Hook Youth Court coordinator, with skepticism. She had heard about youth court when she got in trouble before and did not want any part of it. But after she was caught with a weapon at school, her social worker scheduled an appointment with Martin. Naraya's grandmother escorted her to the Red Hook Community Justice Center to make sure that she got there. What Martin said came as a surprise: the goal of the proceeding would not be to punish Naraya, but to give her an opportunity to take responsibility for her actions. If she participated respectfully in the process and submitted to a sanction imposed by the court's jury, she could clear up the matter. If she refused, the incident could be taken into account if she got in trouble again. Naraya decided to cooperate.

She was next interviewed by a "youth advocate," the youth court member who would represent her during a hearing before the full court of eight teens, most of whom she knew from school and the public housing projects of Red Hook. The meeting changed Naraya's attitude. The youth advocate explained exactly what was going to happen and informed her that the members of the youth court were not against her – they were there to help her. Now she was looking forward to this process.

At the hearing, Naraya's advocate told her story: Naraya knew that carrying a knife to school was wrong but succumbed to pressure from her friends to do so. She did not intend to use the weapon; she just wanted to be accepted. Naraya reported that she maintained a 70 average, but wanted to improve her grades so that she could become a lawyer. After her advocate spoke, the group peppered her with questions, drawing out information about the circumstances of the incident, her feelings about it and her future goals. After the questioning, her advocate closed by highlighting her positive intentions and acknowledging that while she had made a bad choice, she is not a bad person. He asked the youth court to give her a sanction that would help her realize the negative effects of her actions and learn from them.

After several minutes of discussion, the jurors reached consensus. They ordered Naraya to perform 15 hours of community service at a nearby health clinic and to attend a workshop about negative peer pressure and poor decision making. Before sending her away, one of the jurors asked Naraya: "Since you would like to be a lawyer, how would you feel about becoming a youth court member yourself?"

Fast forward to today. Naraya has completed her community service and has begun training to become a youth court member. She will soon hear cases of people in situations like the one that brought her to the youth court and help them as her fellow members have helped her.

While not all teens that appear before the Red Hook Youth Court as respondents follow this path, the program has shown impressive results. It handles more than 140 cases each year and has trained more than 400 young people since 1998. Compliance with youth court sanctions stands at 85% – a significant improvement on the rate achieved by most adult judges. Judge Alex Calabrese, who often refers young offenders to the Red Hook Youth Court, has said, "[T]he message teens get from peers is more effective than the one any adult can give them."

Youth Justice Board

The Youth Justice Board is an after-school program that brings together 15 to 20 teenagers from different New York City schools to devise recommendations on justice system issues that affect youth, such as school safety, juvenile offenders returning to New York City following placement in a state facility, and the permanency planning process. The program aims to create youth leaders and to foster dialogue between teens and policymakers.

In essence, the Youth Justice Board is an experiential civics class, engaging participants not in abstract book learning but in conversation with practitioners responsible for formulating and implementing policy in the real world. A snapshot of a recent Youth Justice Board presentation gives a sense of how the program works.

The most recent Youth Justice Board presentation was devoted to the subject of how the New York City permanency planning process might be improved for youth in foster care, a subject the Board had studied for months. A standing-room-only crowd packed the room to hear the report. Key stakeholders in New York City's child protection system – judges, court attorneys, law guardians, prosecutors, caseworkers, and foster care provider agency directors – chatted while they waited for the presentation to begin. A television crew worked busily in the back of the room.

Artwork created by Michael, Youth Justice Board member, June 2007.

At the front of the room a group of teens – many of whom had spent time in the foster care system – waited, their nervous energy on display. Some posed for photos, some rehearsed one last time, and some fidgeted quietly, peering out at the crowd settling in to hear them speak.

The Youth Justice Board members had earned the audience assembled before them through hard work. Their research included over 40 interviews, court observations, and focus groups with youth in the foster care system. The members examined and debated the permanency planning process from every angle. Early on, they identified their goal: to help foster care youth participate in their court cases so that the process could better meet their needs. Now they were presenting their report: "Stand Up, Stand Out: Recommendations to Improve Youth Participation in New York City's Permanency Planning Process."[5] They had identified concrete steps to help prepare youths to take a more active role in their cases; to strengthen system-wide collaboration; and to ensure that the court environment facilitates meaningful youth involvement.

The members fielded questions and heard suggestions from the audience. One provider agency offered to pilot peer-led workshops. A law guardian suggested that the Youth Justice Board participate in presentations to new attorneys on the needs of teenage clients. The members saw their recommendations begin to become more than words on a page.

The Youth Justice Board will spend the next nine months working in partnership with stakeholders in the permanency planning process on the implementation of some of the Board's recommendations. The program has taught members that they can make a difference – a lesson that will affect how they will operate in school, in jobs, and in their communities in years to come. As one Youth Justice Board member put it, "This is the first time I feel like I've accomplished something. Not only do I feel like I can make a difference for other youth in foster care, it's helped me speak up for myself, and talk about what I think is important."

Conclusion

These two program models offer only a glimpse of a much larger universe of programs that provide young participants with an understanding of how democratic institutions work and help them develop a commitment to take part in government. The further the reach of such programs expands, the closer we will come to ensuring that all of our citizens have the experience necessary to govern well. ■

1. Alexis de Tocqueville, Democracy in America 315 (J.P. Mayer ed., George Lawrence Trans.) New York, NY: Perennial Classics 2000) (1835).

2. These are standards approved by the Board of Regents to define what all New Yorkers should know, understand and be able to do as a result of their schooling.

3. The state's first youth court was established in Colonie, New York, in 1995. Since 2002, youth courts across the state have collaborated through the Association of New York State Youth Courts to strengthen and promote the use of youth courts as an important feature of the juvenile justice system.

4. Not her real name.

5. The full report is available at <http://www.courtinnovation.org/_uploads/documents/YJBreport%20final_2007.pdf>.

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Artwork created by Markita, age 16, a participant in the Chautauqua County Foster Care Youth Art Contest.

What Will It Take?

Improving the Lives of All New York's Children

By Olivia Golden

This is a moment of opportunity for children in New York State. As Governor Spitzer writes elsewhere in this issue of the *Journal*, investing in children is essential to safeguarding New York's economic future. It is also part of the Governor's commitment to One New York – to a state that is based on principles of fairness, so a child's life chances are not determined by whether her parents could afford to send her to preschool or purchase family health insurance.

In the 2007–2008 budget, the Governor and the Legislature went beyond simply articulating this commitment – they backed it up with funding and statutory changes. The budget included a historic increase in funding for pre-kindergarten programs; a historic investment in education, together with a new framework to ensure accountability for results; and the funding and statutory changes to ensure that all 400,000 uninsured children in New York gain access to health insurance within the next four years.

Yet there is much more to do to build on this moment of opportunity and early accomplishment. Taking the next steps will not be easy: the experience nationally, as well as in New York State, suggests the challenges to be negotiated by any ambitious agenda for children. This article summarizes the current circumstances of New York's children, the nature of the agenda ahead and the special features of the Governor's approach that are intended to overcome the challenges.

Who Are New York's Children? How Are They Doing?

About one in four, or 4.5 million, of New York's residents are children age 17 or younger. Of these children, just over one quarter are of preschool age (birth to four), about half elementary school age (five to 13) and just under one quarter high school age (14 to 17).

Over the next decade, the number of children in New York is expected to remain stable while the number of working-age adults decreases, as workers reach retirement age. This decrease means that young adults entering the workforce are particularly crucial to New York's economic future – so we must successfully prepare *every* child for adulthood. Across the state, business and community leaders have persistently highlighted to me their sense of urgency about this goal. In their view, the future of our communities requires our children to experience the right education, health care and family support so they can thrive as adults, replace an aging workforce and drive New York's economic future.

Achieving this goal, however, means grappling with the demographic and economic circumstances of our children, who are increasingly different from older adults. One third of New York's children have at least one parent who is foreign-born. About one in five children in New York is Latino and one in five African American – compared to one in ten Latino and one in ten African-American among New Yorkers age 65 and

older. And even though the large majority of New York State's children live in families where one adult (or more) works full-time, year-round, four in 10 children live in low-income families, defined as families with incomes below twice the federal poverty level or about $40,000 for a family of four.

The challenge of high-work yet low-income families is a problem that cuts across New York State's regions, with about 40% of children upstate and almost 50% in New York City growing up in low-income families. According to national data – which likely understate the problem in New York's high-cost regions – at least a quarter of families at this income level have trouble paying the mortgage or rent and about the same proportion have trouble putting food on the table over the course of a year.

Given how much we depend on this generation of children, we cannot yet feel confident that we have secured their futures. The most recent education data from the State Education Department (SED) show that only about six in 10 eighth-grade students test at or above SED's math learning standards and about five in 10 meet or exceed SED's standards in language arts. And major disparities among different groups of children persist: For example, despite improvements between the years 2004 and 2006, fewer than half the African-American and Hispanic students graduated from high school within four years even in the 2006 cohort, compared to about two-thirds of all students. Similarly, while more than 90% of New York's children have health insurance, that still leaves over 400,000 who do not.

What Will It Take to Succeed? Solutions to the Historic Challenges

Our challenge, therefore, is to turn the historic commitments made to children in the 2007–2008 budget into real improvement in children's lives and New York's future. Beyond appropriating the dollars for children's health insurance, important as that is, we need to make sure that children are actually enrolled in health insurance plans, are able to find doctors and clinics, and – over time – are in better health. Similarly, for the increased preschool appropriation to make a difference, children need to be enrolled in and attending pre-kindergarten programs, the programs need to have good teachers who are experienced in promoting young children's development, and the other child care settings children spend time in – for example, the family child care provider or child care center they attended during the first four years of their lives – also need to provide care that prepares them for learning.

To change children's lives in these ways requires that we take on three challenges. First is the fragmentation challenge, which has defeated many public programs for children. The Governor has taken on this challenge by establishing a Children's Cabinet with an active Advisory Board. Second is the challenge of federal roadblocks. Our strategy combines active national leadership and advocacy with state implementation. Third is the challenge of effectiveness: ensuring that implementation delivers results, not just good intentions. The strategy is to ground the agenda in research and data.

The Children's Cabinet: Why It Matters and How It Works

Across the country, fragmented government structures for health, education, early childhood programs, mental health, economic support and family services make it harder for programs to meet the interconnected needs of children and their parents. New York State has been no exception. In fact, it has even more agencies, more different jurisdictions and more separate reporting structures than most other states.

To overcome this fragmentation and bring everyone to the table to deliver results for children, the Governor created the Children's Cabinet and the Children's Cabinet Advisory Board. The Children's Cabinet is not an informal group of expert advisors or a think tank. Instead, it provides a formal structure, established by Executive Order, that brings the key agencies together and requires them to take joint responsibility for achieving results: first, in the two priority areas of early learning and health

insurance; and second, and more broadly, in achieving the Governor's children's agenda.

Even after just a few months, this new way of operating has paid off for children. For example, SED, the Office of Child and Family Services (OCFS), the Council on Children and Families (CCF) and the Governor's Office have collaborated closely so that as many school districts as possible will implement pre-kindergarten programs this year. Among the early products of the collaboration is a new regulation adopted by the Board of Regents to allow school districts the planning time they need to implement new pre-k programs. Based on this regulation, New York City has already increased the number of pre-k classrooms and enrolled children beyond initial expectations. Other districts which originally did not expect to participate at all this year are now preparing to start pre-k classes on January 1.

Another fragmentation challenge for children's programs around the country is the disconnect between public and private sectors – between public programs on the one hand and researchers, advocates, business and labor leaders, and nonprofit practitioners on the other. Even when all parties care about children, it may be hard for those outside government to understand how to connect to the bureaucracy. In New York State, with its commitment to local control, another challenge can be unclear relationships and communication between state and local agencies.

To bring all these partners together as well, the Governor has appointed an Advisory Board to the Children's Cabinet, co-chaired by Geoffrey Canada of the Harlem Children's Zone and Karen Schimke of the Schuyler Center for Public Policy and Advocacy. Chief Judge Judith S. Kaye is a distinguished member of this group. The Advisory Board includes members from across the state, representing experts, community and local government leaders and practitioners, and is charged with bringing to the Cabinet its real-world knowledge of barriers, solutions and next steps. Early on, the Cabinet and the Advisory Board decided to jumpstart their collaboration through joint working groups focused on very practical issues like local implementation, how to bring funding streams together and how to use technology to smooth the enrollment of children in health insurance.

National Leadership to Overcome Federal Barriers

In contrast to the focus of New York State's leadership, public and private, on making a positive difference for children, the federal government has too often placed obstacles in the way. The Governor in his article writes of the planned expansion of the State Children's Health Insurance Program (SCHIP) to cover all children, including children in families with incomes up to 400% of poverty (about $80,000 for a family of four), who do not have insurance. Unfortunately, however, the U.S. Department of Health and Human Services chose to change the rules on children's health insurance – through a letter sent to the states late on a Friday night – to defeat New York's plans, and those of dozens of other states, to cover more children.

> "Just don't be dissuaded because people don't want to hear your message or are moving too slowly. Unlike many disasters, change for good rarely 'strikes suddenly.' With persistence, with a steady blend of thought, talk and action, it happens incrementally until hopefully it seems to take on a life of its own."
>
> *– Carol Bellamy*

On October 1, 2007, Governor Spitzer announced a multi-state lawsuit against the Bush administration charging that the abrupt policy change was not supported by the law and was made without following proper procedures. In addition the Governor, along with a bipartisan coalition of Governors, has worked closely with members of Congress – including the two Senators and 29 House members of New York's Congressional delegation – to urge the reauthorization of SCHIP to expand enrollment of children. This story is still unfolding and will undoubtedly affect children across the nation, not only through the immediate legislative action but because the leadership of the bipartisan Governors will set the framework for future national policy discussions.

Grounding the Strategy in Research and Data

A key element of the Governor's approach is to ground all strategies in the evidence – that is, what works. For example, research about early childhood programs provides a strong argument for investing in high-quality programs. In fact, the Federal Reserve Bank of Minneapolis, summarizing the evidence from a number of studies, argues that investing in high-quality early childhood programs provides a better economic return than investing in education or training at any other age.[1]

Following this evidence, the Children's Cabinet and the Advisory Board are delving into the quality of programs, not only the number of children enrolled. SED, which is required by statute to develop early childhood learning standards, and OCFS, which is developing a quality rating system[2] that groups programs into different tiers, have committed to collaborating on their work – important for providers and for parents, who will at last see a coherent vision about what a good program is. With this coherent vision, we should also be able to plan a shared approach to measurement, so that we can track not only the number of children in programs but also the characteristics of the programs and the results for children's learning and development.

The Cabinet is also using data to constantly improve its strategies. For example, data on children's enrollment in health insurance show that the problem is not just getting children enrolled but also keeping them enrolled: a large number of children are dropped from the program each month. Potential solutions include simpler forms, more follow-up with parents and more effective use of technology.

The Future

The Governor's ambitious goal is that New York State will erase the inequities that hold children back from fulfilling their true potential – and will reap the benefits of this unprecedented commitment to a whole generation as young people leave school healthy, well-educated and prepared to thrive in the new innovation economy. Over the coming years, we will be moving step by step toward this goal, seeking to make important strides and at the same time to gather and assess the data that will tell us if we need to refine or redirect our efforts. With the continuing involvement of New Yorkers from all parts of the state and all walks of life, we believe that this vision can become a reality. ■

1. Rob Grunewald & Arthur Rolnick, *Early Childhood Development: Economic Development with a High Public Return*, Mar. 2003, <http://www.Minneapolisfed.org/pubs/fedgaz/03-03/earlychild.cfm>.

2. Quality rating systems, used in many states to provide information about quality, are analogous to more familiar rating systems, like rating hotels with one through five stars.

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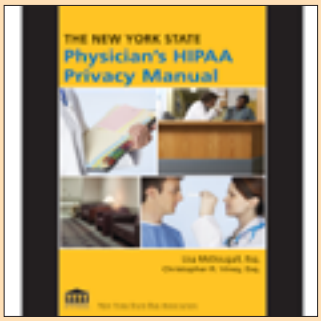

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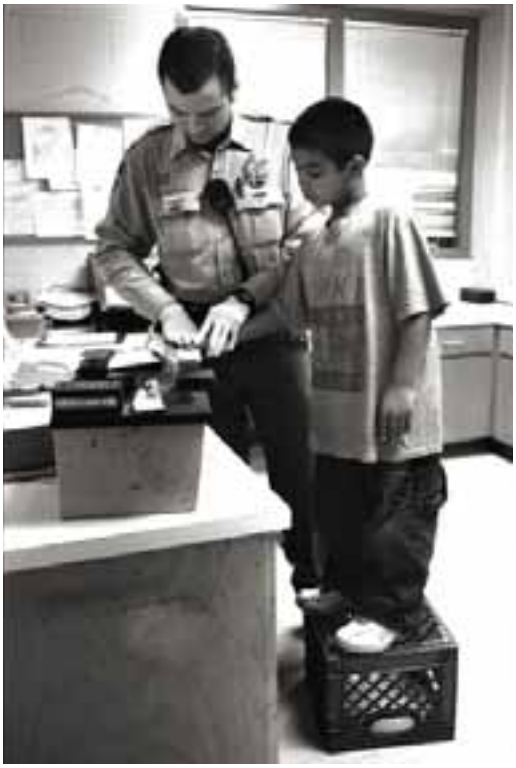
Marian Wright Edelman is the founder and President of the Children's Defense Fund, the nation's leading advocacy group for children and families. Mrs. Edelman graduated from Spelman College and Yale Law School. In 2000, she received the Presidential Medal of Freedom, the nation's highest civilian award, and the Robert F. Kennedy Lifetime Achievement Award for her writings. For more information about the Children's Defense Fund, visit www.childrensdefense.org.



A Call to Action

The Cradle to Prison Pipeline Crisis

By Marian Wright Edelman

It is time for adults of every race and income group to break our silence about the pervasive breakdown of moral, family, community and national values; to place our children first in our lives; and to struggle to model the behavior we want our children to learn. Our "child and youth problem" is not a child and youth problem; it is a profound adult problem as our children do what they see us adults doing in our personal, professional and public lives. They seek our attention in negative ways when we provide them too few positive ways to communicate and to get the attention and love they need. And we choose to punish and lock them up rather than take the necessary, more cost-effective steps to prevent and intervene early to ensure them the healthy, head, safe, fair and moral start in life they need to reach successful adulthood.

- A child is abused or neglected every 36 seconds, over 880,000 a year. A child dies from abuse or neglect every six hours, about 1,460 a year.
- A child is born into poverty every 36 seconds. Our 13 million poor children far exceed the combined populations of Haiti and Liberia. Children who live in households with annual incomes of less than $15,000 are 22 times more likely to be neglected or abused than those with incomes of $30,000 or more.
- A baby is born without health insurance every 47 seconds; 90 percent of the nine million uninsured children live in working families and a majority in two parent families. Forty American states each have fewer than nine million people.
- A child or teen is killed by a firearm about every three hours – almost eight a day. Every four days 32 children and teens die from guns in an invisible, relentless stream of violence equivalent to the tragic Virginia Tech massacre but without the outcry. Over 200 million guns saturate our nation's communities and homes, leaving none of us safe.
- Every minute a baby is born to a teen mother. Children having children would fill up the city of Atlanta each year.
- Every two minutes a baby is born at low birthweight. The U.S. ranks 24th among industrialized nations in infant mortality and 22nd in low birthweight babies. Yet our political leaders in both parties continue to refuse to ensure all pregnant women prenatal and postpartum care to help assure all children a healthy start in life.

These statistics reflect children of every race, place and family type. But minority children fare far worse. Black babies are almost four times as likely as White babies to have their mothers die in childbirth and are more than twice as likely as White babies to be born at very low birthweight and to die before their first birthday. Black children are more than three times as likely as White children to be born into poverty and to be poor, and are more than four times as likely to live in extreme poverty. One in four Latino children and one in three Black children are poor. Between 2000 and 2006, poor Latino children increased by more than 500,000 (to 4.1 million) and poor Black children increased 132,000 (to 3.8 million).

What must children feel when those entrusted with caring for them in their homes, neighborhoods, schools and other institutions abuse and neglect them? How great must be their fear and anger when parents and relatives are snatched away from them by drugs and gun violence and incarceration. How scary it must be for a child to

sleep in an unsafe shelter full of strangers with no place to call home. How angry and rejected a child or teen must feel when there is no loving, reliable person he or she can trust and who is being shunted from one family foster home or group home to another and from one school that suspends and expels him or her to another. How isolated and alone a child or teen must feel when no one sees or cares whether you're truant or home before dark or struggling to see the blackboard or have a learning disorder.

Our children don't need or expect us to be perfect. They do need and expect us to be honest, to admit and correct our mistakes, and to share our struggles about the meanings and responsibilities of faith, parenthood, citizenship and life. So many children are confused about what is right and wrong because so many of us adults talk right and do wrong in our personal, professional and public lives.

The Cradle to Prison Pipeline crisis can be reduced to one simple fact: The United States of America is not a level playing field for all children and our nation does not value and protect all children's lives equally. Countless children, especially poor children of color, already are in the pipeline to prison before taking a single step or uttering a word, and many youth in juvenile justice facilities never were in the pipeline to college or success. They were not derailed from the right track; they never got on it.

So many poor babies in rich America enter the world with multiple strikes already against them: without prenatal care and at low birthweight; born to a teenage, poor and poorly educated single mother and absent father. At crucial points in their development, from birth through adulthood, more risks and disadvantages cumulate and converge that make a successful transition to productive adulthood significantly less likely, and involvement in the criminal justice system significantly more likely. Lack of access to physical and mental health care; child abuse and neglect; lack of quality early childhood education to get ready for school; educational disadvantages resulting from failing schools that don't expect or help them achieve or detect and correct early problems that impede learning; zero tolerance school discipline policies and the arrest and criminalization of children at younger and younger ages for behaviors once handled by schools and community institutions; neighborhoods saturated with drugs and violence; a culture that glorifies excessive consumption, individualism, violence and triviality; rampant racial and economic disparities in child- and youth-serving systems; tougher sentencing guidelines; too few positive alternatives to the streets after school and in summer months; and too few positive role models and mentors in their homes, community, public and cultural life overwhelm and break apart fragile young lives with unbearable risks.

Without significant interventions by families, community elders and institutions, and policy and political leaders to prevent and remove these multiple, accumulated obstacles, so many poor and minority youths are and will remain trapped in a trajectory that leads to marginalized lives, imprisonment and premature death.

The Pipeline is not an act of God or inevitable; it is a series of human choices at each stage of our children's development. We created it, we can change it. We know what to do. We can predict need. We can identify risk. We can prevent damage. We can target interventions. We can monitor progress. In so doing, we can guarantee returns on public investments and control costs to children and society. We can train professionals and create programs that heal and nurture. We can adapt and replicate strategies that work in communities across our nation and incorporate them in policy. We can restore hope and build on child strengths and resiliency. We can wrap buffers around our children's fragile places, bind up their wounds and prepare them with spiritual anchors to better weather the storms of life. We have the knowledge and the experience to do this. It is not impossible or futile as countless inspiring stories of children and youth beating the odds every day attest. What it takes is a critical mass of leaders and caring adults with the spiritual and political will to reach out and pull children at risk out of the Pipeline and never let go and who will make a mighty noise until those in power respond to our demands for just treatment for children. This will not

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happen unless you and I do the hard work to build a movement to save all our children and nation's soul. We can:

1. Name and change the Pipeline and work together, recognizing that children do not come in pieces but in families and communities and are profoundly affected by the norms, priorities, policies and values of our nation and culture. There are many wonderful people engaging in effective efforts all across our land addressing a piece of the Pipeline. The challenge is to connect all the pieces to see and understand the whole Pipeline while breaking it down into manageable pieces for action, always seeing how each piece affects the whole child.
2. Call and work for a fundamental paradigm shift in child policy and practice toward prevention, early intervention and sustained child investment and away from the too frequent first choice of punishment and incarceration. That our President and Congress refuse to invest enough money to provide *all* nine million uninsured children the health care they would not deny a single one of their own children for a single day, and that taxpayers provide them, should be an urgent issue in 2008 and until a national child health and mental health safety net is in place. The lottery of birth should not dictate child survival.
3. Ensure every child quality Early Head Start, Head Start, child care and preschool to get ready for school. High quality early childhood programs help children do better in school, avoid special education and stay out of trouble. Yet only 50% of children eligible for Head Start get it.
4. Link every child to a permanent, caring family member or adult mentor who can keep them on track and get them back on track if and when they stray. The fabric of community must be rewoven to catch falling children until our torn family fabric can be repaired. We must bring to scale promising practices that engage and enrich children during out-of-school time and encourage more minority youths to see teaching and child advocacy as urgent callings. And every adult who works with children in our education, health care, child welfare and juvenile justice systems should love and respect children or go do something else. The most important mentors in children's lives are those they come into regular contact with in their homes, schools and communities and through the all pervasive media.
5. Make sure every child can read by fourth grade and will graduate from school able to succeed at work and in life. An ethic of achievement and high expectations for every child must be created in every home, congregation, community and school and in our culture and public policies and practices. Turn off the television and pick up the books. Make reading cool and fun.
6. Commit to helping the richest nation on earth end the child and family poverty that drives so much of the Pipeline process and the racial disparities faced by Black, Latino and American Indian children who are disproportionately poor. It is not right, sensible or necessary to have 13 million poor children in a $13.3 trillion economy. No other industrialized nation permits such high rates of child poverty. Benjamin Franklin said a long time ago that the best family policy is a good job. A majority of poor children live in working households, yet private sector and government policies do not ensure that work pays enough to escape poverty and get health care. Parents need a range of work and income supports to make ends meet, including expanded and refundable earned income tax and child tax credits and minimum wage laws adjusted for inflation. They also need access to education and training to improve themselves including at least the chance to attend a community college.
7. Dramatically decrease the number of children who enter the child welfare and juvenile and criminal justice systems, stop detaining children in adult jails, and reduce the racial disparities in these and all other child-serving systems. Children need strong and loving families and communities who work together to keep children safely at home whenever possible: to be moved out of foster care promptly and into permanent caring families, and to be helped not to reenter care unnecessarily or get shunted from child welfare to the juvenile and criminal justice systems. Measures to prevent teen pregnancy, provide quality parent-child home visiting programs, comprehensive and quality community family support programs to prevent neglect and abuse, and comprehensive family-based substance abuse treatment to keep children out of the child welfare system are critical.
8. Confront America's deadly, historic romance with guns and violence, and stress more nonviolent values and conflict resolution in all aspects of American life. It is time to provide a counter vision in word and deed to help our children redefine what constitutes success in life.

America's moral compass and investment priorities need resetting. We are sliding backwards, teetering on the brink of destroying at home and around the world the very values of freedom and justice that make America *America*. It is time to ensure every child a healthy, head, fair, safe and moral start in life and successful transition to productive adulthood; to confront the deadly intersection of poverty and race where so many child dreams and futures are wrecked; to ensure all our children a level playing field; and to affirm the basic tenet of every great faith that each child's life is sacred and of equal value. ■

Meredith Wiley is the state director of Fight Crime: Invest in Kids New York. She received her law degree from the Willamette College of Law (cum laude) and her master's in public administration from Harvard University's Kennedy School of Government. Ms. Wiley is the co-author of *Ghosts from the Nursery: Tracing the Roots of Violence*, a book that explores the impact of early child abuse and neglect on child development and crime. For further information regarding Fight Crime: Invest in Kids New York visit the Web site at www.fightcrime.org/ny.

Conquering Youth Violence

By Meredith Wiley

Like every other state across the nation, New York is wrestling with what to do about the numbers of violent children in our midst, overwhelming our education, social services and juvenile justice systems, to name but a few. In the aftermath of particularly horrific incidents – Jonesboro, Paducah, Springfield, Columbine, Virginia Tech – we grieve together, bringing flowers and candles, playing "Amazing Grace" on the bagpipes as yet again we bury dead students and dead teachers.

And as the dreadful images play over and over on the evening news and the headlines splash across the front pages of the morning papers, we ask ourselves why? What gets into these kids? How can they go to school and gun down their classmates in such a cold-blooded, calculated manner? Where are these kids coming from? Contrary to what many may believe, the answer to the question "why" is not a mystery. It lies in the developmental processes of the human brain where all behavior originates. Psychiatrist Dr. Bruce Perry, founder and head of the Child Trauma Center in Houston, Texas, says it best: "It isn't the finger that pulls the trigger, it's the brain. It isn't the penis that rapes it's the brain."

Where It Begins

Violence begins in the brain and the brain begins in the womb. Prenatally and during the first months and years of life, the brain undergoes an explosion of development that is never repeated. It organizes itself in relation to information coming in from the child's environment. Biologically it is part of the adaptive capacity of the human species. We grow a brain that allows us to survive in the world into which we are born. Before we can speak our first complete sentences we have a very strong take on whether or not the world is safe or dangerous and whether we can trust other people; and our brain has organized itself in response to this information. This is a time of both enormous vulnerability and enormous potential.[1]

Toxic substances – prenatal exposure to alcohol, drugs and nicotine – combined with toxic experiences – abuse, neglect, domestic violence – adversely affect both the architecture and the neurochemistry of the brain. Physical abuse also takes its toll. Abused children can develop post-traumatic stress disorders (PTSD) and suffer permanent alterations in their neurochemistry. Even when nothing is threatening them, their brains can become stuck in "red alert" resulting in high resting heart rates and high levels of stress hormones in their blood. Severely neglected children frequently respond to others with aggression and cruelty that is often accompanied by a cold lack of empathy. Some researchers, such as Dr. Perry, believe that the most dangerous children of all are created by a malignant combination of early physical abuse and neglect, a lethal mix that can create violent and remorseless children who grow into violent and remorseless adults.[2]

The cumulative damage to these kids is devastating. A study done by Casey Families Programs in Seattle in 2004 showed that, at age 22, children who had been in foster care in Oregon and Washington were more than two times as likely to suffer from PTSD as Gulf War veterans.[3]

The symptoms of PTSD in children – often mistaken for other things such as attention deficits, behavioral problems, learning disabilities and mood disorders – cause all sorts of problems including serious interference with learning in school.

Early experiences have a profound impact on whether a child's developing brain provides a strong or weak foundation for all future learning, behavior and health.[4] Abuse or neglect during this time can make children more susceptible, not only to later aggression and violence but to a host of long-term negative outcomes including mental and physical illnesses.[5] Early maltreatment undermines a child's ability to master the developmental tasks fundamental to school readiness and life success.[6] The reality is that school readiness begins in the womb.[7] With nearly 71,000 confirmed cases of child abuse and neglect in New York State in 2005, to say nothing of thousands of cases that go undetected each year, the impact of maltreatment on young children's brains should be of grave concern to us all.

Conversely, early childhood is a time of enormous potential with huge returns if we invest in young children. These years are the time when the foundations of good citizenship – empathy, conscience, connection to others, and the ability to engage in complex thinking and reasoning – are established. A nurturing and safe environment during this time can result in a lifetime of contribution and productivity.

We Know What Works

And the good news is that we really do know a lot about what works. There are several well-researched early interventions that provide coaching to parents to mitigate destructive behaviors from the beginning and to build in protective factors. To the surprise of many, New York law enforcement leaders and crime victims understand this and are speaking out. Members of "Fight Crime: Invest in Kids New York," an organization made up of more than 300 police chiefs, sheriffs, prosecutors and crime victims, have taken a careful look at the research and are working to educate policy makers on the crime prevention benefits of proven early interventions.

We are in an unprecedented time in human history where advances in the sciences of early childhood, especially in early brain development, can be coupled with information and data from over 40 years of rigorous program evaluation. Together they point us towards what really works to get kids off to a good start.[8]

The research shows that the best time to intervene for children at high risk of abuse and neglect is to begin before they are born. For example, the Nurse-Family Partnership Program randomly assigned at-risk pregnant women in Elmira, New York, to receive home visits beginning prenatally by nurses who provided coaching in parenting and other skills, up to the child's second birthday. By age 15, child abuse and neglect was reduced by 49% for children in the program. There was a 90% reduction in adjudications as PINS (persons in need of supervision) for incorrigible behavior, a 59% reduction in the number of children arrested and a 61% reduction in arrests of the mothers.[9]

> "Feelings are real and legitimate; children behave and misbehave for a reason, even if adults cannot figure it out."
> *– Unknown*

Another in-home parent coaching program, Healthy Families New York, has also shown promising initial results based on a two-year randomized control evaluation.[10] Other proven early interventions include high quality early educational child care such as pre-kindergarten, early literacy programs provided in-home such as Long Island's Parent Child Home Program, and programs that identify and work effectively with troubled children and their families beginning at age two through early grade school.[11]

No one knows better than law enforcement leaders that violent criminals need to be arrested, convicted and locked up. But sheriffs, chiefs and district attorneys know this is only half the battle when it comes to reducing crime. They see the results of child abuse and neglect and our failure to make early investments in kids every day in the backs of their police cruisers, courtrooms and jails. They know we aren't going to just arrest our way out of the crime problem and that dealing effectively with abuse and neglect is central to long-term community safety.

Babies go home from hospitals every day all over New York State and across our nation to environments that breed rage, despair and alienation. These babies then disappear from view and don't reappear until they can walk, talk back, bully their classmates and shoot guns. Or, just as bad, they wind up at a morgue like the one in Brooklyn where seven-year-old Nixzmary Brown was taken after being tortured for years and finally beaten to death, or at a church like the one in Schenectady where four-year-old Xcstasy Garcia showed up at services one Sunday morning with a broken left arm, broken right shoulder, and eyes swollen shut from bleach that was poured into them after she wet her pants. That's when we notice these kids.

Prevention Is Best

We are geared to deal with disaster, not prevention. We wait for parents to fail and then punish or try to fix them. We put the children in foster care. For the truly grisly cases, in anguish we review the files, look at the past actions of caseworkers and supervisors and talk to neighbors to see where the system failed. Then we pass laws, often named after dead or maimed children, to try yet one more time to reform the child welfare system. This is not to say all these things are wrong. They are often needed and should be done. But they are all after the fact and long past the time when we might have been able to place the parents and child on a very different trajectory.

Policy-wise, we do not pay attention to earliest childhood. There is an inverse correlation to our expenditures on children. When the brain development opportunity is at its greatest, we spend the least. The truth is that the longer we wait to deal with child abuse and neglect the more expensive it gets and the less likely it is that we will be successful. But despite growing interest in and support for programs that have been proven to prevent child abuse and neglect, these programs are, in general, not readily available. For example, less than 15% of New York women who would benefit from early home visitation services currently receive them.[12]

However, one promising effort is underway in New York by a group of people who have quietly been working to change this. After two years of intensive work by a broad group of stakeholders, the Schuyler Center for Analysis and Advocacy (SCAA) has recently issued a white paper that describes a plan for a universal system of home visitation in New York that would begin prenatally. The ideal system would provide an initial screening and basic services that promote optimal physical health, mental health, family functioning and self-sufficiency to all new parents. In addition to general services provided to all parents, the new universal system would target high-risk families for specific evidence-based intensive services such as the Nurse-Family Partnership or Healthy Families New York.[13]

The truth is we really do know a lot about how to prevent child abuse and neglect; we just choose not to invest in it. Child abuse and neglect is an epidemic that we allow to continue year after year unabated. And New Yorkers are paying a terrible price for our communal negligence. Like all states, we expend a staggering amount of fiscal and human resources dealing with the multiple consequences of child abuse and neglect. According to a study done by Prevent Child Abuse New York, we spend $2.3 billion annually treating the direct and indirect consequences which have all been linked to child abuse, including domestic violence, alcohol and substance abuse, juvenile delinquency and crime, mental and emotional problems, injuries and health problems, special education, foster care, homelessness, teen mothers, prostitution and public assistance.[14] Compare this to the benefits reaped from investments made early in a child's life, especially those that reduce abuse and neglect. For example the RAND Corporation concluded that the Nurse-Family Partnership home visitation program saves more than it costs, especially for the highest risk population, where it saved the government $5.70 for every dollar invested.[15]

So where do we begin? At the beginning. With a commitment to protect and nurture each child's potential from the beginning and to make sure all parents have what they need to succeed. The research is compelling and clear. Early childhood is a crucial time when we form the core of conscience, develop the ability to trust and

relate to others, and lay down the foundation for life-long learning and thinking – or not. By giving all our children the gift of protecting and nurturing their capacities from the beginning, we also give them to ourselves and to our communities. ■

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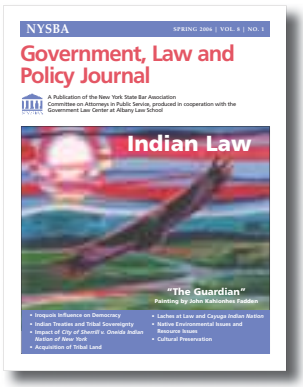

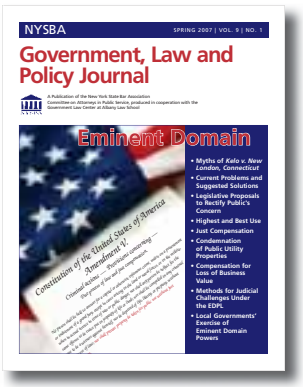

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Artwork created by a child in one of the Family Court Children's Centers.

Geoffrey Canada is President and CEO of Harlem Children's Zone, Inc. which offers education, social service and community-building programs in Central Harlem. Founded in 1970, Harlem Children's Zone today works with over 10,000 at-risk children in one of the state's most devastated areas. Mr. Canada is also the co-chair of Governor Spitzer's Children's Cabinet Advisory Board and is co-chair of New York City Mayor Bloomberg's Commission on Economic Opportunity. Mr. Canada has a masters' degree from the Harvard School of Education and is an internationally renowned advocate for poor children and education reform.

Children in Poverty

Prison Inmates or Positive Outcomes

By Geoffrey Canada

Changing the Odds for Children

We are failing our children. Our institutions, particularly the education and criminal justice systems, have not kept pace with the changes among poor children, so they are not adequately serving them.

We can't blame the children. In many cases, they are facing incredible hurdles and the results are showing up in grim statistics in New York State and across the country. We, as the adults and leaders of this society, need to take responsibility for ensuring that our children succeed – all of our children. In fact there are several things that New York's legal community can do to help.

It's not impossible to turn the situation around. It certainly will cost money, but it will be less expensive than incarceration and will produce adults that are assets to our society.

Criminal Justice

It would be hard to imagine how anyone could argue that our criminal justice system is working when it comes to children. Prison populations are stunningly high, ever-younger children are entering the criminal-justice machinery, but we are still a state and country plagued by violent crime. When prisoners are released, they are by and large not ready to be integrated into mainstream society – so juveniles who enter the system end up with the remainder of their lives wasted. But the situation absolutely can be turned around and these terrible outcomes can be avoided.

Regardless of the intent of the architects of the current system, it has created a crisis, particularly for poor people of color. Our current system is expensive but its cost returns little of use to the society that pays for it. In fact, courts are overwhelmed by the influx of young people – many of whom, in years gone by, would have been dealt with by the adults around them – school staff or family members.

As detailed in the Children's Defense Fund report, *America's Cradle to Prison Pipeline*, we see a country that is standing by as a significant number of its young are sent on an almost-irresistible trajectory to incarceration.

The pipeline to prison can start at birth: often mothers who lack dependable health care have babies with low birthweight, which is a risk factor for developmental and learning problems. The next possible entryway into the pipeline is being born into a poor family that can't provide the basic necessities of life: good food, shelter, stability.

Poor children who are able to overcome those risk factors often still face placement in failing neighborhood public schools, and must walk a gauntlet of gangs and criminality each time they leave their home. Poor children of color must also make their way in a society that expects the worst of them and often treats them accordingly.

Role Models

Tangled in this morass, children in poor communities often have few adults to help guide them or act as role models. More than half a million black men – many of them fathers – are serving time in jail. Not only are their own chances of success diminished, but they are absent from the lives of their children, and studies show that children with an incarcerated parent are six to nine times as likely as their peers to land in prison themselves.

Instead of learning from positive role models, children become attracted to the local thugs who hang out on their street corner or by what they see at home on television: gangsta rappers and trash-talking athletes. I am passionate about this country's freedom of expression, but I am horrified to witness the toxic culture that is deluding our children.

> "We do not inherit this land from our ancestors; we borrow it from our children."
> *– Haida Indian saying*

Readers of the New York State Bar Association *Journal* may have a vague idea of what gangsta rap is, but those of us who work with children see the stranglehold it has on the children who have no strong positive value system to guide them. The fantasies that these rappers spin are swallowed whole by pre-teens who have little experience in the world to counterbalance the glorification of violence and misogyny. In too many cases, the only adults who are talking to these kids are rappers and the kids are eager to listen. Unbelievably, these kids can grow up thinking that being a criminal is a viable or even desirable lifestyle choice.

Breaking the Cycle

The results of this devastated landscape are well documented and are not just sobering, but horrifying. Obviously, we need to change this picture. It won't be easy but, guided by some basic principles, we can change the odds for many of today's children before they become tomorrow's prison population.

We need to take a holistic, long-range, pro-active approach to breaking the cycle of generational poverty. By doing so, we will reduce substantially the pool from which gangs and criminals can recruit.

The evidence is unequivocal: intervening in children's lives earlier is more effective and cost-efficient than addressing the mushrooming problems later in their lives. But that is not enough. Once we get these babies and toddlers on the right track, we need to ensure they stay on that track throughout their young lives. It's been my professional and personal experience that there is no time in a child's life where adults can just walk away for any length of time and assume that the child will be fine. Good parents take that as a given in raising their own children, but we don't seem to extend that assumption for building public policy.

The failure rate of at-risk children grows as they grow. Even with the benefits of a quality pre-school, children need to be supported so they remain at grade level or they may become turned off to school and drift into anti-social behavior.

Support Systems

The tricky part of saving kids comes as they hit middle and high school. Unfortunately, school staff today is increasingly addressing disruptive behavior among students with police and the criminal justice system. These kids acting out need help, not handcuffs. At that age, they are solidifying their outlook on the world and if they are told they are criminals, they will embrace the identity to gain some respect from their peers and the adults around them.

The only way to save large numbers of these children is to build a strong support system of adults around them. Overwhelmed and unprepared parents need guidance about parenting skills; they need help with addressing their own problems so they can help with their children's. Simply taking children away from troubled families and placing them in foster care has overwhelmed that system too. Often a proactive counseling program can stabilize a family and prevent the shattering disruption of taking a child from his parents.

Because these poor children tend to live in particular neighborhoods, these communities also need to be strengthened. While there is little single parents can do about the presence of drug dealers on the corner or in their building, a united and determined group of neighbors can often retake their block and make it safer for their children.

What can we as a state and a country do? First, we need to recognize that this isn't someone else's problem. The costs to our society for this failure are enormous. New York State spends over $30,000 each year to incarcerate a young man. And that does not include the potential wages and taxes lost from that person's dropping out of the workforce. We have several "million dollar blocks" in Harlem where the cost of incarcerating people from that block reaches a million dollars or more each year.

What Lawyers Can Do

What can people in the legal community do? The criminal justice system has to reevaluate its approach to the children careening through its entranceways. Prosecutors and judges need to seriously consider local alternatives to incarceration, so they can divert children from the

path of criminality. A young tough facing prison time will probably only strengthen his anti-social leanings when he lives among criminals for years. While there are obviously cases where incarceration is justified, less serious offenses should not automatically trigger imprisonment. Teenagers are still malleable and their behavior is often a disguised shout for help, even if they themselves don't understand that. Presented with viable alternatives, some may yet turn their trajectories around.

Where members of the criminal justice system don't see any good alternatives in their communities, they must advocate for their creation. If the transition to proactive alternatives to incarceration is going to happen, it will happen only with sustained political pressure to reprioritize expenditures and make the system work.

If attorneys really want to roll up their sleeves to help, they can provide invaluable assistance by doing pro bono work for youth- and family-oriented nonprofits, which are often in need of high-quality legal services. Another everyday solution is to provide internships to low-income children, who may not have access to the world of corporations and white-collar office environments.

The costs of doing this right will actually be less than the current system. Locking kids up is an expensive way to buy what is essentially a short-term solution, and one with little or no resulting benefits for America. Giving large numbers of kids and families a chance at a better life is not just enlightened social policy, it is also smart economics.

We do not lack the money, the solutions or the rationale; we lack only the will. It is up to those of us dealing with this crisis on a day-to-day basis to educate others and immediately make an all-out effort to reform this failing system. We will be helping both the children and ourselves. ■

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Function of the Attorney for the Child

By John E. Carter, Jr.

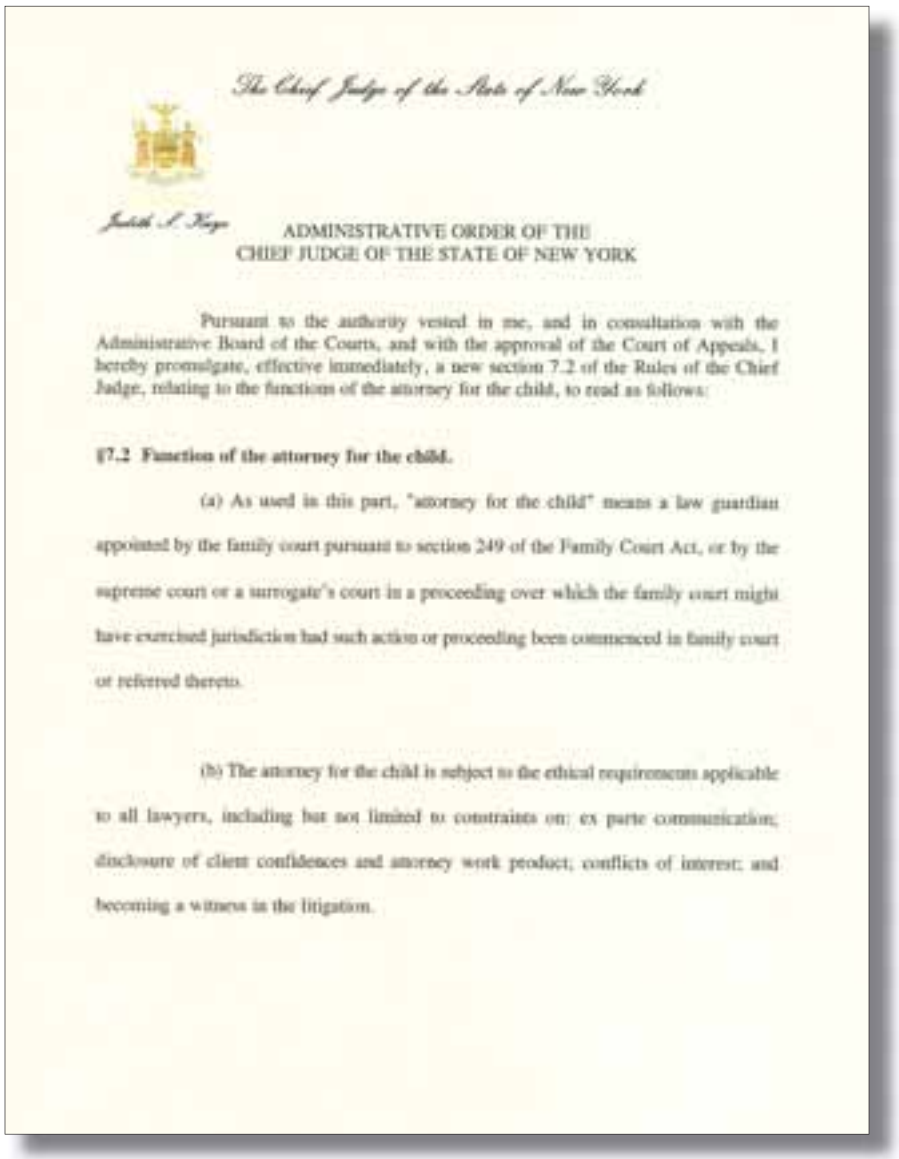
New York State enjoys a long tradition of leadership in providing lawyers for children in court proceedings. This tradition was recently strengthened through a series of important initiatives by the state's Judicial Branch to clarify the role and responsibilities of the attorney for the child.

The initiatives were based on recommendations of the Statewide Law Guardian Advisory Committee, chaired by Edward O. Spain, Justice of the Appellate Division, Third Department, and comprised of judges, law guardian program administrators and other key Unified Court System staff. The recommendations were approved by the Administrative Board of the Courts on October 4, 2007.

The central initiative was enactment of a court rule that sets out the function of the attorney for the child. The new provision, § 7.2 of the Rules of the Chief Judge, was promulgated by Judith S. Kaye, Chief Judge of the State of New York, on October 17, 2007, and became effective immediately.

The rule places the work of a child's attorney squarely within the framework of the classic attorney-client relationship, subject to the obligations of zealous advocacy and adherence to ethical standards applicable to all attorneys. The rule emphasizes the importance of the collaboration between the attorney and the child in establishing and advancing the client's position. At the same time, the rule recognizes the challenges that can confront attorneys for children in addressing the varying capabilities of their clients. In essence the rule provides that, as with all lawyers, attorneys for children are to discharge their duties in a manner that responds to the unique needs and circumstances of each of client.

The second initiative was adoption by the Statewide Law Guardian Advisory Committee, with approval of the Administrative Board, of a policy statement (see page 44) entitled "Summary of Responsibilities of the Attorney for



The Chief Judge of the State of New York

Judith S. Kaye

ADMIN2STRATIVE ORDER OF THE
CHIEF JUDGE OF THE STATE OF NEW YORK

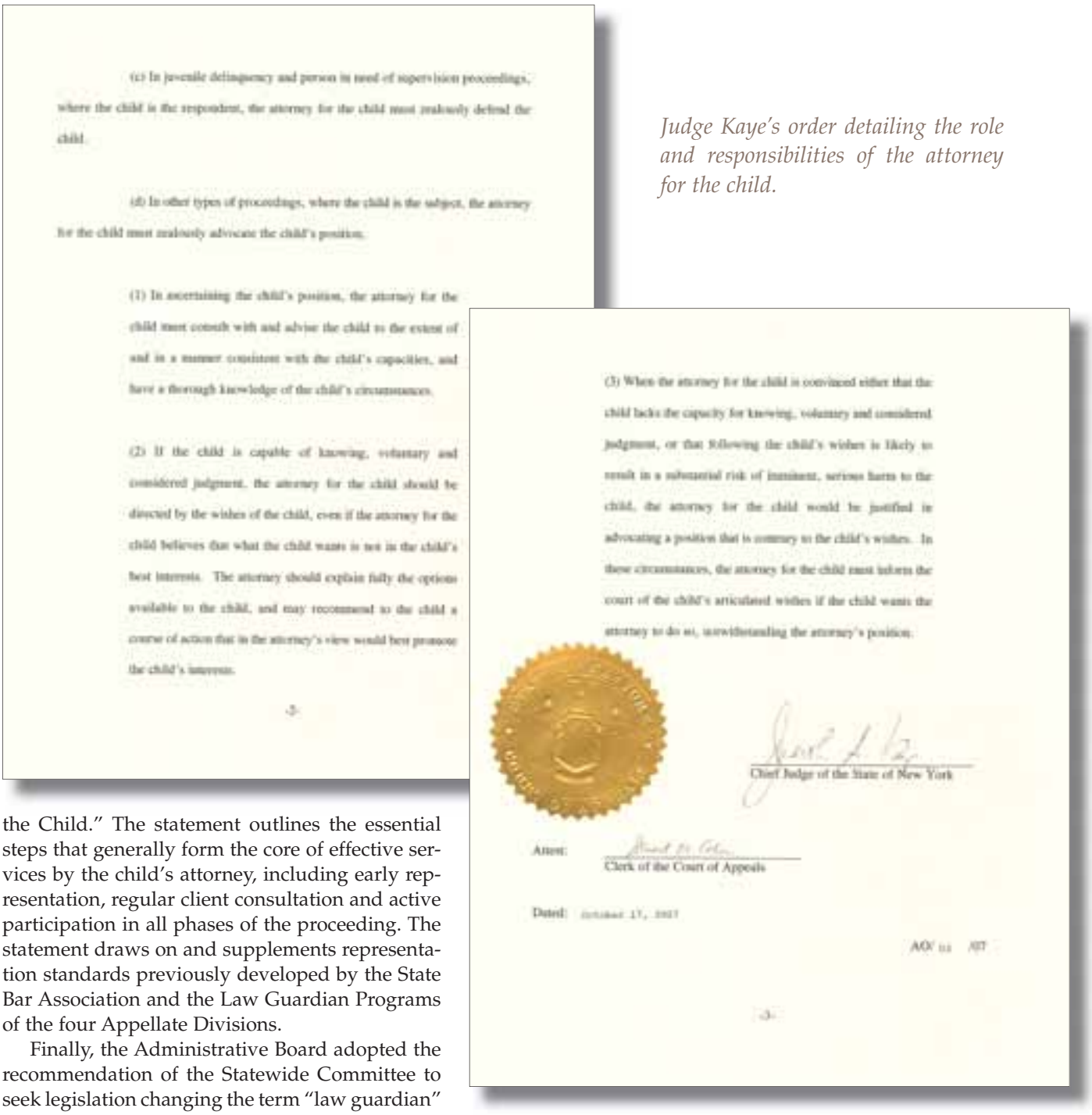
Pursuant to the authority vested in me, and in consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals, I hereby promulgate, effective immediately, a new section 7.2 of the Rules of the Chief Judge, relating to the functions of the attorney for the child, to read as follows:

§7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

(b) The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.

Jack Carter is director of the Law Guardian Program of the Appellate Division, Third Department, and serves on the Statewide Law Guardian Advisory Committee. He is a member of the New York State Bar Association's Committee on Children and the Law, which he previously chaired. He is a recipient of the Bar Association's Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare. He graduated from Middlebury College and Syracuse University College of Law.



(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.

(d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.

(1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

(2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

-2-

(3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

Chief Judge of the State of New York

Attest:
Clerk of the Court of Appeals

Dated: October 17, 2007

AO/ 111 /07

-3-

Judge Kaye's order detailing the role and responsibilities of the attorney for the child.

the Child." The statement outlines the essential steps that generally form the core of effective services by the child's attorney, including early representation, regular client consultation and active participation in all phases of the proceeding. The statement draws on and supplements representation standards previously developed by the State Bar Association and the Law Guardian Programs of the four Appellate Divisions.

Finally, the Administrative Board adopted the recommendation of the Statewide Committee to seek legislation changing the term "law guardian" to "attorney for the child." This change, first advanced by the Chief Judge's Matrimonial Commission under the leadership of Sondra Miller, former Justice of the Appellate Division, Second Department, would remove a major source of confusion concerning the function of lawyers who represent children. For many participants in proceedings involving children, "law guardian" suggests that the lawyer is a guardian *ad litem* rather than an advocate for the child. This misunderstanding can have a significant impact on a proceeding, leading to conflicting expectations about the objectives and actions of the child's lawyer. No doubt the term "law guardian" underscores the important protective function of the child's attorney, but this is a responsibility that all lawyers have when the circumstances require. Replacing the ambiguous "law guardian" with "attorney for the child" will promote effective representation of children by providing a more consistent understanding of this vital function.

Summary of Responsibilities of the Attorney for the Child

Statewide Law Guardian Advisory Committee

While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:

(1) Commence representation of the child promptly upon being notified of the appointment;
(2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
(3) Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;
(4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child;
(5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;
(6) Appear at and participate actively in proceedings pertaining to the child;
(7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and
(8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

[APPROVED by the Administrative Board October 4, 2007]

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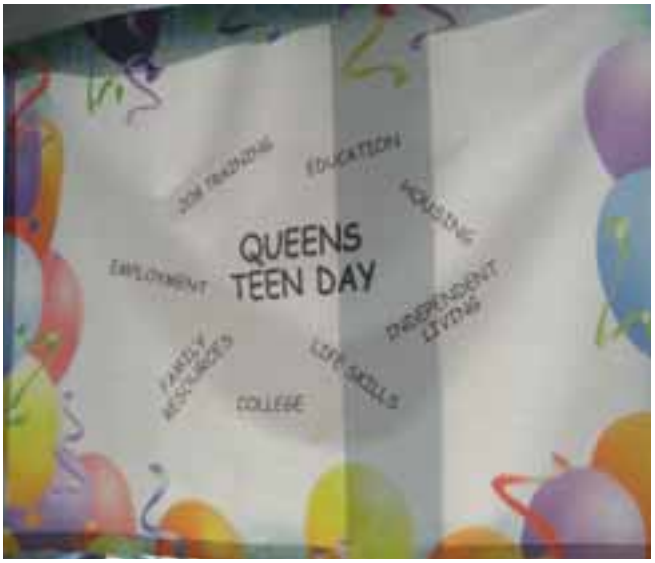

Banner displayed at Queens Family Court Teen Day in April 2007.

Joseph M. Lauria is the Administrative Judge of New York City Family Court. Judge Lauria is a graduate of Long Island University and the New York Law School/Southern Methodist University Law School.

Sharon S. Townsend is the Administrative Judge of the Eighth Judicial District. Judge Townsend is a graduate of the University of Rochester and the University of Connecticut School of Law.

In recognition of their service to children and families, Judge Townsend and Judge Lauria were awarded the 2006 Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare by the New York State Bar Association.

A Decade of Reform in the New York State Family Courts

By Joseph M. Lauria and Sharon S. Townsend

Over the past 10 years, Family Court judges have touched the lives of many thousands of children and families. Increasing numbers of families have turned to the court system to help with their parent-child relationships and to protect them from the drugs and violence on our streets and in our homes. The number of cases has exploded, and the complexity of the issues facing the family courts has multiplied. Poverty, substance abuse and single-parent households have become the norm in many areas of our state.

Since 1982, statewide filings have increased by 58% (not including support matters), while only 21 new Family Court judges have been added (an increase of only 16%). Significantly, there has been no increase in the number of judges in New York City Family Court since 1991. That number remains at 47, despite calendars that have tripled during this period. Passage of new legislation, including the Adoption and Safe Families Act (ASFA) in 1997, Persons in Need of Supervision (PINS) reform in 2002, and the Permanency Legislation in 2005, greatly added to the Family Court's substantive work. Without additional and commensurate judicial resources, fulfilling the court's mission to protect the safety and best interests of each child and individual who came before the court, has been a real challenge.

A Proactive Shift

In an effort to meet the challenge, Family Courts across the state have instigated a proactive shift in the way we work. Even as we face daunting demands, several exciting initiatives enable us to better address the needs of children and families and have changed the way we do business in the Family Court. This article will put the emphasis on the positive, as we continue to press for drastically needed additional resources.

In 1998 the Family Justice Program in New York City created four function-based divisions: Juvenile Delinquency/PINS; Domestic Violence/Custody; Child Protective/Permanency Planning; and Support/Paternity. The new structure allows for facilitated scheduling and expedited resolution of cases as well as more frequent case reviews, with one judge presiding over the case from intake to conclusion. This concept of "One Judge/One Family" enhances the court's oversight ability. In addition, it facilitates the continuous calendaring of cases until permanency is achieved, reduces delays and dem-

Court staff volunteers in costumes traveling through the court waiting rooms to entertain the children.

onstrates respect for Family Court litigants. Without question, however, this restructuring is no substitute for the appointment of additional Family Court judges to do this invaluable work.

Courts have become the venue to triage family tragedies – no courts more so than our Family Courts. The most recognized of the "Problem Solving Courts" – the Drug Treatment Court – is premised on the realization that traditional legal remedies have done little to address the rampant abuse of drugs and alcohol in our society. Treatment courts have been implemented statewide, to assist parents charged with neglect of their children to attain sobriety and learn skills necessary to parent effectively.

Laboratories for Change

Hands-on judicial leadership is also reflected in our mental health courts, integrated domestic violence courts, juvenile treatment courts and permanency planning divisions. These problem-solving models allow for dedicated, continuous judicial supervision as well as expedited referrals to community services where long-term care for children and families is available.

We have been fortunate to preside as lead judges over child welfare "model courts" through our affiliation with the National Council of Juvenile and Family Court Judges. New York City and Erie County Family Courts have become "laboratories" for change in these model court initiatives, looking to our community stakeholders to identify, design and help implement appropriate strategies.

This model of community-inspired, judicially led change has since moved well beyond the child welfare case type and our two designated model courts. The Family Court judge is no longer a passive adjudicator, but is an active participant, crafting resolutions of the cases while utilizing the agencies and other community resources.

In no area of court reform has the involvement of all stakeholders been more instrumental than in the decade of innovation in child welfare, which took a significant step forward with the Court Improvement Project (CIP), in partnership with the Permanent Judicial Commission on Justice for Children. Through the CIP, courts across the state work with their collaborative partners to institute practices which have been demonstrated to improve outcomes for children and families.

As a perfect example of utilizing the unique strengths of a community to increase the wealth of information available to decision makers, the Family Court has promoted four years of professional training on the health and welfare of children through the "Babies Can't Wait" series. The first in the series occurred in the Bronx Family Court in 2001, and was then replicated throughout the city. This program brings judicial, medical and child welfare professionals together. Both the New York City and Monroe County series have drawn experts from local universities and hospitals, in areas from child development to kinship resources, to address monthly lunchtime training sessions and who continue on thereafter to perform a consulting role.

Experience has shown that engaging the public education system is also critical. The New York State Family Court Advisory and Rules Committee sponsored a first-of-its-kind Education Roundtable, bringing together representatives from Family Courts, agencies, advocates, and state and local educators to collaborate on improving educational outcomes for children in foster care. These discussions resulted in two ongoing workgroups focused on educational issues for all children under the court's supervision.

The Challenge of New Laws

Legislative change has also compelled us to look for new and innovative collaborations. In 2002, state law changed to allow the filing of a PINS petition for youth up to the age of 18. At the time of the passage of this legislation, our communities lacked the programs to address the needs of this older juvenile population. Once again we had to act so that the anticipated increase in new case fil-

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ings would not bring the courts to a standstill. Our local collaborators acted preemptively, designing diversionary systems to provide resources and pre-petition services for these families. These age-appropriate, community-based programs successfully diverted the majority of the youth from the court system and reduced reliance on placement and detention, thereby allowing children to remain successfully with their families in their communities.

Legislative Change

In some instances our improved outcomes became the catalyst for important legislative change. In child welfare cases, the 1999 New York State implementation of ASFA inspired a greater emphasis on permanency planning for children in the foster care system. ASFA mandates that we closely supervise the child welfare process of permanency planning. Dubbed "Best Practice" parts, these specialized dockets ensured frequent post-dispositional reviews, more enhanced judicial oversight, better utilization of non-judicial personnel and narrowly tailored court orders to engage the litigants and propel the case toward timely closure. These practices were critical in our state's passage of the federal Title IV-E Foster Care Eligibility Review in 2006.

To meet the expectations of the Permanency Legislation and better utilize judicial time across all case types, the courts have increasingly looked to alternative dispute resolution models to resolve issues, thereby obviating the need for a prolonged trial or hearing. Our courts find that routine use of mediation increases the amount and quality of information to all parties, illustrates a method for reaching agreement despite ongoing conflict and prevents case recidivism. Mediation is being used in many courts across the state in child custody, parental access and child permanency cases.[1] It is truly a participatory model for all involved and empowers parties in making decisions about their own children and families.

Another initiative designed to inform and empower litigants in Family Court is the New York City Family Court Legal Services Project. Highly skilled attorneys from major law firms and corporations provide on-site, legal assistance to low-income, self-represented litigants involved in support, paternity, custody, visitation, guardianship and family offense cases – free of charge.

The court and its community partners have developed new programs that focus on adolescents. Adolescents currently represent 60% of the foster care population in New York City. To engage these youth, New York City has developed specialized education and training on adolescent issues for Family Court stakeholders and practitioners, coordinated resource-rich "Teen Days" designed to focus on issues surrounding permanency hearings for adolescents, and collaborated with the Center for Court Innovation (CCI) on the design and piloting of a checklist titled the "Passport to Adulthood." This document is completed by referees presiding over permanency hearings involving adolescents and is designed to ensure that the court obtains all relevant information concerning the particular issues confronting each adolescent prior to his or her departure from foster care. The checklist and more narrowly tailored hearings are intended to ensure that the youth is better prepared with the skills necessary for successful adulthood. In addition, to better understand the myriad and complex issues facing youth and adolescents in foster care, the court has worked closely with CCI's Youth Justice Board to identify strategies to improve the Family Court system.

Conclusion

In conclusion, our vision to enhance these reforms provides the road map for improvements in future decades for the Family Court and most importantly for our children and families. Families now experience hearings that are more timely, more substantive, more respectful, and more child- and family-focused. Attorneys and parties are better prepared for court, and enhanced information is reaching the bench.

More parents and youth are appearing in court and there is greater effort to engage them in the hearing process. Calendars are better managed and more efficiently run. Facilities and technology are also improving. The Universal Case Management System, implemented in 2001, now connects all 62 counties with Family Court information. Frequently judges, legal advocates and social service representatives meet to share information and collaboratively problem-solve.

We have been proud to be a part of these efforts with our colleagues both on and off the bench, both inside and outside our courthouses. And so we begin the next decade of change with optimism. ■

1. Two excellent programs, mandated parent education, and Children Come First (on-site licensed social workers), are available for Family Court as well as matrimonial judges. These programs are more fully described in the article written by Justice Jacqueline Silbermann that appears in this issue.

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BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

"Dad, There Is Something I Have to Tell You"

Dad, there is something I have to tell you.

Nine words that make my pulse quicken and forehead bead with sweat. Having completed a good number of the laps in the marathon that is the raising of two boys, this type of introductory sentence is rarely followed by good news: "Dad, there is something I have to tell you." "What is it?" "I was named student of the month in middle school!"

No. Instead, "Dad, there is something I have to tell you," is followed by an official school communication, but of the summoning sort. "What is it?" "The principal wants to see you first thing tomorrow morning."

Now, being an attorney has helped very little when it comes to child rearing (about on par with the help it provides in dealing with my spouse). For example, cross-examinations of my boys have been no more successful, on average, than those of non-attorney parents.

However, as an attorney I have one decided advantage as a parent. It affords me a method of immunizing my conversations with my children from disclosure. To anyone (spouse included).

My boys know the drill. After initiating a conversation something along the lines of "Dad, there is something I have to tell you," I tell my son to go and get five dollars (while the amount has increased over time, I do not foresee a time when I will not need my day job) and, when the particular son in question returns, the following exchange takes place:

Me: "Are you giving me this [fill in the amount] in order to retain me as your attorney, in the event you need legal assistance as a result of what you are about to tell me?" Him: "Yes."

Me: "And do you understand that anything you tell me is protected by the attorney-client privilege?" Him: "Yes."

And then my son tells me that he [fill in the blank].

Whereupon the quickening pulse and beading sweat at the start of the conversation starts to look very much like the good old days.

Now, why go through this exercise with my sons? Because I can. Whether or not New York State recognizes a parent-child privilege is unclear, and, if there is such a privilege, when it ends, if it ends, is also unclear. One thing I am certain of in my relationship with my sons: I do not want to ever be put in the position of being compelled to testify against one or both of them.

However, as my son's attorney, my subsequent conversation with my child is privileged. Without engaging in this little *pas de deux*, I cannot be certain that an attorney-client relationship will be found to have been established between my son and me.

Fortuitously, as an attorney, I have the ability to cloak my conversation with my son in a privilege. Most parents don't have this option.

I can't think of a more trusting relationship than the one between a child and parent. If you are a parent, you know this. If you are not a parent, thinking back to the feeling you had for your own father or mother makes this evident.

Now, imagine being compelled to give testimony against your child, or risk being held in contempt of court. I do not ever want to have to make that choice. Hence, the retention of my legal services by my sons.

The law in New York State, as in most jurisdictions, recognizes the special nature, based upon trust, of any number of relationships: attorney-client, clergy-penitent, and physician-patient, to name a few. Recognizing the special nature of these relationships, conversations within these pairings are privileged. Absent a waiver, conversations or other communications that are privileged are not discoverable and are not admissible at trial.

It may surprise some readers, therefore, to learn that conversations between a parent and child, the bedrock relationship of our society, not to mention the mechanism for survival of the human race, may not be privileged in New York State. Far more attenuated relationships, husband and wife, for example, get the benefit of privileged communication.[1]

One leading evidence commentator, Edith L. Fisch, Esq., has explained: "A parent-child privilege has begun to be recognized in this state but its outlines have not yet been sharply defined."[2] Professor Richard T. Farrell points out that "[n]o statutory parent-child privilege exists in New York. Although lower courts have adopted such a privilege, the Court of Appeals has not."[3] Professor Farrell further points out that a number of courts[4] have "avoided the question because it had not been preserved by appropriate objection."[5]

One of the two "avoidance" cases cited by Professor Farrell is a 1994 Court of Appeals decision, *People v.*

Johnson.[6] Although the Court found the issue unpreserved, it went on to opine that the privilege, if there was such a privilege, was not present in the case before it:

> Moreover, a parent-child testimonial privilege (which defendant urges be adopted to preclude his mother's testimony) would not even arguably apply in that defendant was 28 years old at the time of the conversation with his mother; another family member was present; the mother testified before the Grand Jury hearing evidence against defendant; and the conversation concerned a crime committed against a member of the household.[7]

It is unclear under what conditions the Court would consider a parent-child privilege since there were four independent factors militating against the privilege in both cases.

In the second "avoidance" case, the Court of Appeals twice denied leave where the Second Department held:

> The defendant's present contention that the admission of certain testimony was violative of the parent-child privilege is unpreserved for our review inasmuch as it was not cited as a ground for objection at trial. In any event, we find no merit to the defendant's argument. The circumstances which may give rise to a parent-child privilege, i.e., "when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct," were not present here.[8]

The case the Second Department cited for "[t]he circumstances which may give rise to a parent-child privilege" was a 1982 Second Department case where the Appellate Division held:

> We agree that a parent-child privilege does arise in certain circumstances, and in our view, that privilege is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct. As noted earlier, the courts have recognized that, for such a youth, his parent is the primary source of assistance.[9]

However, the Court of Appeals, finding the issue to be unpreserved, wrote, "[W]e have no occasion to address defendant's claim that such a privilege should be recognized."[10]

A Fourth Department case from 1978 eloquently made the case for a parent-child privilege:

> Although the communication is not protected by a statutory privilege, we do not conclude that it may not be shielded from disclosure. It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, "Listen to your son at the risk of being compelled to testify about his confidences?[11]

Numerous trial level and appellate division cases have recognized the privilege.[12]

A bill has been introduced in the New York State Senate to codify the parent-child privilege.[13] Under proposed CPLR 4502-a (immediately following the spousal privilege), "[a] child and his or her parent, guardian, or legal custodian shall not be required, or, without the consent of the other if living, allowed to disclose a confidential communication made by one to the other," subject to certain enumerated exceptions.

This salutary legislation would codify the decisions of trial and appellate courts throughout the state that have recognized the privilege. Interestingly, it provides that the parent-child privilege extends beyond the age of majority, and would not be vitiated by the presence of the child's siblings.

I hope CPLR 4502-a is enacted. Until it is, my sons know the drill. ■

EDITOR'S NOTE: After this column went to press, the Court of Appeals, on November 27, 2007, issued its decision in *Arons v. Jutkowitz, et al.* The Court reversed both the Second and Fourth Departments, and held that the defendants are permitted to conduct post–note-of-issue interviews with a plaintiff's treating physicians, and that HIPAA-compliant authorizations for that purpose must be furnished by the plaintiff. The February 2008 Burden of Proof column will address this issue in detail.

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1. With 50% or so of marriages ending in divorce, "attenuated" seems to fit the bill.

2. Fisch on New York Evidence § 751 (2d ed. 2007).

3. Prince-Richardson on Evidence § 5-412 (Farrell 11th ed. 2006).

4. The issue was found to be unpreserved in a Court of Appeals decision from 1983: *People v. Harrell*, 59 N.Y.2d 620, 463 N.Y.S.2d 185 (1983) ("Not having been raised either at the suppression hearing or as a ground for objection to the admission of the evidence at trial, defendant's present contention that the statement made in his jail cell by him to his mother was inadmissible as having been obtained in violation of a purported parent-child privilege has not been preserved for our review. Accordingly, we have no occasion to address defendant's claim that such a privilege should be recognized.").

5. *Id.*

6. 84 N.Y.2d 956, 620 N.Y.S.2d 822 (1994).

7. *Id.*

8. *People v. Clark*, 215 A.D.2d 494, 626 N.Y.S.2d 527 (2d Dep't) (citation omitted), *leave denied*, 86 N.Y.2d 792, 632 N.Y.S.2d 505 (1995).

9. *People v. Harrell*, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 620, 463 N.Y.S.2d 185 (1983).

10. *See supra* note 4.

11. *In re A and M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (4th Dep't 1978).

12. An excellent review of cases is found in *Fisch on New York Evidence* § 751 (2d ed. 2007).

13. Similar legislation has been introduced in the past.

BY ERIC W. PENZER & FRANK T. SANTORO

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Second Circuit Clarifies Scope of Probate Exception to Federal Jurisdiction

The "probate exception" to federal jurisdiction has been described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."[1] The Supreme Court has cautioned against expansively applying the exception, stating that the probate exception is "narrow" and should not be used as an excuse for federal courts in declining to exercise jurisdiction over suits merely because they involve a probate-related matter.[2] Providing further guidance to lower courts and practitioners, the Second Circuit has established what appears to be a bright line test for applying the exception.[3]

Marshall v. Marshall

In *Marshall*, the Court revisited the probate exception, analyzing its prior decisions on the subject and concluding that the exception applies only in limited circumstances. This case involved the estate of decedent J. Howard Marshall II, who died without providing for his wife, Vickie-Lynn Marshall (a/k/a Anna Nicole Smith). Mr. Marshall's son, E. Pierce Marshall, was the ultimate beneficiary of Mr. Marshall's estate plan.[4] According to Vickie, Marshall intended to provide for her through a gift in the form of a "catch-all" trust.[5] While the estate was subject to ongoing proceedings in the Texas probate court, Vickie filed for bankruptcy in California, and E. Pierce filed a proof of claim in the federal bankruptcy court alleging that Vickie had defamed him when her lawyers told the media that E. Pierce had engaged in forgery, fraud and overreaching to gain control of Mr. Marshall's assets.[6]

E. Pierce sought a declaration that his claim against Vickie was not dischargeable in bankruptcy and Vickie answered and asserted counterclaims, including that E. Pierce had tortiously interfered with a gift she expected from Mr. Marshall.[7] The Bankruptcy Court granted summary judgment for Vickie on E. Pierce's claim and, after a trial, entered judgment for Vickie on her tortious interference counterclaim, awarding her substantial compensatory and punitive damages.[8]

Following the trial, E. Pierce filed a post-trial motion to dismiss for lack of subject matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings.[9] The Bankruptcy Court and the District Court held that the probate exception did not encompass Vickie's counterclaim. The courts also held that E. Pierce had tortiously interfered with Vickie's expectancy by conspiring to suppress or destroy the *inter vivos* trust instrument Mr. Marshall asked his lawyers prepare for Vickie, and conspiring to strip Mr. Marshall of his assets by falsifying documents and presenting them to Mr. Marshall under false pretenses. The Ninth Circuit reversed, however, holding that the probate exception barred the federal courts from entertaining Vickie's counterclaims.

Reversing the Ninth Circuit, the Supreme Court attempted to clarify language that it perceived as ambiguous in its prior decision in *Markham v. Allen*.[10] The Court clarified that, in accordance with *Markham*, federal courts have jurisdiction to entertain suits "in favor of creditors, legatees and heirs and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[11]

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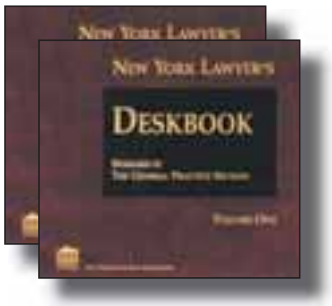

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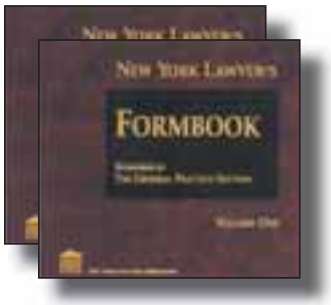

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According to the Court, *Markham* held that a federal court "may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court."[12] The Court disavowed various lower court approaches utilized in the wake of *Markham* in determining the applicability of the probate exception,[13] which included the Ninth Circuit's approach that was largely adopted from the Second Circuit's decision in *Moser v. Pollin*.[14]

In sum, the Court concluded that the probate exception only applies in three limited circumstances: (1) where a federal court is asked to probate or annul a will; (2) where a federal court is asked to administer a decedent's estate; or (3) where the federal court's exercise of jurisdiction will result in the attempt "to dispose of property that is in the custody of a state probate court."[15]

Lefkowitz v. Bank of New York

In *Lefkowitz*,[16] the Second Circuit considered the application of the probate exception for the first time post-*Marshall*. The plaintiff, Adrienne Marsh Lefkowitz, asserted numerous causes of action against the executor of her parents' estates, the Bank of New York (BNY) and other defendants.[17] According to the District Court, the plaintiff argued that proceedings in probate courts were "inactive," while BNY and the other defendants argued that it was required to petition and file accountings in Surrogate's Court for both estates following the outcome of estate proceedings in Hong Kong courts.[18]

The Second Circuit affirmed the dismissal of several of the plaintiff's causes of action. The court determined that the claims through which the plaintiff essentially sought a disgorgement of funds under the control of the probate court – estate funds – were subject to the probate exception. However, claims seeking recovery against the executors personally, rather than from the estates, were not within the ambit of the exception and could be maintained. Specifically, the plaintiff pleaded claims for unjust enrichment and conversion, seeking an order directing the executor to turn over all of the principal assets and accumulated income of the estates to which she alleged to be entitled. The plaintiff also sought an order requiring BNY to make distributions from the estates pursuant to consent orders and a determination that certain assets of the estates belong to her.[19]

Because the claims at issue did not seek to probate or annul a will and neither party sought to administer a decedent's estate, applying the probate exception turned on whether the federal court's exercise of jurisdiction would affect property in the custody of a state probate court, *i.e.*, estate assets. The Second Circuit held that to provide the relief requested by the plaintiff on her claims would require the federal court to assert control over property that was controlled by state courts, which is prohibited by the probate exception.[20]

However, the court held that the plaintiff's *in personam* claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty and fraudulent misrepresentation against BNY, which sought only damages against the defendants personally, were not subject to the probate exception.[21] While the court acknowledged that the plaintiff's claims were "entirely intertwined with nitty-gritty issues of estate administration," it held that the probate exception cannot be applied "merely because the issues intertwine with claims proceeding in state court."[22]

Thus, according to the Second Circuit, the application of the probate exception apparently rests on a bright line distinction focusing largely on the remedy sought. Claims seeking an *in personam* judgment against a fiduciary or other party fall outside the probate exception while claims that seek to recover estate assets, *i.e.*, property under the control of the Surrogate's Court, are subject to the probate exception.

Post-*Lefkowitz*

Shortly after its decision in *Lefkowitz*, the Second Circuit decided *Carvel v. Carvel Foundation, Inc.*,[23] where it dismissed an action to confirm a judgment against an estate. Noting that the action would interfere with a complex proceeding in the New York County Surrogate's Court concerning the assets of the estate, the court held that the probate exception applied because the suit sought to dispose of property in the custody of the Surrogate's Court.[24]

On the heels of *Lefkowitz*, Judge Patterson of the Southern District of New York analyzed the probate exception in *Groman v. Cola*.[25] In *Groman*, an executor of an estate commenced a proceeding in Surrogate's Court, New York County, against the defendant, a New Jersey domiciliary, for a declaration concerning the estate's sale of stock of a privately held company to the defendant. Specifically, the estate sought an upward adjustment of the purchase price pursuant to an agreement executed at the time of the sale. The defendant removed the proceeding to federal court. Upon removal, the defendant interposed a contingent counterclaim seeking a downward adjustment of the purchase price. The plaintiff moved to remand the action to the Surrogate's Court.

Applying *Marshall* and *Lefkowitz*, the District Court remanded the proceeding on the basis that it lacked jurisdiction pursuant to the probate exception. In doing so, the court acknowledged that applying the probate exception requires "fine line drawing." The court found that the proceeding was, "at its heart, a dispute about the proper valuation of an estate asset in a sale by the Estate's executors." The court noted that the estate held a note from the defendant for a portion of the purchase price and had inchoate rights under the purchase price adjustment agreement. According to the court, these assets

were in the possession of the executors of the estate, and thus in the possession and control of the Surrogate's Court. The court held that a determination by the district court affects property in the possession and control of the Surrogate's Court and remanded the proceeding.

Lefkowitz has also provided guidance to courts outside the Second Circuit. In *Colclasure v. Young*,[26] the plaintiff sought damages from the defendant individually, a declaration of rights in and title to the property of a decedent's estate and an inventory and accounting.[27] Following the approach of the Second Circuit in *Lefkowitz*, the *Colclasure* court parsed out the claims, dismissed those seeking a declaration of rights and title to property of the decedent's estate under the probate exception, but retained jurisdiction over the *in personam* claims against the defendant.[28]

Conclusion

It remains to be seen how lower courts will apply the probate exception in the wake of *Marshall* and, now, *Lefkowitz*. Certainly, claims seeking recovery from a decedent's estate are not uncommon. If one accepts the proposition that the assets of a decedent's estate constitute "property that is in the custody of a state probate court", then actions seeking to recover those assets – including claims against the estate and claims by the estate seeking to determine rights in estate property – should be litigated only in the Surrogate's Courts, rather than in federal courts. ■

1. *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).
2. *Marshall v. Marshall*, 547 U.S. 293 (2006).
3. *Lefkowitz v. Bank of N.Y.*, 2007 WL 1839756 (2d Cir. 2007).
4. *Marshall*, 547 U.S. at 3003.
5. *Id.*
6. *Id.*
7. *Id.* at 301.
8. *Id.*
9. *Id.* at 302.
10. 326 U.S. 490, 494 (1946).
11. *Marshall*, 547 U.S. at 1747 (quoting *Markham*, 326 U.S. at 494).
12. *Id.*
13. *Id.*
14. 294 F.3d 335 (2d Cir. 2002).
15. *Marshall v. MArshall*, 547 U.S. 293, 312 (2006).
16. *Lefkowitz v. Bank of N.Y.*, 2007 WL 1839756 (2d Cir. 2007).
17. *Id.* at 1.
18. *Lefkowitz v. Bank of N.Y.*, 2003 WL 22480049, 4 (S.D.N.Y. 2003).
19. *Lefkowitz*, 2007 WL 1839756 at 4.
20. *Id.*
21. *Id.* at 5.
22. *Id.*
23. 230 Fed. Appx. 103 (2d Cir. 2007).
24. *Id.* at 104.
25. 2007 WL 3340922 (S.D.N.Y. Nov. 7, 2007) (Patterson, J.).
26. 2007 WL 3005333 (E.D. Ark. 2007).
27. *Id.* at 3.
28. *Id.*

BY ROBERT W. WOOD

Robert W. Wood practices law with Wood & Porter, in San Francisco (www.woodporter.com), and is the author of *Taxation of Damage Awards and Settlement Payments* (3d Ed. Tax Institute 2005 with 2007 Update) available at www.damageawards.org. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

The ABCs of Charitable Conservation Easements

Environmental organizations promote the conservation of America's natural habitats. With increased media focus on global climate change, people are paying attention to the environment, and especially to its conservation and preservation. Charitable conservation easements can help the environment, and ease one's tax burden at the same time.

Q: What is a conservation easement?

A: A conservation easement is a voluntary restriction placed on the use of land for a conservation purpose. Valid conservation purposes can include the protection of open space, timberland, farm land, scenic views, wetlands, or other significant natural resource values. The easement need not restrict the sale of the property.

Conservation easements are generally not required to provide the public with a right of access or use of the land subject to the easement, unless the purpose of the easement is a public benefit which requires public access (*i.e.*, preservation of the land for outdoor recreation or education of the general public). Generally, the easement (as well as the restrictions it imposes) is donated to a charitable organization or government agency. The easement's terms are ordinarily negotiated between the landowner and the charitable conservation organization or government agency. In negotiating the terms of the easement, the landowner should consider Internal Revenue Code ("Code") requirements.

Q: What are the tax benefits of charitable conservation easements?

A: You can deduct from your taxes the value of the easement (typically, the value of the property *before* contribution of the easement, minus the value of the property *after* contribution of the easement).[1] The amount of the deduction is subject to annual limitations, but unused deductions can be carried over to future years.[2] The annual limitations have recently been changed,[3] though the changes are only effective for easements donated in 2006 and 2007. Thus, donors should be aware of both the old and new annual limitations.

Q: What are the annual limitations (through 2005)?

A: Under the old annual limitations (for 2005 and earlier contributions), "long-term capital gain" property (*i.e.*, a capital asset held for more than one year) and "ordinary income property" (*i.e.*, a capital asset held for less than one year) were treated differently. When a donor made a contribution of "long-term capital gain" property, the federal income tax deduction was limited to 30% of the donor's "contribution base."[4] The contribution base is defined as adjusted gross income computed without regard to any net operating loss carryback.[5]

When a donor made a contribution of "ordinary income property," the federal income tax deduction for that donation was limited to 50% of the donor's contribution base.[6] However, a deduction for ordinary income property could not exceed the donor's adjusted basis in the easement (not to be confused with the donor's adjusted basis in the entire property).[7] For a donation of long-term capital gain property, the donor, however, may elect to treat the donation as a contribution of ordinary income property, and thus, be subject to the 50% contribution base limitation.[8] Any unused amount could be carried forward for five years after the year of contribution.[9]

Q: What are the new annual limitations?

A: The new annual limitations, which only affect contributions during 2006 and 2007, treat "long-term capital gain" property and "ordinary income" property identically. The annual limitation for contributions of both types of property is 50% of the donor's contribution base.[10] Any unused portion may be carried forward for 15 years.[11]

Q: Are there other limitations?

A: Yes. Donors should also consider certain other limitations which can affect the amount of the deduction for a charitable conservation easement contribution.[12]

Q: Aren't easements nondeductible as partial interests?

A: No. In general, charitable donations of "partial" interests of property are denied tax deductions.[13] Easements are partial interests in real property,

so without an exception, the donation of an easement would not qualify for a charitable contribution deduction. Fortunately, there is an exception for "qualified conservation contributions."[14]

Q: How is "qualified conservation contribution" defined?

A: A qualified conservation contribution is:

- a contribution of a qualified real property interest,
- to a qualified organization,
- exclusively for conservation purposes.[15]

A failure to meet any of these requirements can result in denial of the income tax benefits. Plus, in some cases, you can incur gift tax. Furthermore, in making a qualified conservation contribution, the donor must have a "donative intent" (in other words, an intent to make a charitable contribution).[16] More about this intent below.

Q: What is a "qualified real property interest"?

A: A "qualified real property interest" is defined as the donor's entire real property interest other than a "qualified mineral interest," a remainder interest in real property, or a perpetual restriction on the use which may be made of the real property – in other words, a perpetual easement[17] or other restrictive interest in real property.[18] This definition adds one more requirement for tax purposes: the easement must be granted *in perpetuity* to be considered a "qualified real property interest."

Q: Who is an eligible donee?

A: An eligible donee must be a "qualified organization," having a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions.[19] Qualified organizations include local, state, or federal governmental agencies, and public charities defined in Code § 501(c)(3).

Q: What is a commitment to protect the conservation purposes of a donation?

A: While a "commitment to protect the conservation purposes of the donation" is not defined in the Code, a public charity's commitment to protect the conservation purposes of the donation can generally be found in its articles of incorporation or by-laws.

Q: What resources are required to enforce the restrictions?

A: Potential donors should examine whether charitable organizations they are considering have the resources to enforce the restrictions of the contemplated easement. The amount of resources an organization must spend to enforce the restrictions of the conservation easements is not defined in the Code. However, the Treasury Regulations make clear that organizations are not required to earmark funds specifically for enforcement of conservation easements.[20]

Nonetheless, the IRS keeps an eye on qualified organizations' efforts to monitor and enforce conservation easements. Exempt organizations are required to file a Form 990 annually with the IRS. The Form 990 requires organizations holding conservation easements to report the amount of staff hours and expenses spent in monitoring and enforcing easements for the preceding year. Thus, while the resources an organization must spend to monitor and enforce conservation easements are undefined, a qualified organization must document the time and money it spends each year on these tasks.

Q: What constitutes a conservation purpose?

A: There are four broad categories of conservation purposes:

- the preservation of land areas for outdoor recreation by, or the education of, the general public;
- the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
- the preservation of certain open space (including farmland and forest land); and
- the preservation of a historically important land area or a certified historic structure.[21]

Q: What is recreation or education of the general public?

A: If the conservation purpose of the easement is for outdoor recreation, or education of the general public, then the Treasury Regulations require that the recreation or education must be for the "substantial and regular use" of the general public.[22] Accordingly, the easement must provide access to the real property for the general public.

Q: What constitutes preservation of a significant, relatively natural habitat for fish, wildlife, or plants?

A: The Treasury Regulations take a liberal view of what constitutes a significant, relatively natural habitat for fish, wildlife, or plants. Examples provided by the Treasury Regulations include lakes formed by man-made dams; salt ponds; habitats for rare, endangered, or threatened species of animals, fish, or plants; and natural areas that represent high-quality examples of a terrestrial community or aquatic community.[23]

Furthermore, the regulations explicitly state that the fact that the habitat or environment has been altered to some extent by human activity does not result in a deduction being denied so long as the fish, wildlife, or plants continue to exist there in a *relatively* natural state.[24] Note the word "relatively" here.

The United States Tax Court has also taken a liberal view. For example, in *Glass v. Commissioner*,[25] the taxpayers donated two individual conservation easements with the conservation purpose of protecting a significant, relatively natural habitat. The easements were relatively small: one covered an area 150 feet wide by 120 feet deep, and the other covered an area of 260 feet wide by 120 feet deep. The taxpayers also presented evidence that a bald eagle roost (a perch on which birds can temporarily rest or sleep) was located on the property, and that one type of endangered plant grew on the property. The Tax Court held that both conservation easements met the conservation purpose requirement.[26]

There is an important distinction between this conservation purpose and the conservation purpose of recreation or education of the general public. The

Treasury Regulations state specifically that limitations on public access to property donated for the preservation of a significant, relatively natural habitat for fish, wildlife, or plants do not jeopardize the tax deduction.

Q: How can preserving open space qualify?

A: Conservation easements to preserve "open space" qualify as having a conservation purpose if they meet one of the following criteria:

- the preservation is pursuant to a clearly delineated federal, state, or local governmental conservation policy, and will yield a significant public benefit; or
- the preservation is for the scenic enjoyment of the general public, and will yield a significant public benefit.[27]

Q: What is a government conservation policy?

A: There is not much guidance about what constitutes a "clearly delineated government conservation policy." However, the Treasury Regulations make it clear that a "clearly delineated federal, state, or local governmental conservation policy" is something more than a "general declaration of conservation goals by a single official or legislative body."[28] The Treasury Regulations also state that where a governmental entity adopts a resolution specifically endorsing protection of a particular property as "worthy of protection for conservation purposes," a conservation easement granted for that property will be respected.[29]

Q: What constitutes scenic enjoyment of the general public?

A: Whether or not an easement is for the "scenic enjoyment of the general public" is determined by a facts and circumstances test. Factors such as topography, geology, biology, and cultural and economic conditions are relevant.[30] In addition, the Treasury Regulations list eight other factors to be considered:

- The compatibility of the land use with other land in the vicinity;
- The degree of contrast and variety provided by the visual scene;
- The openness of the land;
- Relief from urban closeness;
- The harmonious variety of shapes and textures;
- The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;
- The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and
- The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.[31]

Of course, to qualify as scenic enjoyment, the easement must grant visual access to the general public over a significant portion of the property.[32] In some ways, this is intuitive: there cannot be a scenic view if no one can see it.

Q: What is a significant public benefit?

A: The Treasury Regulations list 11 different criteria for evaluating whether the open space conservation easement yields a significant public benefit. They are:

- The uniqueness of the property to the area;
- The consistency of the proposed open space use with public programs (whether, federal, state, or local) for conservation in the region,
- The intensity of land development in the vicinity of the property;
- The consistency of the proposed open space use with existing private conservation programs in the area;
- The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
- The opportunity for the general public to use the property or enjoy its scenic values;
- The importance of the property in preserving the local or regional landscape or resource that attracts tourism or commerce to the area;
- The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
- The cost to the donee of enforcing the conservation easement;
- The population density in the area of the property; and
- The consistency of the proposed open space with a legislatively mandated program identifying particular parcels of land for future protection.[33]

Some landowners may want the current tax deduction for the easement, but want to retain a right to develop the property in the future. The Treasury Regulations do not allow this. An easement for the preservation of open space cannot permit "a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy" which the easement allegedly promotes.[34]

Q: What is preserving a historic land area or structure?

A: The preservation of a historic land area or structure is another valid conservation purpose. Historic land areas are defined as any that meet the National Register Criteria for Evaluation in 36 C.F.R. § 60.4 (Pub. L. 89-665, 80 Stat. 915), any land area within a registered historic district, and any land area adjacent to a property listed in the National Register of Historic Places where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.[35] A historic structure is defined as any building, structure, or land area listed in the National Register, or any building located in a registered historic district, and certified by the Secretary of the Interior as being of historic significance to the district.[36]

Claiming a tax deduction for a conservation easement to preserve a historic structure became more difficult in 2006 with the passage of the Pension Protection Act. Congress added such requirements as requiring the easement to include a restriction which preserves the entire exterior of the building, requiring the easement to prohibit any change in the exterior of the building which is inconsistent with the historic character of such exterior, and requiring a written agreement between the donor and donee where the donee certifies that it is an eligible donee.[37]

The donor must also include with his or her tax return for the year of the donation, a qualified appraisal, photographs of the exterior of the building, and a description of all the restrictions on the development of the building.[38] Lastly, Congress requires the donor to make a $500 payment with the filing of any tax return claiming a deduction in excess of $10,000 for conservation easements contributed to protect historically significant structures.[39]

Q: Are certain transfers restricted?

A: Yes. The Treasury Regulations restrict the transfer of easements to certain organizations. For example, the easement not only has to initially be conveyed to a qualified organization, but it must prohibit the easement's transfer to any organization that is not "an eligible donee."[40] An eligible donee is defined as an organization that is a qualified organization, has a commitment to protect the conservation purposes of the donation, and has the resources to enforce the restrictions.[41]

Furthermore, a conservation easement must include provisions prohibiting the donee from subsequently transferring the easement unless, as a condition of the subsequent transfer, the donee requires "that the conservation purposes which the contribution was originally intended to advance continue to be carried out."[42]

The Treasury Regulations add one more requirement based on the *cy pres* doctrine.[43] If there is an unexpected change in the conditions surrounding the property subject to the easement which makes impossible or impractical the continued use of the property for conservation purposes, any proceeds resulting from the sale or exchange of the property must be used in a manner consistent with the conservation purposes of the original contribution.[44]

Q: Are there other requirements?

A: Yes. The Treasury Regulations list several other requirements for a charitable conservation easement deduction. For example, existing mortgages on the property must be subordinated to the easement.[45] In addition, uses of the property which are inconsistent with any conservation purpose (whether or not the purpose is specifically identified by the easement) must be prohibited.[46]

Furthermore, the easement may not allow the donor to retain surface mining rights or any other mineral extraction rights in the property.[47] There are also substantiation requirements and reporting requirements.[48]

Q: Are there any basis implications of a donation?

A: Yes. The donor must reduce his or her adjusted basis in the property that is subject to the easement by the proportion of the easement's value over the fair market value of the property before the contribution of the easement.[49]

Conclusion

Charitable conservation easements are experiencing significant current interest. Their benefits make navigating their detailed rules and requirements worthwhile. ■

1. 26 U.S.C. § 170(a)(1).
2. *See* 26 U.S.C. § 170(b)(1).
3. Pension Protection Act of 2006.
4. Treas. Reg. § 1.170A-8(d).
5. Treas. Reg. § 1.170A-8(e).
6. Treas. Reg. § 1.170A-8(b).
7. I.R.C. § 170(e)(1); Treas. Reg. § 1.170A-4(a)(1). This limitation remains unchanged by the Pension Protection Act of 2006.
8. Treas. Reg. § 1.170A-8(b).
9. Treas. Reg. § 1.170A-10(c)(1)(ii).
10. The new annual limitations are even better for "qualified" farmers or ranchers. Under 26 U.S.C. § 170(b)(1)(E)(iv), a "qualified farmer or rancher" can deduct up to 100% of the donor's contribution base.
11. 26 U.S.C. § 170(b)(1)(E)(ii).
12. *See* 26 U.S.C. § 170(b)(1)(A) (limiting the aggregate amount of all of the donor's charitable deductions for the year to 50% of the donor's contribution base). *See also* 26 U.S.C. § 68 (limiting itemized deductions, which include deductions for charitable conservation easements).
13. 26 U.S.C. § 170(f)(3)(A).
14. 26 U.S.C. § 170(f)(3)(B)(iii).
15. 26 U.S.C. § 170(h).
16. *United States v. Am. Bar Endowment*, 477 U.S. 105 (1986); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 690 (1989); Rev. Rul. 67-246.
17. Note that state laws govern the creation and enforcement of easements. Thus, the easement must also comply with all of the state statutory requirements in order to qualify as a "qualified real property interest."
18. 26 U.S.C. § 170(h)(2).
19. Treas. Reg. § 1.170A-14(c)(1).
20. *Id.*
21. Treas. Reg. § 1.170A-14(d)(1).
22. Treas. Reg. § 1.170A-14(d)(2)(ii).
23. Treas. Reg. § 1.170A-14(d)(3)(i), (ii).
24. Treas. Reg. § 1.170A-14(d)(3)(i).
25. 124 T.C. No 16 (U.S.T.C. 2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006).
26. *Id.*
27. Treas. Reg. § 1.170A-14(d)(4)(i).
28. Treas. Reg. § 1.170A-14(d)(4)(iii)(A).
29. *Id.*
30. Treas. Reg. § 1.170A-14(d)(4)(ii)(A).
31. *Id.*
32. Treas. Reg. § 1.170A-14(d)(4)(ii)(B).
33. Treas. Reg. § 1.170A-14(d)(4)(iv)(A).
34. Treas. Reg. § 1.170A-14(d)(4)(v).
35. Treas. Reg. § 1.170A-14(d)(5)(ii)(A), (B), (C).
36. 26 U.S.C. § 170(h)(4)(B), (C).
37. 26 U.S.C. § 170(h)(4)(B)(i), (ii).
38. 26 U.S.C. § 170(h)(4)(B)(iii).
39. 26 U.S.C. § 170(h)(4)(B), (C).
40. Treas. Reg. § 1.170A-14(c)(2).
41. Treas. Reg. § 1.170A-14(c)(1).
42. Treas. Reg. § 1.170A-14(c)(2).
43. The *cy pres* doctrine, emanating from English and French law, holds that where the donor's original intent becomes illegal or impossible to perform, the court may amend a charitable trust to conform as closely as possible to the donor's original intent.
44. Treas. Reg. § 1.170A-14(c)(2).
45. Treas. Reg. § 1.170A-14(g)(2).
46. Treas. Reg. § 1.170A-14(e)(2).
47. Treas. Reg. § 1.170A-14(g)(4).
48. Treas. Reg. § 1.170A-13(c)(3). *See also* I.R.S. Form 8283.
49. Treas. Reg. § 1.170A-14(h)(3)(iii).

ATTORNEY PROFESSIONALISM FORUM

To the Forum

The Attorney Professionalism Forum and the Committee on Attorney Professionalism is soliciting readers' views about the increase in the salaries for first-year associates at large Manhattan law firms, currently $160,000, and higher.

What does this increase mean for the legal profession in New York? What sense, if any, does such an increase make for the law firms initiating such increase? What sense, if any, does such an increase make for the law firms matching such increase? What effect does this have on the lives of lawyers – partners as well as associates – working at those firms? What effect does this have on the clients of such firms and what, if any, responses are such clients likely to make? What effect does this have on the other lawyers in New York State, who do not work at such large law firms? What cumulative effect does this have on the overall legal culture in New York? And, if you view this with concern and worry, and believe the overall effects of such an increase are negative, what antidotes would you suggest?

Send your comments to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org. Please put "Attorney Professionalism Forum" in the subject line. Comments and views will be included in the Attorney Professionalism Forum published in the January 2008 issue of the *Journal*.

Views Concerning Increased Associate Salaries

These thoughts came from Michael Kuhn, an attorney in Houston, Texas, also licensed in New York:

Whether called goals or professional objectives, we all have certain values that guide and direct the operation of our firms. Let me state a few. We strive to attract and retain the best legal and professional talent; to deliver excellent legal services to our clients; to charge a reasonable fee as mandated by our professional rules of conduct; to maintain the competitive force of the firms; and, to provide for the needs of professionals and staff in a manner that makes financial sense. During the better part of a year, the decision by some of the largest and most respected firms to raise associate salaries has been discussed in a way that suggests an inevitable degradation of our fundamental values and a substantial change in the vitality of our individual and collective practices. The question raised by the Committee asks, quite simply, whether our personal and professional values are threatened by the recent associate compensation. This question is not new, and the discussion inevitably will be revisited each time the profession sees a round of 5-digit salary increases.

The point of this column is to discuss briefly the critical sentiment expressed by lawyers and clients, and to offer several considerations to ameliorate these concerns. Throughout the year, since the first announcements were made, numerous blogs and journals have voiced various levels of alarm and have initiated genuine discourse. Many commentaries warned that these substantial pay increases would have a negative impact on lawyers, firms and clients.[1]

Suggesting that even the beneficiaries may not welcome the substantial salary increase, a recent ABA survey reflected that 84.2% of respondents would opt for a salary decrease in exchange for reduced billing obligations.[2] An earlier American Lawyer survey similarly reported that a majority of the participants would accept a pay cut for a reduced billing requirement.[3] While not "scientific" or truly reflective of whether one is so willing to forgo a salary increase, the surveys suggest growing "life" issues. Growing attrition rates also indicate additional pay raises may negatively impact associate life. Although salaries have increased, retention rates have declined. Attrition rates have risen to 80%, with nearly 2/3 of third- and fourth-year associates believing that they will leave their firms within five years.[4] Many believe that "[h]igher pay may well intensify already high anxiety levels among associates . . . provide less time for mentoring . . . [and lead firms to] become less tolerant of mistakes."[5]

Perhaps understandably, clients are more concerned with the salary increases. A recent Altman Weil survey found that many of America's 200 largest law departments believed that the associate salary increase was "outrageous" and some, in fact, changed their policy to restrict the use of first-year lawyers.[6] The survey respondents also registered general dissatisfaction with the firms' decision being made without consultation. In-house lawyers expressed specific concerns. DuPont's chief litigation counsel, for example, rhetorically asked, "How will these law firms pay for these increases? They won't just absorb them. Take them out of partner profits? Doubtful. The answer, of course, is to raise the associates' billing rates."[7] He believed that salary increases would be passed to

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, 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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clients without added value, estimating a cumulative rate increase that could reach $5 million per year for his company.

Following another series of rhetorical questions – "What about the firm's culture, client base, and work environment? Do these intangibles mean nothing? What do first-year associates have to do with high-quality service from top-tier lawyers?" – DuPont counsel concludes that little attention is paid to client needs when it comes to costs and urges firms to take a more disciplined approach to rate increases. Increases should, instead, reflect something other than a reflexive price increase to offset a firm's salary spending or inability to control its own costs.

The salary increases adopted by large firms has been described as "lemmingesque" or having the feel of falling dominos, suggesting that little evaluation or analysis preceded the decision. Frankly, we doubt the accusation since the financial impact is significant and the need to preserve profitability is substantial. Firms understand the need to attract and retain the best possible legal talent, and they are aware of their clients' sensitivity to rates. Well-managed firms cannot ignore the tensions created by the move toward increasing associate salaries and costs of operation.

Is the magnitude of the salary increase sufficient reason for concern? When one firm announced that the salary for a first-year associate would be increased to $160,000, immediate reactions registered surprise. Now, perhaps not for the first time, a first-year associate could earn more than most state judges; more than many experienced in-house legal counsel; more than the median earnings of lawyers in the state. Comparisons are inevitable – but, certainly not dispositive of the issue. It has been pointed out that partner profits have risen at rates greater than the recent associate salary increases, and that the increase could be justified by inflation alone considering the years passing since the last substantial increase.

Assuming a "typical" 2,100 hour year, the increase is approximately $7 to $10/hour or 10% to 15%.[8] One commentator observed that the increase followed six years of relative "salary inactivity" and was not far off the rate of inflation.[9] In that context, a decision by some of the nation's most profitable firms does not seem unreasonable. A decision by firm management to invest in the recruitment of new and existing legal talent makes economic sense. Assuming a $350 billing hour rate, with an annual budget of 2,000 hours, simple math suggests a $700,000 annual gross revenue potential to the firm. With adjustments for overhead and write-offs for efficiency concerns, a firm still stands to profit at least $160,000. Salary increases, thus, may be viewed by many as a necessary move to remain competitive in an environment where the number of law school graduates is flat and the demand for new lawyers is growing.

An additional consideration relates to rising tuition and the growing burden of student loans. Since 1985, the average law school tuition has more than tripled, and the average law school graduate carries an $80,000 student loan debt that can take 15 to 20 years to repay. One report suggests that students "are paying up to 267 percent more for their education, compared with costs in 1990."[10] Beginning lawyers bear proportionately more debt at graduation than their predecessors which erodes a substantial portion of the salary increases and has a direct impact on career choices.[11] Increasing student debt may, as one commentator suggests, "distort incentives" for those that might be happier working somewhere other than a large law firm. Anecdotally, more graduates report a deliberately stated goal to pay down debt then leave for another opportunity. In any event, growing tuition costs along with increased student debt erode the significant pay increase and tend to directly impact a choice among employment opportunities.

Broader concerns and effects on the profession include an erosion of mid-size firm competition (much like a perceived elimination of the middle class). One recent reporter believes that large firms are attempting to segment the market by finding the salary amount that would lead "second tier" firms to drop out of the competition for the best law graduates.[12] While some share a fear that the profession will be divided, others see genuine opportunity for regional and specialized practices to benefit from a growing gap in costs of legal services. As consumers of legal services become more sensitive to rates and costs, there will be a substantial opportunity for boutique or niche practices, as well as firms known for holding the line on salaries with a commitment to first-class, value-based legal work.

Other correlations with increased associate salaries include expansion of "multi-tier" partnerships with an increased number of non-equity partners and fewer equity partners, increased time to partnership, increased and accelerated "up or out" policies with less patience for mistakes, and increased use of paralegals and contract lawyers. With new or expanded policies to retain profitability in the face of rising "labor costs," firms know that whenever profits-per-partner fall, lateral recruitment and partner retention becomes more difficult.

Consideration No. 1: When meeting the competition, don't forget the "core values." While the salary increase may be necessary to recruit first-year lawyers, statistics indicate that more is needed to retain the lawyer beyond the third year. Mr. Sager's rhetorical question – what about the firm's culture, work environment and other intangible, non-monetary aspects of lawyer life – leads to an important antidote: preserve the firm's culture.[13]

Consideration No. 2: Don't lose sight of the standard retention factors preached by consultants during the past decade: training and mentoring; professional development plans with specific goals and objectives; and, use of development directors and ombudsmen.[14] At an average investment of

$300,000 per lawyer by the third year, retention is crucial.

Consideration No. 3: Promote efficiency and productivity through value-based billing structures, selection of appropriate talent for specific projects, and use of temporary legal staff and legal assistants. Efficiencies and productivity are essential to value.[15]

Consideration No. 4: Client communication, addressing fee structure and salary increases – provide more than a "lemmingesque" explanation of the firm's decisions. Firms should listen carefully to client needs and concerns, and overcome the tendency to make decisions in a vacuum. Discussions before raising associate salaries, thereby justifying an increase in rates, is a clear call from corporate counsel.[16]

Consideration No. 5: Be creative and thoughtful in anticipation of the next round of salary increases. There are reported whispers and hints of increases to $190,000.[17] For example, at the risk of missing out on "star" talent, consider a salary below market for the first three years and above market for senior associates. Some even suggest scrapping the multi-million dollar summer programs and law school recruiting efforts – with a risk of being characterized as an "also ran" or second-tier firm.

Consideration No. 6: Offer an alternative track without a stigma. One commentator mentioned Perkins Coie as one of a handful of firms that allow associates to opt for lower pay with reduced billing requirements.[18] Also, whether called project lawyers, contract attorneys, per diems, ad hocs, interims, consultants or borrowed and leased personnel, increased use of talent other than those being paid $160,000/year plus benefits will help minimize fee increases without losing profitability or quality of work.

Michael Kuhn
Bracewell & Giuliani LLP
Houston, Texas
(Member of State Bar of New York, Texas and Colorado)

The following comments come from New York attorney Lewis Taishoff:

I wish to voice my entire approval for increased salaries for beginning attorneys at "going rate" law firms. I only regret these salaries are not higher, so as to match the compensation paid to corporate executives who have driven their corporations' stock prices into the ground, hedge fund managers who bet on subprime mortgages, and athletes. Why should first-year associates right out of law school be compensated at a rate lower than a rookie infielder batting .225 on a last-place baseball team? Or the promoter of a collapsing hedge fund? But why confine your questions to new entrants? I have heard that some more senior lawyers now bill $1,000 per hour; excellent! Even the very senior lawyer who remarked "I cannot see paying that much money to anyone who isn't actually saving your life" has outdated ideas. As for those of the older generation of lawyers (and some younger ones) who looked on the practice of law as a calling or profession, or as a means to public service, it is time they were removed as so much dead wood. Why should these new entrants or senior lawyers care if the public regards lawyers as one step above used car salespeople? The motto of the law business (as opposed to the profession) should be "Hey Ho We Got the Dough," trumpeted to the skies. Only then will public disgust force us to return some sense of proportion to attorney compensation.

Lewis C. Taishoff, Esq.
Schechter & Brucker, P.C.
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM 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? Could my giving of telephone advice possibly be considered practicing law in the foreign state? I am uneasy about what may be considered an attempt to thwart the order of a foreign court.

Sincerely,
Concerned Counselor

1. James J. Sandman, *The High Price of Escalating Associate Salaries*, 21 Wash. Law. 7 (Mar. 2007).

2. Stephanie Francis Ward, *Who Will Pay for Associate Raises: Partners or Clients?*, ABA J. E-Rep. http://www.abanet.org/journal/ereport/f2raise.html (Feb. 2, 2007).

3. Kelly Lucas, *Billing by the Hour May Be Hazardous to Health*, Ind. Law. (Sept. 11, 2002).

4. Carolyn Elefant, *No Attrition in Associate Attrition Rate*, Law.Com Blog Network, http://legalblogwatch.typepad.com/legal_blog_watch/2006/08/no_attrition_in.html (Aug. 15, 2006) (quoting Elizabeth Goldberg, *Exit Strategy*, 28 Am. Law. (Aug. 2006)).

5. Leigh Jones, *Client Expectations Drive Pay Hikes, Firms Say*, 8 Fulton County Daily Rep. (Aug. 7, 2007).

6. Zusha Elinson, *GCs Still Steamed About Raises*, 131 The Recorder (May 21, 2007).

7. Thomas Sager, *Not Going to Take It Anymore*, 14 Corp. Counsel 67 (Sept. 2007). DuPont's chief legal counsel expressed a belief that increased value will not accompany higher rates and suggests five ways to integrate the impact of salary increases. General

counsel for the Association of Corporate Counsel, expressed similar concerns about the recent raises. She predicts resistance to work by young lawyers and heightened billable-hour expectations from firms to cover the costs of the increases. Both of which, she fears, will lead to excessive charges to corporate clients. Leigh Jones, *Latest Associate Salary Hikes Leave Corporate Clients Cold*, 189 N.J. L.J. 667 (Aug. 20, 2007).

8. Posting of Cold Math to The Wall Street J. Law Blog, http://blogs.wsj.com/law/2007/01/22/simpson-thacher-raises-the-bar/ (January 23, 2007, 8:19 am). Cold Math calculated his $42 hourly rate of pay very simply: $160K/(80 hrs. per week) (48 weeks).

9. *Law Firm Salary Wars: Who Really Pays?*, Ill. Bus. L.J. http://iblsjournal.typepad.com/illinois_business_law_soc/2007/03/law_firm_salary.html (Mar. 15, 2007). With its 37 footnotes, the Internet article includes an extensive bibliography.

10. Leigh Jones, *As Salaries Rise, So Does the Debt*, lawjobs.com (Feb. 1, 2006). Increase in education costs since 1990 exceed 267%, while increases in salary average 60% over the same period of time.

11. Mary Alice Robbins, *Jurists Say Minority Clerk Recruitment Failed by Firms That Pay Bigger Bucks*, Tex. Law. (Oct. 15, 2007). With the burden of $100,000 student loans, judges are seeing "[a] lot of people. . . [going] for that $160,000, because they can pay their debt off in a few years."

12. Nathan Carlile, *Are They Worth It?*, 30 Legal Times 1 (Oct. 1, 2007).

13. Sager, *supra* note 7.

14. Susan Raridon Lambreth, *Redressing Attrition: Retain More Associates by Taking a New Approach to Training and Development*, Hildebrandt Int'l Publ'ns, http://www.hildebrandt.com/documents.aspx?Doc_ID=642 (Apr. 2, 2001).

15. Daniel J. DiLucchio, *Business As Usual: Hourly Billing Stays As Standard Fee Arrangement*, 236 The Legal Intelligencer 7 (Sept. 12, 2007); Henry J. Macchiaroli, *Help on the Way: Using Temporary Lawyers Yields Many Benefits*, Legal Mgmt. (Nov.-Dec. 2006).

16. Thomas Sager, *Fight the Ripple Effects From the Associate Salaries Spike*, 23 Tex. Law., In-House Texas S9 (Oct. 1, 2007).

17. Martha Neil, *NY 1st-Year Plan: $250K, But No Jobs*, ABA J. - Law News Now, http://www.abajournal.com/news/ny_1st_year_pay_plan_250k_but_no_hires/ (October 1, 2007). Humorous and cynical to some, a firm could announce a starting salary of $250,000 – "but we're just not going to hire anyone."

18. Stephanie Francis Ward, *Such a Deal*, 93 ABA J. 29 (Oct. 2007); Stephanie Francis Ward, *Associates in the Trenches*, 93 ABA J. 24 (Feb. 2007). Chapman & Cutler, a Chicago-based firm with 3 offices and 220 attorneys, chose to raise first-year associate salaries to $160,000, with a two-track compensation system at the second year. Second-year associates at the Chapman firm will be able to choose fewer hours at lower pay or more hours at higher pay. Lynne Marek, *Cash Caste System: Firm Offers Associate Choice of Pay and Hours Options*, N.Y. Law. (Oct. 16, 2007); Martha Neil, *Chicago Firm Creates 2 Tiers of Associates*, ABA L. Prac. (Oct. 16, 2007).

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Emily Beth Blumsack
Louise Bohmann
Melanie Bond
Celine Laurence Bondard
Amy Karyo Bonderoff
Gregory David Bonifield
Jason Benjamin Bonk
Felton Carnell Booker
Calvina L. Bostick
Neal Aaron Brandenburg
Kathryn Mary Weg Brandt
Bryan Joseph Braunel
Matthew Andrew Bray
Justin Samuel Bridge
Lindsey Valaine Briggs
Stephanie Lloyd Brill
Aaron Broudo
Alvin H. Brown
Amanda Kate Brown
Jonathan Harrington Brown
Kim Suzanne Brown
Tracy Melissa Brown
Jordan Michelle Brudner
Mary Anne Ema Buechel
William Charles Bunting
Joshua Dan Burns
Carmel B. Butler
Aja Claire Byrd
Peter Michael Byrne
Jennifer Marie Cabrera
James Anthony Cadogan
Dorothea Caldwell-Brown
Julie Anne Calidonio
Sherry Cameron-Harry
Liangrong Cao
William Christopher Carmody
Faith Louise Carter
Stephanie Carver
Carmen Casado
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Bartholomew Chacchia
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Nishka Genelle Chandrasoma
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Mark Sun Cho
Minji Cho
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Joshua Lon Crowell
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Danial A. Nelson
Julia Nestor
Daniel Charles Neustadt
David Newman
Margeau J. Ney
Uyen Nguyen

In Memoriam

Abraham Abramovsky
New York, NY

Charles A. Barker
Central Valley, NY

Peter A.A. Berle
Stockbridge, MA

Albert L. Brunell
Demarest, NJ

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Jamestown, NY

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Yorktown Heights, NY

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New York, NY

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Joseph James Pontrello
Whitney Potts
Evridiki Poumpouridis
Peta-Gaye Antoinette Prendergast
Jacob Press
Christopher Charles Prevost
Huaying Qi
Stefan Hisashi Quick
Andrew Townsend Radsch
Dennis Andrew Rambaud
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Donald Theodore Rave
Kimberly Jane Ravener
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Jonathan Day Rechner
Daryl Wornie Reed
Alexander Jonathan Rein
Racquel Heather Reinstein
Natlee Reisen
Sarah Reisman
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Charles Michael Ricciardelli
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Courtney Michelle Rogers
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Veronica Rozo-Martinez
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Alexander Joseph Saffi
Stelios Giuseppe Saffos
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Avani Manoj Shah
Payal Kiran Shah
Fadi Shaheen
Amir Shaikh
Susan Shamoto
Jonathan Charles Shapiro
Aabha Sharma
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Jonathan Roy Shechter
Paul Lewis Shechtman
Jesse Joshua Kamal Sheff
Michael Timothy Shepherd
Marc Adam Sherman
Kathleen Kaufmann Shih
Sara Shikhman
Khardeen I. Shillingford
Kim Marlowe Shipley
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Jeffrey Alan Shooman
Shahram M. Siddiqui
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Craig M. Smith
Katherine Mullen Smith
Shani S. Smith
Whitney Morgan Smith
Mychii Snape
Oliviero Antonio Soldati
Adam Keith Spease
Gina Susan Spiegelman
Joshua Edward Spielman
Andrew Spital
William Rudolph Springer
Peter Sprung
Adam Steinbauer
Eric Jon Stenshoel
Rebecca Meryl Sterling
Amy Kathryn Sterner
Caleb James Stevens
Anna Leora Stewart
Spencer Stiefel
David Michael Stoltzfus
Claudio Storelli
Eric J. Storz
Jonathan Aaron Strauss
Julie Lynn Strom
Preston Matthew Strosnider
Mario J. Sturla
Christina Helen Sullivan
Adam David Summers
Catherine Suvari
Anand Swaminathan
Kirsten Elizabeth Talmage
Derek James Tang
Kenneth Mark Tanzer
Nathan Kron Tasso
Bonnie S. Tellgmann
Marc Alan Tenenbaum
Ann-Marie Tesar
James S. Thompson
Sacha Thompson
William Robert Thornewell
Chen Feng Tien
Thomas Sig Tollefsen
Adam Martin Tomiak
Jeremy Traster
Stacie Elizabeth Trott
Ashley True
Trevor Kress Truman
Susan Tsai
King Fung Tsang
Christopher Alexander Tsarnas
Conray Tseng
Dmitry Tuchinsky
Christopher Richard Tulimieri
Elizabeth Whelan Turchyn
Bethany Rebecca Turke
Erdal Turnacioglu
Caleb McCracken Turner
Deborah Ann Twardowski
Samantha M. Tweedy
Ugochukwu O. Ude
Viktoria Ulyanitsky
Scott Cortlandt Urquhart
Sujal Kirit Vaidya
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Alexander Van Voorhees
Brien Grey Van Wagner
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Deepa Alluri Varma
Jerry George Vattamala
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Anna Vidiaev
Elizabeth Charney Vladeck
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Kulbir Singh Walha
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Ying Wang
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Lauren Willig
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Benjamin Joshua Wolf
Lorianne Melissa Wolseley
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Libing Wu
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Brett David Yacker
Fuhao Yang
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Samantha Page Yellin
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Lanlan Zhou
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Daniel Ioannis Zohny
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SECOND DISTRICT

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Kafui Aku Bediako
Martin Spencer Bell
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Daniel Eduardo Brunetti
Ezra Ulalia Carrasquillo
Jonathan Benning Chazen
Heather Rebecca Demner
Cynthia Joy Domingo-Foraste
Sharyn Maitland Duncan
Eva D. Hoenlein Dworkin
Tanya Patrice Dwyer
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Ian George Fisher
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Jonathan Herman

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Michele Lam
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Mark Alexander Laughlin
Talya Abigail Leader
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Kathleen Malloy
Joana Mary Marshall
Kathleen Mary Mc Inerney
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Elizabeth Mary Moehle
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Alexander Nevins
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Matthew Alain Peller
Denis Petre
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Yi Wang
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Carrie Sophia Zoubul

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Gayle Ann Harshfield
Christos P. Kotsogiannis
Margreta Maria Morgulas
Walter Winfield Weber
Jennifer M. Wilson

FOURTH DISTRICT
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Scott A. Martin

FIFTH DISTRICT
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Travis H.D. Lewin
Mary Helen McNeal

SIXTH DISTRICT
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Lynn Janis Trudell

SEVENTH DISTRICT
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Chenping Su

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Karl E. Najork
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Zachary Germano Schuck
Ryan Christopher Schwarz
Rosemary Anne Sciangula
Diane E. Selker
Ron S. Solow
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Daniel H. Walsh
Leyli Zohrenejad
David Michael Zucker

TENTH DISTRICT
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Victor Adeniyi Adefuye
Tina Fard Attarian
Pierre Bazile
Daniel Robert Biegelman
Jason Todd Bowden
Edward Bradley
Shari L. Braverman
Suzanna Pacht Brickman
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Leonor Hidalgo Coyle
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Ouzy Azoulay
Brooke Barnes
Kyungsoo Cho
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Marilyn Anne Filingeri
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Vassilis Sfyroeras
Alan Michael Sigalow
Sukhbir Singh
Adedayo David Soneye
Lisa Marie Trpic
Leifan Wang
Charlie Yue

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Lesley DeCasseres
Lauren Di Chiara
Belkys Garcia
Bari Gayle Handwerger
Gabriela Leal
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Elizabeth McGrath
William Patrick Novak
Ebere Ogba-Trotman
Raasheja Niche Page
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Katie Marie Ringer
Melissa P. Schwechter
Alexandra Genevieve Sedehi
Andrew Paul Sherwood
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Jamien Oliver Weddle
Shakoya Della Womack
Jason Wong
Kimberly Zick

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Taskeen Ahmed
Bhagwan Dass Ahuja
Alex-handrah Ruth-emilienne Aime
Hamayun Sahl Akbari
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Brent Richard Baker
Gary Francis Ball
Ethan Daniel Balsam
Revital Bar-or
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Krysta Linn Berquist
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Douglas James Boorstein
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Daynor Maria Butler
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Rwanda Nairobi Campbell
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Cheng-ho Chen
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A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

"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."

Professor John Q. Barrett
St. John's University School of Law

Eugene Gerhart was known as *the* lawyer in Binghamton and the surrounding areas. He was a founder of Coughlin & Gerhart LLP, and the author of many books, including several important works on the life of Supreme Court Justice Robert H. Jackson. Gerhart met Jackson at an ABA meeting in Atlantic City, New Jersey, in the fall of 1946. Justice Jackson had come to speak, and Gerhart had come to accept a prize for his essay on labor disputes. Their friendship lasted until Jackson's death in 1954.

While a longer, more fitting piece on Eugene Gerhart is slated for a later issue of the *Journal*, it is important that we pay tribute to him now, however briefly, because for us, at the Bar Association, his greatest contribution to the bar was in his "part-time" job, Editor-in-Chief of the *Journal*.

For nearly 38 years, from February 1961 to October 1998, Eugene Gerhart was, with his incomparable assistant Lorraine Wagner, the *Journal*'s editor in chief, editor, copy editor and proofreader. He gathered the articles and edited them, helped expand the format and set the standard for the journal we produce today. A remarkable achievement.

We are in his debt.

It is with great sadness that I inform the members of our Bar Association of the untimely death of Thomas A. McTigue, Esq., a dear and highly regarded attorney with my firm. Tom was diagnosed in January 2007 with Acute Lymphocytic Leukemia at the age of 38 and fought mightily throughout the last 10 months to survive and be with his wife, Stephanie, their two-year old daughter Kendall, and their new daughter, Summer, who was born in May in the midst of the family's turmoil.

I particularly want to honor Tom here, because he gave me such invaluable assistance and support in my role as editor of the *Journal*. His opinions and ideas were always thoughtful and his advice was invariably spot on.

All who knew Tom will remember him not only for his many accomplishments – as West Point cadet, attack helicopter pilot, champion bagpiper, commercial real estate executive, and talented attorney – but even more for his warmth, kindness, and the natural charisma and purity of heart that endeared him to so many, both clients and adversaries.

Tom passed away the day before Thanksgiving, in the comfort of his home, surrounded by family, and close friends. Tom will be greatly and forever missed; I am fortunate to have known him as a colleague, editorial advisor and loyal friend.

A foundation has been set up in Tom's honor:
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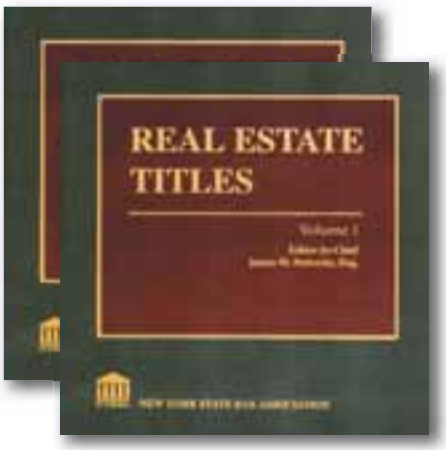

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Edited by a nationally renowned expert on real estate law and title insurance, James M. Pedowitz, this revised Third Edition of *Real Estate Titles* is a thorough update of the original text and is authored by some of the most distinguished practitioners in the field. Many chapters have been substantially revised, including the chapter on title insurance which now includes copies of the new 2006 American Land Title Association policies and the updated Title Insurance Rate Service Association (TIRSA) endorsements. This revised Third Edition includes new decisions, statutes and regulations; the index has also been substantially revised and expanded.

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another adverb. Adverbs tell when, where, why, or under what conditions something happens or has happened. Most adverbs end in "ly." *Examples:* "badly," "completely," "happily," "lazily," "quickly," and "slowly." You can't rely on this rule to recognize adverbs; some adjectives end in "ly": "friendly," "lovely."

Some adverbs are hard to recognize. *Examples:* "afterward," "almost," "already," "back," "even," "far," "fast," "hard," "here," "how," "late," "long," "low," "more," "near," "never," "next," "now," "often," "only," "quick," "rather," "slow," "soon," "still," "then," "today," "tomorrow," "too," "when," "where," and "yesterday."

> Run-on sentences are hard to read, therefore, never use them.

Put the adverb next to the word it modifies. *Incorrect:* "It almost seems impossible to finish the brief by July." *Becomes:* "It seems almost impossible to finish the brief by July." *Incorrect:* "Don't you ever remember writing the brief?" *Becomes:* "Don't you remember ever writing the brief?"

Incorrect: "He drove slow." In this example, you want "slow" to modify the verb "drive." To determine whether "slow" is correct, ask yourself: How did he drive? Slowly. *Therefore:* "He drove slowly." *Incorrect:* "Use adverbs correct." Ask yourself: How should I use adverbs? Correctly. *Therefore:* "Use adverbs correctly."

Put adverbs at the beginning of sentences for emphasis or when you want to qualify the entire sentence. *Correct:* "Fortunately, no one was in the courtroom when the ceiling fell down."

14. Modifiers. Writers encounter four modifier problems: (1) misplaced modifiers; (2) squinting modifiers; (3) dangling modifiers; and (4) awkward separations.

A misplaced modifier occurs when you improperly separate a word, phrase, or clause from the word it describes. Some commonly misplaced words: "almost," "even," "exactly," "hardly," "just," "merely," "nearly," "only," "scarcely," and "simply." *Example of a misplaced word:* "She almost sold all her used law books at the garage sale." The writer isn't trying to say that "she almost sold all her used law books." The writers means to say, "She sold almost all her law books at the garage sale." *Example of a misplaced phrase:* "Throw your sister out the window the Bluebook." The writer isn't trying to say "Throw your sister out the window." The writer means to say: "Throw the Bluebook to your sister." *Therefore:* "Throw the Bluebook out the window to your sister." *Example:* "She served punch to the attorneys in paper cups." The writer isn't trying to say that "the attorneys were in paper cups," but that's the effect. *Therefore:* "She served punch in paper cups to the attorneys." *Example of a misplaced clause:* "She returned the car to the dealer that was defective." This sentence suggests that the dealer, not the car, was defective. *Therefore:* "She returned the defective car to the dealer." *Example:* "He remembered that he forgot his brief when he reached the courthouse." This suggests that "he forgot his brief when he reached the courthouse." *Therefore:* "When he reached the courthouse, he remembered that he forgot his brief." *Or:* "He remembered when he reached the courthouse that he forgot his brief."

A squinting modifier is a modifier that might refer to a preceding or a following word. Like a misplaced modifier, a squinting modifier creates confusion. Unlike a misplaced modifier, the adverb might function perfectly in the sentence structure but its meaning might be ambiguous. *Example:* "Eric told his daughter when the meeting was over he would play with her." Is it that Eric spoke to his daughter when the meeting was over? Or that Eric told his daughter he would play with her after the meeting? Two correct versions: "Eric told his daughter he would play with her when the meeting was over." *Or:* "When the meeting was over, Eric told his daughter that he would play with her."

Where you position a squinting adverb ("almost," "even," "exactly," "hardly," "just," "merely," "nearly," "only" "scarcely," "simply," or "solely") affects the sentence. *Incorrect:* "The court attorney only made one mistake." *Becomes:* "The court attorney made only one mistake." *Examples:* "She only nominated Matthew for partner." (She didn't vote for him.) "She nominated only Matthew for partner." (She didn't nominate anyone else.)

A modifier dangles when the noun or pronoun to which a phrase or clause refers is in the wrong place or missing. Sometimes the dangling modifier is at the beginning of the sentence. Sometimes it's at the end. *Example of a dangling participle:* "Once edited and rearranged, Bill received an A+." This suggests that "Bill" was edited and rearranged. *Therefore:* "Once he edited and rearranged his law-school paper, Bill received an A+." *Example of a dangling gerund:* "After editing for an hour, the brief looked good." This suggests that "the brief" was editing for an hour. *Therefore:* "After I edited the brief for an hour, the brief looked good." *Example of dangling infinitive:* "To write a brief, a computer is needed for efficiency." Because "a brief" is positioned next to "a computer," the writer suggests that a computer can write a brief. *Therefore:* "For efficiency, a computer is needed to write a brief." *Or:* "To write a brief, you'll need a computer for efficiency. *Or:* "To write a brief, an attorney needs a computer for efficiency." *Example of a dangling elliptical clause:* "When just five years old, my father taught me how to cross-examine my sister." Because "when just five years old" is positioned next to "my father," the sentence suggests that "my five-year-old father taught me how to cross-examine my sister." *Therefore:* "When I was just five years

old, my father taught me how to cross-examine my sister."

An awkward separation creates confusion. *Incorrect:* "Many students have, by the time they finish law school, interned for a judge." The sentence is confusing because the auxiliary verb "have" is separated from the main verb "interned." *Therefore:* "By the time they finish law school, many students have interned for a judge." *Or:* "Many students have interned for a judge by the time they finish law school."

Misplaced prepositions lead to miscues. Make sure, for example, not to put the word "with" is in the final position of a sentence. *Incorrect:* "The defendant robbed a bank with money." In this example, the reader might wonder why the defendant didn't use a gun.

15. Problem Words and Pairs. You can't "bare" it when two words sound alike or when they're spelled alike. Or is it "bear" it? Don't let it "affect" you. Or is it "effect" you?

Use "accept" when you mean "take." Use "except" when you mean to "leave out." *Example:* "Please accept my apology." *Or:* "Everyone except for Lawyer Lee went to court." Use "affect" when you mean " to influence" or "a feeling or state." Use "effect" when you mean "something resulting from another action" or "to come into being." *Example:* "Mr. X, whose manner is affected, put his theory into effect. His theory had a profound effect. It affected many things." Use "already" when you mean "before." Use "all ready" when you mean "prepared." *Example:* "She already left for court." *Or:* "She was all ready to go to law school." Use "all together" when you mean "everyone at once." Use "altogether" when you mean "completely." *Example:* "We jumped off the courthouse stairs all together." *Or:* "Lawyer Lee is altogether lazy." Use "bare" to mean "uncovered." Use "bear" to mean "animal" or "endure." *Examples:* "The baby's head was bare." "I saw the bear climb a tree." "I can't bear to sit in court." Use "desert" to mean "leave behind" or "arid region." Use "dessert" to mean "sweet." *Examples:* "His partner deserted him in the hall." "Bring plenty of water and a hat when you travel in the desert." "I love decadent desserts." Use "its" to show possession. Use "it's" to mean "it is" or "it has." *Examples:* "What is its color? It's beige." "It's freezing in the courtroom." Use "less" for things that can't be counted or which can be counted, but only as a group, not individually. Use "fewer" for things that can be counted individually. *Example:* "Less sand; fewer grains of sand." Use "loose" when you mean "unfastened." Use "lose" when you mean "misplace." *Example:* "My button is loose." "I'll lose my tie if I don't fasten it." Use "principal" when you mean "main" or "head of school." Use "principle" when you mean "rule." *Examples:* "In this town, this is the principal road." "The principal, Mr. Discipline, isn't my friend." "I follow all the principles of writing." Use "than" to compare. Use "then" to mean "at that time." *Examples:* "New York has more attorneys than Hawaii." "New York was then unpopulated." Use "their" when you mean "belonging to them." Use "there" when you mean "place." Use "they're" when you mean "they are." *Examples:* "They used their car to get to New York." "How do I get there?" "They're coming to New York." Use "weather" to mean "environmental conditions." Use "whether" to mean "if." *Examples:* "The weather will be hot and muggy tomorrow." "I don't know whether it will be hot or muggy tomorrow." Use "your" when you mean "belonging to you." Use "you're" when you mean "you are." *Examples:* "Your argument was brilliant." "You're brilliant."

16. Who and Whom. It isn't egregious to use "who" instead of "whom." But it's unforgivable to use "whom" instead of "who" to sound erudite. "Who" is the subject. *Example:* "Who wrote the brief? Jane!" "Whom" can be an object or a subject. *Object example:* "Whom did you see at the corner?" *Subject example:* "Jane is the person whom defendant shot." Here's a tip: Answer the implicit question the sentence raises to see whether "he" ("she") or "him" ("her") can replace "who" or "whom." "He" or "she" replaces "who." "Him" or "her" replaces "whom." *Incorrect:* "Who do you want to argue the case?" *Becomes:* "Whom do you want to argue the case?" *Answer:* I want *him* or I want *her to argue the case*. An unnecessary "whom": "Jane is the person whom defendant shot." An unnecessary "who": "Jane is the person who defendant shot." *Becomes:* "Jane is the person defendant shot."

17. The Sentence Extra. Eliminate the unnecessary "that" in a string of clauses. *Incorrect*: "The law clerk said that although she will draft the opinion, *that* no one will read it." *Correct:* "The law clerk said that although she will draft the opinion, no one will read it." Also eliminate extra prepositions. Consider this James Bond lyric from the Wings' classic "Live and Let Die": "But if this ever changing world in which we live *in* . . . ." *Boring but correct:* "But if this ever changing world in which we live . . . ." *Or:* "But if this ever changing world *that we live in* . . . ."

Misusing words will effect your writing.
Pick on the right idiom.
Use adverbs correct.

18. "That" Versus "Which." "That" is a demonstrative pronoun. "Which" is an interrogative pronoun. *Examples:* "that brief"; "which brief?" "That" is restrictive or defining. "That" introduces a restrictive clause: a clause necessary to the sentence's meaning. "Which" isn't restrictive or nondefining. "Which" introduces a nonrestrictive clause: a clause unnecessary to the sentence's meaning. Use "that" to introduce essential information. Use "which" to define, add to, or limit

information. Commas usually set off a clause beginning with "which."

Here's a tip: If the word or concept before the "that" or the "which" is one of several, use "that." If the word or concept before the "that" or the "which" expresses a totality, use "which." *Example 1:* "Judge Right must impose a sentence, *which* he doesn't want to impose." *Example 2:* "Judge Right must impose a sentence *that* he doesn't want to impose." Use "which" if Judge Right must impose but one sentence and doesn't want to impose it. Use "that" if Judge Right, who has several sentences to impose, doesn't want to impose only one of them.

Another tip: If you can drop the clause and still retain the meaning of the sentence, use "which." If you can't, use "that." *Example 1:* "The trial exhibits that were damaged in the fire were my exhibits." *Example* 2: "My trial exhibits, which were 8 x 10 inch color photographs, were damaged in the fire." In Example 1, if you drop the "that" clause" ("that were damaged"), the entire sentence would lose its meaning. In Example 2, if you drop the "which" clause ("which were 8 x 10 inch color photographs"), the sentence would make sense. The "which" clause in Example 2 adds information. In Example 1, the "that" clause defines the entire sentence and gives it meaning.

19. Comparisons. Use the comparative degree to compare two persons or things. Use the superlative degree when you want to compare more than two persons or things.

For some adjectives that have one syllable and some adjectives that have two syllables, form the comparative by adding "er" and form the superlative degree by adding "est." *Examples:* "Fine" *becomes* "finer" or "finest." "Friendly" *becomes* ""friendlier" or "friendliest."

For some two-syllable adjectives and most adjectives that have more than two syllables, form the comparative by adding "more" or "less." For these adjectives, form the superlative by adding "most" or "least." *Examples:* "The recent decision seemed more hopeful." "Jack is the least competent attorney in the firm." "As a litigator, he became most successful."

Some adjectives have irregular comparative and superlative forms. *Examples:* "bad" (ill) *becomes* "worse" or "worst." "Far" *becomes* "farther" (distance) or farthest." "Far" also *becomes* "further" or "furthest" (additional or distance). "Good" (well) *becomes* "better" or "best." "Little" *becomes* "less," "lesser," or "littler" in the comparative form. "Little" *becomes* "least" or "littlest" in the superlative form. "Much" (many) *becomes* "more" or "most."

20. The Right Idiom. An idiom is a phrase whose meaning is greater than the sum of its parts. Some incorrect idiomatic expressions in legal writing: "Abide from a ruling" *becomes* "abide by a ruling." "Accord to" *becomes* "accord with." "Adverse against" *becomes* "adverse to." "Angry at" *becomes* "angry with." "Appeal at a court" *becomes* "appeal to a court." "As regards to" *becomes* "as regards." "Authority about" *becomes* "authority on." "Blame it on me" *becomes* "blame me for it." "Centers around" *becomes* "revolves around" or "centers on," "centers in," or "centers at." "Comply to" *becomes* "comply with." "Contrast to" *becomes* "contrast with." "Convicted for [or *in*] a crime" *becomes* "convicted of a crime." "Correspond with," as a comparison, *becomes* "correspond to." You "correspond with" when you write a letter to someone. "Desirous to" *becomes* "desirous of." "Dissent from this case" *becomes* "dissent in this case" or "dissent from the majority opinion." "Equivalent with" *becomes* "equivalent to" or "equivalent of." "Free of" *becomes* "free from." "Graduated law school" *becomes* "graduated from law school" or "was graduated from law school." "Identical to" *becomes* "identical with." "In accordance to" *becomes* "in accordance with." "Inadmissible for evidence" *becomes* "inadmissible into evidence" or "inadmissible for the purpose of impeachment." "In search for" *becomes* "in search of." "Insured from a loss" *becomes* "insured against loss" or "insurance on the property" or "insurance for the business." "Plead the Fifth Amendment" *becomes* "take [or invoke] the Fifth Amendment." "Prefer . . . over" *becomes* "prefer . . . to." "Relation with" *becomes* "relation to." "Relations to" *becomes* "relations with." "Released from a debt" or "released into custody" or "released by the court." "Stay for awhile" *becomes* "stay a while" or "stay for a while." "Ties with" *becomes* "ties to." "Warrant for eviction" *becomes* "warrant of eviction."

In the next issue, the Legal Writer will discuss the do's and don'ts of punctuation. ■

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"I've felt a lot better about my job since realizing that nothing that happens in court is my fault."

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: More frequently than ever, I find writers using the term "Ivory Towered" when it seems to me that they should be saying "Ivy Covered Tower." I believe that "Ivy Covered" describes absent-minded professors who are insulated from the real world, and the term became corrupted to "Ivory Covered Tower" with the same meaning. I know of many ivy-covered buildings in the old colleges of New England which once served as the habitat of absent-minded professors. I know of no ivory-covered towers. I look forward to reading your views.

Answer: My thanks to Syracuse attorney Milton J. Crystal for his interesting question. The two terms "Ivy-towered" and "Ivory-towered" are much alike, and "ivy-towered" does seem to more closely identify the college buildings in many states. But the noun phrase "Ivory-covered tower" is the source of the phrase "Ivory-towered." That phrase has a long heritage, biblical in origin. It was first recorded in the Song of Solomon (7,4) in the context: "Your neck is like an ivory tower." It's true that that does seem an unlikely origin for the current meaning of the phrase, so how did the current sense come about?

In its modern sense of an unworldly dreamer, the term first appeared in an early 19th-century French poem which contrasted the socially engaged author Victor Hugo with the less-worldly poet Alfred de Vigny. In England, the twin towers of All Souls College in Oxford University, its only purely research towers, epitomized the idea of academic purity and separation from worldly concerns and desires.

But over the years the term suffered pejoration because of the conflicting implications in the term "ivory-towered scientist." One is the image of a noble researcher, isolated from temptations of self-interest and corruption. The other is the image of an academic researcher so deeply involved in abstract studies that he or she has lost touch with the outside practical world.

The pejoration and amelioration of language are on-going processes in all living languages. One example of the process of amelioration is the word *nice*, which in Chaucer's time meant "silly." It came from the Latin combination of *ne* ("not") and *scire* ("to know"), and in Middle English, "unknowing" people were considered to be both ignorant and foolish. Through the centuries *nice* has improved so that now it is flattering to be considered nice (that is "polite, considerate, and generally pleasant"). Along with amelioration, *nice* has expanded in meaning, now applying to things ("a nice vacation") as well as to persons.

On the other hand, the word *silly* has taken the opposite route (downward) to reach its present pejorative meaning, "foolish." In Old English, *silly* (spelled *saelig)* meant "blessed" or "saintly," Jesus having been called "that harmless silly babe." The adjective *silly* also described holy men, who were both blessed and unworldly. But the "unworldly" characteristic of *silly* also implied that persons so described could easily be duped, and Shakespeare called his rustic characters, who were weak and defenseless, "silly." From there, *silly* took on its current meaning: "foolish, lacking good sense."

Besides improving or degrading in meaning, words can also narrow or broaden in scope. A New York editor wrote that her mother and her mother's friends use the word "doctoring," when discussing various ailments, to mean "Are you seeing a doctor about this problem?" The writer added that she has "doctored" many a pot of jarred tomato sauce with garlic and basil, but had never before heard the new meaning.

That new meaning does seem to indicate an expanded meaning for "doctoring," which traditionally meant "performing in the role of a doctor by applying remedies." The meaning of her mother's phrase seems to be "consulting a doctor." Since its origin in Middle English, the noun *doctor* had narrowed. In Middle English (1066 to 1400AD), any learned person was called "doctor." The noun originated in the Latin verb *doceo* ("teach"). All teachers were once called "doctor," and no "doctorate" was required for that title. So a word that originally had a broad meaning has narrowed and perhaps is beginning to expand once more.

Other words have followed that route. The verb *starve* originally had the broad meaning of "die" before it came to designate a narrower meaning of "to die of hunger." In the phrase "meat and drink," the word *meat* has its original meaning "food," but now means one kind of food. I have recently heard the noun *meat* used in an expanded sense in the context: "Just eat the meat of the orange, not its skin."

A conspicuous expansion of meaning is seen in the small adjective *hot*, which once referred only to temperature. Now it has a myriad of meanings: attractive, charged or energized with electricity, successful ("a hot item"), fresh ("hot off the press"), in trouble ("in hot water"), and others.

Its original opposite, *cool*, has also expanded, with added meanings having little to do with temperature. It can mean "composed," "indifferent," "full" ("a cool million"), and even "hot," in "That's a cool idea." When "cool" can mean "hot," you can understand why English is so hard for foreigners to learn.

My thanks to both correspondents for their interesting questions. ■

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BY GERALD LEBOVITS

Do's, Don'ts, and Maybes: Legal Writing Grammar — Part II

In the last column, the Legal Writer discussed 10 grammar issues. We continue with another 10.

11. The Run-on Sentence. A run-on sentence isn't a long sentence. A run-on sentence is formed when (1) a conjunctive adverb separates two independent clauses (clauses that could serve as separate sentences) and a semicolon or a period doesn't precede the adverb; (2) no punctuation separates two independent clauses; or (3) a comma splices two independent clauses.

Example 1 — the conjunctive adverb run-on: "Judge Doe wrote the opinion, however, he never read it to the litigants." In this example, "however" is the conjunctive adverb separating two independent clauses, or clauses that could be a full sentence. Examples of conjunctive adverbs are "accordingly," "again," "also," "anyway," "besides," "certainly," "consequently," "finally," "for example," "further," "furthermore," "hence," "however," "incidentally," "indeed," "instead," "likewise," "meanwhile," "moreover," "nevertheless," "next," "nonetheless," "on the other hand," "otherwise," "rather," "similarly," "still," "then," "thereafter," "therefore," "thus," and "undoubtedly." In Example 1, no semicolon or period precedes the conjunctive adverb "however." To fix this sentence, put a semicolon or a period after "opinion." Then put a comma after the conjunctive adverb. *Example 1 becomes:* "Judge Doe wrote the opinion; however, he never read it to the litigants." *Or:* "Judge Doe wrote the opinion. However, he never read it to the litigants."

Example 2 — the no-punctuation run-on: "It's cold in the courtroom I should put on a jacket." In this example, there's no punctuation between the two independent clauses. The first clause is "It's cold in the courtroom"; the second is "I should put on a jacket." To fix this run-on sentence, put a semicolon or a period between the independent clauses. If appropriate, include one of the conjunctive adverbs listed above. *Becomes:* "It's cold in the courtroom; I should put on a jacket." *Or*: "It's cold in the courtroom. I should put on a jacket." *Or:* "It's cold in the courtroom; thus, I should put on a jacket." *Or:* "It's cold in the courtroom. Thus, I should put on a jacket."

Example 3 — the comma-splice run-on: "It's cold in the courtroom, I should put on a jacket." In this example, a comma separates the independent clauses. Fix this run-on sentence the same way as in Example 2: Put a semicolon or a period between the independent clauses and include a conjunctive adverb.

It's not a run-on sentence to separate two independent clauses with a coordinating conjunction such as "and," "but," "or," "for," "nor," "so," or "yet." *Example:* "Lawyer X read the decision, but he didn't understand a word of it."

Exception: It's not a run-on sentence to use asyndetons: independent clauses not joined by conjunctions. *Example:* "I came, I saw, I conquered."

Run-on sentences are hard to read; therefore, never use them.

12. Articles. "A" and "an" are indefinite articles that refer to someone or something general. Use "a" and "an" to begin a noun phrase. *Example:* "A juror was disqualified for speaking with the press." Use "a" or "an" as a subject complement. *Example:* "The attorney is an intelligent man." "A" precedes a word that begins with the sound of a consonant, even if the word begins with a vowel, such as "eulogy." "An" precedes a word that begins with a vowel sound, even if the word begins with a consonant. Use "an" before a silent "h": "an heir." Use "a" before an aspirated, or pronounced, "h": "a historic occasion," "a history book." "The" is a definite article that refers to someone or something specific. "The" begins a noun phrase to refer to something already known to listeners or to assert the existence of something. *Examples:* "The courthouse is across the street." "The shortest attorney in New York County was the most successful attorney."

Use an article before a count noun: a noun that names something that can be counted. Don't use an article before a noncount noun or a mass noun: a noun that can't be counted. *Incorrect:* "My law clerk celebrated birthday yesterday." *Becomes:* "My law clerk celebrated *a* birthday yesterday." ("Birthday" is a count noun.) *Incorrect:* "The witness asked for glass of water." *Becomes:* "The witness asked for *a* glass of water." (Glasses can be counted.) *Incorrect:* "He showed a courage when he jumped into the lake to save the baby." *Becomes:* "He showed courage when he jumped into the lake to save the baby." ("Courage" is a mass noun. An article may not precede "courage," which can't be counted.)

13. Adverbs. Adverbs are words that modify a verb, an adjective, or

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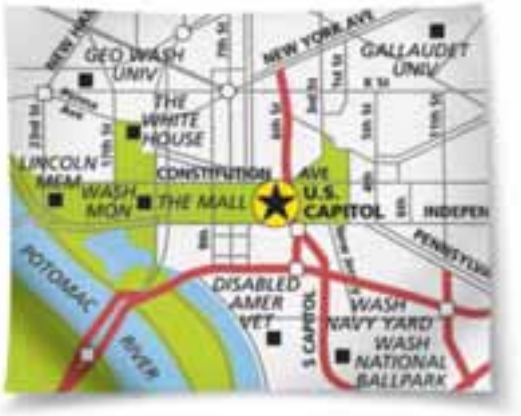

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