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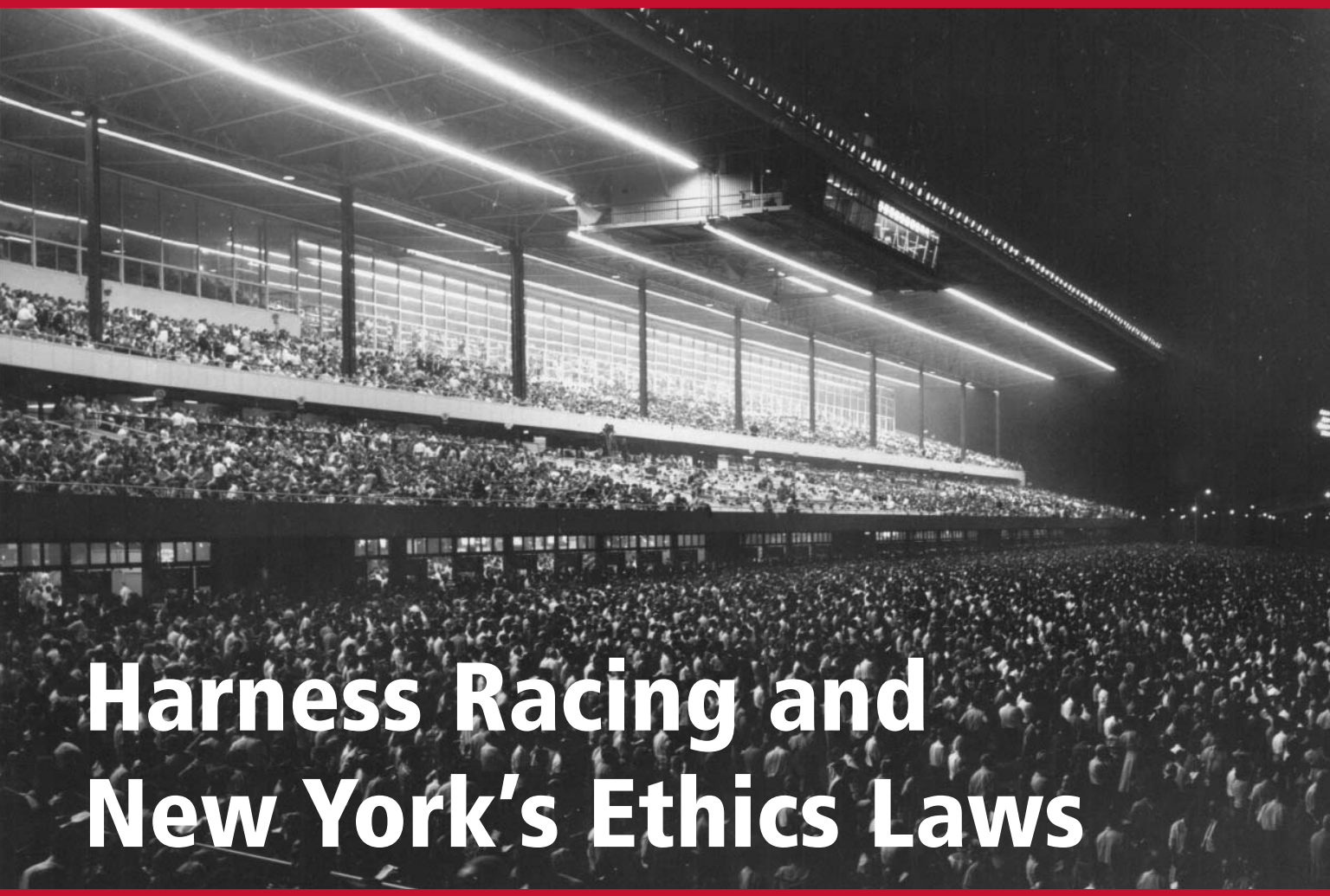
NEW YORK STATE BAR ASSOCIATION

Journal



Harness Racing and New York's Ethics Laws

How politicians' interest in the harness tracks gave New York its ethics laws.

by Bennett Liebman

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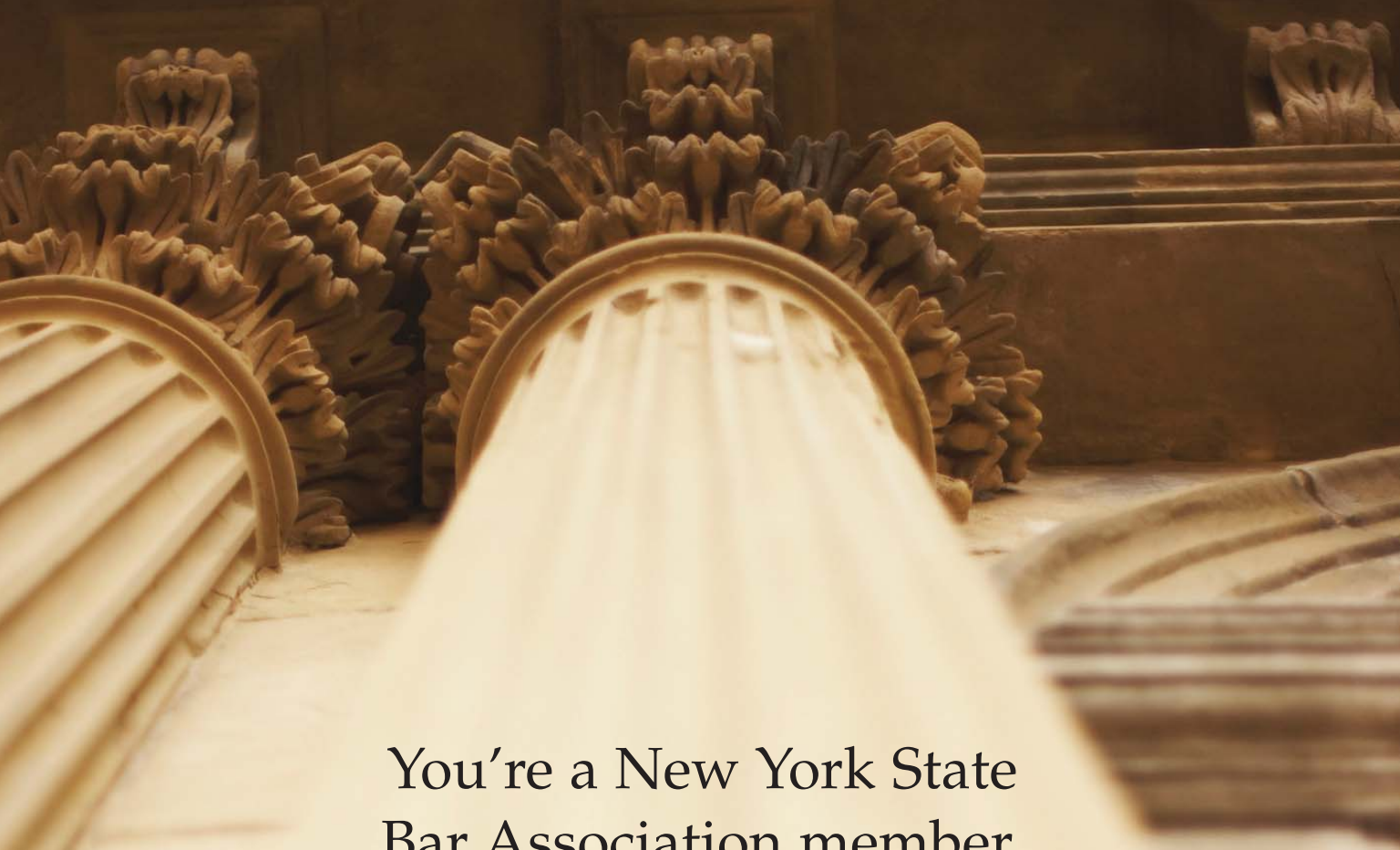

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Mark H. Alcott
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May 2007

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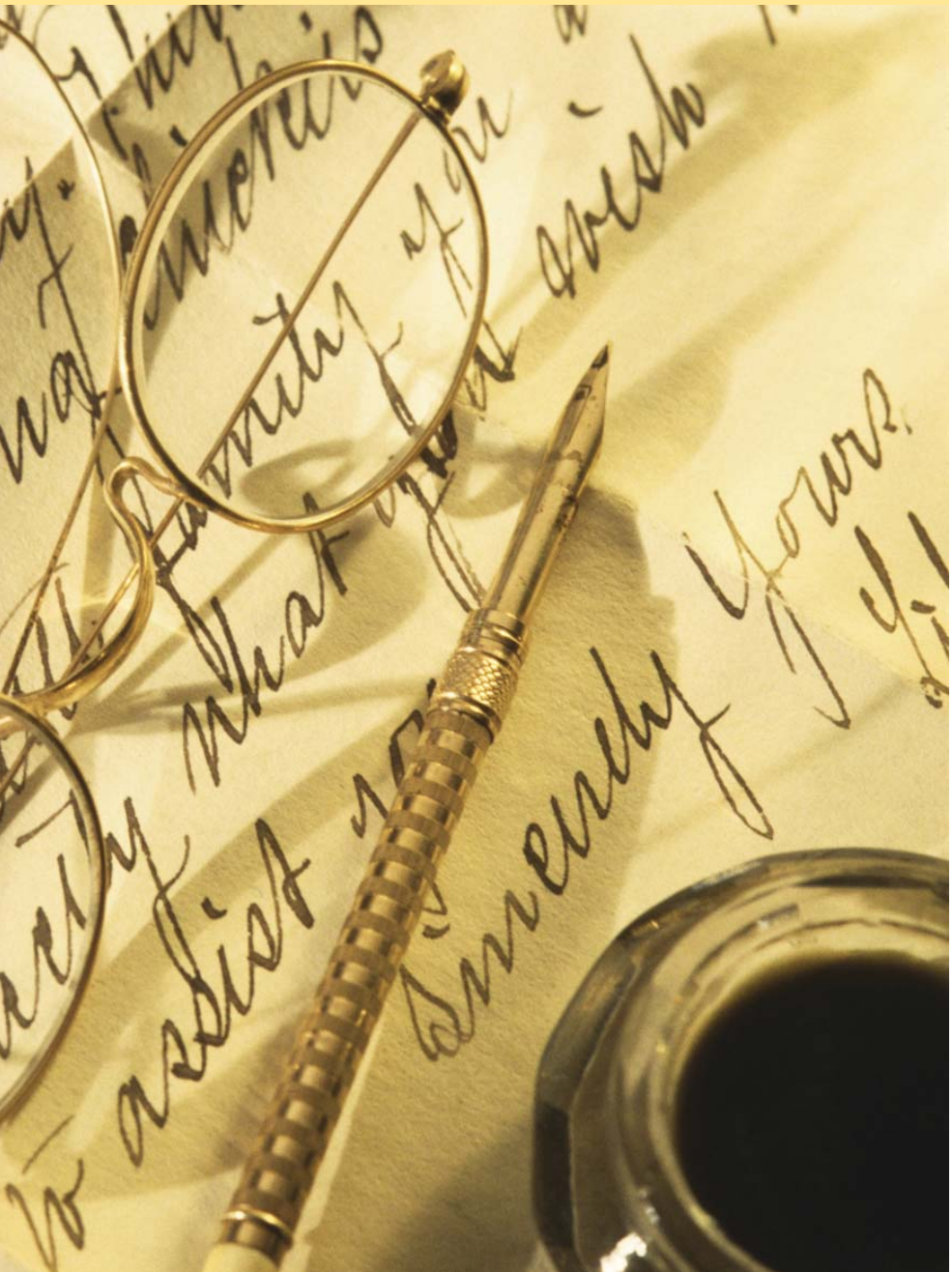

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HARNESS RACING AND NEW YORK'S ETHICS LAWS

BY BENNETT LIEBMAN

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Cover photo and photo on page 12 courtesy of the Harness Racing Museum & Hall of Fame, Goshen, NY, the Roosevelt Collection.

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2007 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

Closing Statement

Mark H. Alcott

When I took office, my predecessors imparted two pieces of wisdom:

- This will be the greatest experience of your professional life; and
- It will pass in the blink of an eye.

They were right on both accounts.

Forewarned with this advice, I knew there was only one way to conduct my presidential term: Seize the moment. In so doing, I have tried to pursue the role I assumed at the outset – voice of the profession; advocate for the public. And I have emphasized the themes I believe to be most compelling and urgent – promote major reform; strengthen and defend core values.

Reform

Much of my recent effort has focused on reform. This is an opportune moment to assume the mantle of the reformer. We have a new Governor, who has made "reform" his mantra. We have a new term for our great, long-time Chief Judge, who has achieved important reforms and keeps adding to her list.

So, change is in the air. But resistance to change remains strong. It will require vigorous effort to effectuate our more far-reaching agenda. I have been supplying the former, and I am optimistic that we will achieve the latter.

Let me focus on three of the major reforms which have engaged my recent attention, reforms which are important not only in themselves but also because they illustrate the imperative of continuity of policy, as presidents come and go.

The first reform is not my initiative. It is a long-standing policy of the Association, but the chance to pursue it arose on my watch, and I have seized that opportunity. I refer, of course, to merit selection of judges.

In the wake of the *Lopez-Torres* decision, we brought this policy to the fore and pressed it, despite the doubters and the "realists." As a result, without question, our Association has emerged as the leading advocate and spokesperson for merit selection. I have given countless speeches, written numerous articles, been interviewed repeatedly, and participated in many debates on this subject. Recently, for example, I advocated our position at a very well-attended forum conducted at the Monroe County Bar Association, and at a panel discussion at Cardozo Law School (in which I was counter to Judge Lopez-Torres herself). On March 13, accompanied by Pat Bucklin, Kate Madigan, and our legislative experts, I spent a full day at the Capitol, lobbying for our entire legislative agenda, including merit selection. We met with legislators, legislative staff and the Governor's office. We have developed a close relationship with the Governor's staff and have given them significant technical assistance and advice on reform issues.

It is true that the U.S. Supreme Court has now granted certiorari in *Lopez-Torres*, but that doesn't hurt our position. The major argument that the self-styled pragmatists have used against merit selection is that it will take too long to enact a constitutional amendment; accordingly, they say, a watered-down solution must be adopted immediately to deal with the "emergency" arising from the injunction issued in *Lopez-Torres*. Those arguments are now gone. A Supreme Court decision is at least a year away, and it is far from clear that the decision will be definitive; there could well be a remand. The difference between the time needed to enact a constitutional amendment and the time that will be

MARK H. ALCOTT can be reached at president@nysbar.com.

consumed by the *Lopez-Torres* case has narrowed considerably.

We will file an *amicus* brief in the Supreme Court, along with the New York City Bar and the Fund for Modern Courts, urging affirmance of the lower court ruling striking down New York's judicial convention system. But the decision in *Lopez-Torres*, whatever it is and whenever it finally comes, will not resolve the policy question facing New York. The Supreme Court will tell us what is constitutionally permissible; it will not tell us what is equitable or desirable. And so, our Association will continue to advocate for merit selection, buoyed by the knowledge that we have the strong support of the Governor, the outspoken support of the newspaper editorialists and, most important, the overwhelming support of our members. I believe we will see significant progress on merit selection before the year ends.

The second reform is one that I initiated at the outset of my term and that came to fruition at my final House of Delegates meeting as president: ending age discrimination against lawyers in the form of mandatory retirement policies.

When I raised this issue, no one was thinking about it, much less talking about it. Now, it has captured national attention. I have been flooded with media inquiries, and the initiative has been reported everywhere – from the *New York Times*, to the CBS Evening News, to National Public Radio, to the *New York Law Journal*. And coming soon – a report in the *AARP Bulletin*! At the invitation of the ABA, I lectured on this subject at the National Conference of Bar Presidents. I hear about it from supportive lawyers wherever I go.

Age is the last bastion of discrimination. Gray lawyers and judges are the last group against whom discrimination seems to be socially acceptable and legally permissible. Mandatory retirement has largely disappeared from – and indeed has been prohibited by law in – most sectors of the economy, but it remains deeply rooted in law firms. I appointed a Special Committee on Age Discrimination in the Profession, chaired by Mark Zauderer, to review this practice. The committee submitted a splendid, thoughtful report, calling mandatory, age-based retirement "an unacceptable practice" and recommending that law firms terminate it. The report was unanimously approved by the House of Delegates. It has started a dialogue within the profession, in which I plan to play a vocal role.

Likewise, state court judges are the only public officials who face mandatory, age-based retirement. All other officials, including federal judges, legislators, the president – even the person who carries the codes to our nuclear weapons – can remain on the job regardless of age. But New York's Court of Appeals judges and most lower court state judges, outside of the state Supreme Court, must step down at age 70. Supreme Court justices, on the other hand, may remain on the bench until age 76, if it is certified that they are capable of doing so and that there is a need for their continued service. I appointed a task force, chaired by Hon. Leo Milonas, to examine this issue. Based on its report, the House of Delegates voted to end this anomaly and to permit all state court judges to remain in office until age 76, subject to the same certification requirement.

I expect that these two initiatives will ultimately lead to major change.

The third reform is a new initiative of mine that will come to fruition not in my term, but in the term of my successor or my successor's successor. It could have a major impact on the way we practice law.

I have appointed a Special Committee to re-examine the issue of lawyer specialization. Currently, New York lawyers can't hold themselves out as specialists. They can't use the "S" word. But, as we know, many lawyers do, in fact, specialize. There is a strong impulse to inform clients and potential clients of this fact, and clients hunger for this information.

So we resort to euphemisms, such as: "My practice is limited to real estate matters," or "I concentrate on immigration work." Or, we invoke our affiliation with an outside group: "I am a member of the International Academy of Tax Lawyers," or "I am certified by the National Council of Probate Practitioners." But when we resort to these circumlocutions, we risk generating as much confusion as enlightenment. And when we refer to these affiliations, we have to issue a lengthy disclaimer that makes the affiliation meaningless.

In any case, why should we deny consumers vital information about our qualifications? Why should we give certifying authority to outside groups, who are not credentialed by, or subject to oversight from, the New York court system or legal profession?

It has been more than 20 years since our Association looked at the issue of specialization. It is time to look at it again. Last November, at my urging, the House of Delegates approved a major change to Rule 7.4 of the Proposed Rules of Professional Conduct. The Proposed Rule allows a lawyer to state that he or she is a specialist *if* the lawyer is "certified as a specialist by an organization that has been approved or accredited by the American Bar Association or the New York State Bar Association."

Of course, this new language must be approved by the Presiding Justices. But, even as they consider it, it's time for us to explore the issue in depth. To do so, I have appointed a Special Committee chaired by Anne Reynolds Copps and Gerald Paul. This is the start of a long process, and I look forward to the outcome.

I can't leave the issue of reform without mentioning the state's failure to approve a judicial salary increase or establish a mechanism for future salary adjustments during the recent budgetary process. That failure cast a dark shadow on the horizon of reform. Those who control New York's purse strings, who have the power to make or break New York's court system, turned their backs on New York's judiciary. In so doing, they turned their

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May 16 Rochester

2007 Insurance Coverage Update – Focus on First Party Coverage Issues
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May 16 New York City
May 18 Albany; Buffalo; Melville, LI

Trust Your Planning: A Comprehensive Review of Trust Planning and Drafting Techniques
Fulfills NY MCLE requirement for all attorneys (7.5): 0.5 of ethics and professionalism; 3.5 of skills; 3.5 professional practice
May 16 Albany; Tarrytown
May 23 Binghamton; Uniondale, LI
May 30 New York City; Rochester
May 31 Syracuse

Introduction to Health Law
Fulfills NY MLCE requirement for all attorneys (7.0): 7.0 of professional practice
May 17 Albany

Zealous Representation: Ethical Limits and Trial Techniques
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 of ethics and professionalism; 2.0 of skills
May 17 Melville, LI
May 18 New York City

Starting Your Own Practice – "A Practice of One's Own" Establishing Your Own Practice
Fulfills NY MCLE requirement for all attorneys (7.5): 3.0 of ethics and professionalism; 4.5 of practice management
May 17 Rochester
June 5 New York City
June 12 Melville, LI

Working Out and Litigating the Problem Loan
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 practice management and/or professional practice
May 18 Syracuse

Equitable Distribution and Maintenance: Cutting-Edge Trends and Drafting, Litigating and Settlement Solutions
(half-day program)
† *Fulfills NY MCLE requirement (4.5): 4.5 of skills, practice management and/or professional practice*
May 18 Rochester
June 8 Albany
June 15 New York City

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Labor Law and Corporate Restructuring
† *Fulfills NY MCLE requirement (6.0): 6.0 practice management and/or professional practice*
May 22 New York City

Ethics and Professionalism
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 of ethics and professionalism
May 22 Buffalo
June 5 New York City
June 8 Rochester
June 11 Melville, LI; Syracuse
June 14 Ithaca
June 15 Albany; Tarrytown

Basic Securities Law for the Business Practitioner
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 of ethics and professionalism; 6.5 of practice management and/or professional practice
May 24 New York City

Automobile Crashworthiness Litigation: A New Look at Auto Cases in a World Without Title-Owner Liability
Fulfills NY MCLE requirement for all attorneys (7.5): 7.5 of professional practice
June 1 New York City

Drafting Elder Law Documents – Old and New
† *Fulfills NY MCLE requirement (7.5): 7.5 of professional practice and/or practice management*
June 1 Albany; White Plains
June 6 New York City
June 8 Melville, LI
June 15 Rochester

Practical Skills Series – Collections and the Enforcement of Money Judgments
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 of ethics and professionalism; 1.5 of skills; 5.0 of practice management and/or professional practice
June 4 Albany; Hauppauge, LI; New York City; Syracuse; Westchester

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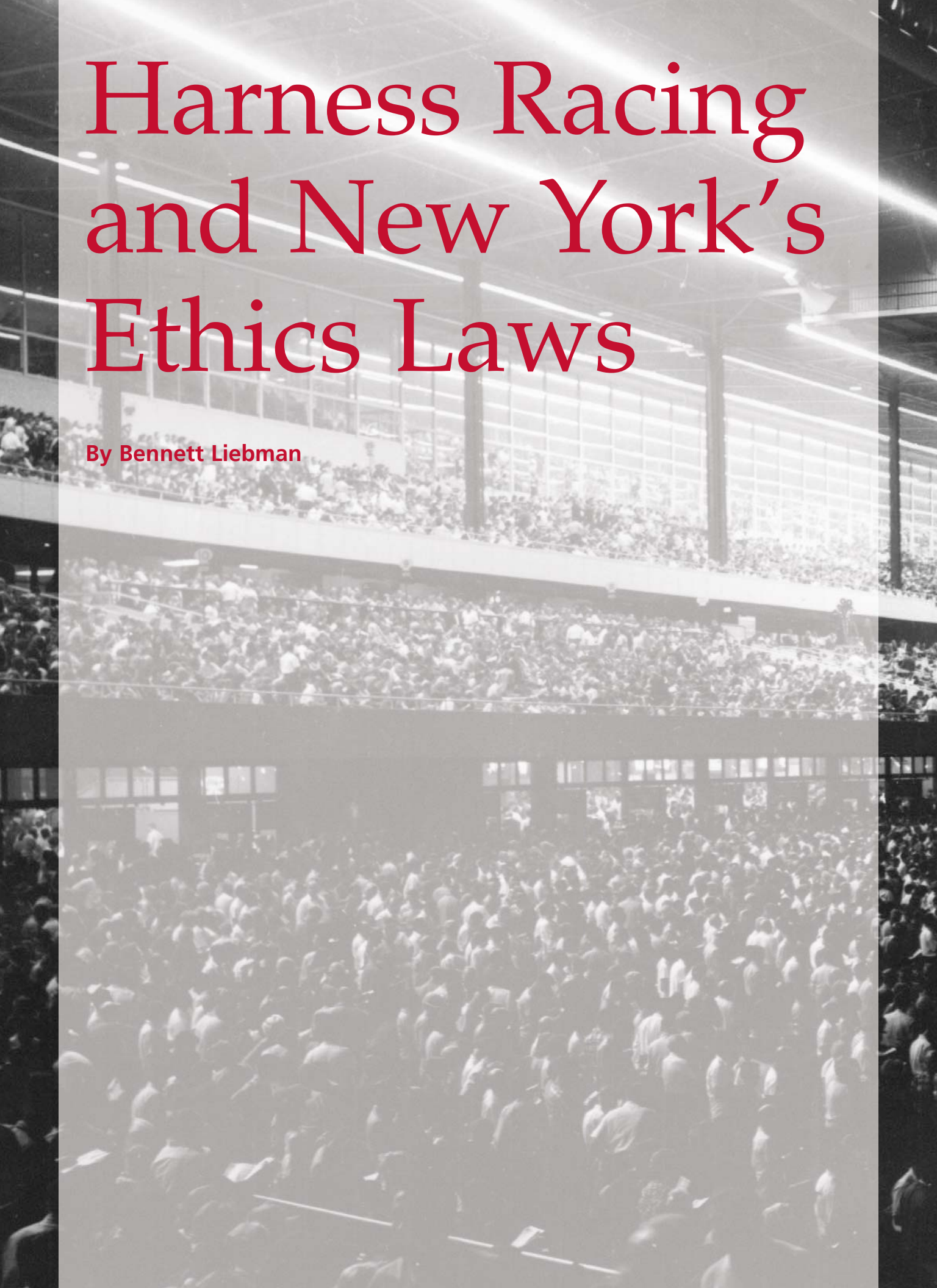
Harness Racing and New York's Ethics Laws

By Bennett Liebman



Bennett Liebman (blieb@albanylaw.edu) is Coordinator of the Racing and Gaming Law Program of the Government Law Center at Albany Law School.

We thank the Harness Racing Museum & Hall of Fame for providing the images for this article.

To the public officers and employees of New York State, the major contribution of the sport of harness racing does not come in the form of gambling, entertainment, or even tax revenues. Rather, harness racing is directly responsible for most of the provisions of the state's ethics laws, the main portions of which are the result of an unprecedented harness racing scandal that broke in 1953.

The scandal involved no race fixing, drug use, or any activity on-track. Instead, it involved the establishment, development, and the ownership of the various harness tracks around the state. Quite simply, the tracks became a money-making scheme for many of the state's most significant politicians in both the Republican and Democratic parties.

As the *New York Times* summarized, "Influential politicians acquired substantial blocks of stock in tracks and racing associations, generally just before an association received a license, or existing associations obtained extended racing dates. Public pressure to increase the state share of the betting revenue was ignored by the Legislature. Stock was obtained by the politicians at bargain prices. Shares were held secretly in the names of friends and relatives and sold at fabulous gains."[1] The scandal, for a time, introduced the term "tracketeer" to the English language.[2]

The Origins of the Scandal

The scandal "broke" in 1953, but years earlier it was obvious that something was amiss in the ownership of the harness tracks.

Commercial harness racing started in New York in 1940 after the passage of a constitutional amendment authorizing pari-mutuel racing in 1939 and enactment of enabling legislation in 1940. These were co-sponsored by John J. Dunnigan, who was the Democratic Minority Leader of the State Senate in the late 1930s.[3] Dunnigan, who has been termed the "father" of pari-mutuel racing in New York,[4] owned Buffalo Raceway, which started operations in 1942.[5] Initially, former Democratic State Senator Thomas Sheridan also held an interest in Buffalo,

but he relinquished his holdings, and the Dunnigan family acquired the entire interest.[6] Republican State Senator Walter Mahoney had a hand in the operation too – he had placed some of the insurance on the Buffalo facility and had been the counsel to the racetrack.[7]

Irwin Steingut, the Democratic Minority Leader of the Assembly at the time, also got in at the onset of harness racing. He held three-quarters of the ownership of Batavia Downs, which he had initially acquired through his attorney.[8] Steingut remained the Assembly Minority Leader until his death in 1952, a year before the harness scandals broke open.

In 1951, however, the federal Kefauver hearings[9] had revealed that the Old Country Trotting Association – which owned Roosevelt Raceway on Westbury, Long Island, and had run a harness meeting at Roosevelt since 1940 – had paid racketeer Frank Costello $60,000 over a four-year period, allegedly to keep bookmakers away from the harness track. In addition, the head of Old Country, George Morton Levy, admitted to playing golf with Costello, and the notorious mob bookmaker Frank Erickson, on about 100 occasions.[10]

The stakes were clear. Harness racing was the fastest-growing spectator sport by the early 1950s. Betting on harness racing in New York in 1952 was 132 times greater than it had been in 1940. New York track attendance was up 34 times over 1940's numbers.[11] Owning a New York harness track was akin to owning a casino in 2006. It seemed to be a virtual license to print money.

The Lewis Murder and Its Aftermath

What forced this situation in New York harness racing into the open was the gangland-style killing of Thomas Lewis on August 28, 1953. Lewis was a Bronx union official who allegedly controlled most of the more than 1,000 jobs at Yonkers Raceway, which was operated by Yonkers Trotting.[12]

Lewis's actual killer was soon caught, but the subsequent investigations showed a deeper problem: considerable mob and political influences at the harness tracks. Yonkers Trotting officials had paid large amounts of money (approximately $167,000) to "labor consultants" and union officials to preserve the peace.[13] The raceway employed a number of ex-convicts. There were charges that politicians were working with mobsters to insure continued operations of the harness tracks, and that there were large undisclosed interests. The State Harness Racing Commission, at the behest of Governor Dewey, indefinitely suspended the license of Yonkers Trotting.[14]

The investigation proceeded to Roosevelt Raceway in Nassau County. Nassau County union boss William De Koning was a longtime associate of convicted union boss and extortionist Joseph Fay, former vice-president of the International Operating Engineers Union.[15] In October 1953, De Koning and 12 others were charged with extorting money from employees of Roosevelt Raceway.[16] De Koning pled guilty on these charges in 1954.[17]

As the investigation into Lewis's murder and De Koning's activities proceeded, it also produced more and more contacts between political, harness racing, and mob influences. It turned out that Lewis was also involved with Joseph Fay. Fay was being held in the state penitentiary at Sing Sing, and a review of his penal records showed that he had received visits from Arthur Wicks, the State Senate Majority Leader and the acting Lieutenant Governor (Frank Moore, the elected lieutenant governor, had resigned on September 30, 1953); Senator William Condon of Yonkers; and William Bleakley, counsel to Yonkers Raceway, 1936 Republican candidate for governor, and the person who was generally considered the de facto head of the Republican Party in Westchester County.[18]

The outcry over Wicks's involvement with Fay forced Wicks to resign from office in November 1953.[19] His place as majority leader and acting lieutenant governor was taken by Walter Mahoney, who had to give up his position as a counsel to Buffalo Raceway and his ownership of the company that placed Buffalo Raceway's insurance business.[20]

Governor Thomas Dewey's political opponents called for a public accounting of the actual ownership of the harness tracks. Dewey appointed a special counsel to the State Harness Racing Commission to prepare questionnaires to determine actual ownership, but the Harness Racing Commission determined that it lacked the authority to pursue this investigation.[21] Governor Dewey quickly appointed a Moreland Act commission to investigate harness racing in New York.[22] Efforts by racetrack officials to block the probe of the Moreland Act Commission were ultimately unsuccessful.[23] And the commission, headed by former Court of Appeals judge Bruce Bromley, eventually held hearings, and issued reports on the actual ownership of the racetracks and recommendations on which racetracks were fit for licensure.

Governor Dewey's political opponents called for a public accounting of the actual ownership of the harness tracks.

The commission found that, besides the Buffalo interests of the Dunnigan family, there was considerable political control over the state's racetracks. Thirty-five percent of the harness track stock in 1953 was held by politicians: 19% by Republicans and 16% by Democrats.[24]

Growth of the Upstate Tracks

By 1953, Pat Provenzano was president of Batavia Downs, which was initially controlled by Assemblyman Steingut. Provenzano, a former Republican Assemblyman who had been active in passing the original pari-mutuel legislation, was also serving as Assistant Secretary to the State Senate and was a Republican County Committeeman from Monroe County.[25] He owned 41.5% of Batavia stock and a similar percentage of the corporation that owned the land on which Batavia was situated. Provenzano had obtained his interest in Batavia Downs by buying out William Weisman, who was Assemblyman Irwin Steingut's attorney.[26] Weisman had acquired most of the stock in Batavia Downs from funds he held for Steingut, on behalf of a deceased bookmaker named Max Kalik.[27] Provenzano got his interest in the track by taking out loans from a variety of individuals, some of whom were involved in gambling operations.[28] Provenzano had invested $5,000 and ended up with an interest valued at $415,000.[29] Half of the insurance coverage of Batavia Downs was handled through the insurance company of State Senator George Manning.[30] Provenzano left his Senate position in 1953 when the scandal broke.

Vernon Downs – which is between Utica and Syracuse – was first developed by a number of well-known Republicans. They started development of the track just after the Legislature authorized an eighth harness license in 1950, presumably for Vernon Downs.[31] The four most prominent politicians involved with Vernon Downs were State Senator Wicks; Congressman and Republican State Chairman Dean Taylor; former Congressman and former Republican State Chairman William Pfeiffer; and Alger Chapman, former president of the State Tax Commission, he had managed Governor Dewey's gubernatorial reelection campaigns in 1946 and 1950.[32] The four sold out their interests in 1952, before the track opened,[33] and there was no indication that they had profited from their dealings. Also involved initially – and maintaining their interests in the venture – were former Republican State Chairman Melvin Eaton and former Republican Assemblyman Elmer Kellam. In 1953, Eaton sold 5,000 shares and $10,000 worth of bonds to his brother and a friend. Kellam, who was a harness racing steward in 1952 and an associate judge at Yonkers Raceway in 1953,[34] owned 9,500 shares of Vernon. He placed his Vernon stock in the name of another person when he was appointed a harness racing official.[35] Former State Senate Majority Leader George Fearon was the vice-president and director of Vernon. He owned 10,000 shares and $20,0000 face value of debentures;[36] he had also purchased $2,000 worth of Old Country stock in 1950.[37]

Frank Wiswall, a former State Senator, was the president of Saratoga Raceway. In 1942, while serving as Secretary to the State Harness Racing Commission, he obtained 3,200 shares of stock in the track.[38] They were initially not registered in his name, and he did not pay for his stock, which was worth $250,000 in 1954. Wiswall testified that Senator Majority Leader Wicks and Speaker of the Assembly Oswald D. Heck had tried to influence him when he was with the Harness Racing Commission in the selection of track officials.[39] He claimed to have lost his job for failing to be responsive to these political requests.[40] In addition, the police chief of Saratoga Springs was on the payroll of the harness track. (The police chief of Batavia was similarly on the payroll of Batavia Downs.[41]) Ernest Morris, who had served as a Deputy Attorney General and as the district attorney for Albany County, also owned a piece of Saratoga Raceway – 3,990 shares.[42]

Growth of the Downstate Tracks

The downstate tracks were all interrelated. Old Country, which was the first track licensed in 1940, owned

Roosevelt Raceway. It also had voting control over Algam Corporation, which owned the Yonkers Raceway property. The Yonkers Trotting Association conducted racing at Yonkers as a tenant of Algam. Yonkers, Algam, and Old Country had an arrangement under which Old Country controlled the dates at Yonkers. Sixty percent of Yonkers' profits went to Algam. Additionally, Nassau Trotting conducted racing at Roosevelt Raceway as a tenant of Old Country. Old Country was largely controlled by attorney George Morton Levy, who had inaugurated legalized pari-mutuel harness racing at Roosevelt.[43]

Many other political figures were involved with the operation of Yonkers Trotting, Old Country, and Algam.

J. Russel Sprague, the Nassau County Republican leader and the Nassau County Executive from 1938–1953, owned 40% of Cedar Point (the predecessor of Nassau Trotting). Sprague had invested $2,000; 10 months after the purchase he sold his shares for $195,000. When Nassau Trotting was formed, Sprague received $1,000 worth of stock, which he paid for out of future dividends. This stock sold in 1953 for $64,000.[44] Another 8,000 shares of Nassau Trotting were owned by Irving T. Bergman, the son-in-law of Benjamin Feinberg, who was the chairman of the Public Service Commission and the former majority leader of the State Senate.[45] Bergman eventually testified that the stock, which was worth $100,000 in March of 1954, was also owned by the wife, son and daughter of Mr. Feinberg. Mr. Bergman did not put up any money to obtain the stock.[46]

In almost all ways, the sire of Yonkers Trotting was William Cane's Goshen Association. The Goshen Association moved from Goshen, New York in Orange County and started running at Roosevelt in 1948. When the association began racing at Roosevelt, Mr. Cane issued 25,000 shares of stock. He kept the voting stock for himself and sold 17,500 shares to former Republican Assemblyman Norman Penny at a price of 20 cents per share. Penny, who had been instrumental in passing the original pari-mutuel legislation, was closely associated with J. Russel Sprague and was also the insurance underwriter for three tracks.[47] Penny in turn sold 14,000 shares to (mostly) Republican politicians and friends, for 50 cents a share. These shares were worth $100 a piece in 1954. Pat Provenzano ended up with 3,000 shares in Yonkers Trotting (the successor to the Goshen Association). Irwin Steingut's daughter held 200 shares of Yonkers Trotting.

Yonkers Raceway was sited on the former Empire City Race Track, which, until 1942, was a thoroughbred track owned by the Butler family. The Algam Corporation wanted to develop Empire into a harness track eligible for licensure and bought out the Butler interest in 1949. Algam Corporation was organized by Tammany Hall politicians, in particular Arthur Lynch, who was the Deputy Treasurer during the New York City mayoral administration of William O'Dwyer, from 1946–1950.[48] Lynch's initial $12,000 investment paid him $400,000 in salary and stock holdings over seven years, including a $50,000 finder's fee.[49] Algam's management also included a number of garment manufacturers and fronts for racketeers, most notably one Irving Sherman, who was considered the contact man for Frank Costello during the course of the O'Dwyer administration.[50] Sherman allegedly invested $60,000 and received $336,000.[51] Algam hired Secretary of State (and Manhattan County Republican leader) Thomas Curran as its co-counsel for the purchase of the Empire property. Curran was paid $10,000 and his wife received 500 shares of Algam.[52]

In 1949, the Legislature passed a bill that prevented the transfer of a harness racing license to a location other than the one at which racing was currently being conducted.[53] Thus, the Goshen Association – with the same stockholders – re-formed itself and was licensed as the Yonkers Trotting Association. When Yonkers Trotting was formed, it signed an agreement with Old Country and Algam under which Old Country would control the dates of operation for Yonkers Trotting. The two track licensees established an interlocking directorate, and Old Country established voting control over Algam. In short, Old Country controlled the race track operator and the owner of the land at Yonkers.[54]

Many other political figures besides Pat Provenzano, Thomas Curran, Irwin Steingut, and Benjamin Feinberg were involved with the operation of Yonkers Trotting, Old Country, and Algam. For example, J. Russel Sprague held the largest block of non-voting stock in Yonkers Trotting: 4,000 shares, which he had bought on the installment plan for $20 per share. He used his subsequent accumulated dividends (that amounted to $88,000, from 1950 to 1953) to pay for the stock.[55] Mallory Stephens, the Republican leader of Putnam County, had a hidden ownership of 2,200 shares. He bought those shares for $45,000 in 1951; they were worth $220,000 in 1953. Stephens also had a hidden ownership of 4,500 shares of Nassau Trotting.[56]

Besides her 200 shares in Yonkers Trotting, Irwin Steingut's daughter owned 10,000 shares in Nassau Trotting.[57] William Bleakley, a director of Algam, owned 12,920 shares in that corporation.[58] The son-in-law of bookmaker Frank Erickson owned 1,600 shares in Old Country.[59] Irwin Steingut's former attorney, William Weisman, also owned a significant amount of Old

Country stock. John Crews, the Republican leader of Kings County, owned 400 shares of Yonkers Trotting for which he had paid $200 in 1946.[60] Frank Kenna, the Queens County Republican leader, also held 400 shares of Yonkers Trotting – in the name of another party.[61] Former Assemblyman Penny was not only the insurance underwriter for three harness racing associations, he was a track concessionaire as well.[62] Mr. Penny's father-in-law owned 500 shares of Yonkers Trotting.[63]

The wife of Nicholas Ratteni, a former associate of Frank Costello, owned $179,000 of Old Country stock.[64] Harry Stevens, the concessionaire at Old Country, improperly shared 10% of its revenue with Albert De Meo, an executive at Old Country, and William De Koning.[65] "Doc" Robins, the individual who held the program concession at Roosevelt Raceway, was directed by George Morton Levy to add specific additional partners, so Robins ended up with only 35% of the concession profits.[66]

George Morton Levy sat at the top of the downstate racetrack food chain. Not only did he control all the downstate licensees through his interest in Old Country, he and his associates were paid royally for their efforts. Besides his significant ownership interests in racetracks in New York and in other states,[67] Levy had received at least $3 million for legal work and in stock gains from the racetracks, since 1944.[68]

The Political Effects of the Scandal

Governor Dewey's future as a nationally important Republican figure was seriously threatened by the harness racing scandal. Many of his prominent political supporters were involved with the harness tracks, and the mess threatened his reputation as an effective government administrator.[69] As a result, he attacked this threat on two fronts. He supported general ethics legislation and major reform of the regulation of harness racing in New York. In his State of the State message in 1954, the governor called for legislation to raise the moral and ethical standards of government officers, employees and legislators.[70] The Legislature quickly voted to establish a joint committee to draft the ethics guidelines.[71]

Under the leadership of retired State Supreme Court Justice and former State Senator Charles Lockwood, the Special Legislative Committee on Integrity and Ethical Standards in Government was formed on January 14, 1954.[72] It held two hearings,[73] investigated the ethics issue, and issued a report with legislative recommendations on March 9, 1954. The Lockwood Committee had few precedents to guide it, however. The only significant investigation to report on ethics in government had been conducted by United States Senator Paul Douglas, in 1951.

As there were widely disparate views on ethics in government, the Committee took its cue from Governor Dewey's State of the State message and recommended a package of laws that would establish some specific activities that would clearly be illegal for government and party officers. Violation of these laws would be a criminal offense. Second, the Committee sought to develop the governor's suggested general code of ethics that would apply "under a variety of circumstances that it would be either foolish or unjust to attempt to establish a set of statutory rules."[74]

The Committee unanimously recommended four specific ethics bills. One bill made it a misdemeanor for public officials to commit certain specified actions. For example, former state officials were banned for two years from appearing before their former state agency on matters in which they were directly concerned. Similarly, party officers were banned from serving as judges and district attorneys. The second bill established a code of ethics for public officers and employees. The third required disclosure of appearances before regulatory agencies. And the fourth established an advisory committee on ethical standards in the department of law. The Committee also recommended a legislative resolution to establish committees in the Legislature to review ethics issues.

Two members of the committee – Richard H. Amberg, the publisher of the *Syracuse Post-Standard*, and Franklin

R. Brown, a former president of the State Bar Association – submitted a supplementary memorandum recommending greater penalties and more comprehensive legislation. Chairman Lockwood, however, would not include their recommendations in the Committee's full report.[75]

The Buffalo Evening News found that the ethics report "will do much to offset one of the most noisome scandals that has afflicted an administration in state history. . . . It's too bad it took a scandal to bring us this far – for if there had been such a code before there might have been no scandal."[76]

The four bills (as well as the resolution) were submitted to the Legislature on March 10, with the endorsement of all the leaders, and were passed by March 20. Governor Dewey signed the legislation as Chapters 695–698 on March 25.[77]

The one significant dissenting voice in the Legislature was Republican Senator Thomas Desmond of Newburgh. He believed that the proposed code did not go far enough and should have banned legislators from any appearances before state agencies.[78]

The Harness Racing Legislation

Early in 1954, Governor Dewy recommended a major reform in the harness racing laws:[79] disband the ineffectual three-member harness racing commission and hire a one-person harness racing commissioner. The legislation passed quickly,[80] and New York City Police Commissioner George Monaghan became the harness racing commissioner. Monaghan had been an assistant district attorney when Dewey was the New York County district attorney. In late February, the Moreland Act Commission, after consulting with the governor's office, issued additional recommendations for harness racing, including higher taxes for harness racetracks, significantly greater powers for the commissioner to bar people from racing, and a strict separation, blocking government employees and political leaders from involvement with harness tracks.

Governor Dewey issued two special messages to the Legislature, on March 12 and March 15, to pressure the Legislature to enact the Moreland Act Commission's recommendations.[81] Six bills were introduced in the last week of the session, and on the last day, all six bills were passed.

They were signed by Governor Dewey as Chapters 510–515. Chapters 510, 511, and 512 gave the harness racing commissioner added powers over stock transfers at harness tracks and over licensees. Chapter 513 increased the taxes paid by the tracks. Chapters 514–515 made it extremely difficult for political leaders and government employees to obtain licenses at harness tracks. As was later said, "It was the plain intent of the statute, among other things, to effect a complete divorcement between all public officials and all proprietors of race tracks."[82]

Aftermath of the 1954 Racing Legislation

Perhaps not surprisingly, the 1954 legislation has retained much of its significance. Much of its ethics language and harness racing language remain on the books.

The restrictions on public employees and party leaders from participating in racing have been modified slightly but are still the law today.[83] It remains difficult for many public officers and party officers to participate in racing. For example, Kings County Democratic leader Meade Esposito was removed from his party position for maintaining an interest in a racetrack.[84]

The added powers granted to the harness racing commissioner are all intact and belong now to the State Racing and Wagering Board.[85]

What have not remained are the higher taxes at the harness tracks. With decreasing attendance and handle at these tracks, the taxes have been reduced to such an extent that they are a tiny fraction of what they were in 1954.[86] Also gone is the single-member harness racing commission. Commissioner Monaghan was given a six-year term in 1954. In 1959, however, during the administration of Nelson Rockefeller, Monaghan was the subject of an unflattering report by the State Commission of Investigation.[87] Rockefeller was unsuccessful in asking Monaghan to resign from office. Instead, at Rockefeller's urgings,[88] the Legislature, in a special session in 1959, changed the harness racing commission back into a three-member commission, resulting in the de facto removal of Commissioner Monaghan.[89]

Aftermath of the 1954 Ethics Legislation

The ethics provisions enacted in 1954 have lost none of their vigor. For example, the regulatory appearance disclosure requirement[90] remains in § 166 of the Executive Law and has been strengthened over the years.

The advisory commission on ethical standards[91] has been terminated, and its place has been taken by the State Ethics Commission, established by the Ethics in Government Act of 1987.[92]

The criminal provisions for public officers established by 1954 N.Y. Laws Chapter 695 largely remain in § 73 of the Public Officers Law. As enacted in 1954, this provision: (a) banned public officers from obtaining contingent fees in appearances before state agencies, (b) required competitive bidding whenever a public officer sought to sell goods to a state agency, (c) banned political party officers from holding prosecutorial or judicial positions, and (d) created a "revolving door" provision under which a person leaving government could not appear before his or her former agency for two years on any "case, proceeding, or application" where the person had been directly concerned and personally participated.

The contingent fee language is the basis for current § 73.2 of the Public Officer Law. The competitive bidding language is the basis of current § 73.4, and the ban on

political party leaders holding prosecutorial or judicial positions is in § 73.9 of the law.

The "revolving door" provision was strengthened greatly by the 1987 Ethics in Government Act. The revolving door now bans most every appearance by a former officer or employee before his or her former agency within two years after the termination of employment. Yet, the language of current § 73.8 has proven almost impossible to decipher. Section 73.8 has been the basis of numerous advisory opinions,[93] considerable amendatory legislation[94] and several lawsuits.[95] Part of the inexorable uncertainty of the "revolving door" is due to the 1954 language applying to appearances by former officers and employees before their former agencies in "cases, proceedings, or applications."

Most significantly, the state code of ethics in § 74 of the Public Officer Law is largely intact since its inception in 1954. While minor changes were made after a legislative ethics scandal in 1964,[96] § 74 was not touched by the 1987 Ethics in Government Act. The basic language governing the overall ethical conduct of state employees is unchanged.

State employees, officers, employers, and the general public trying to make sense of the code of ethics, can only scratch their heads and blame harness racing for the conundrum of the state's ethics laws. ■

1. Emanuel Perlmutter, *Politicians and Raceways: Fortunes for Insiders*, N.Y. Times, Mar. 14, 1954.

2. *Note to Mr. Webster*, Albany Knickerbocker News, Feb. 8, 1954.

3. L. 1949, N.Y. Laws ch. 254.

4. *John J. Dunnigan Is Dead at 82*, N.Y. Times, Dec. 12, 1965, at 86; *Todd to Question Political Chiefs*, N.Y. Times, Nov. 17, 1944, at 14.

5. Senator Dunnigan's son James actually ran the racetrack, but for a number of years former Senator Dunnigan was on the Buffalo Raceway payroll. James Dunnigan employed his father from 1945–1955 paying him in excess of $182,000. Associated Press, *Borrowed to Buy Racing Stock: Senator's Son Tells Commission*, Rochester Democrat & Chronicle, Mar. 6, 1954.

6. New York (State) Commission to Study, Examine and Investigate State Agencies in Relation to Pari-Mutuel Harness Racing Hearings, Mar. 5, 1954, p. 1019 (hereinafter *Moreland Act Hearings*); Associated Press, *Commission Invites Balch to Testify if He Has Evidence*, Buffalo Evening News, Mar. 6, 1954; William Rudy, *Demands Trot Quiz Call Dewey to Stand*, N.Y. Post, Mar. 7, 1954.

7. Judith Crist, *Trosk Gets Track Union Probe Post*, N.Y. Herald Tribune, Nov. 7, 1953; Leo Egan, *Wicks Resigns Post as Senate Leader in Compromise Step*, N.Y. Times, Nov. 19, 1953, p. 1.

8. "Television and Radio Broadcast over State-Wide Network from New York City," 1954 Public Papers of Thomas E. Dewey 945, 946 (Oct. 15, 1954).

9. The formal name for the Kefauver Committee, which was named after Senator Estes Kefauver of Tennessee, was the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.

10. James A. Hagerty, *Costello's Power in Politics, Crime Shown at Hearing*, N.Y. Times, Mar. 13, 1951, p. 1; *The Bookie's Books*, Time, May 15, 1950; Virgil W.

Peterson, The Mob 261–62 (1983); New York State Crime Commission, Vol. 1, Public Hearing No. 4, N.Y. County, Nov. 13, 1952, Testimony of Frank Erickson at 199.

11. Charles Grutzner, *Upsurge of Harness Racing Spreads Scandals Over U.S.*, N.Y. Times, Oct. 25, 1953, p. 1.

12. Emanuel Perlmutter, *Lewis Knew Peril, Prosecutor Holds*, N.Y. Times, Sept. 2, 1953, p. 1; Emanuel Perlmutter, *Ex-Felon Is Queried on Murder in Bronx*, N.Y. Times, Aug. 30, 1953, p. 1.

13. *See supra* note 11; *see also Pacifiers of Labor Got $164,000 from Track*, N.Y. Times, Sept. 18, 1953, p. 1.

14. Warren Weaver, Jr., *Yonkers Raceway Closed by Dewey in Labor Scandal*, N.Y. Times, Sept. 23, 2006, p. 1; Douglas Dales, *Harness Racing: State's Profitable Problem*, N.Y. Times, Sept. 27, 1953, p. 172.

15. A.H. Raskin, *The Story of Joe Fay: Labor Rule from Jail*, N.Y. Times, Oct. 25, 1953.

16. Emanuel Perlmutter, *Moreland Inquiry of Harness Racing Started by Dewey*, N.Y. Times, Oct. 9, 1953, p. 1.

17. *De Koning Jailed in Labor Racket*, N.Y. Times, Apr. 10, 1954, p. 1.

18. Warren Weaver, Jr., *Wicks Paid Visits to Fay in Sing Sing*, N.Y. Times, Oct. 3, 1953, p. 1.

19. *See* Egan *supra* note 7; *see also* "Statement Concerning the Calling of the Legislature in Extraordinary Session to Consider Legislative Reapportionment and for the Senate to Act Upon the Resignation of Senator Arthur H. Wicks," 1953 Public Papers of Thomas E. Dewey 1116.

20. *See* Egan *supra* note 7.

21. "In the Matter of the Investigation of Harness Racing in New York State," 1953 Public Papers of Thomas E. Dewey 507.

22. "Order of Appointment of Bruce Bromley, John F. Brosnan, and George Trosk as Commissioners in New York State," 1953 Public Papers of Thomas E. Dewey 511.

23. *Alexander v. N.Y. State Comm'n to Investigate State Agencies in Relation to Pari-Mutuel Harness Racing*, 306 N.Y. 421, 118 N.E.2d 588 (1954); *Weil v. N.Y. State Comm'n*, 205 Misc. 614, 128 N.Y.S.2d 874 (Sup. Ct., Nassau Co.), *modified*, 283 App. Div. 808, 129 N.Y.S.2d 501 (2d Dep't 1954).

24. *35% of Track Stock Held by Politicians*, N.Y. Times, Mar. 14, 1954, p. 1.

25. *Moreland Act Hearings*, *supra* note 6, p. 908.

26. *Id.*, at p. 896.

27. *Id.*, at pp. 962–65. *See also* United Press, *Testifies J.J. Dunnigan Controlled Buffalo Oval*, Morning Telegraph, Mar. 6, 1954; William Rudy, *Bookie Set Up GOP Haul*, N.Y. Post, Mar. 5, 1954. Weisman's involvement with the Kalick estate had been disclosed previously by special prosecutor Hiram C. Todd in 1944. *See State Bar Starts Own Albany Study*, N.Y. Times, Dec. 12, 1944, p. 25; *see also Steingut v. Imrie*, 270 App. Div. 34, 58 N.Y.S.2d 775 (3d Dep't 1945).

28. Kermit Hill, *$327,500 Track Deals Revealed by Provenzano*, Rochester Democrat & Chronicle, Mar. 6, 1954; Jack Meddoff, *Dunnigan Says Family Drew $700,000 in Track Salaries*, Buffalo Evening News, Mar. 6, 1954; Jerome Edelberg & Harry Corren, *Track Exec Names Top Dewey Aides*, N.Y. Daily Mirror, Mar. 7, 1954.

29. *Track License Ready if Marra Is Ousted*, Batavia Daily News, Mar. 8, 1954.

30. Alexander Feinberg, *Bromley Promises Stern Race Inquiry*, N.Y. Times, Oct. 19, 1953, p. 1.

31. 1959 N.Y. Laws ch. 657.

32. James Desmond, *3 Dewey Favorite and Wicks Named as Trot Track Backers*, N.Y. Daily News, Mar. 7, 1954; Edelberg & Corren *supra* note 28.

33. *Moreland Act Hearings*, *supra* note 6, at p. 1124.

34. *Id.*, at p. 169.

35. Emanuel Perlmutter, *Hidden Ownership of Raceway Stock Bared at Hearing*, N.Y. Times, Mar. 2, 1954, p. 1.

36. *Moreland Act Hearings*, *supra* note 6, at p. 272.

37. *Id.*, at p. 273. Other politically connected early stockholders at Vernon Downs included the brother of Rensselaer County judge DeForest Pitt, Frank Costello, a former mayor of Syracuse, Louis Gross, a banker from Troy who had been associated with Dean Taylor, and William Kiley, the secretary at Vernon Downs, who had been a special deputy attorney general, the Madison County attorney, and who was active in the New York State Young Republican organization. *See* Judith Crist, *$6,000,00 Rise Asked in State's Raceway's Tax*, N.Y. World Telegram, Mar. 7, 1954; Russell Porter, *Raceway Inquiry Asks Rise of 33% in State's Share*, N.Y. Times, Mar. 7, 1954, p. 1.

38. United Press, *Fabulous Gains Reported by Harness Stockholder*, Morning Telegraph, Mar. 5, 1954.

39. *NTTA Prisoner of OCTA, Probers Told as Trot Group Bares Feud*, Newsday, Mar. 5, 1954; Jerome Edelberg & Harry Corren, *Crews Kenna Tied to Sweepstakes*, N.Y. Daily Mirror, Mar. 5, 1954.

40. Associated Press, *Sprague Wiswall Reveal Harness Race Holdings*, Albany Knickerbocker News, Mar. 5, 1954; *Dewey Is Silent on Trot Hearing*, N.Y. Times, Mar. 4, 1954, p. 22.

41. *See supra* note 30.

42. *Moreland Act Hearings*, *supra* note 6, at p. 363.

43. Levy had also been Governor Dewey's main courtroom opponent in the trial involving the prosecution brought by Dewey against infamous mobster Charles "Lucky" Luciano. *See People v. Luciano*, 275 N.Y. 547, 11 N.E.2d 747 (1937).

44. *See generally* Dick Aurelio, *Sprague Kin Hid $147G Stock: Levy*, Newsday, Mar. 4, 1954; Dick Aurelio, *Probe Trot Fortunes of Sprague, GOPers*, Newsday, Mar. 5, 1954; *Track Quiz Turns Next to Sprague*, Yonkers Herald Statesman, Mar. 4, 1954; James Desmond, *How Sprague Struck It Rich*, N.Y. Daily News, Mar. 2, 1954.

45. *See supra* note 30.

46. Emanuel Perlmutter, *G.O.P. Heads Admit Race Stock Deals with Big Profits*, N.Y. Times, Mar. 5, 1954, p. 1.

47. *See supra* note 38.

48. *Moreland Act Hearings*, *supra* note 6. *See* Testimony of Nathan Herzfeld and Arthur Lynch.

49. *Id.*, at p. 299.

50. Emanuel Perlmutter, *Hidden Ownership of Raceway Stock Bared at Hearing*, N.Y. Times, Mar. 2, 1954, p. 1. Sherman was also described as a "mysterious underworld contact man." Dick Aurelio, *Probe Sees Hidden Trot Stock Pattern*, Newsday, Mar. 2, 1954. In 1951, the Kefauver Committee had labeled Sherman as a "one-time intimate friend of William O'Dwyer at the time O'Dwyer was mayor of New York" and a "man of great mystery." Final Report of the Special Committee to Investigate Organized Crime in Interstate Commerce 62 (1951).

51. William Rudy, *Trot Probers Told How Mystery Man Parlayed $60,000 into $336,000*, N.Y. Post, Mar. 1, 1954.

52. Dick Aurelio, *Dewey Aide Got 10G in Trot Track*, Newsday, Mar. 3, 1954.

53. 1949 N.Y. Laws, ch. 661.

54. Emanuel Perlmutter, *Inquiry Asks End of Track 'Empire,'* N.Y. Times, Mar. 10, 1954, p. 1.

55. *See* Desmond, *supra* note 44; Perlmutter, *supra* note 46.

56. Emanuel Perlmutter, *Putnam GOP Chief Bares Ownership of Raceway Stock*, N.Y. Times, Mar. 6, 1954, p. 1.

57. *Id.*

58. Emanuel Perlmutter, *Bleakley Bows Out as Tracks Lawyer*, N.Y. Times, Nov. 15, 1953, p. 1.

59. *Moreland Act Hearings*, *supra* note 6, at p. 203.

60. *See supra* note 39.

61. *See* Associated Press *supra* note 40; *see also* N.Y. Daily Mirror, *supra* note 39.

62. *See supra* note 46.

63. Emanuel Perlmutter, *Curran Discloses He Got $10,000 Fee in Raceway Deal*, N.Y. Times, Mar. 3, 1954, p. 1.

64. *Costello Is Heard on Raceway Links*, N.Y. Times, Feb. 4, 1954, p. 26.

65. *Raceway Caterer Accused of Lying*, N.Y. Times, Mar. 19, 1954, p. 17.

66. Anthony Marino & Henry Lee, *Tells How Freeloaders Cut Raceway Program Pie*, N.Y. Daily News, Oct. 29, 1953; *Moreland Act Hearings*, *supra* note 6, p. 23.

67. *See supra* note 11.

68. *See supra* note 1.

69. For example, William L. Pfeiffer, the former head of the Republican Party, and one of the founding partners of Vernon Downs, had become a lobbyist for

the thoroughbred tracks. "Mr. Pfeiffer's rapid shift from high party office to lobbying was one of a series of incidents that prompted Governor Dewey to call this month for a code of ethics for politicians and public officers." Warren Weaver, Jr., *Dewey Bars Rise Asked by Tracks in Share of Bets*, N.Y. Times, Jan. 25, 1954, p. 1.

70. "Annual Message," 1954 Public Papers of Thomas E. Dewey 9.

71. "Statement Issued in Connection with the Appointment of the Special Committee on Integrity and Ethical Standards in Government," 1954 Public Papers of Thomas E. Dewey 576.

72. *Lockwood Named to Head Albany Ethics Committee*, N.Y. Times, Jan. 14, 1954, p. 14.

73. *See generally* Associated Press, *State Ethics Body Gets 3 More Plans*, N.Y. Times, Feb. 12, 1954, p. 11.

74. *See supra* note 70, at p. 11.

75. Associated Press, *Ethics Code Asked: Penalty Is Ignored in Recommendation*, Batavia Daily News, Mar. 10, 1954; Leo Egan, *Code of Ethics Goes to the Legislature*, N.Y. Times, Mar. 11, 1954, p. 1.

76. *Locking the Stable*, Buffalo Evening News, Mar. 10, 1954.

77. "Four Bills Establishing a Code of Ethical Standards Relating to the Conduct of Public Office," 1954 Public Papers of Thomas E. Dewey 304.

78. *Diluted Ethics Code Draws GOP Criticism*, Newsday, Mar. 11, 1954; *Straw Man Demolished by 'Purity' Committee*, Albany Knickerbocker News, Mar. 13, 1954.

79. *See supra* note 70, at p. 12.

80. 1954 N.Y. Laws ch. 5.

81. "Message Recommending Legislation for the Regulation of Harness Racing in New York State"; "Message Concerning the Ownership and Participation by Public and Party Officers in Racing Associations," 1954 Public Papers of Thomas E. Dewey 120, 124.

82. *Maguire v. Monaghan*, 206 Misc. 550, 556, 134 N.Y.S.2d 320 (Sup. Ct., N.Y. Co. 1954), *aff'd*, 285 App. Div. 926, 139 N.Y.S.2d 883 (1st Dep't 1955).

83. N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 107 ("Rac., Pari-Mut. Wag. & Breed. Law").

84. *See Abrams v. Esposito*, 75 A.D.2d 528, 426 N.Y.S.2d 770 (1st Dep't 1980), *aff'd*, 54 N.Y. 2d 886, 444 N.Y.S.2d 918 (1981), *appeal dismissed sub nom. Esposito v. Abrams*, 455 U.S. 996 (1982).

85. *See, e.g.*, Rac., Pari-Mut. Wag. & Breed. §§ 303, 307.

86. *See* Rac., Pari-Mut. Wag. & Breed. § 318.

87. Temporary State Commission of Investigation, "Report of an Investigation into the conduct in office of New York State Harness Racing Commissioner George P. Monaghan, and certain members of the staff of the Harness Racing Commission and certain aspects of the administration of that office," 1959; Richard J.H. Johnston, *Monaghan Bolts Track Hearings, Café Tabs Listed*, N.Y. Times, May 29, 1959, p. 1.

88. "Extraordinary Session – Convened and Adjourned on July 1 Message Outlining Items to Be Considered at the Special Session," 1959 Public Papers of Nelson A. Rockefeller 141.

89. 1959 N.Y. Laws ch. 881; *The Special Session*, N.Y. Times, July 1, 1959, p. 30; Leo Egan, *Rockefeller Seeks Farley for Post*, N.Y. Times, July 29, 1959, p. 16.

90. 1954 N.Y. Laws ch. 697.

91. 1954 N.Y. Laws ch. 698. A "law growing out of the harness race inquiry authorized the Attorney General to establish an 'advisory committee on ethical standards' and gave this committee broad investigative powers." Leo Egan, *Harriman and Javits Set to Go Along at Albany*, N.Y. Times, Nov. 14, 1954, p. E5.

92. 1987 N.Y. Laws ch. 813.

93. *See* <http://www.dos.state.ny.us/ethc/opinions.html>.

94. 2004 N.Y. Laws chs. 523, 540; 2002 N.Y. Laws ch. 514; 2001 N.Y. Laws ch. 357; 1998 N.Y. Laws ch. 218; 1995 N.Y. Laws ch. 299.

95. *See, e.g.*, *Forti v. N.Y. State Ethics Comm'n*, 75 N.Y.2d 596, 555 N.Y.S.2d 235 (N.Y. 1990); *McCulloch v. State Ethics Comm'n*, 285 A.D.2d 236, 728 N.Y.S.2d 850 (3d Dep't 2001); *Kelly v. N.Y. State Ethics Comm'n*, 161 Misc. 2d 706, 614 N.Y.S.2d 996 (Sup. Ct., Albany Co. 1994).

96. *See* 1965 N.Y. Laws ch. 1012; 1964 N.Y. Laws ch. 941.

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No Interview for You!

For several years there has been a split among trial courts over whether a judge in a medical malpractice case may require the plaintiff to furnish a Health Insurance Portability and Accountability Act (HIPAA) compliant authorization permitting defense counsel to conduct a post-note of issue interview with one or more of the plaintiff's treating physicians, so long as the physician consents. The plaintiffs' and defendants' bars have been anticipating an appellate decision, and the Second Department is first out of the gate, deciding *Arons v. Jutkowitz*[1] on December 6, 2006.

In *Arons*, the trial court ordered the exchange of HIPAA-compliant authorizations, permitting the defendant to conduct post-note interviews with the plaintiff's treating physicians, and the plaintiff appealed. To paraphrase the [in]famous soup purveyor from "Seinfeld," the Second Department has told defense counsel: "No interview for you."[2]

Normally, counsel may interview non-party witnesses at any time, both before an action is commenced and up through and during the time of trial. The Court of Appeals has acknowledged the value of informal interviews: "'A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion – frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product.'"[3]

Care must be exercised in interviewing certain individuals who, while not named parties themselves, have a relationship with a named party that makes extra-judicial contact with them improper. This most often occurs where a corporation is a named party, and opposing counsel wants to interview an employee of the corporation. Eschewing a bright-line test, the Court of Appeals declared in *Niesig v. Team I*, that individuals "who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation," may not be contacted.[4] Other employees, however, are fair game.

A treating physician, while a non-party, is prevented by the physician-patient privilege from divulging medical information about a patient. The physician-patient privilege, codified in CPLR 4504(a),[5] bars the physician from furnishing protected information absent a duly executed authorization from the patient or the patient's legal representative. HIPAA is a separate, and independent, restriction on the exchange of a patient's medical information.[6] The physician-patient privilege belongs to the patient, and must be waived by the patient.

Of course, by commencing a medical malpractice action, the plaintiff is deemed to have waived the medical privilege as it relates to the injuries and/or conditions claimed in the lawsuit.[7] Thus, defense counsel may request, and the plaintiff must furnish, authorizations permitting the release of the plaintiff's medical records insofar as they relate to the injuries and/or conditions claimed in the lawsuit.

The passage of HIPAA in 1996, and several statutory modifications since that time, precipitated a long period of unease for both medical providers and lawyers. By imposing federal restrictions upon the exchange of medical records, and imposing serious penalties for non-compliance, the routine exchange of medical records became, for a brief time, a significant area of contention, and what had previously been routine exchanges of records nearly ground to a halt. However, with input from the bench, bar, and medical providers, the Office of Court Administration promulgated an "official" HIPAA-compliant authorization that was designed to, and did, acquire state-wide acceptance. And all was well in the world.

However, the routine practice of defense counsel, primarily in medical malpractice cases, to demand that plaintiffs' attorneys furnish HIPAA-compliant authorizations permitting post-note of issue interviews with the plaintiff's treating physicians, engendered much motion practice. While defense counsel had conducted post-note of issue interviews prior to HIPAA's effective date, a specific, HIPAA-compliant authorization from the plaintiff would now be required, necessitating a demand for authorizations, and generating the predictable motion practice. Perhaps just as predictably, trial-level courts throughout the state rendered decisions that ran

the gamut from outright prohibition to unfettered access. The pre-*Arons* split among trial courts, reported in the September 2005 *Burden of Proof* column, "HIPAA . . . Help!," created what the *Arons* court called an "unsettled" area of law. Thus, the state of the world before *Arons*.

The *Arons* court first recited a brief history of treating physician interviews, commencing with its 1979 decision in *Anker v. Brodnitz*.[8] In *Anker*, the Second Department affirmed a trial court holding that a pre-note of issue interview of the plaintiff's treating physician was not permitted. Thereafter, in the late '80s, the Second Department issued two decisions concerning post-note of issue interviews. While the *Arons* decision glosses over the second decision, it plainly distinguished pre- and post-note of issue interviews, barring the former while appearing to permit the latter.

The first case, *Zimmerman v. Jamaica Hospital, Inc.*,[9] simply held that a treating physician's testimony should not be precluded at trial solely on the grounds that defense counsel had conducted a post-note of issue interview with the physician. The second case, *Levande v. Dines*,[10] decided a year after *Zimmerman*, goes further, suggesting that post-note of issue interviews are different from pre-note of issue interviews:

> [T]he rationale for this rule [barring pre-note of issue interviews] is the sanctity of the physician-patient privilege during discovery. We find that the trial court's reliance on the *Anker* case was misplaced. The record contains no indication that the defendant conducted such prohibited interviews. The defendant first contacted Dr. Moccio after the note of issue had been filed, when the discovery phase of the action clearly had been completed.[11]

The Second Department's protestations notwithstanding, *Levande* can be read to imply that the rule barring pre-note of issue interviews did not apply post-note.

The *Arons* court started from the proposition that there had been a par-

The federal government's enactment of HIPAA does not alter this precedent despite the obstacles it now imposes.

tial waiver of the plaintiff's physician-patient privilege "with respect to those physical or mental conditions which [the plaintiff] affirmatively places in issue in the lawsuit."[12] Accordingly, this otherwise protected information was fair game for the defendant to discover. "In order to obtain this information, a defendant may therefore resort to the discovery devices provided by CPLR article 31 and the Uniform Rules for the New York State Trial Courts (hereinafter Uniform Rules)."[13]

> Notably, however, neither CPLR article 31 nor the Uniform Rules include a provision authorizing defense counsel to meet privately with a plaintiff's treating physician. Moreover, unlike the production of medical reports and hospital records, there is no statutory or regulatory authority which requires a plaintiff to execute authorizations permitting such ex parte interviews between their treating physicians and defense counsel. In the absence of such authority, or the plaintiff's consent, it has long been the rule that defense counsel are prohibited from conducting such private interviews during discovery. These limits on disclosure are imposed "not because of the physician-patient privilege, which is generally waived by bringing a malpractice action, but by the very design of the specific disclosure devices available in CPLR article 31."[14]

After reviewing *Anker*, *Zimmerman*, and *Levande*, the Second Department stated:

> However, we did not declare that defense counsel have a right to such informal, post-note of issue interviews, nor did we require plaintiffs to consent to them. Rather, we merely held, under the circumstances, that the treating physician's unique and highly relevant testimony would not be precluded. "This is in keeping with the general rule that no party has a proprietary interest in any evidence, and that absent unfair prejudice each party has the right to marshall, and the jury has the right to hear, the testimony that best supports each position." The federal government's enactment of HIPAA does not alter this precedent despite the practical obstacles it now imposes for defense counsel who seek such private interviews.[15]

After a brief digression to review the origin and potential impact of HIPAA, the Second Department returned to the discussion of post-note of issue interviews and, after surveying a number of trial court decisions, concluded:

> While courts are empowered to supervise disclosure, they must do so in accordance with the Uniform Rules and the provisions of CPLR article 31 which, as previously noted, do not authorize private, ex parte interviews as a disclosure device. Rather, compulsion of such unsupervised, private and unrecorded interviews plainly exceeds the ambit of article 31.
>
> Indeed, after the filing of a note of issue, a court's authority to allow additional pretrial disclosure is limited to a party's demonstration of "unusual or unanticipated circumstances." In the absence of additional statutory authority, the "courts should not become involved in post-note of issue trial preparation matters and should not dictate to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted."[16]

So, until such time as another appellate division weighs in on this issue, defense counsel wishing to discuss a plaintiff's medical treatment with a treating physician must do so within the confines of a non-party deposition. And all is well with the world, again. ■

1. 825 N.Y.S.2d 738 (2d Dep't 2006).

2. Of course, nothing in the decision prevents the voluntary exchange of such an authorization by plaintiff's counsel, subject to whatever terms and conditions the parties arrange as a condition for furnishing the authorization.

3. *Niesig v. Team I*, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493 (1990) (quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 520 F.2d 37, 41 (2d Cir. 1975)).

4. *Id.* at 374.

5. CPLR 4504. Physician, dentist, podiatrist, chiropractor and nurse.

> (a) **Confidential information privileged.** Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

6. HIPAA was the subject of the September, 2005 *Burden of Proof* column "HIPAA . . . Help!"

7. It is important to remember that the waiver of the physician-patient privilege in any personal injury suit, including a medical malpractice action, is limited. *See, e.g., Gill v. Mancino*, 8 A.D.3d 340, 777 N.Y.S.2d 712 (2d Dep't 2004).

8. 73 A.D.2d 589, 422 N.Y.S.2d 887 (2d Dep't 1979).

9. 143 A.D.2d 86, 531 N.Y.S.2d 337 (2d Dep't 1988).

10. 153 A.D.2d 671, 544 N.Y.S.2d 864 (2d Dep't 1989).

11. *Id.* at 672 (citations omitted). *See Zimmerman*, 143 A.D.2d 86.

12. 825 N.Y.S.2d at 740.

13. *Id.* (citation omitted).

14. *Id.* (citations omitted).

15. *Id.* at 741 (citations omitted). *See Levande*, 153 A.D.2d 671; *Zimmerman*, 143 A.D.2d 86.

16. *Id.* at 743 (citations omitted). *See* CPLR 3104; 22 N.Y.C.R.R. § 202.21(d); *see generally* CPLR 3102(a).

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A Brief Introduction to Florida Tort Law for New York Attorneys

By Michael B. Kirschner and Charles B. Draper

Why, you might ask, would a New York lawyer be interested in knowing anything about Florida tort law? The simple answer is that there's a good chance that someday one of your clients will call you about an accident he or she had while on vacation, on a business trip or at a convention in Florida. Because Florida is a major tourist attraction for those still living "up north" or a winter home for those we call "snowbirds" or the home of retired family members, it is not uncommon that some of your clients might be involved in motor vehicle accidents, theme park injuries, hotel and restaurant falls or just about any other kind of injury claim attorneys encounter in their practice. Further, some cruise ships docking in Florida require claims to be brought here.

This article highlights basic principles of Florida tort law that impact those accident cases so you, the out-of-state practitioner, will know the fundamentals of Florida practice and procedure in order to assist your client, and perhaps even handle the claim to a successful conclusion. As we who have practiced in other states now know, sometimes there are major differences between jurisdictions and how accident claims are handled. Unfortunately, not all situations can be covered in this article and generalizations are necessary. Detailed research, consultations and referrals may well be needed. We hope that this brief analysis will offer some guidance and useful information. And remember that Florida is a big state, so if you decide to seek consultation or a referral, choose legal help from the area where the accident occurred.

Statutes of Limitation

Statutes of limitation may well be the most important thing to know. We receive calls every year from out-of-state attorneys in a panic because they think they are nearly out of time to do *something* with a cousin's injury claim. It seems that she had a slip and fall or car crash two years earlier near Disney World and the exchange of letters with the insurer did not get any results. "How do I file a suit there *today*?" is the urgent question.

Good news. Florida's statute of limitations for most actions founded on negligence is four years.[1] In general, the time runs from the date of injury. That would include motor vehicle accidents, slip and falls, animal bites, and other general negligence claims. The four-year period also applies to property damage, most intentional torts such as assault and battery, false arrest, malicious prosecution, and most product liability claims.

Be advised, however, that professional malpractice claims are governed by a two-year statute of limitations.[2] *Professional malpractice* means negligence by a recognized "professional," usually someone with a license and at least a four-year degree. While all malpractice is subject to the two-year limitation, which runs from the date the injury is or should have been discovered, *medical malpractice* also has a four-year statute of repose which bars even a claim yet undiscovered.[3] Two years is the limitation for a wrongful death claim.[4]

Actions founded on an oral contract carry the four-year period,[5] while those founded on a written contract have a five-year limit.[6] This can have significance for injury claims if there is an insurance policy issue such as uninsured motorist coverage or medical benefits, although the law of the state where the contract was made may apply.

While some jurisdictions may toll the statute of limitations for minors and others, Florida does not do so, although there are some exceptions. If a minor has a parent or guardian who could have filed suit for the child, the basic limitation applies.[7] If the injured party dies from unrelated causes, up to one year from the date of death may be added to the applicable period.[8] If the accident causes the death, the deceased's claim is extinguished and becomes a wrongful death case (discussed below).

The time period is met by the *filing* (not the service) of a complaint.[9] The deadline is typically the anniversary date of the injury since the day of the injury is not counted and the last day is; for example, where an auto accident occurs on June 1, 2002, the statute runs on June 1, 2006.[10] If the last day is a Saturday, Sunday or legal holiday, the time runs on the next business day.[11] The date stamp affixed by the clerk will determine timeliness.[12]

One more caveat: cruise lines can set their own period of limitation as set forth in the ticket document, often only one year.[13] The ticket also may require suit in Florida, but only with respect to cruises from here.[14]

This summary provides a frame of reference for this very crucial requirement of Florida law. Just remember that this brief analysis is not meant to be exhaustive; there are exceptions, and each case must be examined on its own facts.

Courts, Jurisdiction and Venue

You'll probably need to know a little about the Florida court system if you are to inform your client about the way suits are handled. After all, your client will want to know what you will sue for and where he or she will need to go if and when it comes time to appear in court.

The primary trial court in Florida is called the circuit court. These exist in every county, although some circuits include more than one county. This court has general jurisdiction over all cases having a value in excess of $15,000, exclusive of interest, costs and attorney fees.[15] Almost all personal injury claims are filed in the circuit court. The county court, again one in every county, has jurisdiction over all cases having a value not in excess of $15,000.[16] Because Florida's No-Fault law provides $10,000 in medical benefits, actions to recover such personal injury protection (PIP) payments are filed in the county court. Jury trials are freely available in both the circuit and county courts.[17]

The county of venue is determined in most cases by either the place where the accident occurred or the place where the defendant resides, and the choice is up to the plaintiff.[18] Corporate defendants may be sued where they have places of business.[19] Governmental bodies must be sued in their home county and that usually supersedes the venue for any other defendants.[20] The subject of venue becomes complicated where there are multiple defendants, individuals and corporations, foreign and domestic entities, and the factual specifics must be analyzed.

Motor Vehicle Matters

The odds are good that your client's claim may arise out of a motor vehicle collision. Like most states, Florida has an abundance of auto accidents. Unlike most states, we have some peculiar rules.

The Dangerous Instrumentality Doctrine and Car Rentals

For most lawyers, this concept may be as remote as the Rule Against Perpetuities, but the Dangerous Instrumentality Doctrine governs motor vehicle accident cases in Florida. In essence, a motor vehicle is considered dangerous and the owner is vicariously liable for damage done by anyone he entrusts with control of the vehicle; the driver need not be on an errand for the owner.[21] Hence, both driver and owner are defendants in the case. This could affect jurisdiction and venue, but the primary practical effect is to render a car rental company liable for the negligence of its customer.

From this vicarious liability of the rental car company comes some unusual legal principles. By statute, if the rental contract properly states in bold type, and nearly all now comply, the auto policy of the renter is the primary coverage with that of the rental company being excess.[22] All this makes for deeper pockets in rental car accidents. In 1999, however, Florida provided rental car companies with a $100,000 cap on their vicarious liability, as long as the renter has adequate ($500,000!) insurance; if not, up to $500,000 liability for economic damages may be added.[23]

Unfortunately, your client may be on the wrong end of this law if he or she was the renter of a vehicle. Therefore, your client may need to know that his or her insurance will probably be primary if your client causes an accident while driving the kids to Sea World. And your client could actually be liable to the rental company

if the company has to pay more than the client's insurance covers.[24]

No-Fault/Personal Injury Protection

Florida is a "no-fault" state. Vehicles are required to carry personal injury protection and property damage liability insurance;[25] curiously, liability insurance for bodily injury is not compulsory in the Sunshine State and a good number of drivers are either uninsured or woefully underinsured. More about that situation below.

The standard PIP policy in Florida provides medical and wage loss benefits for injuries arising out of ownership or use of a motor vehicle.[26] The limit is $10,000. Benefits may have a deductible and pay only 80% of medical bills and 60% of wages. The death benefit is $5,000.

The statutory phrase "arising out of the ownership, maintenance, or use of a motor vehicle" has led to some interesting interpretations. First, a "motor vehicle" does not include a motorcycle, a public bus or mass transit, so no PIP applies to occupants of those vehicles.[27] Second, taxis and limousines are not required to carry no-fault coverage and PIP is only available if the injured party has it himself.[28] Third, "arising out of" does not require a typical car crash; it can include falls while alighting from the car or other injuries resulting from the use or maintenance of a covered vehicle, even, in some cases, where the driver is attacked while changing a flat tire.[29]

If your out-of-state client is driving his own car, most likely his own auto insurance will govern his rights and claims and he will seek such benefits as his own policy may provide. On the other hand, your client may have been a passenger in his retired Dad's car and could thus be entitled to Florida PIP benefits if he has none of his own.[30]

The second half of Florida's no-fault law is called the "tort exemption." This means that a person involved in a motor vehicle accident is exempt from tort liability if his vehicle has the required Florida minimum insurance, including no-fault coverage[31] – that is, exempt unless the claimant can prove that he has met the so-called "threshold" requirements for maintaining a suit for pain and suffering. Those requirements include significant scarring and disfigurement, permanent loss of a bodily function, death and, most commonly, "permanent injury within a reasonable degree of medical probability."[32] Proof of the permanent injury requirement is met by expert medical testimony, often by a chiropractor, and usually expressed in the form of a percentage derived under the impairment rating system of the American Medical Association or some similar, recognized method.[33] Indeed, if the case is tried, the jury is asked to answer a specific question that the plaintiff did or did not sustain a permanent injury.[34] If so, then and only then may the non-economic damages for pain, suffering, anguish, etc., be awarded; if not, then the plaintiff is limited only to economic losses not paid by PIP benefits.

Uninsured/Underinsured Motorists (UM)

Once again, note that bodily injury liability insurance is not compulsory in Florida. You probably advise your clients to carry Uninsured/Underinsured Motorist coverage under their own policies anyway, but in Florida that can become the only source of recovery for the negligence of others.

Curiously, liability insurance for bodily injury is not compulsory in the Sunshine State and a good number of drivers are either uninsured or woefully underinsured.

In some instances, your client may be entitled to recover under a Florida UM policy. For example, she is driving her mom's car when struck by an uninsured or underinsured driver. "Uninsured" simply means that the other vehicle has no liability insurance, but it can also mean that its insurer is insolvent. It also refers to an underinsured vehicle, one that has insurance in an amount insufficient to cover the damages sustained; and it can also mean an unknown vehicle, such as a hit-and-run driver.[35] Unlike some states, the policy limit of Florida's Uninsured Motorist insurance is in addition to any insurance the tortfeasor vehicle has; in other words, the tortfeasor's coverage is not subtracted from the UM limits. Thus, if the tortfeasor has a $25,000 limit and Mom's Florida UM coverage is $100,000, there is $125,000 in available coverage, not the $100,000 UM limit as in some states, made up of the tortfeasor's $25,000 and the $75,000 difference to reach the UM limit.[36]

Further, in Florida, UM limits may be "stacked." This allows an insured to add together all UM coverage he has purchased for the family's cars.[37] A higher premium is paid for this option, but some do purchase it. Unfortunately, a nonresident family member or a non-relative usually cannot benefit from stacking under most policies, so you'll have to explain to your client that while Mom gets a UM limit of $200,000 because she has two "stacked" insured cars, Daughter only has a $100,000 limit from the car she was in.[38]

The typical procedure is to file suit against the tortfeasor (owner and driver) and the UM insurance carrier. Although in some states UM claims may be arbitrated, in

So-called "wild animals" play a role in Florida jurisprudence too.

Florida most such claims proceed in court if not settled. The above-mentioned no-fault threshold rules still apply and permanency is an issue in UM claims too.[39] If the case is tried against the UM carrier, it is identified by name, its specific involvement is discussed and its attorney discloses that he represents the insurer.[40] If the tortfeasor has not settled or defaulted, he or she is a co-defendant and separately represented by counsel at trial. The court molds the verdict to apply the tortfeasor's coverage as a set off if the damages are less than the combined coverages.[41]

Premises Liability

Trip/slip and fall cases are the primary example of this category and the most common claims attorneys see against hotels, restaurants and amusements. The main consideration in such cases is often whether the property owner had actual or constructive knowledge of the dangerous condition that caused the accident.[42] Constructive knowledge may be shown by proof that the danger existed long enough or occurred often enough for an inference that the owner should have known about it.[43] Actual knowledge and notice may be shown by prior incidents.[44] Experts may be used to show slippery floors, inadequate inspection or faulty operation methods.

Animals

As the heading indicates, this section covers more than just dog bite cases, and for very good reasons. Your client may need recourse for other animal injuries and damages while visiting in Florida; remedies are available in many situations.

Florida distinguishes between wild and domestic animals.[45] It also provides special treatment for dogs.[46] As in most states, by statute the owner of a dog that bites a person is strictly liable without regard to notice of a vicious propensity.[47] By a second statute, the owner of a dog that does "damage" to a person, or to a domestic animal or livestock, is also strictly liable.[48] The difference is that the first provision requires a *bite* to a *person*, while the second one deals with other causes of injury or damage and includes animals as well as people.[49] Both statutes apply only to dogs, not cats, birds, goldfish or other animals. The more general section affords a remedy even without direct contact, as long as the injury results from an aggressive act; for example, a car crashes trying to avoid a dog running into the street.[50] Although these statutes apply only to the *owner* of the dog, Florida does hold a landlord responsible under common law where he knew or should have known of a vicious dog on his premises and had the ability to remove or control it under the lease.[51] Similarly, any other party in control of a dog, but not an owner, can still be held liable under common law concepts of negligence.[52]

The dog bite statute also contains a few other conditions besides requiring an actual bite to be involved. The victim (the person, not the dog) has to be in a public place or lawfully in a private place, so trespassing may be a defense.[53] Any negligence contributed by the victim reduces the liability of the owner, so provoking the dog or going into its pen or chained area may be a defense.[54] If the owner has a proper (as defined by the statute and case law) "bad dog" sign, there may be no liability at all if the victim is at least six years old.[55]

So-called "wild animals" play a role in Florida jurisprudence too. By common law, the owner or keeper is absolutely liable for injuries unless the victim causes the attack.[56] It is not necessary to prove knowledge of a vicious propensity with a wild animal; that it is wild is enough and that term usually refers to the species and not the individual creature.[57] In case you are wondering how this can apply to your client, just think about all the attractions in Florida having "wild" animals. We have everything from alligator farms to zebra ranches. We have Disney's Animal Kingdom, Lion Country Safari, Busch Gardens, Gatorland, Sea World and numerous other places, great and small, where animals and people come together and mostly enjoy each other's company. Occasionally, however, an animal behaves like an animal and a person is injured. Your client can sue the owner, proprietor, keeper or whomever.

Domestic animals, on the other hand, are not presumed vicious and proof of the propensity is required, although reasonable care is measured in light of generally known qualities, as well as any *known* propensities of the specific animal.[58] For example, saddle horses are not presumed dangerous but scrub cattle may be.[59] Again, the owner or keeper can be held liable for injury by a domestic animal on a common law negligence theory.

Finally, just to be fair, a word is needed about injuries to animals. Many visitors bring their pets with them and little "Fifi" may be injured or killed by the big mutt owned by grandma's next door neighbor. If the owner was merely negligent, there may be liability for compensatory damages, but if he can be said to have been willfully or grossly negligent, or even that he did it maliciously, there may be liability for compensatory damages and punitive damages.[60] Compensatory damages are usually for fair market value since animals are generally treated as personal property, but Florida has recognized the emotional side of pet ownership and the grieving owner may be allowed to add mental suffering as an element where his pet was maliciously killed.[61]

Governmental Tort Claims

Florida has largely abrogated sovereign immunity by a tort claims statute.[62] As in other states, the statute sets out substantive and procedural requirements and limitations that must be complied with if a claim against a municipality, county, school board, state department or agency or other governmental entity is brought. The old distinction between governmental and proprietary acts has been replaced by a test for discretionary and operational activity.[63] The former involves planning and judgment and is not a basis for liability, while the latter includes the operation and maintenance of property and facilities and liability may attach as it would for a private person.[64]

The statute specifies that a claimant must file a Notice of Claim with prescribed information within three years after the claim accrues and there is a waiting period prior to suit for settlement negotiations or rejection of the claim.[65] There is, in general, a liability limit of $100,000 per person and $200,000 per incident, although a legislative claims bill is possible in certain cases warranting a higher payment.[66] Attorney fees are capped at 25%.[67] The statute of limitations is four years, except if medical malpractice is involved, in which case the two-year statute applies; even a wrongful death claim gets the benefit of the four-year statute as to any governmental entities.[68] Claims may include both negligent and intentional acts, but individual employees are not personally liable, absent malice or willfulness.[69] Venue is usually where the governmental entity is located.[70]

Case law has established that claims will lie for faulty maintenance of streets, buildings, and sidewalks, and for failure to warn of known hazards.[71] It has also established that claims cannot be brought for the failure to improve roads, build guardrails or correct unknown conditions.[72] Unfortunately, the discretionary/operational distinction is made on a case-by-case basis and legal research of current authority may be needed.

Wrongful Death

Tragedy may strike, even on vacation, and fatal accidents come under Florida's somewhat complex wrongful death statutes. As noted, the statute of limitations is two years in most cases, and that is usually computed from the date of death.[73] In the case of death by medical malpractice, however, the two years generally runs from discovery of the malpractice.[74] The statutory scheme eliminates any survival action on behalf of the deceased for injuries causing the death in favor of an entirely new cause of action on behalf of the estate and the beneficiaries.[75] (Note that claims unrelated to a fatal accident do survive death, are *not* affected, and may still be brought on the decedent's behalf.[76])

The Florida Wrongful Death Act is a bit unusual in some respects. While there is no attempt here to detail the requirements, elements and nuances of bringing such claims, a few specifics may be highlighted. All claims of all the survivors are included in one action brought by the Personal Representative – *e.g.*, the executor or administrator.[77] The term "survivors" includes the spouse, children, parents, other blood relatives when dependent on the decedent and adoptive siblings when dependent on the decedent.[78] All have claims for economic losses such as support.[79] A spouse also has claims for lost companionship and mental pain and suffering.[80]

Children of the deceased are classified as either minor or adult and have different rights and claims: "minor children" are those under 25[81] and have claims for lost companionship and guidance as well as mental pain and suffering; adult children only have such claims if there is no surviving spouse, but may have claims for economic losses if dependent.[82] Parents of a deceased minor child (under 25) can also claim mental pain and suffering in addition to economic loss.[83] If the wrongful death arises from medical malpractice, some of the rules are different: for example, adult children cannot recover for their mental pain and suffering even if there is no spouse.[84]

In addition to the claims on behalf of the qualified survivors, the estate itself has claims for lost earnings the deceased may have had from injury to death, medical and funeral expenses and "loss of net accumulations," which is compensation for projected net business income or salary during the expected lifetime of the decedent.[85] Obviously, this latter element can be substantial in the case of a high earner. Neither the survivors nor the estate can make a claim for the pain and suffering of the decedent; the rationale is apparently that the deceased is beyond compensation for that.[86]

Comparative Negligence and Shared Responsibility

Florida operates under a "pure" comparative negligence system.[87] The responsibility of each party is determined by the jury on a percentage basis and any negligence of the plaintiff is deducted from the total award.[88] Each defendant is assessed his respective share.[89] The legislature recently abolished joint and several liability so any judgment-proof defendant's share may be uncollectible.[90]

We also allow non-parties to be included in a verdict if properly identified in discovery. Thus, the theory goes, responsibility is apportioned to all who contribute to the accident, regardless of their ability to be sued or held accountable, so that each contributor bears only his or her or its actual share of the responsibility.[91] This makes for some interesting issues and strategies and some anomalous results, including the fact that persons who cannot be legally liable because of immunity can still be accorded a share of the responsibility.[92]

Another factor in accident responsibility is Florida's seatbelt law. Our motor vehicle law requires use of seatbelts in most instances and, where required and not used,

that fact can reduce or eliminate an award to an injured party on a percentage comparative negligence basis.[93] Advise your client to wear a seatbelt in Florida. ■

1. Fla. Stat. § 95.11(3).
2. Fla. Stat. § 95.11(4)(a).
3. Fla. Stat. § 95.11(4)(b).
4. Fla. Stat. § 95.11(4)(d).
5. Fla. Stat. § 95.11(3)(k).
6. Fla. Stat. § 95.11(2)(b).
7. Fla. Stat. § 95.051(1)(h).
8. Fla. Stat. § 733.104.
9. *Szabo v. Essex Chem. Corp.*, 461 So. 2d 128 (Fla. Dist. Ct. App. 1984).
10. *McMillen v. Hamilton*, 48 So. 2d 162 (Fla. 1950).
11. *Moorey v. Eytchison & Hoppes, Inc.*, 338 So. 2d 558 (Fla. Dist. Ct. App. 1976).
12. *Eichenbaum v. Rossland Real Estate, Ltd.*, 502 So. 2d 1333 (Fla. Dist. Ct. App. 1987).
13. *Wilkin v. Carnival Cruise Lines, Inc.*, 661 So. 2d 1308 (Fla. Dist. Ct. App. 1995).
14. *Burns v. Radisson Seven Seas Cruises, Inc.*, 867 So. 2d 1191 (Fla. Dist. Ct. App. 2004).
15. *See* Fla. Stat. § 26.012(2)(a) (giving exclusive original jurisdiction over actions not cognizable in the county court).
16. Fla. Stat. § 34.01(1)(c).
17. Florida Rules of Civil Procedure (Fla. R. Civ. P.), Rule 1.430, Demand for Jury Trial, applies to both Circuit and County Court. Fla. R. Civ. P. 1.010.
18. Fla. Stat. § 47.011.
19. Fla. Stat. § 47.051.
20. *Flanagan v. Dep't of Health & Rehabilitative Servs.*, 314 So. 2d 235 (Fla. Dist. Ct. App. 1975).
21. *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000).
22. Fla. Stat. § 627.7263 provides for this notice, in bold type: "'The valid and collectible liability insurance and personal injury protection insurance of any authorized rental or leasing driver is primary for the limits . . . required by [Florida law].'"
23. Fla. Stat. § 324.021(9)(b)(2).
24. *Ins. Co. of N. Am. v. Avis Rent-a-Car Sys., Inc.*, 348 So. 2d 1149 (Fla. 1977).
25. Fla. Stat. §§ 627.733, 627.7275.
26. Fla. Stat. § 627.736.
27. Fla. Stat. § 627.732(3).
28. Fla. Stat. § 627.733(1).
29. *Blish v. Atlanta Cas. Co.*, 736 So. 2d 1151 (Fla. 1999); *Padron v. Long Island Ins. Co.*, 356 So. 2d 1337 (Fla. Dist. Ct. App. 1978); 31A Fla. Jur. 2d, Insurance §§ 2836–2837.
30. Fla. Stat. § 627.736(4)(d).
31. Fla. Stat. § 627.737(1).
32. *Id*.
33. *Mattek v. White*, 695 So. 2d 942 (Fla. Dist. Ct. App. 1997); *Dutcher v. Allstate Ins. Co.*, 655 So. 2d 1217 (Fla. 1995).
34. Florida Standard Jury Instructions – Civil, 6.1d.
35. Fla. Stat. § 627.727(3); a common policy provision as in *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d 429 (Fla. 1971).
36. *Shelby Mut. Ins. Co. v. Smith*, 527 So. 2d 830 (Fla. Dist. Ct. App. 1988).
37. *Fla. Farm Bureau Cas. Co. v. Hurtado*, 587 So. 2d 1314 (Fla. 1991).
38. *Id*.
39. Fla. Stat. § 627.727(7).
40. *Lamz v. GEICO*, 803 So. 2d 593 (Fla. 2001).
41. Fla. Stat. § 627.727(1); *GEICO v. Brewton*, 538 So. 2d 1375 (Fla. Dist. Ct. App. 1989).
42. Fla. Stat. § 768.0710; cf. 41 Fla. Jur. 2d, Premises Liability § 109.
43. *Schaap v. Publix Supermarkets, Inc.*, 579 So. 2d 831 (Fla. Dist. Ct. App. 1991).
44. *Liberty Mut. Ins. Co. v. Kimmel*, 465 So. 2d 606 (Fla. Dist. Ct. App. 1985).
45. Fla. Jur. 2d, Animals § 1.
46. Fla. Stat. §§ 767.01–767.16.
47. Fla. Stat. § 767.04.
48. Fla. Stat. § 767.01.
49. *Josephson v. Sweet*, 173 So. 2d 463 (Fla. Dist. Ct. App. 1964).
50. *Allstate Ins. Co. v. Greenstein*, 308 So. 2d 561 (Fla. Dist. Ct. App. 1975).
51. *Rosseau v. Fintz*, 711 So. 2d 1352 (Fla. Dist. Ct. App. 1998).
52. *Noble v. York*, 490 So. 2d 29 (Fla. 1986).
53. Fla. Stat. § 767.04.
54. *Id*.
55. *Id*.
56. *Keyser v. Phillips Petroleum Co.*, 287 So. 2d 364 (Fla. Dist. Ct. App. 1973).
57. *Jones v. Bramalea Ctrs., Inc.*, 559 So. 2d 298 (Fla. Dist. Ct. App. 1990) (bear act); *Sharp v. Levine*, 528 So. 2d 1369 (Fla. Dist. Ct. App. 1988) (elephant); *Isaacs v. Powell*, 267 So. 2d 864 (Fla. Dist. Ct. App. 1972) (monkey farm).
58. *Groh v. Hasencamp*, 407 So. 2d 949 (Fla. Dist. Ct. App. 1982).
59. *Id.*; *cf., Loftin v. McRainie*, 47 So. 2d 298 (Fla. 1950).
60. *Levine v. Knowles*, 197 So. 2d 329 (Fla. Dist. Ct. App. 1967).
61. *LaPorte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964).
62. Fla. Stat. § 768.28.
63. *Orlando v. Broward County*, 920 So. 2d 54 (Fla. Dist. Ct. App. 2005).
64. *Dudley v. City of Tampa*, 912 So. 2d 322 (Fla. Dist. Ct. App. 2005).
65. Fla. Stat. § 768.28(6).
66. Fla. Stat. § 768.28(5).
67. Fla. Stat. § 768.28(8).
68. Fla. Stat. § 768.28(14); *Dubose v. Auto-Owners Ins. Co.*, 387 So. 2d 461 (Fla. Dist. Ct. App. 1980).
69. *Richardson v. City of Pompano Beach*, 511 So. 2d 1121 (Fla. Dist. Ct. App. 1987).
70. Fla. Stat. § 768.28(1).
71. 28 Fla. Jur. 2d, Government Tort Liability §§ 30–32.
72. *Id*.
73. *Fulton County Administrator v. Sullivan*, 753 So. 2d 549 (Fla. 1999).
74. *Ash v. Stella*, 457 So. 2d 1377 (Fla. 1984).
75. Fla. Stat. § 768.20.
76. *Tappan v. Fla. Med. Ctr., Inc.*, 488 So. 2d 630 (Fla. Dist. Ct. App. 1986).
77. Fla. Stat. § 768.20.
78. Fla. Stat. § 768.18(1).
79. Fla. Stat. § 768.21(1).
80. Fla. Stat. § 768.21(2).
81. Fla. Stat. § 768.18(2).
82. Fla. Stat. § 768.21(3).
83. Fla. Stat. § 768.21(4).
84. Fla. Stat. § 768.21(8).
85. Fla. Stat. § 768.21(6).
86. *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765 (Fla. 1975); 17 Fla. Jur. 2d, Death § 57.
87. *Garcy v. Dupee*, 731 F. Supp. 1582 (S.D. Fla. 1990).
88. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); Fla. Stat. § 768.81(2).
89. *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).
90. Fla. Stat. § 768.81(3).
91. *Fabre*, 623 So. 2d 1182.
92. *Y.H. Investments, Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997).
93. Fla. Stat. § 316.614(10); *Smith v. Butterick*, 769 So. 2d 1056 (Fla. Dist. Ct. App. 2000).

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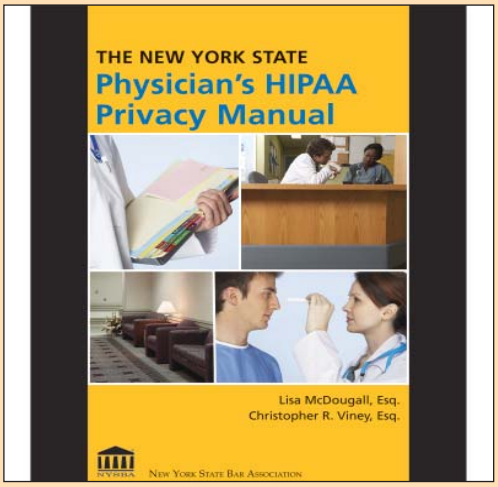

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BY A. VINCENT BUZARD

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Suggestions for Effective Appellate Oral Argument

Delivering an effective appellate argument is an exhilarating and rewarding experience. Effective argument requires lawyers to draw on all of the abilities they possess, including the ability to prepare, to analyze legal issues, to focus, and to persuade. In a typical argument, the lawyer has only a few minutes to convince the court why the client's position is correct and to directly and persuasively answer questions posed by the court. Because oral argument is so focused, and so important, this article makes the fundamental point that effective appellate oral argument does not just happen by preparing for two or three hours, showing up and answering questions. Only by the most careful preparation and thought can we as advocates serve our clients.

When the court is prepared, and the lawyers are adequately prepared, the resulting exchange is not only personally satisfying to the lawyer, but can make the difference in whether the case is won or lost. Indeed, our system of justice is dependent in part on our performance as attorneys. How well we prepare our briefs and how well we argue play an indispensable role in determining whether the court makes the correct decision.

I offer these suggestions based upon what I have read on the subject over the years, what I have observed watching others argue, and over 35 years' experience. I have also taken every opportunity, formally and informally, to discuss with appellate judges what makes an effective oral argument. I also realize the risk that people will read this article and the next time they hear me argue, say to themselves that I ought to practice what I preach, or at least reread this article. Knowing that the lawyers of this state are not generally judgmental, I am willing to run the risk.

Never Waive Oral Argument

Never waive oral argument unless you are able to read the mind of the court. As lawyers, we are unable to know whether the court understands the facts, is focused on the issues we believe important, or agrees with us on those issues. By waiving oral argument, lawyers are shortchanging their clients out of the final opportunity to help the court get the case right.

I know from talking to many lawyers, particularly former law clerks, that many people believe that cases are decided by the time of argument and arguing is simply a meaningless ritual. My experience tells me that is simply not true. In almost every case I have argued, I have found that one of the following has occurred: the facts needed to be clarified or pointed out, the focus was wrong, or the memo which had been prepared in advance for the court by law clerks was mistaken in some material respect. Furthermore, in talking to judges at judicial screening panels, we always ask what is the role of oral argument and we are repeatedly told how significant it is. Appellate judges tell countless stories about how they were looking forward to asking the attorney a question for clarification or seeing how he handles the issue, only to find out the lawyer did not even appear. The natural tendency of the judge at that point is to say, "Well, if he does not care, neither do I."

I am also continually surprised at the number of lawyers who, while they appear for argument, really are waiving it. To me, appearing before the court and saying "all my points are in the brief and unless you have any questions, I will sit down," is a waste of the money the lawyer spent for gas to get to court. It is really saying to the court, "I am not especially prepared and I have not taken this very seriously." I particularly find no justification in just asking the court for questions when an attorney is representing the appellant and must obtain a reversal in order to win. The chance of obtaining a reversal is generally low, so why lower your chance even more? As a respondent, even if you think the court is going your way from the comments made by the court during appellant's argument, at least make a few focused points. Give the court time to think of questions or to remember that they do have questions, and to show you they may not be with you after all.

The primary purpose of oral argument, of course, is to focus on the important issues, to explain why your position is correct and to answer

questions about the facts and the law. Because the court may be approaching the case from a different angle, the court may misunderstand the issues, or there may be some issue in the record which is not clear. Oral argument provides the opportunity to clarify the record, to answer questions, and to focus the case on the issues which are important to you. To waive that opportunity, whether by an outright waiver or by only resting on your papers is to waive a critical opportunity to win the case. At a trial, we certainly would not waive final argument even if we thought that the proof had gone in well. Maybe somewhere out there is a case which is such a sure winner that it doesn't require oral argument, but I have never had the good fortune of having such a case; and if the case is such a dead-bang loser, then why was it appealed?

Preparation

The key to effective oral argument, as in every other aspect of the law, is preparation. I personally find that preparation for oral argument takes hours and often days. As I am preparing, I have often considered how much time I am putting into getting ready for 15 to 20 minutes of argument, but that is what it takes. I am always surprised at the number of lawyers I see going through the record and making notes on a blank legal pad immediately before argument. I keep going over my argument right up to the last minute, but I have done the basic preparation. At a recent meeting of the Council of Appellate Lawyers of the Judicial Division of the American Bar Association, I heard circuit federal court judges from outside New York say that, in their experience, only 20% of the lawyers appearing before them made effective arguments and only 10% were really "hot." The point is that appellate argument, even on what may seem to be a simple case, is not a task to be taken lightly with short preparation and a lack of focus. The client and our system of justice can only be served if oral argument is treated as an indispensable part of the adequate representation of the client.

I realize method of preparation is a personal matter, but I set forth in the following paragraphs my method for whatever guidance it may provide. The important point is to have a method of preparation that works for you. What I find most effective is to begin preparing several days or weeks in advance of the argument. To set aside a couple of days immediately before the argument sounds like enough time, but if it turns out not to be, then the result is panic. Usually, time has elapsed between the preparation of the brief and the oral argument so that other cases and issues have intervened and the case may seem somewhat cold when it is time to start preparing for argument. Therefore, at least two weeks before the argument, I will begin preparation. By that point, I will have had all the cases cited in the briefs and the opinion of the court bound in a notebook alphabetically so that I have all the cases readily available and organized. I also put copies of the brief and the opinion below in a notebook so that I have a portable, organized set of notebooks to carry around. I have found long ago that in trying lawsuits, notebooks give a great sense of security and I find the same thing in the argument of appeals.

Reread

My first step in early preparation is to reread the briefs, the opinion of the court below and the cases to be reminded of what the case is about. When I am rereading, I try to think of what would be the most persuasive way to present this case, what few issues do I wish to emphasize (because they shouldn't all be emphasized), and in what order will they be presented, even though I know the order will be thrown off when the questioning starts. Also, if the questions don't come quickly, I will be in a position to argue rather than being dependent upon questions from the court.

Prepare a Synopsis

I prepare a synopsis of each of the important cases, writing both on the case and with notes, so I know what it is about, whether it has to be distinguished and how it helps or hurts me. After I have read all of the cases in the notebook, if they are voluminous, and if some of the cases are simply boilerplate, I may pull out the most important ones and put them in a separate notebook so that it is more portable.

Outline

I prepare a detailed outline in large print of each of the points I wish to present, so I can readily read the argument. Of course, I revise and re-revise it, which requires retyping or reprinting because eventually the outline becomes illegible as the argument evolves. I include important case names with citation to the page of my brief. I then prepare a single page of the key points so that when the questions come and as the argument progresses, I can look at one page to see what point I have or have not covered, rather than leafing through several pages.

List Key Points

Many times during an oral argument, I won't have time to go back to my detailed argument outline because the questions come too fast; and when the questions do come, the planned order of the argument, of course, can be lost and my train of thought can be lost. If, however, I have the key points laid out on a single page, I can look down to see what I have or have not covered. I also tab separate arguments on my main outline behind the key points page so that if a question does come on that point, I can quickly open up the outline and use it in answering the question or in making the points. Having a single page at the front, however, gives me a sense of security that I won't forget a major point. With adequate preparation, the outline oftentimes is not even necessary because the key points are on one page and I basically know what I want to say. The outline gives me security, however, and, if there is time to use it, there is a greater likelihood that the points I want to make will be remembered and made.

You have the court's maximum attention at the beginning, so don't squander it.

Use Record References

I incorporate record references into the outline, so that I can refer to the record when making a key point if a question comes up. I am deathly afraid of being asked about the record and not knowing the answer on a key point, because not having a quick answer is embarrassing and can affect credibility. Therefore, I take every precaution to avoid being caught without an answer. I also make copies of the key pages of the record and put them in the notebook. I have them tabbed so that I can read directly from the record for a key phrase. I also will put in the notebook copies of statutes, excerpts from cases, or excerpts from the decision of the court below. While reading excerpts should be done sparingly, if it is necessary the important rule is not to paraphrase but rather to quote exactly, so I want them readily accessible.

Who Should Argue?

Ideally, the person who argues should be the person who either prepared or supervised preparation of the brief. However, I have sometimes been asked to argue cases when I have not prepared the brief and will do so provided that the brief is adequate. In other states, there is a longstanding recognition of the benefits of having separate appellate counsel handle the appeal. In fact, the argument has been made that appellate practice should be recognized as a separate area of the law. In the *Journal of Appellate Practice and Process*, Volume A1, Spring 2006, the author states: "On the civil side, the tradition of the trial lawyer who handles a case from first interview to last order of the highest available court dies slowly despite the growing understanding that few lawyers can optimize both trial and appellate skills." Furthermore, some very able trial lawyers do not have the time to handle their own appeals or do not like doing them. If either is the case, then appellate counsel should be brought in.

Additionally, the person handling the case below often is so wrapped up in a particular approach or particular issue that he or she may miss an issue or approach that will win the case. I have found that in each case where I have been asked to do an appeal where I did not handle the case below, I have been able to come up with an approach simply because I am giving the case a fresh look. In so doing, one must work carefully with trial counsel so that the benefit of his or her knowledge is not lost.

When I did not handle the case below, I also make it a point to meet with the client to understand that it is a real case and not simply an intellectual exercise. By meeting with the client and empathizing with the client and hearing his or her concerns, I then am able to feel like I am not simply working on a file, but as a caring lawyer who may have an effect on the life of an individual, business or government.

The Argument

To start the argument, I always use a "grabber," which is a sentence or two that will get the court's attention, just as I would during an opening statement or in summation at trial. Years ago, I heard Judge Hugh Jones, associate judge of the New York Court of Appeals, give an incredibly good presentation of how to argue a case, and one of his main points was that you have the court's maximum attention at the beginning, so don't squander it. That maximum attention comes right after the judges have put the papers in the case in front of them. Judge Jones's point is not to waste that moment by pointing out an error in the record or by giving a recitation of the facts; rather, have a statement about the case explaining why justice requires the result that you are asking for. If there are some extreme facts, which are reasonably dramatic and sum up your case, emphasize those. I have generally found that the court will look up and be interested.

The only time a grabber didn't work was when I was arguing a zoning case in the Fourth Department, where I was trying to reverse a decision upholding the City of Rochester's decision to permit a hotel in a residential area. The hotel had already been open a few weeks by the time of the argument, so I gave a grabber about the importance of preserving residential neighborhoods. My argument was going to be that hotel guests by their nature come back late, loud and sometimes intoxicated, and affect the residential area. I gave my grabber, which the court didn't seem to grasp and there was a hubbub on the bench. Then, the presiding justice said: "Mr. Buzard would it bother you if I told you that when the court is in session, we stay at that hotel." At that point, not only had my grabber failed, my case had failed. Of course, I assured the court that the mere fact that they were staying at a hotel I was trying to shut down would not be a ground for me to ask for a recusal; but on the other hand, I quickly changed my argument on the undesirable nature of hotel guests.

After getting the judges' attention, move on to the two or three key points you planned to emphasize. Don't depend on the court's questions to structure your argument. You probably won't be able to make the argument in the order that you wish because of questioning, but don't depend on the court. Be ready to argue until stopped.

Be sufficiently familiar with your argument so that you are not reading it and are able to speak essentially without notes. Reading from your argument or, worse yet, reading from your brief is a sure way of stopping the judges from listening, and actually in some cases drawing a rebuke from the court.

Be enthusiastic and sound like you believe in your case. I sometimes think that because of the usual advice that argument is not the time for a peroration, lawyers decide that a dull monotone is appropriate. No one, including

judges, likes to be bored and, usually, people are not especially persuaded when they are bored. Therefore, I believe that making the argument interesting and showing enthusiasm is important, and I have been told so. One of the highest compliments I received early in my career, which I appreciated very much and took to heart, was when a judge told me that "you always seem to be enthusiastic and believe in your case and that it is good." I was afraid that I might have been overdoing it by giving speeches, but I was reassured. Just like instructions we give to people trying cases, to be an effective advocate you must be yourself, but showing enthusiasm and belief in your case is critical, regardless of your personality.

Never Misstate the Law or Facts

The Pattern Jury Instruction charge that permits the jurors to disregard anything a witness says if they find a witness was not credible on one issue,[1] I believe is equally applicable to lawyers and their relationship with the court. To be helpful to the court and to maintain our credibility, we as lawyers must carefully and accurately state the facts and the law in our briefs and in oral argument. Once a judge asks a question in oral argument and the lawyer gives an inaccurate response, and the judge finds it out, or knows it is inaccurate immediately, then there is a danger that that judge will not listen to anything else the lawyer has to say. That phenomenon has been confirmed to me by talking with judges.

Answer the Questions of the Judges

We are told from law school forward always to immediately and directly answer the questions of the court. I, therefore, continue to be amazed as I watch others argue who make the rookie mistake of not answering the court's questions even though they are not rookies. I don't think I have sat through a session of cases, either in state or federal appellate courts, without there being a few instances of a lawyer, at least initially, refusing to answer the question and requiring the judges to follow up.

Furthermore, more often than one would expect, there are lawyers who persist in not answering the question given after follow-up by the court, up to and including the point at which the judge gives up or is angry. The lawyers are wasting an opportunity to bring a judge around, whose vote they might get if the question is satisfactorily answered. Furthermore, a judge may be asking the question to help you persuade a colleague. Finally, not answering a question makes lawyers look like they failed moot court in law school. Often, in answering the question, a fundamental point can be reinforced or an entire point can be made in the answer.

Saying "I will answer the question later" is the same as a direct refusal and must be avoided. The harder problem, I think, is when the judge's question is difficult to understand or doesn't make sense. The better practice is to ask for clarification rather than attempting to answer a question that you don't understand. If the facts are wrong in the question, then I think with most judges, one can gently say, "Well to answer your question, let me clarify the facts just for a moment." Clarify them and then answer the question.

Some questions may call for a concession on the facts or law. In order to maintain credibility a concession should be given where to not do so would be a misstatement of the law or facts. Furthermore, a concession should be given where it doesn't really hurt your case. Make the concession, then explain how the concession is not harmful.

Don't Attack Opposing Counsel

Direct attacks turn off the court. I err on the side of caution and never accuse opposing counsel of misstating the facts of the case. To me, the better approach is to let the facts speak for themselves. I believe that by comparing what your opponent says with the facts using a record reference is more effective than a direct attack.

The Use of Humor

The use of humor is a matter of personal style and also depends on the nature of the humor. Obviously, oral argument should not be a stand-up comedy routine. However, I find that spontaneous self-deprecating humor can be helpful. I was arguing a case involving the emergency doctrine and the issue was whether the appearance of a bird of unknown size was a sufficient basis for the judge to charge the emergency doctrine in an automobile case. One of the judges asked me whether it was true that we didn't know the size of the bird and whether the bird could have been big enough to create an emergency. To which I said, "Your Honor, in upstate New York, there are no birds sufficiently large to create an emergency – not even a buzzard." The judges roared with laughter because I was making fun of my own name. I later heard the judges retelling the story to others and I won the case. Occasional humor can work if it is spontaneous, on the point, sparingly used, and self deprecating.

Bringing the Client to Court

Generally appellate argument is not the place for clients. Their participation is not required and they can be a distraction. If, however, the client insists on coming, give the client the same directions you would for trial on demeanor and dress. The court can generally figure out in what way which people are connected with which lawyers, particularly if you are sitting together. One appellate judge told me that on a case involving the reduction of child support, the husband showed up in an expensive suit with a Rolex watch, therefore providing persuasive demonstrative evidence against his own case.

Rebuttal

Some appellate courts in this state permit rebuttal by the appellant and others do not, so you should check the rules and practice if you are going to an unfamiliar court. If rebuttal is permitted, I believe the prudent course is always to reserve time for rebuttal. As an appellant, just the fact that you reserve the time may keep your opponent more on the straight and narrow. I believe that in the courts where rebuttals are not permitted, respondents often feel free to take liberty with the record because they know the appellant cannot respond. The Fourth Department does not permit rebuttal but has a rule permitting response by letter,[2] which I will do. However, a letter is by far less effective and less timely than the ability to stand up and under a minute point out the law or facts which the other side has misstated and to quickly answer an argument emphasized by the respondent which hadn't been addressed before. On the other hand, do not under any circumstances use rebuttal for the purpose of going back over the argument that has already been made – that will do nothing but annoy the court.

Summary

Some readers may disagree with some of these suggestions, so use what makes sense. Furthermore, while basic points can be included in an article like this, the handling of special situations and emergencies only comes with experience and instinct. Finally, in evaluating our performance, we should always remember the observation of our fellow New York lawyer, Justice Robert Jackson, who said that in arguing before the Supreme Court he had three arguments: (1) the argument he planned, which was organized and complete; (2) the argument he actually made, which was interrupted, inconsistent and incomplete; and (3) the unanswerable argument that he made at night afterwards. ■

1. N.Y. P.J.I. § 1:22, Falsus in Uno.
2. N.Y. Court Rules § 1000.11.

"Sorry to get you up so early, son. But I wanted to get in some quality time before my 9 AM trial."

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Economic Globalization and Its Impact Upon the Legal Profession

By James C. Moore

There can be little doubt that the past two decades have witnessed an extraordinary advance in the globalization of the world's economies. Less obvious, however, has been the impact of globalization on the delivery and quality of legal services.

That such an impact has occurred cannot be questioned. The simple fact is that the same forces that are transforming the manufacture, delivery and sale of goods are also having their effect on the way in which legal services are provided. The legal profession is, therefore, at a most important point in its history. One can now see that while globalization of the world's economies has created an extraordinary array of intellectually challenging and lucrative problems for lawyers, it also brings with it the potential to undermine or seriously erode the core values of the profession.

Globalization of Economies

It is essential to first ask what is meant by economic globalization, before considering its impact on the profession. Broadly stated, it can be defined as the increasing integration of large segments of the economies of the nations of the world into a few economies – some might even say a single economy – so that many goods and services may be supplied and sold throughout the world rather than just within the producer's nation state.

A helpful illustration of globalization can be seen in the automobile industry. At the middle of the 20th century, most nations could claim at least one motor vehicle manufacturer within their borders; virtually all of those manufacturers sold their products solely within their borders. By 2005, however, although there were still approximately 50 vehicle manufacturers remaining in the world, consolidation and global expansion had taken place. Thus, in 2005, a mere 10 manufacturers accounted for 75% of the worldwide sales of vehicles, and every one of those manufacturers assembled and sold their products in far more than one country.[1]

The phenomenon of economic globalization depends upon the free movement of people, goods, information and capital through ever-enlarging portions of the world.[2] It is, in fact, Adam Smith's free market capitalism in bold, vivid color. In reality however, Smith's free market still remains tempered by national interests and policies.

Interestingly, economic globalization is not new to the world. In the 18th and 19th centuries, merchants in areas as disparate as Indonesia, Brazil, Scotland, South Africa and the United States sought opportunities to market their products – rubber, sugar, wool, diamonds and steel – globally. In fact, while some national governments accomplished this by shipping the goods to other parts of the world, others reached the goal in a more limited way by establishing colonies around the world. But the cataclysms of the 20th century – two world wars, a worldwide economic depression, and the Cold War, as well as shifting attitudes towards colonialism – dramatically slowed the growth of those emerging global markets.[3]

During most of the past century dozens of economies were largely defined by the nation-state in which they existed. At that time the movement of goods, services and people was severely limited by the tariffs and borders of the producer's states. However, in little more than two decades all of that changed and the globalization of the world's economies has accelerated at a breathtaking speed.

New Developments

Why has this happened? What occurred in the immediate past that had not happened during the preceding 100 years? As with most complex social issues there are several answers to those questions but, foremost among them, are the more or less simultaneous occurrence of three events or developments:

First has been the integration and consolidation of the world's financial markets so that capital can now flow freely and quickly throughout the world. For example, 10 years ago because of the number of institutions involved, it might have taken 48 to 72 hours to transfer funds from a bank in Berlin to one in Singapore; today, that same transaction can take place in less than a minute.

Second, there has been a general but by no means total lowering of national trade barriers so that some products and services can flow unhindered and inexpensively from one geographic area to the next.

And third, the ability not only of goods and services, but people, to move freely throughout the world has been a critical facilitator of globalization. Today, with virtually no restrictions on the movement of people throughout the countries of the industrialized world, bankers from Switzerland can lend money in Romania, accountants from London can provide services in Hong Kong, and suppliers in Korea can market their goods in Canada.[4]

There were other factors which emerged during the last quarter of the 20th century to revive and give new energy to the phenomenon of economic globalization:

The extraordinary advances in telecommunications – cell phones, satellite television, e-mail, BlackBerrys and PDF – especially during the past 15 years, all of which have made it possible to communicate verbally and in writing throughout the world almost instantly.

Yet another factor favoring globalization has been advances in transportation capability and the resulting reductions in the per-unit cost of transporting goods. Goods which in times past often took a month or longer to move around the world and at significant cost, can now be transported from, say, Shanghai to Los Angeles in no more than 11 days; and, because of the size of the ships doing the transporting, the cost of moving each unit from one location to the other has been dramatically reduced. Nevertheless, some costs of moving goods around the world – commercial insurance, airfreight – remain something of a retarding factor to globalization.[5]

The increasing ability to store and swiftly retrieve information from even the smallest computers has made it possible to enhance the inventory supply process; the result is the precise movement of goods from one geographic location to another in such a fashion that delays are reduced or made nonexistent.

And finally, of course, the end of the Cold War in 1989, and the absence of a major war or depression, have served the cause of economic globalization.[6]

New Consequences

One of the consequences of these globalizing forces, argues the American journalist Thomas Friedman, has been the creation of a world in which virtually anyone on the planet can compete with the rest of the world to provide high quality goods or services at low prices. The modern business structure, says Friedman, will be horizontal – hence, the title of his book, *The World is Flat*.[7] This development will also have ramifications for the delivery of legal services in the immediate future.

Economic globalization has had some long-term consequences, as well. Among the most significant has been the consolidation of many of the world's industries: automobile manufacturing, railroads, banking and accounting are excellent examples of this trend. This has led to ever larger and economically more powerful international corporations. Consider, for example the worldwide scope and influence of Microsoft in computing and software, Veolia in water treatment, Allianz in insurance, and HSBC in banking. The economic wealth of many of these businesses rivals or exceeds the gross national product of some of the countries in which they do business. Toyota and Exxon, for example, have capitalizations that are greater than all but a small handful of the world's nations.[8]

A further consequence of these events has been that the economic power of these businesses has tended to reduce the power and relevance of the political state. Thus, because of the economic power of some businesses, and because of the benefits to the nation state in which they exist – in the form of wages, taxes, development

and ancillary services – there is a great likelihood that the political leaders of the state will be more deferential to the business leaders than would otherwise be the case. In a globalized world, therefore, place becomes less important than the corporate player.[9] This development too, will bear upon the delivery of legal services.

Economic globalization has also produced some winners and some losers. Nations such as Russia and Venezuela that are in geographic areas which have an abundance of natural resources – oil, gas, coal – and those with a well educated, technologically proficient population such as India, Singapore and China have and will continue to prosper. On the other hand, those geographic areas whose citizens possess only average technological skills or whose leaders are unwilling to change or adapt to the economic forces which are at work in the world, will be left behind.

Sadly, for some geographic areas, the advent of economic globalization has been painful. Steel mills that were once productive in East Germany and in the northeastern United States now lie unused because products which they produced can be obtained less expensively from other parts of the world. Some commentators have also noted that for the world's poorest nations, – Pakistan and most of Africa are examples – globalization has produced no significant benefits.[10] Not surprisingly, people who live in those adversely affected geographic communities are disheartened by the effects of economic globalization for, in many ways, its force has destroyed their world, their culture and their lives. And yet, as the prominent U.S. historian, Walter Lafeber, has astutely observed, "In this developing battle of capital versus culture, capital will ultimately win."[11]

Globalization's Impact on Law

These developments lead, therefore, to a discussion of globalization's impact on the law. Indeed, that impact cannot be denied. Law professionals – lawyers, magistrates, judges, corporate counsel – find themselves working in a world which is undergoing a transformation as radical as that of the industrial revolution. How then, will this phenomenon of economic globalization affect the profession of law? What are its ramifications for today's law professionals and their successors?

Preliminarily two aspects of globalization should be noted: The first is that globalization carries with it an abundance of opportunities for lawyers and their firms. For example, the globalization of markets will require lawyers capable of facilitating the merger of business entities from different cultures, or lawyers capable of bringing about the resolution of disputes among people and businesses from different societies, or who are capable of protecting intellectual property as its use expands beyond its country of origin. Clearly, lawyers who participate in worldwide networks of lawyers, or who serve global financing institutions, and who are technologically competent, will enjoy an abundance of clients and satisfying work. Without doubt, economic globalization will lead to exceptional opportunities for many of our colleagues.

A second point is that many observers believe that economic globalization is not an implacable force which will overwhelm everything in its path. This is important for lawyers to bear in mind. While globalization may present the profession with new opportunities, it must be understood that other opportunities will still be abundant among a lawyer's non-globalized clients. The fact is that while globalization has dramatically affected market segments like publishing, manufacturing and the provision of some services such as banking and insurance, in agriculture, health care, and entertainment, its progress has been modest at best; in some cases, it has met strong resistance. For example, in the summer of 2006, Pascal Lamy, the director general of the World Trade Organization, suspended talks intended to facilitate international trade in agriculture. Those negotiations were not successful because the major countries involved, France, Germany and the United States, could not agree upon the levels to which they would reduce financial supports given to their farmers. In sum then, it can be said that while globalization is clearly an extraordinarily important force in the world there are also aspects of the world economy, places in the world, and political groups resisting it and in some cases, with considerable success.

It seems beyond serious argument that globalization's impact on the profession of law will be profound both in the short and in the long term.

All of that having been said, it seems beyond serious argument that globalization's impact on the profession of law will be profound both in the short and in the long term. Indeed, the great concern is that the very forces which are propelling the global expansion of markets – increasing profits through cost reduction, speed, efficiencies, consolidation, and ceaseless competition for a lower cost supplier – have the potential to undermine the core values of our profession, values which have well served the profession and society.

Consider what it is that lawyers around the world regard as the core values of the profession. These are: the

independence of each lawyer from all forms of authority – political, religious and most important, from that of the attorney's clients – which results in unbiased and objective judgment; the sanctity of what the client tells the lawyer in confidence; and that the profession is a learned one – that one may not join its ranks without some formal and prescribed training.[12] Lawyers also subscribe to the primacy of the rule of law rather than the rule of an individual, of an army or of a religious leader. And lawyers place great emphasis – at least in theory – on the concept of equal access to justice and the ethical obligation of the individual lawyer to fulfill that mission, even if it means doing so without compensation.

These values have existed for centuries largely because lawyers and their professional associations have sought to protect them and because of the perception that they have served society well. However, there can be little doubt about the fact that the advance of economic globalization poses a serious and potentially devastating challenge to many if not all of these values. Regrettably, the beneficiaries of globalization are often well served by a less independent legal profession, by one in which lawyers may be required to disclose comments made by their clients, or worse, in which individuals will be discouraged from seeking legal counsel so that the attorney-client privilege will be avoided, and by circumstances in which anyone can be taught to perform individual legal functions without the necessity of complying with the rigors of a legal education.

Globalization, characterized by the rise of the large, multinational corporation not wedded to the culture and norms of any state, may also undermine respect for the rule of law. This may occur because of the way in which those large corporations tend to privatize law by contractually establishing their own periods of limitation, standards of conduct, damages which can be recovered, and methods of dispute resolution. While this development may well serve the interests of the corporation and its customers, the long-term result may be that a nation's legislatively enacted laws will become irrelevant and its judiciary will be left with only criminals and the impoverished to pass judgment upon.

And, one can only ponder in a worried way what impact the force of globalization will have on the individual lawyer's or the law firm's ethical but not mandatory obligation to assist those who cannot afford to pay for the lawyer's assistance. Will time pressures, travel and client needs leave the lawyer with less time and incentive to respond to the legal needs of the poor? Will the profession's proud tradition of *pro bono* assistance survive this revolution?

As the phenomenon of economic globalization reduces the role and power of the nation state – when compared to the economic power of the international corporation or regional trading groups or institutions such as the World Bank, Mersocur in Latin America, or the European Union's "single market" – there is a significant risk that the core values of the profession will be challenged by those groups, or efforts to circumscribe these values will be made. Consider, for example: the large international corporation with major facilities and many workers in a modestly sized political state which would very much like to keep that corporation operating within its borders. However, the leaders of the corporation are finding that environmental challenges to its work by lawyers are an impediment to its continuing success. The corporate leaders then suggest to the political leaders that it would be in the best interests of the country to place some limits on the type of environmental litigation or challenges which lawyers in that country could mount. Will those political leaders have the desire or political will to resist the demands of the corporate leaders? Will they be willing to state that their citizens are better served by an independent, aggressive bar than by one which is subservient and passive?

It is essential, therefore, that members of the profession constantly be conscious of the forces brought on by economic globalization and the likelihood that those forces will adversely affect the lawyer's independence and his or her objectivity.

Yet another change in the way legal services are provided in these times of economic globalization is the speed with which transactions must be accomplished and advice given. There are few lawyers who have not on occasion thought, "I lament the pace at which business is conducted these days; I am dismayed that there is not more time to think about the way this merger or that acquisition is being structured and its consequences for my client." The facts are that the use of laptop computers, BlackBerrys and modern cell phones, the need to prevail over the competition, and the costs of capital, have greatly accelerated the speed with which transactions must take place. Unfortunately, one consequence of this development is that the individual lawyer has less time for contemplation and revision. And, regrettably, in the end, it will be the client who suffers because there will be less time to develop a thoughtful legal product.

Finally, on this far-from-exhaustive list of the consequences of economic globalization upon the legal profession is the fact that there will be the increasing existence of cross-border practice. This will be especially true as the barriers to legal practice in other than one's home jurisdiction, are lowered. Indeed, serious consideration is being given in several jurisdictions to modifying ethical standards so that lawyers admitted to practice in one state, in some circumstances, will be permitted to practice in another state without the need of having to seek admission to the bar of that state.

The phenomenon of cross-border practice means that lawyers and law firms who are part of an international

network of legal service providers, or those who work with financial service providers, will be able to provide added value to the clients which they serve.[13] It also means that language skills in other than one's native tongue will be of great value. Indeed, the American statesman, Henry Kissinger, predicted a few years ago that by 2025 only three languages would be used in international business: English, Spanish and Chinese.[14] And of course, law firms with a physical presence in countries other than their own will be at a great advantage.

There will also be some opportunities for lawyers who can provide a service to clients who may not be in their home state, at a lower price. Thus, for example, it has been widely reported within the past year that some U.S. businesses have sought legal services from lawyers outside of the United States – specifically, from India – for what the business leaders regarded as routine, non-critical legal functions.[15]

An obvious corollary of these developments – and a concern – will be the reduced ability of individual states and professional associations to regulate the profession. Thus, for example, which state will set the continuing education standards or the standards for admission to the bar for lawyers who practice in more than one jurisdiction? And, one has to wonder, will that state regulatory authority have the power to discipline lawyers who violate those standards?

Some commentators have also predicted that much like their business and corporate clients, law firms will consolidate into ever-larger firms with some reaching the size of 10,000 lawyers. Because of their size, these observers believe the firms will have a voracious appetite for capital to pay for talent, technology and facilities. One of the observers even suggested that the need for capital in these mega-firms will be so great that it may cause them to seek to become public corporations so that they can sell stock.[16] In the near future, some believe, globalization will lead to greater reliance by appellate courts on international norms and the decisions and statutes of states other than their own.[17]

There are some who argue that the phenomenon of economic globalization will abruptly end if the scourge of terrorism gains force, or if state protectionism becomes more of a factor, or if a major economic depression occurs.[18] Indeed, it is ironic, is it not, that the very forces that drive economic globalism – open borders, free movement of goods and capital – also lower the barriers to acts of terrorism? But for the time being, the words of the Japanese economist Kenichi Ohmae seem an apt statement of the impact of globalization on the world: "The global economy has its own dynamic and logic; it is irresistible; it is destined to impact everybody."[19] ■

1. Organization Internationale des Constructeurs d'Automobiles Statistics Committee, "World Wide Motor Vehicle Production by Manufacturer," 2005; *see also There's Detroit and There's Trnava*, N.Y. Times, Nov. 25, 2006, p. C1.

2. Thomas Friedman, *It's a Small World*, Sunday Times (London), Mar. 28, 1999 (News Review) p. 1; Joe Kendall, *The Diligence Due in the Era of Globalized Terrorism*, 36 Int'l Law. 49 (Spring 2002).

3. Niall Ferguson, *Sinking Globalization*, Foreign Affairs (Dec. 2005).

4. Daly, *The Ethical Implications of Globalization on the Legal Profession*, 21 Fordham Int'l L.J. 1239, 1295 (1998); *see also Global Economic Integration: What's New and What's Not?*, Ben S. Bernanke, Chair, Federal Reserve Board (U.S.), symposium, F.R.B. of Kansas City, Aug. 25, 2006.

5. John Murphy, *The Impact of Terrorism on Globalization*, 36 Int'l Law. 80 (Spring 2000); *see also* Jessica Brice, *China Trade Spurs Spending by Ports Aiming to Rival Los Angeles*, Bloomberg.com, Aug. 2, 2005.

6. Daly, *supra* note 4, at p. 1295.

7. Thomas Friedman, The World is Flat 7.

8. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 Vand. J. Transnat'l L. 931, 942 (2001).

9. *See, e.g.*, Alfred C. Aman, "Globalization and the U.S. Administrative Procedures Act," Snyder Lecture, Feb. 1999; Robert S. Shapiro argues that economic globalization has also limited the ability of the central banks of many nations to affect national economics, *Business Week*, Nov. 20, 2006, p. 58.

10. Murphy *supra* note 5, at p. 83; *see* Joseph C. Stiglitz, Globalization and Its Discontents 4–6 (2002).

11. Walter Lafeber, Michael Jordan and the New Global Capitalism 21 (2002).

12. Christopher Whelen, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 Vand. J. Transnat'l Law 931, 939 (Oct. 2001).

13. Carole Silver, *Globalization and the U.S. Market in Legal Services*, 31 Law & Pol'y Int'l Bus. 1093 (2000).

14. *A Look at the Practice of Law in 2025*, Metro. Corp. Counsel, May, 2006, p. 28.

15. Eric Bellman, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, Wall St. J., Sept. 28, 2005 (Marketplace) at B1.

16. Peter Zeughauser, *quoted in* The Metropolitan Lawyer, May 2006, p. 29.

17. Charles Lane, *Thinking Outside the US*, Wash. Post, Aug. 4, 2003.

18. Carol Silver, *Globalization and the U.S. Market in Legal Services*, 31 Law & Pol'y Int'l Bus. 1093, 1096 (2000).

19. Kenichi Ohmae, The Next Global Stage: Challenges and Opportunities in Our Borderless World 18 (2005).

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Researching New York State Administrative Rules and Regulations

Researching New York State administrative rules and regulations can be a difficult and unfamiliar task for many researchers.[1] Attorneys who are thoroughly familiar with the case reporters, formbooks, and *McKinney's Consolidated Laws* may have little experience with researching state administrative rules and regulations, including even such basic tasks as identifying citations and knowing where they are published. In fact, this author has encountered researchers who have confused citations to state regulations with those to the New York City Administrative Code and vice versa.

Under the State Constitution, "[n]o rule or regulation made by any state department, board, bureau, officer, authority, or commission . . . shall be effective until it is filed in the office of the Department of State."[2] The rule-making process[3] that produces these rules and regulations begins with the writing of a proposed rule by a state agency, department, etc. After a regulatory impact statement, regulatory flexibility analyses, and a job impact statement are prepared, approval to proceed is sought from the Governor's Office of Regulatory Reform. The proposed rule is then submitted to the Department of State for publication, accompanied by the impact statements and flexibility analyses, in the weekly *State Register*. Published since April 1979, the *State Register*, unlike its better-known counterpart, the *Federal Register*, contains the full text of only a few proposed or new regulations.[4] If the relevant regulation exceeds 2,000 words, or if the agency or department in question so chooses, only a summary appears. Persons seeking the full text of the summaries should get in touch with the department or agency representative listed as the contact in the *Register* notice.

Once notice of a proposed rule appears in the *State Register*, there is a 45- or 60-day period for public commentary, either at a scheduled public hearing or by written communication to the agency or department involved. Unless substantial changes are required, necessitating another notice in the *Register* and an additional 30-day comment period, the agency or department adopts the final rule and files the text, along with an Assessment of Public Comment, with the Department of State's Division of Administrative Rules. A notice of adoption appears in the *State Register*, and the full text of the rule will then eventually be published in the *Official Compilation of Codes, Rules and Regulations*, popularly known as the N.Y.C.R.R.

Prior to publication in the N.Y.C.R.R., a copy of a regulation, usually signed by a commissioner, is forwarded to the Department of State. Editorial work is then done by the Department, which enters additions and deletions, and then prints out a hardcopy version. This is proofread and revised before being sent electronically to Thomson West for publication. Ideally, new inserts for the N.Y.C.R.R. are supposed to be ready on the 15th and 30th of each month, but publication of the *State Register*, which must appear weekly,[5] takes precedence over updating the contents of the N.Y.C.R.R., which can cause a delay in issuing updates. Thus, as of this writing, the most recent supplement to the N.Y.C.R.R. was dated July 31, 2006, which creates a so-called "gap" in coverage.

The N.Y.C.R.R. contains the full text of New York State rules and regulations for over 100 state agencies, authorities, departments, commissions and interstate commissions. Its predecessor was a five-volume bound set first published in 1945, and then updated with 15 annual supplements, which was replaced by the current loose-leaf version, which first appeared in 1960, published by Lenz & Riecker. Today, the official print edition of the N.Y.C.R.R. consists of 83 volumes, plus a two-volume master index, containing 22 titles of various lengths, Regulations of major departments may take up several volumes, such as those of the Department of Taxation and Finance (Title 20; three binders), and Judiciary (Title 22; five binders). In contrast, the far-shorter compilations of 82 smaller agencies, such as the Buffalo Sewer Authority or the Long Island Power Authority are grouped together in the three-volume Title 21 (Miscellaneous).

Each section of the N.Y.C.R.R. is followed by an historical note indicating when it was filed, amended, or repealed, along with the effective dates of these actions. Each volume

has a separate annotations section providing summaries of cases, attorney general opinions, and agency/department opinions, orders or decisions relating to the regulations it contains. The annotations sections also contain cross-references to sections of the Consolidated Laws, and to a limited number of secondary sources, including *New York Jurisprudence 2d*, *Carmody Wait 2d*, *American Jurisprudence 2d*, *American Jurisprudence Pleading and Practice Forms*, and *ALR* annotations.

There are also eight administrative codes that are not part of the N.Y.C.R.R. These are the Building Code, Residential Code, Fire Code, Plumbing Code, Mechanical Code, Fuel & Gas Code, Property Maintenance, and Energy Conservation Construction Code, which were all released in 2002, and whose adoption was the result of a regulatory reform program aimed at bolstering the state construction industry and creating jobs. They are based on codes published by the International Codes Council (ICC) in 2000 and amended in 2001. The codes have New York modifications; these New York-specific additions are underlined in the text, and deletions of basic code language are noted by arrows in the margins. The eight codes are available either individually or as a complete set in loose-leaf or softcover from the Council (http://www.iccsafe.org).

Commercial online access to the N.Y.C.R.R. is provided by LexisNexis, Westlaw, Loislaw (which is available at a discount to NYSBA members), and the Bill Drafting Commission's subscription service, the Legislative Retrieval System (LRS). The Westlaw and West CD versions mirror the official Thomson West print version, and thus contain the case annotations; users of Westlaw can also link directly to the cited cases and to selected sections of *New York Jurisprudence 2d*. The other services' unofficial versions only provide the text of the regulation and an historical note. However, since they mirror the print version, the Thomson West electronic products are only as current as the last loose-leaf update. In contrast, LRS's unofficial version, which is updated when new regulations are received directly from the agencies involved, is more current. Similarly, LexisNexis and Loislaw databases also include changes made since the last updating of the official N.Y.C.R.R. Thus, for example, the LexisNexis, Loislaw, and LRS version of N.Y.C.R.R. title 8, § 574.1, dealing with parking at SUNY Delhi, contains a new section d, a veterans' exemption from parking fees, which was effective on September 13, 2006. However, as of this writing, the Westlaw version did not.

Currently, there is no free Internet access to the entire contents of the N.Y.C.R.R. However, free Internet access to an unofficial version is planned for 2007 or 2008. Free access to selected sections of the Code is currently provided at the Governor's Office of Regulatory Reform Web site, which maintains links to the sites of agencies and departments that post their regulations online. The quality of coverage naturally varies from site to site. (Two which the GORR believes do an especially good job in keeping their rules up to date are the sites of the Department of Environmental Conservation (http://www.dec.state.ny.us/website/regs) and the Department of Health (http://www.health.state.ny.us/regulations).) The eight ICC-based codes are available on CD-ROM, and a subscription providing online access to the codes in downloadable PDF files is available at the Council's e-codes Web site (http://www.ecodes.biz). Code clarifications made in 2003, including corrections of typographical errors, are available at the Department of State, Division of Code Enforcement and Administration Web site (http://www.dos.state.ny.us/CODE/codeclarif.htm).

Unfortunately for those who wish to keep track of rule changes, the *State Register* table of contents and action pending index do not indicate which title and section of the N.Y.C.R.R. would be affected by proposed regulatory changes. There is also no state-published equivalent of the *Code of Federal Regulations Sections Affected* for the N.Y.C.R.R. However, James R. Sahlem, director of the Supreme Court Library at Buffalo, compiles *N.Y.C.R.R. Sections Affected*, which is updated twice monthly, and provided to subscribers electronically, free of charge. Arranged by title and section, it notes any new or proposed regulations, and those which have been added to, amended, renumbered, or repealed. Also included are the dates a regulatory action was noted in the *State Register* and, if applicable, the effective date. Other methods of tracking regulations include making a standing request with the relevant agency or department, and checking commercial publications or agency/department-published bulletins or newsletters such as the DEC's *Environmental Notice Bulletin*. Online tracking services are available on LexisNexis, Westlaw, State Net (a service of Information of Public Affairs in Sacramento), the Legislative Retrieval System, and possibly at selected individual agency or department Web sites.

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Obtaining historical information about state rules and regulations varies in difficulty. Access to back issues of the *State Register* should present few problems since it is held in hardcopy by a large number of depository libraries, and a complete set of back issues on microfiche, published by the William S. Hein Co., is also widely available. As for online availability, issues of the *State Register* published since June 25, 2003, are available free in PDF format at the Department of State Web site (http://www.dos.state.ny.us/info/register.htm), as well as on LexisNexis (since issue 48 of 1997). However, locating the text of superseded regulations from the N.Y.C.R.R. can be time-consuming and difficult. It involves using loose-leaf pages, known as "take-outs," which were removed from the binders when new supplementation was received.

The take-outs are not widely available. Most libraries that receive the N.Y.C.R.R., including those at the New York Law Institute and the Association of the Bar of the City of New York, do not retain them. Major libraries with complete collections of take-outs include the State Library in Albany, the Fourth Department Library in Rochester, and the Supreme Court Library at Buffalo. The University of Buffalo Law Library also has a complete set, and New York County Lawyers' Association Library has a collection of out-takes starting with June 1969.

Typically, those libraries that retain the take-out pages will keep them in dated binders. Thus, to find a superseded regulation, one must first ascertain the date of amendment or repeal from the historical note that accompanies the regulation, and then check the binder containing the take-outs for the date immediately following the date of repeal or amendment. For example, if one wanted to see the early 1970s version of the Rules and Regulations on Controlled Substances, the historical note in the current edition indicates that the entire previous version was repealed in March 1973. Accordingly, the pages containing the old version can be found in out-takes from that date. This may seem to be a relatively simple task; however, in many instances it is a painstaking process since the desired rule may be difficult to locate within a given batch of out-take pages, and the older versions of regulations may have had different section numbers. Things are far simpler if one simply needs to locate the version of a regulation in effect at the end of a given recent year. LexisNexis has databases containing the N.Y.C.R.R. as it was on December 31 in 2004 and 2005. Westlaw's back file is more extensive, providing databases containing the versions of the N.Y.C.R.R. in effect on December 31, for 2002 through 2005.

In contrast, locating citations to various state regulations is a relatively simple matter. Volume 8 of the latest edition (2005) of *Shepard's New York Statute Citations* lists citations in federal and state case reporters, the *ALR*, New York attorney general opinions, and selected law reviews. As with statutes, analysis codes identify cases declaring regulations to be constitutional, unconstitutional, valid, void, etc., as well as those that provided interpretation. However, unlike statutes, no historical information is provided. The aforementioned information can also be obtained online with LexisNexis's *Shepard's* service and Westlaw's *KeyCite*.

Finally, determining the intent behind regulatory changes can be difficult since, unlike statutes, there is no "legislative history." The general advice usually given to those seeking information on intent is to get in touch with the department or agency contact person as listed in the *State Register* when the rule was proposed or adopted. An alternative is to contact the department/agency's legal department, where someone might have knowledge as to why the rule in question was changed or adopted. An additional possibility, if the rule's adoption was newsworthy, would be to search for relevant articles in the LexisNexis or Westlaw newspaper databases. ■

1. For more detailed treatments on certain aspects of New York administrative law research, see Patrick J. Borchers & David L. Markell, *New York State Administrative Procedure and Practice* §§ 10.2–10.3 (1998); William H. Manz, *Gibson's New York Legal Research Guide* 209–33 (2004).

2. N.Y. Const. art. IV, § 8. For a history of the State Register and the N.Y.C.R.R., see Robert Allan Carter, *The Official Compilation of Codes, Rules and Regulations of the State of New York and the State Register: Their History and Use* (1984).

3. A helpful chart outlining the rule-making process is available at the Department of State Web site <http://www.dos.state.ny.us/info/ruleddiagram.htm>. *See also* N.Y. State Administrative Procedures Act § 202.

4. The *State Register* was preceded by the *State Advertising Bulletin* (1928–1944) and the *State Bulletin* (1944–1979).

5. N.Y. Executive Law § 147(1).

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NYSBA

The Wave of the Future or Blatant Copyright Infringement?

Digitalization of Libraries and Other Works

By Joel L. Hecker

The concept of making all knowledge readily available for free to everyone, or at least everyone with access to the Internet, is now more than just a dream to some. Of course, to achieve such a universal library would require, in the opinion of those opposed, either a wholesale revamping of current copyright laws or judicial interpretations that would, in effect, curtail the limited constitutional monopoly granted to authors over their work.

Current Copyright Laws

In substance, the United States Copyright Act of 1976 grants a limited monopoly to copyright owners to exploit their copyrightable creations. The monopoly is limited because of the need to balance other constitutional rights loosely grouped under the concept of the public's right to know, which are now codified under the theory of fair use in 17 U.S.C. § 107.

Fair use is an affirmative defense to copyright infringement that creates a limited privilege to use copyrighted material without the owner's consent in a reasonable manner that does not stifle the very creativity that copyright law is designed to foster. When analyzing whether

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a particular use constitutes a "fair use," the Copyright Act lists four non-exclusive factors to be considered. These factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

While no one factor is considered dispositive in the fair use analysis, the courts have traditionally given the most weight to the first and fourth factors. The more recent cases have emphasized the "transformative" aspect of the use under the first factor, which has been loosely defined as adding something new to, and not merely superceding the, original work.

Needless to say, a fair use analysis is very fact intensive.

Google's Booksearch Project

Google has entered into agreements to digitize the entire contents of five major libraries, including Harvard University, the New York Public Library and Oxford University, without the affirmative consent of the copyright owners of the material constituting the collection. Some of the agreements cover entire collections, while others permit only materials in the public domain to be scanned. Google has taken the position that digitizing the libraries is not the creation of substitutes for the original works, but simply the creation of an electronic card catalogue, and to do that, it must copy the entire works.

Primary Litigation Against Google

Lawsuits have been filed by the Authors Guild[1] and by the Association of American Publishers[2] in the United States District Court in New York to stop the Google Booksearch Project. At present, the cases are still in the preliminary stage.

Ancillary Litigation

There are other lawsuits against Google which may have significant influence upon the Booksearch Project cases in New York.

Agence France-Presse

Agence France-Presse v. Google. Inc.[3] was brought against Google in the United States District Court in Washington, D.C. in March 2005. Agence France-Presse (AFP) alleges that Google's News Service scans approximately 4,500 news outlets and highlights the top stories under generic topics such as "sports." Many stories carry a small photographic image known as a thumbnail, a headline, and some text from the beginning of the story. The concept is that a visitor can click on the headline to access the complete story at the source Web site.

However, the stories carried by AFP do not come directly from AFP. Rather they originate from AFP subscribers, some of whom may actually want their sites indexed by Google to enhance potential advertising revenue.

At the time the AFP case was filed, Google was expected to rely on the *Leslie Kelly v. Arriba Soft Corp.*,[4] a Ninth Circuit Court of Appeals 2003 decision which held, in effect, that the thumbnail photographs in that case were transformative and thus constituted a fair use. However, the effect of that decision has become questionable after the February 2006 decision in *Perfect 10 v. Google, Inc.*,[5] which may pose the gravest threat yet to global digitalization.

Perfect 10 v. Google

The Ninth Circuit Court of Appeals's opinion in *Leslie Kelly v. Arriba Soft Corp.* affirmed that of the district court, and permitted Arriba's Internet search engine to continue to display Kelly's photographs in the form of small thumbnail size images. After that circuit court opinion, most people, including Google's attorneys, presumed that use of thumbnail images would continue to be a fair use under the Copyright Act.

Perfect 10 v. Google, Inc., brought in the United States District Court for the Central District of California, has now revisited the issue in a different context and, given the changing technology and market conditions, has found that reproducing thumbnail-size images of photographs on an Internet search engine may indeed constitute copyright infringement. The case concerns Google's image search function in the form of thumbnail-size images as part of its search engine services. As stated by the court, it "arises out of the increasingly reoccurring

conflict between intellectual property rights on the one hand and the dazzling capacity of Internet technology to assemble, organize, store, access, and display intellectual property 'content' on the other hand."[6]

Perfect 10 publishes an adult magazine and operates a subscription Web site which features "high quality, nude photographs of 'natural' models."[7] It has invested $36 million over the past nine years to develop its brand, which included photographing over 800 models and creating over 6,000 high-quality images, which have been registered with the Copyright Office.

Google is of course the king of the search engines. It indexes Web sites on the Internet via a web crawler. Google, as part of its activities, displayed thumbnail versions of images found on the Perfect 10 Web site. Google admitted it displayed these thumbnail versions but argued that such use is considered fair use under the Copyright Law. In particular, Google relied upon the *Kelly* decision.

The *Perfect 10* court, on a preliminary injunction motion, ruled against Google, finding that the use of the thumbnail images in this instance probably constitutes copyright infringement. The opinion differs from *Kelly* largely because Perfect 10 was able to establish that it had created a new market for these thumbnail-size images of its nude photos. This new market arises out of the fast developing technology which permits downloading of images onto cell phones. The court found the availability of the same images in the same size on the Google Image Search would more than likely impact upon Perfect 10's market and therefore decrease its sales.

This issue really did not arise in the *Kelly* case as that court just made a presumption that there was no market for thumbnail-size images, without any discussion, and apparently Leslie Kelly had not established that he made sales of that size image. This is a prime example of how new technology impacts on existing law.

Google has appealed the *Perfect 10* decision so the Ninth Circuit Court of Appeals will have a chance to revisit its own rulings in the *Kelly* case. In the meantime, Google and other search engines can no longer feel confident that they can continue to crawl the Internet and reproduce photography in thumbnail-size images or any other sizes for that matter, without the possibility of being found to have committed copyright infringement.

Conclusion

One of the basic issues raised by the Google Booksearch Project, and the responses by publishers, is not whether the copyright content contained in libraries and other repositories should be digitized, but who will control it and be in a position to economically exploit the resulting databases. At least one publisher has already indicated that it intends to digitize its entire backlist of books, representing some 20,000 titles, and make them available online. This, of course, is being challenged by authors on similar grounds to their opposition to Google's Booksearch Project. These issues are complex and not subject to easy solutions. The one certainty would appear to be that the ever-changing technology will be the dog that wags the legal tail. ■

1. *Authors Guild v. Google, Inc.*, No. 05 CV 8136, 2005 WL 2463899 (S.D.N.Y. Sept. 20, 2005).
2. *McGraw-Hill Co. v. Google, Inc.*, No. 05 CV 8881 (S.D.N.Y. Oct. 19, 2005).
3. No. 05-00546 (D.C. Cir. Mar. 21, 2005).
4. 336 F.3d 811 (9th Cir. 2003).
5. 416 F. Supp. 2d 828 (C.D. Cal. 2006).
6. *Id.* at 831.
7. *Id.*

President's Message
Continued from Page 6

backs as well on all of us, and on all New Yorkers who look to the courts to protect their rights and redress their grievances.

The failure to adopt a fair pay adjustment for New York's judges, much less to approve a compensation commission, was terrible public policy and a serious setback to the reform agenda. I can assure you that the New York State Bar Association will continue to raise its voice in protest until that failure is reversed.

Core Values

I have written in many previous President's Messages about my efforts to protect and strengthen core values. Those efforts will continue until the last day of my term.

Independence of the bench and the bar are the cornerstones of our legal system. Both have been under attack, indeed under siege. But the vigorous response of the legal profession – including, in particular, the New York State Bar Association – has made a difference. In recent months, that response has included the following:

- We led the national fight against the outrageous effort by Assistant Defense Secretary Charles Stimson to punish lawyers who represent Guantanamo detainees. I issued an immediate statement denouncing Stimson's proposal for a boycott of such lawyers and then spoke on NYSBA's behalf at the ABA House of Delegates as the lead sponsor of a resolution condemning it. The resolution was overwhelmingly approved, Stimson's proposal collapsed and Stimson himself resigned.
- We fought the Justice Department's notorious Thompson Memorandum, which directs federal prosecutors to coerce waiver of the attorney-client privilege and the termination of corporate counsel fee reimbursements. Again, I spoke on our Association's behalf at the ABA House of Delegates as lead sponsor of the successful resolution against these practices; we filed an *amicus* brief in the Second Circuit in support of Judge Lewis A. Kaplan's decision invalidating the fee cut-off in the *KPMG* case.
- I wrote and broadcast public service announcements explaining and extolling the role of lawyers in aiding the needy, helping ordinary people solve their problems, defending the judiciary from political interference and protecting the public's rights. These were aired thousands of times on hundreds of radio stations throughout the state. Because of the public service value of the announcements, we received $1,500,000 of air time in exchange for a $60,000 donation to the Broadcasters Association.
- I testified and lobbied for the judiciary's budget and, with the singular exception of the salary adjustment, we were remarkably successful. The $2.4 billion judicial budget, as approved by the Legislature, contained everything that Chief Judge Kaye advocated and we supported, again with the exception of the raises. In addition, we were instrumental in getting a significant increase in funding for the Commission on Judicial Conduct.
- Our Committee to Review Judicial Nominations vetted the qualifications of three sets of nominees, in connection with the expiration of the terms of Chief Judge Kaye and Judges Albert K. Rosenblatt and George Bundy Smith. This is a difficult, time-sensitive and extremely important task, which helps to ensure that only qualified nominees will fill those seats, and that partisan politics will not control the selections.
- Our reform agenda, including merit selection, the judicial salary commission, and increasing the retirement age of judges, is designed to protect the independence of the judiciary, and, as indicated above, I devoted a great deal of energy to promoting that agenda.

As a result of all these efforts, together with the defeat of the more extreme anti-court, anti-judge and anti-lawyer measures put before voters and legislatures in the last year or two (*e.g.*, "Jail for Judges," the "Lawsuit Abuse Reduction Act," etc.), the intense pressures on the independent bar and bench have eased. It is no longer two minutes to midnight.

But we must remain vigilant, and speak out where appropriate. The New York State Bar Association will always do so.

I promoted diversity of the profession through a number of initiatives and efforts, including:

- The Special Committee on Senior Lawyers, a new entity that I hope will ultimately develop into a section. Justin L. Vigdor, a former Association President, is chair. The committee is addressing the special needs of and opportunities for older lawyers and developing programs and activities such as pro bono representations, career counseling, mentoring of young lawyers, board memberships and the like.
- The Special Committee on the Civil Rights Agenda, chaired by the Hon. George Bundy Smith, is developing specific goals to help break down racial barriers, increase racial diversity in the legal system and the legal profession, and advance the cause of civil rights over the next five years.
- The Special Committee on Lawyers in Transition, chaired by Lauren Wachtler, is developing programs to preserve the links between the profession and lawyers, particularly women attorneys, who have left the workforce, whether for a brief or extended period, because of family or other obligations. As part of its efforts,

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am employed by a firm that does a substantial amount of defense work on behalf of insurance companies. Of course, when one of their insureds is sued, we appear for the named defendant, and do not purport to represent the insurance company. Recently, we were asked to appear for a certain corporate client being sued for a substantial amount of money.

We interposed general denials to the allegations of the complaint, the verified answer stating that it was based on information contained in the client's files. The litigation proceeded. However, in response to demands for discovery and inspection, employees of the client told me that they did not have certain basic documents which one would expect to be part of the company's records. They continued to give me this same response even though sanctions, including striking the answer, have been threatened during court conferences. If the court strikes our pleading as a result of what the other side characterizes as deliberate obstruction and "stonewalling," the insurance company may be on the hook for a large judgment.

Under these circumstances, should I report what I believe is client obstinacy to the insurance carrier, which is at risk, knowing it may deny coverage because of non-cooperation by the insured, or should I do my best to tough it out and attempt to justify the client's position in court?

Sincerely,

Loyal But to Whom

Dear Loyal:

Understandably, your firm would like to shield the insurance company from a loss, as it is the source of much of its business. Nevertheless, the law, while acknowledging that it is a "fiction that the insured is the real party in interest" (*Thrasher v. U.S. Liability Insurance Co.*, 19 N.Y.2d 159, 167, 278 N.Y.S.2d 793 (1967)), requires that your loyalty be given to the insured client for whom you have appeared. DR 5-107(B). Accordingly, it would not be advisable to "report" client obstinacy to the insurance carrier. Having said that, you must do what you can to avoid the threatened sanctions.

Evidently, you have no firsthand knowledge of the status or location of the files being sought by your adversary. At the very least, you must obtain an affidavit from someone attesting to the facts as to where the files had been kept, what ostensibly happened that would explain their disappearance, what efforts were made to search for them, and if and how the search is continuing. *Jackson v. City of New York*, 185 A.D.2d 768, 586 N.Y.S.2d 952 (1st Dep't 1992). You have the obligation to act diligently to bring about the insured's co-operation in this regard (*Continental Insurance Co. v. Bautz*, 29 A.D.3d 989, 815 N.Y.S.2d 718 (2d Dep't 2006)), and if in fact the court imposes a penalty, the insurance company can then disclaim coverage for "willful and avowed obstruction." *Eagle Insurance Co. v. Sanchez*, 23 A.D.3d 655, 656, 805 N.Y.S.2d 103 (2d Dep't 2005). In short, in order to protect your client you must do your best to obtain the files or get a reasonable explanation for their non-production, or it may find itself with a stricken answer and without insurance.

You are indeed between a rock and a hard place.

The Forum, by

Edward J. Greenfield

J.S.C. (ret'd)

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am representing a client in a divorce case. The rules of the court require each party to submit a signed and acknowledged net worth statement. The attorney for the party must sign the following certification: "I, ……., certify that to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the foregoing paper or the contentions therein are not frivolous as defined in section (c) of section 130-1.1 of the Rules of the Chief Administrator of the Courts."

Section (c) of section 130-1.1 of the Rules of the Chief Administrator of the Courts reads, in relevant part, as follows:

> For purposes of this Part, conduct is frivolous if:
>
> * * *
>
> (3) it asserts material factual statements that are false.
>
> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

My client is in his own business and I know, from his own admission, that his income tax return does not reflect his entire income. If I advise the client to list his entire income in his sworn net worth statement, he has admitted to committing a crime. If I don't, I'm acting unprofessionally and filing a false certification. Is there a solution to my dilemma?

Sincerely,

Baffled

President's Message
Continued from Page 47

the Committee is developing a web page to provide information on topics such as re-establishing a law practice, educational and networking programs, board memberships and the availability of assigned counsel opportunities.

- Our diversity program expressly includes sexual orientation, and I mention that in my speeches and articles on the subject. I have included openly gay lawyers in very important appointments; lobbied for our proposals in support of equal rights for same-sex couples; and I presented an award to a law firm that did pro bono work on the gay marriage case.
- On mandate from the Governor, I was given the authority to appoint one member to each of four departmental judicial screening committees. Similarly, the Chief Judge invited me to appoint one member to each of 12 district judicial election qualification commissions. Of my 16 appointments, six were women and five were minorities.
- When the Board of Law Examiners released its study showing that the increased passing score on the bar exam had a disparate, adverse impact on minorities, I immediately called for a cancellation of future proposed increases. The Board responded by "freezing" future increases; I am confident that there will never be a thaw.

Our fourth core value is access to justice. Here, my signature initiative is the Empire State Counsel program, which celebrates lawyers who render 50 hours of free legal services to the poor. This has been my most popular program. Almost 500 of our members have already qualified, and the number grows weekly. Kate Madigan and I honored our Empire State Counsel at a luncheon held during State Bar Week, at which the featured speaker was Michael Greco, immediate past president of the ABA.

Of course, lawyer pro bono efforts, no matter how substantial, are not enough to meet the civil legal needs of the poor. Society must fill in the gap, through legal services programs. I testified and lobbied for expanded state funding, and I am gratified that total funding this year was significantly increased to $36 million.

Farewell

This is my last President's Message. Accordingly, this is a fitting occasion to tell you what an extraordinary experience it has been to serve as President of our great Association this year – a challenging year; an important year; a productive year; a thrilling year. And, as my predecessors assured me, it has been the greatest experience of my professional life.

On June 1 – but not a day before – I will turn over the office to our President-Elect. No one has ever come to this job better prepared or more experienced than Kate Madigan. She will be an outstanding 110th President of the New York State Bar Association.

In that effort, she will have, as I have had, the support of our outstanding State Bar Association staff. I am enormously grateful for their exemplary performance and dedication. It would not be feasible to mention each name. But I must single out one person of exceptional dedication and achievement, at the top of her game – my colleague, our chief executive, Pat Bucklin.

With a fine staff, a superb Executive Director, and an outstanding President-Elect waiting in the wings, the state of the Association is excellent. And yet, in the final analysis, the future of the New York State Bar Association depends on you, our 72,000 members. Presidents come, and presidents go. But it is our members who are the heart of the Association, its raison d'être. You have my deep gratitude for your membership and participation in our Association and for the support and friendship you have shown me.

These remarks have a valedictory flavor, but please don't think of them as my last gasp. Although you are reading these remarks in May, I am writing them at the beginning of April. It is true that June 1 looms. But I still have most of April and all of May before I pass the baton to Kate. Think how much mischief I can do in that time!

It has been and continues to be a great ride. And, as the poet said, "I have miles to go before I sleep." ■

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What is the proper spelling of these words: *email* vs. *e-mail* and *voice mail* vs. *voice-mail*? *The Chicago Manual of Style* says that the tendency today is to use fewer hyphens, but I have seen various spellings for both terms.

Answer: The word *email* (the noun, verb, and adjective) is always one word, but you can hyphenate it or not, as you prefer, although it is now more often spelled without a hyphen. The hyphenating of compounds like *email* usually represents only an interim phase in their development. They are introduced as two separate words, then as they become popular, they are hyphenated, and finally they are written as a single word.

But I was surprised to discover that *email* is not a new word – only its meaning is new. Today *email* is defined as "electronic mail automatically passed through computer networks via modems over common-carrier lines." But the word *emailled* is listed in the *Oxford English Dictionary* (OED) with the meaning "embossed with a raised pattern." The OED says it was first recorded in 1480, and traces its etymology to the French word *emaille* ("enameled"). It is doubtful that whoever coined the modern *email* was aware of its predecessor. The spelling of *email* with no hyphen will probably become the overwhelming favorite because it is widely used and shorter. (That's why I prefer omitting the hyphen.)

The phrase *voice mail* is not listed in the unabridged 1996 *Webster's*, but it is listed online in the 2006 *Random House Unabridged Dictionary* as two words, with the meaning: "An interactive computerized system for answering and routing telephone calls, for recording, saving, and relaying messages, and sometimes for paging the user."

Perhaps it has been retained as a two-word term because it is newer and less common than the term *email*. As I wrote in my February 2006 "Language Tips," in answer to a question about hyphenation, compounds like *ball park* then become *ball-park*, and finally, *ballpark*. This sequence has occurred with many common terms, like *passbook*, *postpartum*, and *withhold*. Compounds like *withhold*, *cooperate*, and *loophole*, that contain double letters, resist becoming single words, but those three have done so. Modifiers are written as separate words when they occur after the noun they modify, but they are hyphenated to indicate that they modify the noun together rather than separately:

A plan that was prepared well
A well-prepared plan

An affair requiring a black tie
A black-tie affair

A job finished in one day
A one-day job

A report that was up to date
An up-to-date report

Question: Are statements like the following one, which a reputable reporter used on television recently, now considered correct? "This behavior is similar, though not as annoying, as [the official's] previous behavior."

Answer: No. The statement illustrates what I call "the vanishing preposition." When the preposition in the second clause of a sentence differs from the preposition in the first clause, both prepositions must be used. However, today many speakers and writers ignore that rule. In the sentence submitted, the preposition *to* was omitted. But because it differs from *as* (in the second clause), it should have been included. The statement should have been, "This behavior is similar *to*, though not as annoying *as* the official's previous behavior."

A Midwest congressman recently omitted *as* when he answered a reporter with, "You know that as well or better than I do." (He should have said, "You know that as well *as* or better *than* I do.") And a reporter on NPR asked his interviewee, "How many exotic species did you find in the area you went?" (Missing, the preposition *to*.)

Some ungrammatical phrases have become idiomatic; for example, the missing *about* in: "We're not talking brain surgery here!" The slang verb-phrase *hang out* ("spend time idly") became popular some time ago. Then *out* was dropped, and *hang* now appears alone, as in, "The star pitcher is so popular we all like to *hang* with him." The preposition *from* has disappeared from billboards that urge people to "Fly our airport!" and from signs in theaters to "Exit the rear door!"

The argument is that deletions save space. That makes sense, but then why redundancies like these? (You could no doubt add to this list):

A *little* bit of a problem. (American usage; Britons just say "a bit of a problem.")

You are *exactly* right. (And he is *absolutely* wrong.)

Tighten it *up* and close it *down*.
Sweep *out* the garage.

People who do include needed prepositions and adverbs sometimes choose the wrong ones. Here's a typical quote, from a newspaper column: "It generally costs about twice *as* much to build a commercial vessel in the United States *than* it does overseas." This construction probably blends two idioms: *as much as* with *more than*. (Change the word *than* to *as*.)

Another blend is changing the idiom, *between . . . and* to *between to*. The traditional idiom was, "The event will take place *between* 6:00 *and* 9:00 P.M." Now it is becoming, "The event will take place *between* 6:00 *to* 9:00

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P.M." The phrase *between . . . to* blends two former idioms: *between . . . and* and *from . . . to.*

Potpourri:
The planet Pluto was recently demoted, but it got respect from wordsmiths if not from astronomers. To *pluto* is to demote or devalue someone or something, as happened when the General Assembly of the International Astronomical Union decided Pluto no longer met the definition of a planet. *Plutoed* was chosen the word of the year in 2006 by the American Dialect Society. ■

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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.

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infer that the spilling was intentional. When you later argue it was intentional, the reader will agree. Surround unfavorable facts with favorable facts for a halo effect. Emphasize favorable facts and de-emphasize unfavorable ones. In a brief, never let two sentences pass without letting the reader know which side you represent.

In an office memorandum, present the facts neutrally and objectively, with no intention to persuade the reader. The reader shouldn't know from the facts what you'll ultimately recommend or predict.

In a brief's Argument section or an office memorandum's Discussion section, apply only those facts mentioned in your facts. In your facts, use only those facts you'll apply in the Argument or Discussion section. Review your facts after preparing the Argument or Discussion sections to confirm that you've included all necessary facts. Eliminate irrelevant dates, facts, people, and places. The record must support every assertion of fact, which comes from pleadings, affidavits, and deposition, hearing, and trial transcripts. Always cite the record for facts mentioned anywhere in a brief or office memorandum.

The brief's Statement of the Case or Counterstatement should begin with something about the person you want the reader to identify with or hate. Start from that person's perspective. End the Statement of the Case or Counterstatement with procedural history. The office memorandum's Facts section should begin with procedural history.

5. Love Clarity. Jewelers say that the better the clarity, the better the quality. The same applies to legal writing. Omit unnecessary fact, law, and procedure. In sentences, paragraphs, and sections, put essential things first. Assume that the reader knows nothing about your case. Write directly, not indirectly. *Example:* "Justice is an important concept." *Becomes:* "This court should reverse the conviction." State clearly and repeatedly why you're writing. What do you want? What relief are you seeking? Go from general to specific, but don't generalize. Raise the issue before you explain it. Give the rule before you give the exception. Give rules and exceptions in separate sentences. Lay a foundation before you discuss something: Don't discuss the terms of a contract before you establish that the parties have a contract. Familiarize readers with a case before you analogize or distinguish it. Introduce characters before you talk about them.

6. Love Getting to the Point Fast. State your point in the first paragraph on page one of your document or, in a brief, in the Argument section. Putting your main point up front gives your readers the conclusion in case they don't read further. It tempts readers to continue and puts everything in context. Consider the shape of a funnel or inverted pyramid: give the conclusion (the big picture), then detail. Stating your point immediately in a brief means including a thesis paragraph after each point heading. The thesis paragraph is the roadmap, the organization to your argument. In the topic sentence — first sentence — of the thesis paragraph, state your conclusion on the issue. Then explain how you've reached that conclusion: why you should win. Conclude the thesis paragraph with a thesis sentence: what you want the court to do. In an office memorandum, begin the thesis paragraph with a topic sentence: a statement of your issue. Then state the law objectively on the issue from your topic sentence. Conclude the thesis paragraph with a recommendation or prediction.

7. Love Succinctness. Readers have short attention spans. Don't repeat yourself: Say it once, all in one place. Don't dwell on givens. Don't give the entire procedural history unless doing so advances your argument or proves necessary in context. Include only legally significant facts, apply only relevant law to those facts, and tell your readers only what they need to know. Include only facts that advance your theme and help good arguments get noticed. Cite only to legal authority that's helpful to your argument. Unless you want to analogize or distinguish your case from the authority you're citing, don't analyze the authority in depth or give its facts. Don't add unnecessary text by defining and qualifying.

8. Love Concision. Use only necessary words: the fewest words without losing precision in language, because precision is more important than concision. Make every word count. If the last line of a paragraph has only a few words, cut words out of the paragraph to save a line. Deleting unnecessary words will make your writing tighter and your document shorter. This technique lets you come within the page limit. Obliterate the obvious. *Incorrect:* "If respondent is evicted, he will have to leave his apartment." Replace coordinating conjunctions ("and," "but," "for," "nor," "or," "so," "yet") with a period. Then start a new sentence. Transfer to a second sentence most parenthetical expressions, also called embedded clauses — an internal word group that has its own subject and verb. Doing so shortens your sentence and thus is concise, even though it might add text. *Example:* "The judge's chambers, which has a view of the Empire State Building, is on the ninth floor." *Becomes:* "The judge's chambers is on the ninth floor. It has a view of the Empire State Building." Delete "as" and "to be," if possible. *Examples:* "Some consider cigarette smoking as a crime." *Or:* "Some consider cigarette smoking to be a crime." *Become:* "Some consider cigarette smoking a crime." Don't begin sentences with "in that" or use "in that" in an internal clause: "In that the judge's cousin was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her cousin was a litigant." Delete "being." *Example:* "The attorney was regarded as being a good writer." *Becomes:* "The attorney was regarded as a good writer." Wipe out "of" and "as of." Delete the following: "in fact," "in point of fact," "as a matter of fact,"

"the fact is that," "given the fact that," "the fact that," "of the fact that," and "in spite of the fact that." Save "in fact" to state facts, not opinions. *Incorrect:* "The opinion relies on the fact that testimonial statements are inadmissible at trial." *Correct:* "The opinion relies on the rule that testimonial statements are inadmissible at trial." Strike the nonstructural "who," "who are," "who is," "whoever," "whom," "whomever," "which," "which is," "which are," "which were," "that," "that is," "that are," and "that were." *Example:* "The point that I'm making is that . . . ." *Becomes:* "The point I'm making is that . . . ." Trim "to" stilts: "Help to prepare" *becomes* "help prepare." "In an attempt to," "in an effort to," "in order to," "so as to," "unto," "with a view to," and "with the object being to" *become* "to." "In order for" *becomes* "for." "Is authorized to" *becomes* "may." "With reference to," "with regard to," and "with respect to" *become* "about." Eliminate pleonasms. They're unnecessarily full expressions. *Example:* "The judge, who e-mailed me, *he* likes me." *Becomes:* "The judge, who e-mailed me, likes me."

9. Love Concreteness. Don't just tell your readers something: Show them what you mean. Show by describing people, places, and things. Abstract conclusions don't help readers understand the problem. Turn the general and vague into the particular and vivid. Write so that readers will hear, see, smell, taste, and touch your ideas. Prefer concrete nouns and vigorous verbs to adverbs and adjectives. Use adjectives and adverbs sparingly. *Poor examples:* "The man is tall." *Or:* "The man is very tall." *Good example:* "The man is seven feet, three inches tall."

10. Love Memorable Rhetoric. Rhetoric is the art of marshaling and expressing argument. Embrace rhetorical strategies by using metaphors, similes, parallelism, and antithesis. Metaphors, which compare unlike things that have something in common, make abstract concepts concrete. *Examples:* "You don't get a second bite from the apple." "Property rights are a bundle of sticks." "The court must suppress the fruit of the poisonous tree." A simile is a comparison using "as," "as if," "as though," or "like." *Examples:* "A judge is like an umpire at a baseball game." "Judges are like funnels: There's a big opening at the top and all the law clerks and the staff attorneys pour stuff in there."[1] Another effective device is parallelism: a similarity of structure in a pair or series of words, phrases, and thoughts. *Examples:* "A government of the people, by the people, and for the people."[2] "We will not tire, we will not falter, and we will not fail."[3] "I came, I saw, I conquered."[4] Antithesis is powerful when it concisely contrasts ideas of the same order. *Examples:* "Injustice anywhere threatens justice everywhere."[5] "Never in the field of human conflict was so much owed by so many to so few."[6] "We must all hang together or we will all hang separately."[7]

11. Love Issues. A common mistake law students make is to focus on citations instead of issues and arguments. Stress issues and arguments, not citations. Give rules first. Then support them with citations.

Here are some suggestions on writing issues, called Questions Presented in a brief or Issues Presented in an office memorandum. Choose one to four issues. An issue is an independent ground on which the relief you seek can be granted if the reader agrees with you on that issue and disagrees with you on everything else. Avoid trivial issues. The only time you should raise as many points as possible — the kitchen-sink approach — is if you have an important case in which you must preserve the record for appeal. State your main point within 90 seconds. Recite facts chronologically. Add detail to tell a memorable story. Cut out facts that don't advance your argument. Use 50 to 75 words to frame your issue.

In a brief, use separate sentences to create a statement-statement-question format for each Question Presented. Starting your question with "whether" and writing one long, convoluted sentence is superficial and ineffective. The first two sentences in this statement-statement-question format present the legal controversy and introduce relevant facts. The last sentence is a question that goes to the heart of the issue. Write the question so that the answer is yes. The answers to the Questions Presented are found in your point headings. In an office memorandum, write the Issues Presented as a question, one sentence long, that addresses the issues. To prevent a long, intricate question, write the Issues Presented in a statement-statement-question format. After the Issues Presented, include an Answer section — answer the Issues Presented with a "yes," "no," or "maybe" and the concise reasons for your answer, without repeating the question and without using "because."

First argue the issue that has the greatest likelihood of success. If all claims have the same likelihood of success, discuss the claim that'll affect the litigation most. In a criminal appeal in which you represent the defendant, for example, discuss whether the court should grant your client a new trial before you discuss whether the court should reduce your client's sentence.

Exceptions: Your first issue should be a dispositive threshold issue — jurisdiction or statute of limitations — if you have one. Move logically

There's a consensus about what's important: accuracy, brevity, clarity, and honesty.

Putting your main point up front gives your readers the conclusion in case they don't read further.

through statutory or common-law tests. Discuss your issues in the order in which the statute or case laid out a multi-factor test. When the answer to one issue depends on the answer to an earlier question, resolve the first issue first. Discussing claims and issues in the order they arose facilitates understanding if the claims and issues arose chronologically. Resolve issues by a hierarchy of authority: constitutional issues first, then statutory issues, then common-law issues.

In opposition papers, don't copy the way your adversary ordered the issues. Tell your reader which issue you're opposing, but order your opposing issues the way it works for your client, not your adversary.

12. Love Large-Scale Organization: Headings. Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Identify each section in your brief or office memorandum: "Question Presented" or "Issue Presented"; "Statement of the Case" (opening brief) or "Counterstatement" (replying brief) or "Facts"; "Argument" or "Discussion"; and "Conclusion."

After you've figured out the issues and how to order them, divide your brief's Argument section or office memorandum's Discussion section into headings to tell readers where you're going. Headings are signposts. Use roman numerals for your point headings (I., II., III.). Some writers believe that you should use all capitals for your point headings. The Legal Writer recommends capitalizing only the first letter of each word. All capitals is unreadable. For your subheadings (A., B., C.), capitalize the first letter of each word: Don't use all capitals. For your sub-subheadings, use figures (1., 2., 3.). You can't have a subheading (A.) or a sub-subheading (1.) on its own. With subheadings or sub-subheadings, you need two or more subheadings (A., B.) or sub-subheadings (1., 2.). The exception is that you can have a single point heading (I.) on its own. Use a period after each heading, subheading, or sub-subheading. Single-space your headings.

All headings, subheadings, and sub-subheadings should be one sentence long, although they may contain a semicolon. They must be concise, descriptive, and short.

Point headings in a brief answer the Questions Presented. Match the number and order of your Questions Presented with your point headings. If you have one Question Presented, you should have one point heading; if you have two Questions Presented, have two point headings. If you have two or more Questions Presented, mention them in the same order in the table of contents and in the Argument section. In the office memorandum's Discussion section, address the issues in the same order as you did in the Issues Presented.

In a brief, write headings in an affirmative, argumentative, and conclusory way — the conclusion you want after applying law to fact. The more subheadings or sub-subheadings, the more conclusory the point headings. The argument in the subheadings should add up to the argument in the point headings. The sub-subheadings should add up to the subheadings. Too many headings will break up the text too much. Your document will be disjointed and have no flow. Too few headings will make your document disorganized. To determine whether you've enough headings, read all the headings in the table of contents as they appear in the brief. The argument should reveal itself.

In an office memorandum, write the headings in an objective, neutral, and informative way.

Keep your subject near its predicate. Don't interject information between your subject and predicate. Never write ambiguous headings in which "not" precedes "because." Will the sentence mean "Not because of this, but rather because of that"? Or "Not so, and for this reason"? Or "Because of this, but for a different reason"? Use "because" before "not," but never use "not" before "because" unless you add a second clause or sentence.

What goes in the text after the heading, subheading, and sub-subheading shouldn't repeat the heading, subheading, and sub-subheading. Be creative. Don't regurgitate. Don't even paraphrase.

In the body of your document, bold your headings, subheadings, and sub-subheadings, including the roman numerals, letters, and figures that come before them. Don't bold anything in the brief's table of contents or use a period after each heading. Use dot leaders in your table of contents to separate your headings from their corresponding page numbers.

13. Love Large-Scale Organization: IRARC and CRARC. For a brief's Argument section, organize each issue using the CRARC method — the Legal Writer's patent-pending way to organize. CRARC is an IRAC variant (Issue, Rule, Analysis, and Conclusion). CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section of CRARC, state the issue and why you should prevail on it. In the Rule section, state your points from the strongest (those you'll most likely win) to the weakest (those you'll least likely win). After each rule, cite your authority from the strongest to the weakest and from the most binding on down. In the Analysis section, apply your rules — the law — to the facts of your case. The facts should come from the Statement of the Case or Counterstatement. In the Rebuttal and Refutation section, state the other side's position honestly and refute it persuasively. Address adverse fact and law, even if your adversary didn't or might not. Doing so will diffuse its impact before your reader figures out your adversary's argument. The Rebuttal and Refutation section is placed here on purpose. The Rebuttal

and Refutation section is in the middle, not the beginning or end — places with the greatest emphasis — of the argument. You've begun with why you should win. You're right because you're right, more than because the other side is wrong. In the Rebuttal and Refutation section, don't repeat anything you've written in the Rule section. In the second Conclusion section, state the relief you're seeking on the issue.

For an objective office memorandum's Discussion section, organize each issue using the IRARC method — the Legal Writer's other organizational tool. IRARC, an IRAC variant, stands for the Issue, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the Issue section, state the issue objectively. In the Rule section, state the rule applicable to the issue. Then support each point with the law. In the Analysis section, apply your rules — the law — to the facts of your case. Facts come from the Facts section, which is compiled from affidavits, affirmations, and deposition, hearing, and trial transcripts. In the Rebuttal and Refutation section, create a strawman argument — the contrary argument — and then refute it. In the second Conclusion section, give your recommendation or prediction.

In the next issue, the Legal Writer will continue with a second set of 13 do's. Following that column will be two columns on legal writing's don'ts. ■

1. Richard S. Arnold, *The Future of the Federal Courts*, 60 Mo. L. Rev. 533, 543 (1995).

2. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 The Collected Works of Abraham Lincoln 17, 23 (Roy P. Basler ed., 1953).

3. George W. Bush, address before Joint Meeting of Congress, September 20, 2001.

4. "I came, I saw, I conquered" is the English translation of Julius Caesar's oft-quoted statement from the Latin, "Veni, vidi, vici."

5. Rev. Dr. Martin Luther King Jr., Letter from the Birmingham Jail, Apr. 16, 1963, *available at* http://www.almaz.com/nobel/peace/MLK-jail.html (last visited Feb. 22, 2007).

6. Sir Winston S. Churchill, 1940, on the debt due to the Royal Air Force pilots during World War II.

7. John Bartlett, Familiar Quotations 348 (15th ed. 1980) (attributing these words to Benjamin Franklin).

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BY GERALD LEBOVITS

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan. He thanks court attorney Alexandra Standish for assisting in researching this column. His e-mail address is GLebovits@aol.com.

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

To create a legal document, you must know your audience, the purpose of your document, how to organize, and when to stop researching and start writing. You must follow deadlines. You must comply with court and ethics rules. You must edit your work and have pride in it. That's the writing process.

Once you've perfected the process you can focus on the final product. The way to create a good final product is to know legal writing's do's, don'ts, and maybes. This column and the next offer the Legal Writer's top 26 do's — a double baker's dozen. Following these two columns will be two columns on legal writing's don'ts. The Legal Writer will then continue with columns on grammar errors, punctuation issues, and legal-writing controversies. Together this series of columns covers legal writing's do's, don'ts, and maybes.

There's no one way to write it right. Good writers do things differently. But writers and readers always agree about whether a document is written well. Despite the controversies about some legal-writing details, there's a consensus about what's important: accuracy, brevity, clarity, and honesty. Here's the consensus — the things writers should love.

1. Love the Right Tone. Tone helps determine whether readers will accept what you write. To get your tone right, ascertain whom you're writing for. Anticipate the reader's concerns. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don't bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. Avoid excessive capitalization. Once you've found the right tone, keep it consistent. If the audience is a court and you're writing a brief, your tone should be confident, formal, persuasive, and understated, not angry, colloquial, harsh, or pushy. If your audience is your boss and you're writing an office memorandum, your tone in discussing fact and explaining law should be objective, not argumentative. Write about emotional issues, but don't write emotionally.

2. Love Perspective. To persuade, make your reader identify with your client. Write about real people and real events. Your client isn't a wooden figure, although your adversary's client might be. Bring your client to life. The way you refer to people affects how readers perceive them. Use your client's real name. If you represent the defendant in a criminal case, describe the crime blandly or generally. If you represent the prosecution, invoke the victim's perspective and describe the crime in detail. A key place for perspective is when you write the facts. Telling a revealing and vivid story will engage the reader and help the reader remember what you wrote.

3. Love Theme. Every persuasive legal document must have a theme. Without a theme, a document won't be persuasive. A theme works if it appeals to a smart high-school student. Themes involve right and wrong, good and bad. Theme is about what's just and moral. To create a theme, imagine you're in a jurisdiction with no laws, a jurisdiction in which all that counts is justice and morality. Tell the reader you're right, not because some law says this or that, but because if you lose the bad will prosper and the good will suffer. Think about your adversary's theme. Once you find a theme, weave it from the beginning to the end of your writing. Include every important and helpful authority, fact, and issue that supports your theme or contradicts your adversary's theme. Exclude all else.

4. Love Good Facts. Organization, perspective, and theme are essential to writing facts. How you present facts determines whether the story is effective. Organize facts chronologically. Reciting facts witness by witness won't engage the reader.

A brief's Statement of the Case or Counterstatement section or an office memorandum's Facts section, should contain only facts, not argument. Don't explain the significance of the facts. Save the argument for the brief's Argument section or office memorandum's Discussion section.

In a brief, present facts favorable to your position first. Readers will prejudge the case and rationalize later inconsistent facts because of what they already believe is true. *Example:* A man you've already described as a pillar of the community walks into a bar and spills beer on someone. The reader will infer that the spilling was accidental. When you later argue it was accidental, the reader will agree. *Example:* A man you've already described as dishonest and vile walks into a bar and spills beer on someone. The reader will

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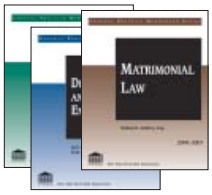

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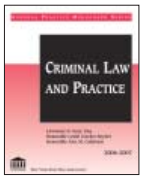

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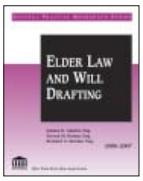

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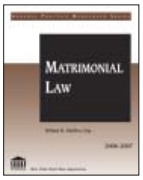

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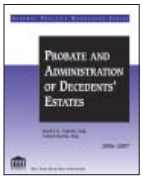

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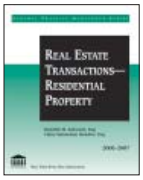

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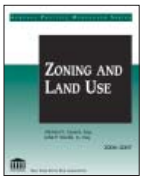

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