NEW YORK STATE BAR ASSOCIATION

Journal

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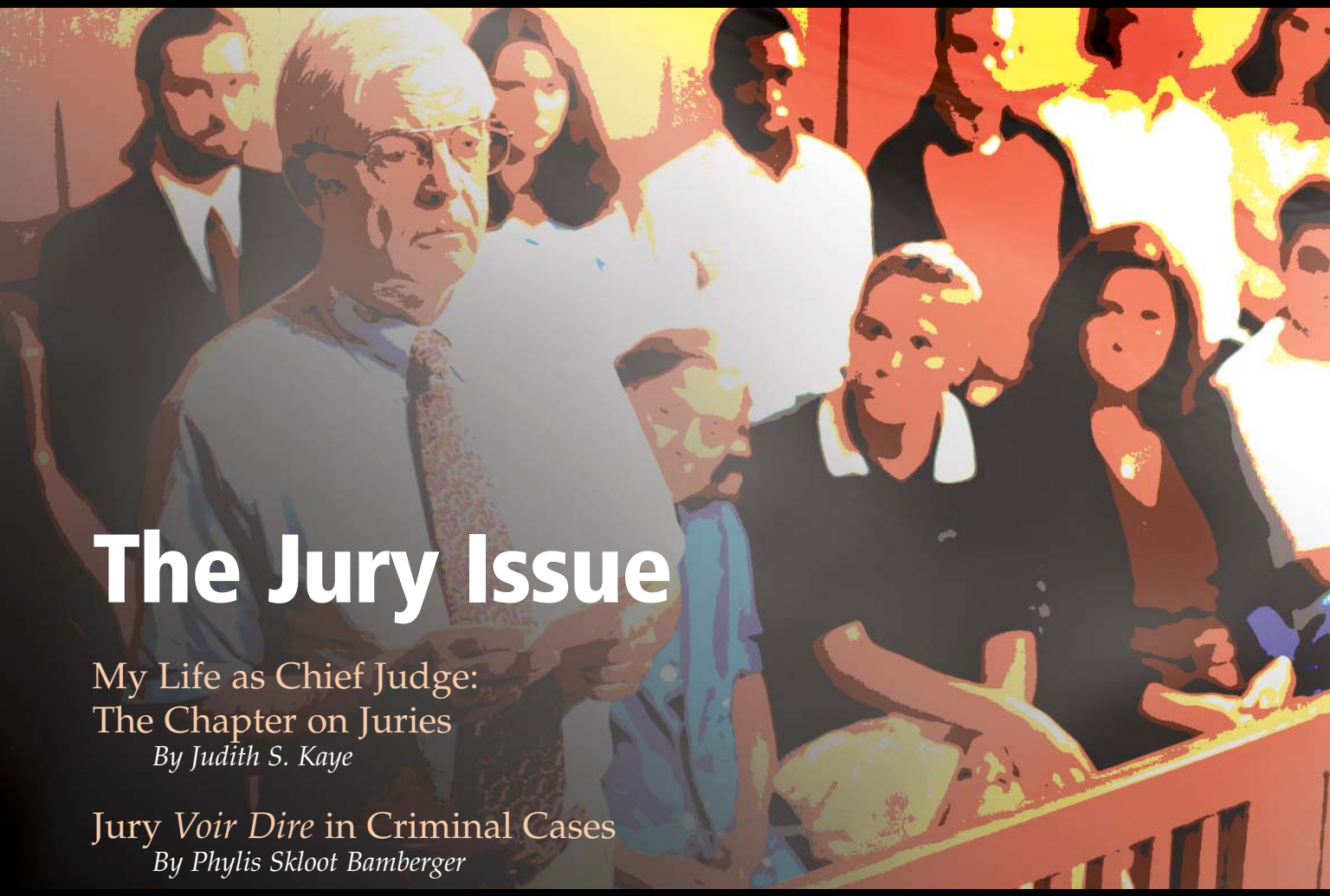

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October 2006

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BY JUDITH S. KAYE

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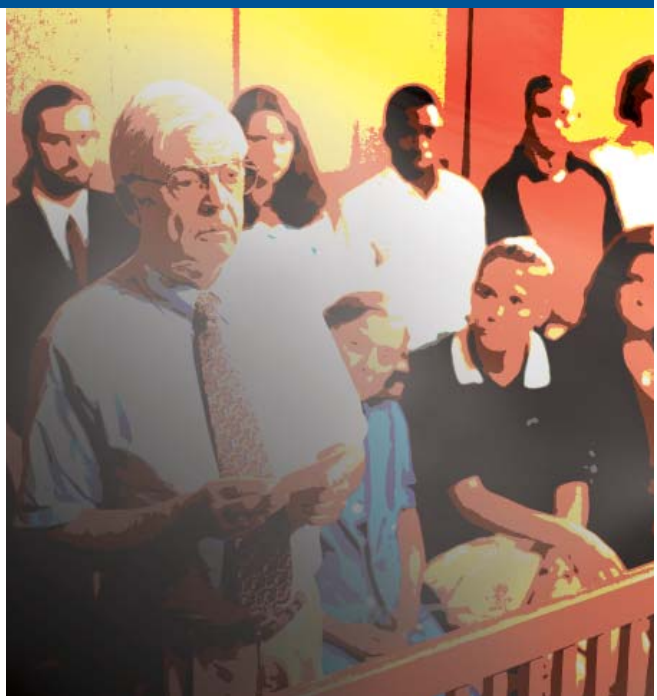

DEPARTMENTS

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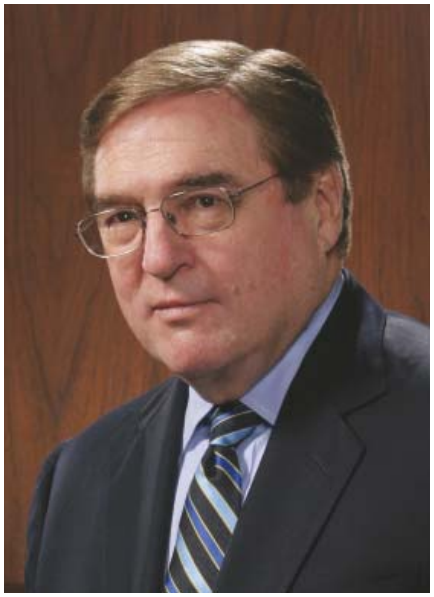

Promoting Needed Reform, Defending Core Values

Mark H. Alcott

The major priorities of my presidency are to strengthen and defend our core values while promoting needed reform. Recent events have provided rich opportunities to do both – to reform New York's dysfunctional method of selecting Supreme Court judges and to defend the core value of independence of the bar. I deal here with each of these major developments.

Judicial Selection

"The defects of New York's present system of 'electing' judges are well known. In reality, New York's electorate does not participate in the process. Nominees of the major political parties for the Supreme Court are at present chosen in conventions tightly controlled by party leaders. Party loyalty, not ability, is the primary prerequisite for nomination."

Report approved
by House of Delegates,
New York State Bar Association, 1993

"All of the evidence presented, and accepted by the District Court, reduces to this bottom line: through a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment. '[I]n every practical sense,' these regulations preclude all but candidates favored by party leadership 'from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support' (citation omitted). 'The effect of this exclusionary mechanism on voters' is to 'substantially limit [ ] . . . their choice of candidates' (citation omitted)."

United States Court of Appeals for
the Second Circuit, in *Lopez Torres v. N.Y. State Board of Elections*, August 30, 2006

"Even as we defend our core values, opportunity is knocking for major reform. Judicial selection will take center stage. The Second Circuit has heard the appeal in the [Lopez] Torres case, and is reviewing Judge Gleeson's decision that the current method of conducting judicial conventions is unconstitutional. Whatever the result on appeal, the issue of judicial selection will be very much in play, and we will be players. For 25 years, our Association has called for change. Some thought it was pie in the sky. But now, we have a rare opportunity for genuine reform, and we must seize that opportunity."

Mark H. Alcott, Inaugural Address,
Delivered to House of Delegates,
June 24, 2006

The fault lines in New York's process of selecting Supreme Court justices have been apparent to the State Bar and other knowledgeable observers for decades. They are outlined in an extraordinary report issued more than 12 years ago by a special Association committee known as Action Unit #4, chaired by Jules J. Haskel. I have quoted above a few lines indicating the thrust of that report – which remains as fresh and on-target as if it had been issued yesterday.

The report was approved by the House of Delegates in 1993. And now, nearly 13 years later, in the *Lopez Torres* case, the Second Circuit has dramatically endorsed its principal conclusions.

The committee reported, and the Second Circuit has confirmed, that New York's system of choosing Supreme Court justices, although nominally democratic, in fact places the selection power in the hands of party leaders accountable to no one but themselves. They, in turn, use the selection process to enhance their political control. The public is effectively shut out of the process. So, too, are the highest officials

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elected by the public and entrusted by it with executive and appointive authority.

Remarkably, the process has produced many Supreme Court judges of exceptional quality. But it has also led to a bench lacking ethnic, gender and geographic diversity; a system that rewards party loyalty rather than judicial ability; a number of judges who lack merit; and a disconnect between the constitutional mandate of free and open participation and the reality of party control.

The last point is particularly important. As I have said many times, courts have no armies or weapons; they depend on their moral authority. That moral authority is undermined if courts are not free from political interference, in perception as well as reality. We cannot expect the public to have respect for, and confidence in, our legal system if the very method by which judges are selected is suspect. The discrepancy noted by the Second Circuit between the de jure system of open participation and the de facto system of political party control breeds cynicism about, not respect for, the process and the results of the process.

What is to be done?

We have already made thoughtful proposals for reforming judicial nominating conventions and implementing judicial screening panels through our Committee on Judicial Selection, chaired by our former President G. Robert Witmer, Jr. But we have to do more than patch up the holes in the existing system.

What about open primaries and elections?

The Second Circuit required that nominations for the office of Supreme Court Justice proceed by open primary elections until the Legislature adopts a new nominating system. But an elective system, however open, creates as many problems as it solves. Again, the 1993 report of our Association's Action Unit #4 was right on target:

> In constituencies where one party predominates, nomination is tantamount to election, and the election is superfluous. In other instances, leaders of opposing political parties totally eviscerate the "elective" process by cross-endorsement of candidates. Even in contested races, the voter has little meaningful opportunity to choose between opposing judicial candidates because the Canons of Judicial Ethics prohibit them from campaigning on political legal issues.
>
> Judicial elections also have become prohibitively expensive. Contributions are solicited from the very attorneys who will practice before the candidate, creating an appearance of impropriety that detracts from the public's perception of judges and the judicial system.

There is a better way: Merit selection, in which the chief elected official of the state, city or county appoints judges from candidates designated by non-partisan nominating commissions, subject to confirmation by the Senate or local legislative body. This plan is similar to that already in effect for the Court of Appeals.

Our Association has advocated merit selection of New York's judges for a quarter of a century. It was endorsed by the House of Delegates in 1973, 1979 and 1993. The details of the plan are spelled out in the 1993 report of Action Unit #4.

Some say this idea is politically unrealistic. I say it is an idea whose time has come. No one wants an open primary system, but that is what will happen unless agreement is reached on an alternative. And agreement must be reached soon; the Second Circuit expressly refused to stay its order beyond this year's election cycle. So the pressure to reach agreement and change the system is very strong. In this environment, we should and will be a strong voice for merit selection, which is our long-standing position. This is an historic opportunity for fundamental reform, and we must seize that opportunity.

Independence of the Bar

This summer, the American legal community fought back against government's latest assault on the independence of the bar, and the New York State Bar Association led that fight. At its annual meeting, the American Bar Association – on the initiative of our Association – condemned the effort by federal prosecutors to prevent companies from paying the defense costs of their employees in criminal cases.

Until recently, these payments, which are generally required by law, contract or company policy, were not questioned. But under the doctrine articulated by the Justice Department's notorious "Thompson Memorandum," prosecutors warn company officials that the government may consider such payments to be evidence that they are "uncooperative." In short, if a company enables its employees to defend themselves, the company itself is more likely to be indicted.

This unconstitutional interference with the right to counsel is a threat to the independence of the bar. That people have a right to legal counsel and that government has no business interfering with that right are fundamental concepts of our legal system. These days, however, they are concepts our government has chosen to attack.

The bar's position on this issue is its latest salvo in the battle to preserve a neutral legal system, where disputes are resolved fairly, fearlessly and without political interference. Independence of the bench and bar are the cornerstones of that system of justice, and they are irrevocably linked. That is why those who attack the courts and judges also attack lawyers and the legal profession. And these attacks are accelerating.

In recent years, the lawyer-client relationship has been a focal point of those attacks. For example, the same Thompson Memorandum encourages prosecutors to warn company officials that the government may consider a company to be uncooperative – and therefore more likely to be indicted –

CONTINUED ON PAGE 53

NYSBACLE

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

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Gaining an Edge: Effective Writing Techniques for the New York Attorney by Hon. Gerald Lebovits
(half-day program)
Fulfills NY MCLE requirement for all attorneys (3.5): 3.5 skills

October 17	New York City
October 26	Mt. Kisco
October 27	Saratoga Springs

Operating the New York Not-For-Profit Organization: Current Issues and Best Practices
Fulfills NY MCLE requirement for all attorneys (7.0): 0.5 ethics and professionalism; 1.0 skills; 5.5 practice management and/or professional practice

October 18	Albany
October 25	Syracuse
November 1	New York City
November 8	Buffalo

Shared Parenting and Child Support; Real Problems and Real Solutions
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.5): 2.0 skills; 2.5 practice management and/or professional practice

October 20	Albany
November 3	New York City
November 17	Melville, LI
December 1	Buffalo
December 8	Syracuse

Henry Miller – The Trial
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 ethics and professionalism; 6.5 skills

October 20	Tarrytown
December 4	Albany (new date)

Practical Skills Series – Probate and the Administration of Estates
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 2.5 skills; 3.5 practice management and/or professional practice

October 24	Albany; Buffalo; Hauppauge, LI; New York City; Rochester; Syracuse; Westchester

The Keys to Effective Trial Advocacy with Jim McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 skills

October 25	New York City
October 26	Syracuse

Update 2006
(live sessions)
Fulfills NY MCLE requirement for all attorneys (7.5): 7.5 practice management and/or professional practice

October 27	New York City

(video replays)
+Fulfills NY MCLE requirement (7.5): 7.5 practice management and/or professional practice

October 20	Utica
October 27	Binghamton; Canton
November 2	Rochester
November 8	Ithaca; Plattsburgh; Saratoga

Update 2006 *(con't)*
+ (video replays)

November 9	Jamestown
November 17	Poughkeepsie; Watertown
November 28	Melville, LI; Nanuet
November 29	Buffalo
December 1	Loch Sheldrake
December 5	Tarrytown

Buying or Selling a Small Business
Fulfills NY MCLE requirement for all attorneys (6.5): 3.0 skills; 3.5 practice management and/or professional practice

October 27	Buffalo
November 1	Albany
November 8	New York City

Accounting for Lawyers
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 5.5 skills; 0.5 practice management and/or professional practice

November 2	Syracuse
November 29	New York City
December 1	Albany
December 6	Buffalo
December 7	Melville, LI

Handling DWI Cases in New York State
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 1.5 skills; 4.5 practice management and/or professional practice

November 2	Buffalo
November 30	Albany

Handling Tough Issues in a Plaintiff's Personal Injury Action
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 ethics and professionalism; 3.0 skills; 3.0 practice management and/or professional practice

November 3	Albany; Melville, LI
November 17	New York City
November 29	Rochester

Update on Trucking Litigation and Claims
Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice

November 9	Melville, LI
November 16	Syracuse
November 30	New York City

Ethics and Professionalism
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 ethics and professionalism

November 9	Rochester
November 14	Albany
November 17	Tarrytown
November 30	Melville, LI
December 1	Syracuse
December 7	New York City
December 13	Buffalo

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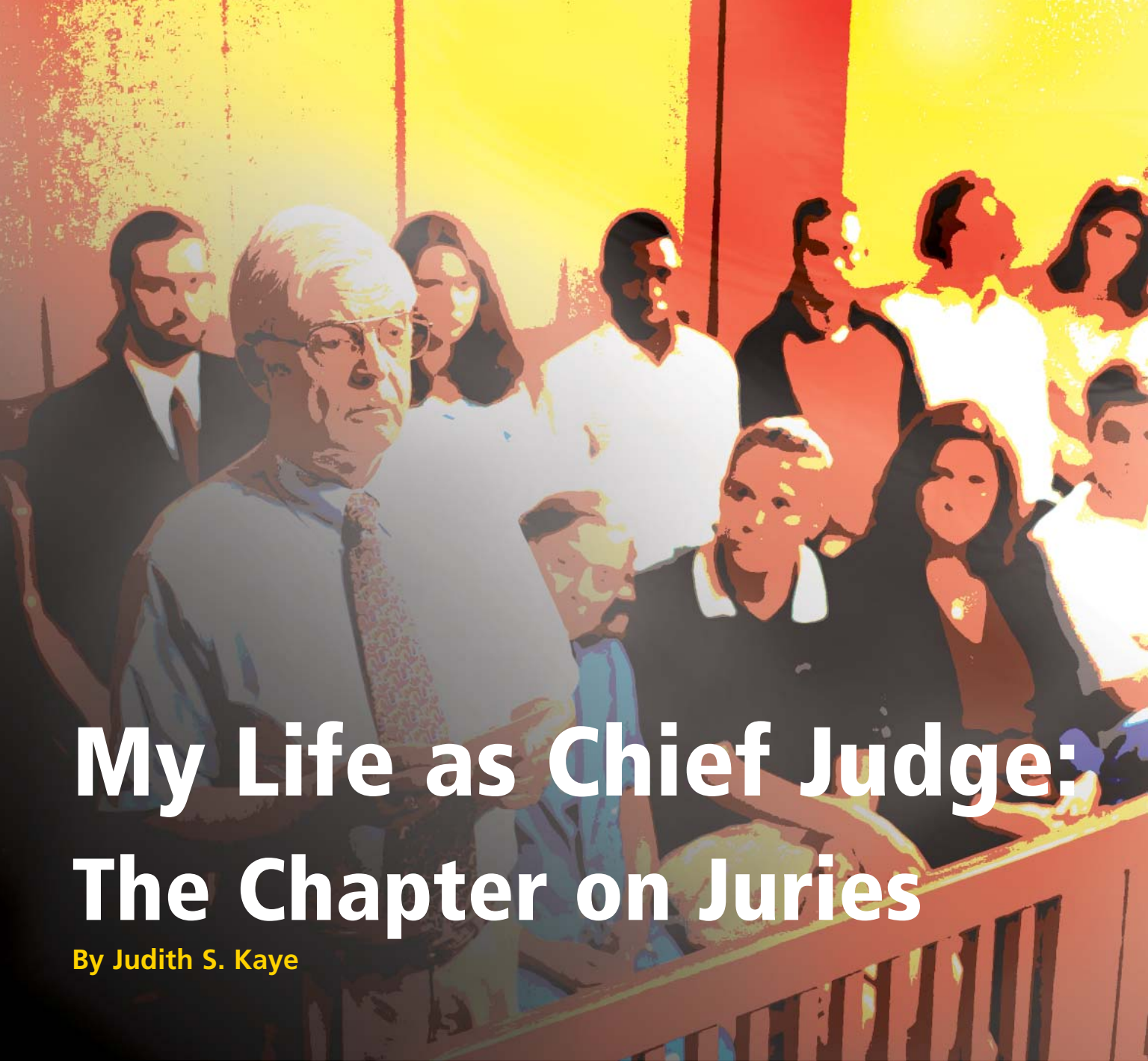

My Life as Chief Judge: The Chapter on Juries

By Judith S. Kaye

A recent speaking engagement prompted me to reflect on my years as Chief Judge. Ultimately, these ruminations took shape, and I share my thoughts with readers of the *Journal*.

As Chief Judge I hold two positions, each genuinely a full-time job. As Chief Judge of the Court of Appeals, I am one of seven equals, hearing appeals on a range of issues that defies human imagination. On any one day at Court of Appeals Hall we could be hearing argument on budget-making authority, or education funding, under the State Constitution; a slip-and-fall on a patch of ice; a construction site injury under Labor Law § 240; a multiple murder case; and a teacher's claim that his right to tenure under the Education Law has been violated.

Honest, we have days like that. The very idea of a court such as ours – a second level of appeal – is that we will, through a relatively few cases raising novel issues of statewide significance, settle and declare law that has widespread application. I am proud of our Court, which is sound and efficient in its work, and true to its awesome responsibility. I think of my judicial role, as a Judge of the Court of Appeals, as Lawyer Heaven. That is as true today as it was on September 12, 1983, over 23 years ago, when I first took my seat on the Court of Appeals.

But the second box of stationery, which I acquired more than 13 years ago, Chief Judge of the State of New York, a chief executive officer role, is right up there too. When I saw *Pride of the Yankees* recently on television, for the 100th time, I thought I could adopt Lou Gehrig's closing line as my own. Genuinely, I feel that I am the luckiest person on the face of the Earth.

Two Basic Questions

As I stepped back and thought hard about what I do, particularly as head of the Third Branch of government, it occurred to me that most often I was returning to two overlapping questions. First, how do we assure the delivery of justice in this modern, fast-paced, rapidly changing society? And second, how do we maintain the trust and confidence of the public so that our work and our decrees are respected? I could think of no better context for a discussion of both questions than the subject of juries.

The jury system is central to the delivery of justice in the New York State courts, where we have close to 10,000 jury trials a year. Jury service, moreover, is the courts' direct link, often our *only* direct link, with the millions of citizens called to serve as jurors – more than 650,000 a year in New York State alone. Surely, 650,000 positive jury experiences would be a great means of fostering public confidence in the justice system. How do we best assure public trust and confidence when jurors come into our courts? Jury issues run the gamut of my responsibilities; I've even been summoned several times to serve as a juror. Believe me, I know the pain of people being rejected during *voir dire*.

The jury, of course, is the subject of innumerable Court of Appeals decisions, on issues such as discrimination in selection, juror misconduct, even how jurors are seated in a courtroom for *voir dire*. But instead of Court of Appeals jurisprudence, I will focus on my executive and administrative Chief Judge role. Both of the fundamental questions I've posed are pertinent to the subject of juries.

The Roots of Our Jury System

The jury system came to our shores with our earliest settlers. Throughout the colonies, the jury was seen as a fundamental right and a way for the public to restrain government power. As you might imagine, the colonists were none too pleased when the Crown dispensed with jury trials for anyone accused of violating the despised Stamp and Navigation Acts. That added to the many grievances against King George III listed in the Declaration of Independence. So it's no surprise that Article III of the United States Constitution provided for a right to trial by jury for all crimes except impeachment; the omission of that right in civil cases ultimately led to inclusion of the Seventh Amendment in the Bill of Rights, guaranteeing jury trials in certain civil cases. Every state constitution separately secured those rights.

The jury in many ways reflects the progress of America. The right to have, and to serve on, juries has been part of our nation's struggle from its beginnings. Just think: critical as the jury was to the founders of a free nation, they limited service to white male landowners. Although the requirement of property ownership did not last long, it was not until 1880 that the Supreme Court held that jury service could not be restricted by race; not until 1975 that the Court prohibited the systematic exclusion of women from jury service; and not until 1986 that it banned the discriminatory use of peremptory challenges.

New York's public policy echoes our proud history. In the words of Judiciary Law § 500, litigants entitled to a jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community[,] . . . all eligible citizens shall have the opportunity to serve . . . and shall have an obligation to serve when summoned for that purpose, unless excused."

Reality vs. Rhetoric

Regrettably, the reality of jury service has not always matched the rhetoric. By the early 1990s in New York, we were calling the same people every two years like clockwork, and they served on average two full weeks, even if not selected for a trial. One reason for this was that our statutes allowed dozens of automatic exemptions and disqualifications from jury service, ranging from judges, doctors, lawyers, police officers, firefighters, and elected officials to embalmers, podiatrists, people who wore prosthetic devices and people who made them, to individuals with principal child-care responsibilities. Seemingly every group that could lobby Albany for an automatic exemption successfully did, and that sorely depleted our jury pools. To makes things worse, the court system did little follow-up on the rooms filled with summonses returned as undeliverable.

Given the huge demand for jurors, and the short supply, New York State used what were called Permanent Qualified Lists. Once qualified for jury service, a person remained qualified. Not a choice list to be on, especially given the condition of our juror facilities, which often were shabby and neglected.

How was the reality measuring up to the rhetoric? I knew for sure that we weren't earning points with the public. So in 1993, months after I became Chief Judge, we convened a commission of lawyers, judges and public members to review jury service in New York, with the

Judith S. Kaye is Chief Judge of the State of New York; Chief Judge of the Court of Appeals of the State of New York. This article is based on Judge Kaye's 2006 Burton Lecture, presented at the Rockefeller College of Public Affairs & Policy of the State University at Albany.

Jury Duty Stamp Announced

The United States Postal Service previewed its 2007 Commemorative Stamp program to the philatelic press at a stamp collecting show in late August, announcing that a stamp honoring jury duty will be released. *Linn's Stamp News* (September 11, 2006) reports: "The stamp is square and features silhouettes in various colors showing heads in two separate lines. Across the top of the stamp is a bold 'Jury Duty' and at the bottom is 'Serve with pride.'"

goal of making the New York State jury system one that would be valued and appreciated by jurors, judges, attorneys and litigants alike. In six months, with a dynamic trial lawyer – Colleen McMahon, now a United States District Judge – as chair, The Jury Project handed us a blueprint for comprehensive reform, which we have been implementing ever since.

In fact, this experience was so encouraging that again and again we have convened task forces and commissions to help us address other vexing issues. Over the years, superb commissions of lawyers, judges and others have paved the way on virtually every one of our successful reforms: business courts, fiduciary appointments, drug courts, judicial selection, matrimonial litigation, the legal profession and more.

A Reform Agenda

Without doubt, the centerpiece of New York jury reform was legislation adopting The Jury Project's top recommendation – end automatic exemptions. How shocking, especially for groups that lost their exemption! Fortunately, the Legislature resisted pressure to restore exemptions, and about one million potential new jurors were added to the court lists. Then, the Legislature adopted the recommended expansion of juror source lists to include unemployment and public assistance rosters, adding yet another 500,000 potential jurors.

These reforms sent a strong message: no person, no group is more privileged, or less important, when it comes to jury service, and no one gets excused automatically from this fundamental right, and obligation, of citizenship. We underscored that message with assiduous follow-up of all summonses returned as undeliverable. Besides gaining a more diverse jury pool, we could now spread the burdens and benefits of jury duty more widely, ending the Permanent Qualified Lists, the customary two-week service and the every-two-years-like-clockwork callbacks. The Legislature also increased juror pay and ended automatic sequestration in criminal cases.

These successes were also a powerful lesson for a new Chief Judge. We treasure the independence of the Judiciary, and rightly so. It's essential to our democracy, to our system of checks and balances, that the Judiciary be wholly independent in its core decision-making function. But in so many other ways – most notably systemic reform – we are vitally connected to our partners in government. The jury program – still, by the way, a work in progress – is one of the best examples of profound system-wide reform within the Third Branch.

Which brings me to my next subject: how best to manage the bounty – or, in other words, be careful what you wish for. Not all of the potential new jurors were as pleased as the Chief Judge. Thus, the court system faced a huge new challenge, but always the vision has been clear: to deliver justice for the litigants while affording a positive experience for jurors. This means efficient use of jurors' time in their summoning, selection and service; and it means courteous, respectful treatment. A lawyer-friend – the general counsel of a major media corporation – told me that her recent jury service ranked among the great experiences of her life. We need to multiply that. Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial—they are more likely to have a favorable impression of service and feel that they have made a contribution.

Implementing the Agenda

The easier part of the challenge, without question, has been the internal administrative part – like employee training in dealing with jurors; an online system for submitting juror qualification questionnaires; more efficient summoning procedures, like allowing jurors to call in by telephone to see if they really need to show up on the summons date; obtaining one automatic postponement by telephone or on the Web; orientation of jurors through handbooks, as well as live and video presentations (which are also available at www.nyjuror.gov); decent facilities and quiet work space, including wireless Internet access and even laptop work stations in juror waiting rooms; clean restrooms with locks on bathroom doors, paper towels and liquid (instead of bar) soap (the Chief Judge checks out that sort of stuff – ladies' *and* men's rooms); and assuring prompt payment of juror fees. We have excellent court staff, who are always finding new ways to improve the jury experience.

Yes, definitely the easy part, though still – and I would think forever – a work in progress. The really hard part – changes that would give jurors tools to help improve the way they do their job – would involve cultural change.

The entrenched culture I have in mind includes age-old practices of experienced lawyers and judges, such as settling cases only after (instead of before) the jury is selected; endless, unsupervised *voir dire* in civil cases; and proceedings conducted in a foreign language – legalese – before passive jurors, who are assumed to be taking in information uncritically, recalling it accurately and not thinking about it until they are told, at the end of the trial,

what the rules will be for evaluating all the information they've absorbed.

Two decades of solid research and experience in other states have shown that change is both possible and desirable.

Earlier, I mentioned statutory reforms that radically changed the face of our juries, best described as top-down reform. New rules and statutes imposed requirements, and court administration made the appropriate adjustments. But changing how trials are conducted by experienced lawyers and judges cannot be accomplished by order of a chief executive officer, particularly a CEO without power to hire, fire or promote; particularly for wonderful people at the pinnacle of their careers, mindful of affording due process and avoiding reversible error, and thus understandably more comfortable staying with ways that are tried-and-true. The sort of change I am advocating here can be accomplished only by the judges and lawyers themselves, from the ground up.

To stimulate the process of reform inside the courtroom, we convened a group of judges from around the state willing to try out some of the well-researched and best-known modern aids to juror comprehension, and we very carefully documented their experience by surveying lawyers and jurors who participated in using these aids. Perhaps the most telling finding was that, where jurors reported that the trials were "very complex," judges and lawyers reported that those same trials were not "complex." Doesn't that speak volumes? What lawyers and judges understand easily does not necessarily get through clearly to the jurors.

At the conclusion of its study, the group issued an overwhelmingly positive report, endorsing such "innovations" as opening statements that give jurors some idea of the nature of the case before *voir dire*; allowing juror note-taking to facilitate better recall of the evidence; permitting jurors to submit written questions to the judge, who would then determine whether they should be asked of witnesses; and providing jurors with a copy of the judge's final instructions to take into deliberations. This was followed by publication of a "Practical Guide" describing these practices, which we have distributed to all judges.

Will this succeed in changing the picture? Only time will tell.

Public Trust and Confidence

I turn next, and finally, to what may be the most difficult issue of all, how to assure the trust and confidence of the public – jurors and nonjurors – in the work of the courts, particularly given an abysmal lack of civic education and a flood of negative news. A major part of the answer to my question, perhaps a complete answer, is what I have just been describing: improving in every possible way the jury experience for those called to serve, and generally

doing a first-rate job. Still, we need to do more. The public *should* know more about us, and *should* think well of us.

In the words of the great French statesman and observer of American life, Alexis de Tocqueville, "The jury may be regarded as a . . . public school ever open, in which every juror learns his [or her] rights." I have no doubt that de Tocqueville's observation remains true today, and that serving on a case to verdict is not only an educational experience but also a satisfying one for a juror.

Sadly, only 18% of those summoned to jury service will actually get selected for a trial. For the other 82%, we depend on courtesy, efficiency and outreach efforts, such as our orientation video, the availability in every juror assembly room of copies of informational periodicals, and Juror Appreciation Week events in courthouses throughout the state. We have also just completed a booklet about juries for teachers and students, *Democracy in Action*, designed to be shared with family, neighbors and friends.

But how do we address the fact that New Yorkers for the most part are unaware of the role of the courts in their daily lives? That is a challenge I put to the Bar: help us build a citizenry that is better informed about all three branches of government, but especially about the courts, which of necessity – and, I must admit, habit – remain somewhat remote and detached. One of our newest initiatives, announced in the 2006 State of the Judiciary, will be a Center for the Courts and the Community, a nonprofit public-private partnership now in formation, to focus on fortifying educational alliances with schoolchildren and adults, and on establishing programs to inform and facilitate the work of the media in reporting on the courts. I'd appreciate your ideas, in whatever form you see fit, for furthering the success of this new effort.

Conclusion

And there, in brief capsule, is the jury chapter in my life as Chief Judge of the State of New York. A dozen other chapters – such as children in the courts, domestic violence, drug courts, matrimonial issues, fiduciary appointments, commercial courts – have the same questions at their core: are we meeting today's needs, and how are we perceived by the public? Sometimes the answers lie in legislation, sometimes in court rules, sometimes in task forces and commissions, sometimes in small groups seeding reform, always in vital partnerships with our great Judiciary and court staff, with the Bar and with others. When the mountain moves, even a millimeter – as it clearly has in the New York State jury system – it's absolutely exhilarating.

That's one of the reasons why, as Chief Judge, I believe I am the luckiest person on the face of the Earth. ■

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The Latest in Juries

What's Happening Around the Country That's of Interest to New York Lawyers and Judges?

By Elissa Krauss

The American Bar Association's Principles for Juries and Jury Trials, approved by the ABA House of Delegates in 2005, highlight the latest in jury research and practice. The 19 jury principles cover everything from assembling a jury to post-verdict activity.[1] They provide a roadmap for "best practices" in conducting modern jury trials in light of existing legal and practical constraints.

The ABA Principles begin by emphasizing the importance of protecting the right to trial by jury. They then highlight operational enhancements aimed at assuring jury pool representativeness and facilitating citizens' participation through practices such as eliminating automatic exemptions and shortening the term of service. This article will focus on those Principles concerned with enhancing jurors' understanding of evidence and law, beginning with three highly controversial Principles and proceeding to three that remain controversial in New York but are widely accepted elsewhere.

Three prominent jury researchers, including two who participated in the American Jury Project, have provided comments on the results of their own research or experience in these areas.

Widely Controversial Principles

The three widely controversial ABA Principles concern jury size, unanimous verdicts, and whether to permit jurors in civil cases to discuss the evidence during trial.[2] Juries of fewer than 12 members and non-unanimous verdicts were endorsed by the Supreme Court in the 1970s.[3] Thus, a whole generation of civil trial attorneys in most jurisdictions, including New York, has known only juries of fewer than 12 and non-unanimous verdicts. The commentary to the Principles points to extensive research suggesting that larger juries and unanimous verdicts are more reliable and more accurate.[4]

No recommendation is being made here that the New York Legislature amend the statutes concerning civil jury size and verdict votes. Nevertheless, experience elsewhere provides food for thought. In the federal courts, unanimity has always been required, and juries of 12 are explicitly permitted by Rule 48 of the Federal Rule of Civil Procedure. Professor Stephan Landsman, the American Jury Project's Reporter, interviewed 10 Seventh Circuit District Court judges who tried cases with larger juries as part of the Seventh Circuit's evaluation research on seven of the ABA Principles.[5] He reports on the variety of reasons most of the judges preferred larger juries in his commentary (see page 21).

The Executive Summary of the Seventh Circuit research reports that 85% of attorneys who participated in the study preferred juries of larger than six, and 92% of those in trials in which juries of 10 or 11 were seated felt that the "right number" of jurors were used.[6] In light

of the Seventh Circuit's experience, New York civil practitioners may, by consent of the parties, use the flexibility available to them to occasionally opt for larger juries or unanimous verdicts.

Even more controversial (and not tested in the Seventh Circuit's Project) is the suggestion that civil juries *may* discuss evidence among themselves before deliberations.[7] The recommendation is drawn from Arizona's Rule of Civil Procedure 39(f), which permits judges to instruct jurors in civil cases that they may discuss the evidence among themselves when they are all together in the jury room during the trial. There is no suggestion that New York depart from the long tradition of prohibiting jurors from discussing a case before deliberations. However, there is much to be learned from the Arizona jurors' experience in discussing evidence before deliberations.

Arizona's adoption of the jury discussion rule led to the first-ever systematic taping of jurors' pre-deliberation and deliberation discussions in 50 trials.[8] These tapes are a treasure trove of insight into jurors' concerns and thought processes, providing evidence that contradicts many long-held assumptions. For example, despite instructions to the contrary, many jurors discuss "forbidden" topics such as insurance and attorney fees, but the influence of these discussions tends either to be minimal or different from that assumed by practitioners.[9]

Talk about insurance occurred in 85% of the cases studied.[10] In only two cases was there explicit evidence that talk of insurance influenced verdicts.[11] Of interest to litigators is the finding that jurors' discussion about insurance most often focused on the plaintiff's insurance coverage rather than the defendant's coverage. Attorney fees were mentioned by at least one member of the jury in 83% of the cases, despite the fact that they are never mentioned in instructions or testimony.[12] In only four cases did jurors' concern about attorney fees appear to affect the jury's award.[13]

Thus, simply forbidding jurors from discussing a widely known topic is no guarantee that the topic will not be discussed. There is no reason to think that Arizona jurors are different from New York jurors in this regard. Counsel and judges are well advised to bear in mind that during deliberations jurors often discuss and make assumptions about the role of insurance and attorney fees.

The Arizona jurors' discussions provide insight into another area of concern to attorneys and judges: how jurors who submit written questions for witnesses react when their questions are not asked. Professor Shari Diamond and her colleagues at Northwestern studied the tapes of jurors' discussions both before and during deliberations to discern reactions to unanswered questions.[14] The researchers found that when a question was disallowed "the most common reaction from jurors was no reaction at all, either during the trial itself or during deliberations."[15]

Thus, while allowing jurors to discuss the case during trial is not recommended, the Arizona experience provides New Yorkers with otherwise unavailable insights about jurors' behavior and reactions.

Two Principles That Are Controversial in New York: Juror Note-Taking and Questions of Witnesses

Juror note-taking and submission of written questions for witnesses remain controversial in New York practice.

> There is much to be learned from the Arizona jurors' experience in discussing evidence before deliberations.

The ABA Principles recommend these practices as part of Principle 13: "The court and parties should vigorously promote juror understanding of the facts and the law."

Principle 13 recommends that all jurors be permitted to take notes and be provided with writing materials, and that jurors in civil cases "ordinarily" be permitted to submit written questions for witnesses.

Note-taking has become routine in many jurisdictions. It is so widespread in the federal courts that when the Seventh Circuit decided to test seven concepts from the ABA Principles note-taking was not among them.[16] The New York Court of Appeals held nearly a decade ago that it is within the discretion of the trial court to permit jurors to take notes.[17] The Court cited leading research to support its conclusion.[18]

More recently, researchers have found that note-taking in combination with substantive preliminary instructions enhances jurors' comprehension and performance. Of particular interest is the finding that for many people the act of taking notes rather than the notes themselves is what helps them recall the evidence.[19]

Ninety-one trials in New York's Jury Trial Project[20] included note-taking. In the Project, roughly 60% of jurors took notes when permitted to do so. Jurors said they find note-taking helpful in understanding evidence and law as well as in reaching a decision.[21] Not surpris-

ingly, jurors with a college education are more likely than others to take notes because they are trained to use note-taking as a memory aid.[22]

Despite all the evidence contradicting judges' and attorneys' fears about note-taking, New York judges hesitate to allow the practice. The National Center for State Courts National Program to Increase Citizen Participation, a nationwide study reviewing actual trial implementation of jury innovations, found that New York lags behind its neighbors and the nation as a whole in allowing note-taking or providing note-taking materials. The results comparing New York to its neighbors (Connecticut and New Jersey) and to the nation as a whole are discussed in a commentary by Paula Hannaford-Agor, Director of the National Center for State Courts Center for Jury Studies, and Chris Connelly (see page 19).

Juror questions in criminal trials remain controversial in New York and elsewhere.

Jurors' written questions for witnesses are more problematic. Though many New York civil trial judges routinely allow jurors to submit written questions for witnesses, the practice is by no means universal. Some civil trial judges have permitted jurors to submit written questions for some time, including Judge Leonard Austin, Judge Alice Schlesinger, Judge John P. Lane, Judge Stanley Sklar, and Judge Dana Winslow. Judge Rosalyn Richter and Judge Donna Siwek, as a result of their experience with the Jury Trial Project, began allowing jurors to submit questions.

Juror questions in criminal trials remain controversial in New York and elsewhere. The drafters of the ABA Principles implicitly acknowledged this by recommending that civil juries "ordinarily" be permitted to submit written questions and that the procedure "be considered" in criminal trials.

In New York State, the First Department has long held that in criminal trials it is within the trial court's discretion to allow written questions from jurors.[23] This holding is consistent with those of every federal circuit that has considered the issue and the court rules or high court holdings in at least 31 states.[24] In light of the First Department's position, Judge Michael McKeon and Judge Felix Catena permitted jurors to submit written questions in criminal trials as part of the Jury Trial Project's research. Judge Anthony Ferrara of New York City Criminal Court has begun doing so as a result of the Project's recommendations.

Professor Diamond found that the Seventh Circuit's recent Jury Project provided new insights into the role the judge plays in jurors' submission of questions. For this study, jurors were permitted to submit written questions in 27 trials.

Federal judges were more likely than the New York State judges to reject the questions. In the Seventh Circuit project only 69% of the jurors' questions were asked, while New York judges permitted 90% of the questions submitted.[25] Only four objected-to questions were asked. Among the Seventh Circuit jurors, 62% reported submitting questions; a similar percentage of New York jurors submitted questions in the New York Jury Trial Project. Notably, in six of the Seventh Circuit trials, no questions at all were submitted. Professor Diamond looked closely at what might have distinguished those six trials. She discusses her finding that the judge's own instructions may have played a crucial role in whether jurors submitted questions in her commentary on page 23.

Sensitive to the key role judges play in both allowing and limiting jurors' questions, Jury Trial Project judges devoted considerable attention to drafting suggested instructions for judges interested in permitting questions. Ultimately, two recommended instructions were developed and included in the Unified Court System's pamphlet summarizing key Jury Trial Project recommendations.[26] Each suggested instruction cautions jurors that for the most part questions are to be asked by attorneys, not jurors, and that jurors should limit their questions to clarification of statements made by witnesses.

The National Program to Increase Citizen Participation survey found that while the practice of permitting jurors to submit questions is increasing, it has been generally slow to catch on. Moreover, New York lags behind the national average in permitting jurors to submit written questions. In New Jersey, where a court rule authorizes juror questions in civil cases, such questions were permitted in 55% of reported trials.[27] By contrast, in Connecticut, which also has court rules authorizing juror questions, only 1% of reported trials included juror questions.[28]

Substantive Preliminary Jury Instructions

ABA Principle 6(C)(1) recommends that preliminary instructions include elements of the charges or claims. Judges and attorneys in the 35 New York Jury Trial Project trials where substantive preliminary instructions were given generally agreed that such instructions had a positive impact on fairness, were helpful to jurors' understanding, and aided trial preparation. Nevertheless, the procedure remains controversial in New York State.

On the criminal side, the Second Department just recently reversed its earlier holding that it was a mode of proceedings error to review the elements of the charges at the outset of the trial. In *People v. Harper*, the court looked

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Jury Innovation in Practice

The Experience in New York and Elsewhere

By Paula Hannaford-Agor and Chris Connelly

The "State-of-the-States" Survey

The National Center for State Courts (NCSC) National Program to Increase Citizen Participation Through Jury Innovations is surveying judges, attorneys, and court administrators across the country to document policies and practices related to jury trials.[1]

As of May 19, 2006, NCSC received completed questionnaires from 9,139 judges and lawyers, describing 8,066 state court trials in the 50 states and the District of Columbia. Criminal and civil jury trials each comprise 50% of the dataset.[2] We received 171 reports of jury trials in New York State: 97 replies from state trial judges, 72 from attorneys, and the remainder from other practitioners. In addition, 22 of the 708 federal court jury trials reported on were conducted in New York State.

In all, the dataset reflects nearly 10% of the jury trials that take place annually in state and federal courts. Reports by state trial court judges account for nearly one-third of all general jurisdiction court judges in the nation.

Trial Practices

The judge and lawyer questionnaires asked about the various techniques used in the respondent's most recent trial. Table 1 provides an overview of the New York responses on several of these techniques compared to responses from Connecticut, New Jersey, and other state courts.

Table 1: Trial Innovations

	New York Courts	New Jersey Courts	Connecticut Courts	Other State Courts
Jurors permitted to take notes	26%	28%	51%	74%
Jurors given paper for notetaking	19%	31%	47%	70%
Jurors given a notebook	1%	0%	2%	7%
Juror questions permitted	4%	33%	1%	16%
Civil trials	5%	55%	1%	18%
Criminal trials	1%	0%	0%	14%
Jurors given final instructions before closing arguments	6%	2%	2%	47%
Jurors receive at least one copy of written instructions	6%	27%	31%	77%
All jurors receive copy of written instructions	4%	16%	15%	38%

As a baseline, the survey asked about the evidentiary and legal complexity of each trial. Overall, New York State trials were comparable to those of other states in terms of trial complexity. Twenty-two (13%) of the New York State trials were rated as very complex by at least one measure of complexity and 6% on both measures. Nationally, 18% of trials were rated very complex on at least one measure of complexity and 6% on both measures.

Juror Notebooks

Trials that are highly complex (rating a 6 or higher on a 7-point scale) are trials in which juror notebooks can be extremely helpful to jurors.[3] Yet, juror notebooks were less popular in New York than in other state courts. Jurors were given a notebook in only one of the 22 New York trials reported to be particularly complex. In other states, jurors were given trial notebooks in 12% of the 499 trials that were rated particularly complex.

Note-Taking

Permitting jurors to take notes during trial has caught on less quickly in New York than in other jurisdictions. Juror note-taking was permitted in 26% of reported New York trials, compared to 74% in other state courts. Note-taking materials were provided to jurors in only 19% of New York trials, as compared to 70% of those in other state courts.

Juror Questions of Witnesses

The practice of permitting juror questions varies substantially across the country. Nationally, jurors were allowed to ask questions in 14% of criminal trials and 18% of civil trials (16% overall). In New York State courts, the rate of permitting juror questions was much lower: 1% and 5% in criminal and civil trials, respectively. The three states that mandate juror questions in civil and criminal trials, Arizona, Colorado, and Indiana, had the highest rates of permitting juror questions (94%, 63% and 90%, respectively). Seven states (Delaware, Iowa, Louisiana, Mississippi, Nebraska, and North and South Carolina) reported no instances of juror questions in their trials; two of these (Mississippi and Nebraska) prohibit juror questions.

Jury Instructions

There is considerable variation across the country in the timing and form of jury instructions. For example, in 47% of state court trials respondents reported that jury instructions were given before closing arguments, compared to just 6% in New York State. Fourteen states (including New York) overwhelmingly favored jury instructions after closing arguments, although only three routinely kept written instructions from jurors. Jurors were

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at the ABA Principles and also at the Jury Trial Project research to conclude that the decision whether to preliminarily instruct the jury on the elements of crimes charged is within the trial court's discretion.[29] The Seventh Circuit Jury Project found that judges who used substantive preliminary instructions overwhelmingly thought they improved the fairness of the trial (82%) and jurors' understanding (91%). As in the New York research, attorneys were less comfortable than judges with the concept. Nevertheless, 72% of attorneys thought preliminary instruction improved jurors' understanding of the case. Jurors who heard preliminary instructions generally found them helpful and 73% of those who were not given such instructions wished they had.[30] Moreover, examination of the use of multiple innovative practices in a research setting found that the combination of note-taking and preliminary substantive instructions is more effective in enhancing juror comprehension than either one alone.[31]

Providing Written Copy of Instructions to Deliberating Jurors

Principle 14 declares that jurors should routinely be supplied with a written copy or copies of the judge's charge to the jury. Here again, research has shown that written instructions help jurors resolve disputes, reduce juror confusion, and reduce the number of questions during deliberations.[32] In New York civil trials, judges may exercise their discretion to provide jurors with written copy of the charge.[33] In criminal trials, however, the parties must consent before a jury may be given instructions in writing.[34] The Fourth Department has held that consent is not required where the judge chooses to project the charge onto a screen or the wall so that jurors may read along while the judge reads the charge.[35]

As with the other ABA recommendations that remain controversial in New York State, the National Center for State Courts' National Program to Increase Citizen Participation found that New York lags behind the nation as a whole, as do New York's two neighbors, in permitting written instructions.

One concept in the ABA Principles that is not controversial is the idea that it is best for jury instructions to be given in language that jurors can understand.[36] Extensive research in the 1970s and 1980s found that 50% or more of jurors who had completed service and deliberated did not understand key instructions.[37] But improving comprehension is no easy task. Balancing juror comprehension against the rigors of appellate review is extremely difficult.[38]

Conclusion

The goal of providing jurors with tools that enhance comprehension has been met with open arms in some quarters and resistance in others. The ABA has defined best practices for achieving this goal in its comprehensive Principles for Juries and Jury Trials. The in-court experience in New York State, combined with data obtained from federal and state courts across the country, should be persuasive to judges that improvements can be made in jury trials without sacrificing fairness. ■

Extensive research in the 1970s and 1980s found that 50% or more of jurors who had completed service and deliberation did not understand key instructions.

1. *See* <www.abanet.org/juryprojectstandards/principles.pdf>. Unfortunately, the extensive Commentary to the Principles is not currently available online.

2. Principle 3: Juries should have 12 Members. Principle 4: Juries should be unanimous.

3. *Williams v. Fla.*, 399 U.S. 78 (1970) (jury of less than 12 in criminal trials); *Colgrove v. Battin*, 413 U.S. 149 (1973) (jury of less than 12 in federal civil trials); *see Apocada v. Or.*, 406 U.S. 404 (1972); *Johnson v. La.*, 406 U.S. 356 (1972) (non-unanimous verdicts).

4. *E.g.*, Dennis J. Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 662 (2001).

5. TrialGraphix, *7th Circuit American Jury Project: Executive Summary* (May, 2006).

6. *Id.* at 3.

7. Principle 13: The courts should vigorously promote juror understanding of the facts and the law. Subpart F suggests that civil juries "may be instructed" that they may discuss evidence among themselves prior to deliberations.

8. Diamond & Vidmar, *Juror Discussion During Civil Trials: A Study of Arizona's Rule 39(f) Innovation* (2002). Available at <http://www.law.northwest ern.edu/Diamond/papers/arizona_civil_discussions.pdf>.

9. Diamond & Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857 (2001).

10. *Id.* at 1875.

11. *Id.* at 1893.

12. *Id.* at 1900.

13. *Id.* at 1903.

14. Diamond, et al., *Jurors' Unanswered Questions*, 41 Ct. Rev. 20 (Spring 2004).

15. *Id.* at 25.

16. Note-taking is permitted in every state (except Pennsylvania where it is prohibited in criminal cases) and has been held to be discretionary by every Federal Circuit Court. These cases are listed at the Web site of the American Judicature Society: <http://www.ajs.org/jc/juries/jc_improvements_notetaking.asp>. Last visited July 14, 2006.

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An Experiment in Larger Juries in Civil Trials

By Stephan Landsman

In the fall of 2005, the Seventh Circuit Bar Association, in cooperation with the judges of the Seventh Circuit Court of Appeals and federal district judges from throughout the Circuit, agreed to undertake an eight-month program to test several of the innovative jury practices specified in the American Bar Association's Principles for Juries and Jury Trials.

Among the principles designated for testing was the use of 12-person juries in civil cases. Notwithstanding contrary Supreme Court precedent,[1] ABA Principle 3 declares: "Juries should have 12 members." The commentary to Principle 3 highlights experimental data demonstrating that the superiority of 12, both in terms of diversity and predictability of decision making, is overwhelming.[2]

As part of the Circuit Bar's program, I interviewed 10 judges who had conducted approximately 20 civil jury trials with either 11 or 12 jurors.[3] The interviews provide strong support for a return to juries of 12.

All the judges I interviewed recognized the potential for 12-person juries to enhance diversity. One judge kept careful records and noted that his juries of 12 had 27% minority membership while on panels of six the figure was 17%. Others noted, anecdotally, an increase in the number of African American and women jurors in the larger juries. However, diversity meant more than race and gender to these federal district judges. They noted an increase in geographical diversity, an enhanced range of life experience, and greater acquaintance with those who were foreign-born (especially important in several cases involving immigrant witnesses).

In the end, eight of our 10 judges recognized the particular importance of diversity and six concluded that this issue tipped the scale, leading them to favor larger juries in civil cases.

The judges also noted the advantage in numbers of a 12-person jury. For one judge this meant a reduced risk that one or two jurors would dominate. For another it forestalled "overrepresentation" of a single point of view. A third saw a panel of 12 as enhancing the dignity and importance of the civil trial process – raising its status to that of the criminal trial.

None of the judges I interviewed favored six-person juries. All thought them too small and, for one reason or another, too risky. Relying on the permissive federal rule, all considered eight jurors the minimum appropriate.[4]

Larger juries posed few logistical problems. *Voir dire* was found to be slightly longer (perhaps by an hour). Deliberations of these juries of 10 or 11 took no longer than deliberation of juries of eight, typical for federal court. There was one hung jury, but the parties in that case elected to accept its 9-3 vote as determinative. None of the attorneys involved objected to the larger jury size.

This group of judges generally agreed that bigger is better. They were not treating 12 as a magic number. Instead, modern concerns about diversity and quality of deliberations led them to appreciate the traditional wisdom that had led to reliance on larger juries. Their reaction to their experience is, perhaps, a signpost to the future – one informed by the wisdom of history and findings of social science. ■

1. *See Williams v. Fla.*, 399 U.S. 78 (1970).

2. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622 (2001); Michael J. Saks, *The Smaller the Jury the Greater the Unpredictability*, 79 Judicature 263 (1996).

3. Variation occurred because jurors were excused in several cases due to illness or for other reasons.

4. Fed. R. Civ. Proc. 48.

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given at least one copy of instructions in 61% of jury trials nationally compared to only 5% of trials in New York. This also varied considerably from state to state.

Conclusions

New York State is a national leader in jury improvement efforts related to the summoning, qualification, and treatment of jurors. Under Judge Kaye's leadership, New York spearheaded the use of multiple source lists, eliminated occupational exemptions, raised the juror fee to $40 per day, and reduced the term of service. New York has been less active in providing jurors with decision-making tools during trial. New York's Jury Trial Project has demonstrated that techniques such as juror note-taking, juror questions, and written jury instructions work as well in New York State as in other state courts. Bearing these positive experiences in mind, we hope New York State will soon join the mainstream in courtroom jury improvements. ■

1. All of the analyses are based on judge/attorney surveys.

2. Capital felony, non-capital felony, and misdemeanor trials comprise 3%, 36%, and 12% of the surveys, respectively.

3. The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds.

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17. *People v. Hues*, 92 N.Y.2d 413 (1998). A New York trial court rule authorizes judges in both civil and criminal matters to decide for each case whether to allow jurors to take notes. 22 N.Y.C.R.R. § 220.10. New York criminal jury instructions include a standard jury instruction on note-taking. CJI 2d [NY] Note taking (Revised Oct. 25, 2001). The instruction is available at <http://www.nycourts.gov/cji/1-General/cjigc.html>. Last visited July 14, 2006. It is reprinted in the pamphlet, *Jury Trial Innovations in New York State: A Practical Guide for Trial Judges*. Available from the Office of Court Research (212) 428-2990 and online at <www.nyjuryinnovations.org>. Can also be requested by e-mailing the author at: ekrauss@courts.state.ny.us.

18. Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 Psychol. Pub. Pol'y & L. 259, 263 (1997).

19. *Id.* at 263.

20. Unified Court System, "Final Report of the Committees of the Jury Trial Project" (2005), available at <www.nyjuryinnovations.org/materials/Final_Report_of_the_Committees_of-the_Jury_Trial_Project.pdf>.

21. *Id. See also* Elissa Krauss, *Jury Trial Innovations in New York State*, N.Y. St. B.J. (May 2005), p. 22.

22. *Id.* at 74.

23. *People v. Knapper*, 230 A.D. 497, 245 N.Y.S. 245 (1st Dep't 1930). Most recently affirmed in *People v. Miller*, 8 A.D.3d 176, 778 N.Y.S.2d 12 (1st Dep't 2004).

24. These decisions are available at the American Judicature Society Web site <http://www.ajs.org/jc/juries/jc_improvements_juror_questions.asp>. Last visited July 14, 2006.

25. Of 347 questions submitted in 19 trials only 41 were objected to and 37 of those were not asked. *Jury Trial Innovations*, *supra* note 17, at 5.

26. One suggested instruction was drafted by Hon. Stanley Sklar. The other was drafted by Hon. William Donnino. *See Jury Trial Innovations*, *supra* note 17, at 12.

27. NJ Rules of General Application, 1:8-8c. Earlier this year, jurors in the high-profile Vioxx trial in New Jersey were permitted to submit questions and at least 23 were addressed to witnesses. Lisa Brennan, *When Jurors Run the Show*, NJLJ, Apr. 4, 2006. Available at law.com.

28. *People v. Harper*, 818 N.Y.S.2d 113, 2006 WL 1543932 (2d Dep't 2006), *rev'g People v. Mollica*, 267 A.D.2d 479, 700 N.Y.S.2d 759 (2d Dep't 1999).

29. *Id.*

30. TrialGraphix, *supra* note 5, at 5. Jurors' average helpfulness rating on a 7-point scale was 5.8.

31. ForsterLee & Horowitz, *The Effects of Jury-aid Innovations on Juror Performance in Complex Civil Trials*, 86 Judicature 184, 188 (2003).

32. Heuer & Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & Hum. Behav. 4009 (1989).

33. 22 N.Y.C.R.R. § 220.11.

34. *People v. Owens*, 69 N.Y.2d 585, 516 N.Y.S.2d 619 (1987); *see People v. Johnson*, 81 N.Y.2d 980, 599 N.Y.S.2d 525 (1993).

35. *People v. Williams*, 8 A.D.3d 963, 778 N.Y.S.2d 244 (4th Dep't 2004).

36. This concept is incorporated into the ABA's Principle concerning substantive preliminary instructions (6(C)(1)) as well as in Principle 14 which declares: "The court should instruct the jury in plain and understandable language regarding the applicable law."

37. Simon & Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom*, 5 L. & Soc'y Rev. 319 (1971); Strawn & Buchanan, *Juror Confusion: A Threat to Justice*, 59 Judicature 478, 481 (1976); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Severance, Greene & Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. Crim. L. & Criminology 198 (1984); Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J. L. Reform 401 (1990); Reifman, et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & Hum. Behav. 539 (1992).

38. *See* Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993), and *Communicating with Juries: How to Draft More Understandable Instructions*, National Center for State Courts (2006) (orginally published in 10 Scribes J. Legal Writing 2005–2006).

Juror Questions at Trial

In Principle and in Fact

By Shari Seidman Diamond

The practice of allowing juror questions during trial, although familiar at common law,[1] fell into disuse over time and has only recently been revived. While the practice remains controversial, experience with pilot programs permitting jurors to submit questions during trial is producing "converts" among judges and attorneys who participate in these trials.

One recent convert is Judge James Holderman, co-chair of the Seventh Circuit Bar Association's American Jury Project, which tested seven ABA Principles between October 2005 and May 2006. Judge Holderman's initial skepticism about juror questions disappeared after he found through experience that the procedure worked smoothly, the questions were generally relevant and provided beneficial insights to the attorneys, and, the jurors appreciated the opportunity to submit questions. Other Seventh Circuit judges and attorneys reached the same conclusions.

In the Seventh Circuit Project, 14 judges permitted jurors to submit questions in 27 cases. Jurors submitted questions in 20 of the 27 cases. There were no notable differences in length of trial or complexity of evidence and law between the group of seven cases in which the jurors did not submit questions and the 20 in which they did. The question arises: what influenced whether jurors submitted questions in a particular case?

I interviewed all of the judges who permitted questions and asked them to describe how they went about it. In some respects, all of their instructions were similar. All specified that questions were to be submitted in writing, that the judge would discuss the questions with the attorneys, and that legal rules might prevent the judge from permitting some questions. In other ways, the instructions differed. Some judges described juror questions as an "opportunity"; others specifically told the jurors that their questions should be aimed at clarifying a witness's testimony. Some told jurors to write down their questions and give them to the bailiff, without indicating when that would occur; others told the jurors that questions would be collected after each witness finished testifying. Some provided special forms for questions; others did not. With the small sample of cases and the variety of combinations of procedures used, we could not assess how these variations affected the number of questions that jurors submitted. But one difference turned out to be crucial in affecting whether any questions were submitted at all.

The principal difference between the group of trials in which jurors submitted questions and the group in which no questions were submitted was whether or not the judge mentioned the possibility of juror questions again *after* the initial introduction. In the 20 trials in which jurors submitted questions, 10 of the 11 judges asked the jury after each witness if there were any questions; the 11th asked only after the first witness and received questions only for that witness. But the three judges who presided in the seven remaining trials in which no questions were submitted mentioned juror questions only in their initial introduction before testimony began and never again mentioned the possibility of juror questions.

It turned out that when the judges only mentioned juror questions in their introductory remarks, many jurors simply did not realize that questions were an option when the time for questions came. On their post-trial questionnaires, only a little more than a third (38%) of the jurors in these cases reported that they were permitted to submit questions. By contrast, among jurors who sat on trials in which the judge mentioned the possibility of submitting questions during the trial, 99% understood that questions were an option. Thus, when judges mentioned that jurors would be permitted to ask questions only at the outset of the trial, at the same time that they gave the jurors other important and sometimes complex information and the judges never reinforced that message during the trial, most jurors did not recall the embedded instruction on juror questions.

The Seventh Circuit test of juror questions demonstrated an important lesson about realistic implementation of innovations. The results show that judges who are interested in offering jurors a real opportunity to submit questions must make sure that jurors know they can do it by giving the jurors a reasonable opportunity to actually submit the questions they have. A single mention of the procedure at the outset of a trial is apparently not sufficient.

The success of the efforts of the various Jury Commissions, Projects, Courts, and Bar Associations to optimize jury trials depends on what happens in the trenches. The courtroom can be a daunting environment, and jurors depend on the judge for guidance. It is thus up to the court to assure that "innovation on the books" becomes "innovation in fact." ■

1. *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995).

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Jury *Voir Dire* in Criminal Cases

By Phylis Skloot Bamberger

Voir dire questioning is a process for eliciting, within legally mandated boundaries, information relevant to prospective jurors' qualifications for service. New York law allows lawyers to question each prospective juror about his or her qualifications for service on a particular trial. It is, after all, the well-prepared lawyer who best knows the issues in a case and who is able to fashion an inquiry that is most likely to reveal a potential juror's bias or inability to meet the obligations of judging the evidence and applying the law.

The importance of the *voir dire* in criminal trials has turned it into a virtual battleground between judge and lawyer. If counsel asks questions that are repetitive, improper in form, or that encourage the prospective juror to form an opinion in the case, counsel will provoke adverse rulings from the judge. A tug of war develops, which breeds distrust, so that the judge may preclude even proper questions. The trial is likely, but unnecessarily, off on the wrong foot. This unfortunate state of affairs can be resolved, however, by re-examining the purpose of *voir dire*.

The Purpose of *Voir Dire*

The New York State Court of Appeals and the United States Supreme Court both have made clear that the *voir dire* is essential to the selection of a fair and impartial jury. The *voir dire* discloses prospective jurors who are unable to fulfill the obligations of a juror or who are not capable of undertaking an impartial evaluation of the evidence and application of the relevant legal rules. Such disclosure leads to excusal of jurors for cause. It also enables counsel to exercise peremptory challenges appropriately.

> *Voir dire* provides a means of discovering actual or implied bias and a firmer basis [than stereotyping] upon which the parties may exercise their peremptory challenges intelligently.[1]

Thus, the *voir dire* is the mechanism for carrying out the due process mandate that the fact-finder be fair.[2]

The Respective Roles of Judge and Lawyer

Criminal Procedure Law § 270.15(1)(c) (CPL) and the case law prescribe the roles of the lawyers and the judge in the conduct of the *voir dire*. The lawyers are given "a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications." The role of the court is to prevent "questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law," and "if necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter."

Thus, counsel's opportunity to examine a prospective juror extends to questions that are relevant to the case and not repetitious of inquiries already made.[3] The *voir dire* is to be used to learn about a prospective juror's qualifications; it is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant's point of view, or as a dress rehearsal of the trial.[4]

The judge's traditional role in the *voir dire* is to set out the relevant legal principles. Further, to prevent

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irrelevant and repetitious questioning by attorneys, the judge has the discretion to preclude, or limit the scope of, counsel's questioning,[5] and the authority to conduct the questioning of the prospective jurors. Indeed, the court may ask each prospective juror to complete a questionnaire covering any "fact relevant to his or her service on the jury."

After identifying the attorneys and the parties, and outlining the nature of the case, the court is required to "put to the members of the panel . . . questions affecting their qualifications to serve as jurors in the action." These questions are asked of the prospective jurors as a group or individually. The court may have the jurors answer by raising their hands or speaking individually. The court may interrupt during attorneys' examination to prevent repetitious and irrelevant questions. When the lawyers have completed their questioning, the court may ask such further questions as it deems proper regarding prospective jurors' qualifications.

The trial judge sets the boundaries of the inquiry. Noting that this is "an area of the law which does not lend itself to the formulation of precise standards," the Court of Appeals has said that the trial judge "has broad discretion to control and restrict the scope of the *voir dire* examination."[6]

Areas for Examination

Both the nature of the case and the characteristics of the jurors determine what information is relevant to selection of a jury and therefore what questions are permissible. In all cases, each prospective juror must be qualified to serve and legally suitable for service. Each juror must be fair and unbiased, able to render an impartial verdict in accord with the evidence and applicable law, and capable of performing the functions required of a juror.[7] Here are some areas for inquiry aimed at establishing jurors' qualifications to serve in criminal trials.

1. ***Statutory requirements for jury service.*** Judiciary Law § 510 lists the qualifications for service. Jurors must be American citizens and residents of the county to which they have been summoned. They must not be convicted of a felony. They must be at least 18 years old and able to understand and communicate in English.[8]

2. ***Statutory requirements to sit on a particular case.*** CPL § 270.20(1)(c) lists the social or familial relationships between the prospective juror and trial participants which require that a prospective juror be excused.

3. ***Ability to fulfill the duties of a juror.*** The duties of a juror include: attending court at the prescribed hours, listening to the evidence, evaluating evidence fairly in accordance with the instructions, deliberating, and making efforts to arrive at a decision. Knowing whether these obligations can be fulfilled requires information about: a prospective juror's physical or mental circumstances and how those circumstances might be accommodated; family or employment obligations that cannot be avoided; economic hardship due to jury service; ability to deliberate with other jurors and to judge the credibility of witnesses;[9] and assurance that the juror's ability to make a decision is not prevented by religious belief or some other tenet.

4. ***Personal information about the juror.*** CPL § 270.20(1)(a) requires examination of the prospective juror's state of mind to determine if the juror can render an impartial verdict. Among the relevant subjects are marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests. Other areas might be relevant depending on the circumstances and issues in a particular case.

> A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.

5. ***Views about issues related to the case and witnesses who may be called to testify.*** Here, too, state of mind is important. For example, views concerning police witnesses, child witnesses, witnesses with prior convictions, accomplice witnesses, child abuse issues, scientific evidence (or the absence thereof), eye-witness identification, or evidence of confessions may be relevant to a juror's qualifications. The circumstances of the case may determine other areas of questioning.

6. ***Professional expertise.*** If a prospective juror has professional expertise about a material issue in a case, the judge must ask if the prospective juror can deliberate without using personal professional knowledge to assess the evidence and without communicating his or her knowledge as if it were evidence to other members of the jury.

A prospective juror who cannot follow the rule not to disclose expert information to other jurors should be excused.[10] The judge must also question a prospective juror who has professional information about whether that juror can decide the case based on the evidence and disregard any opinion held as a result of personal professional information. A juror who cannot provide unequiv-

ocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.[11]

7. *Race and ethnic issues.* Questioning prospective jurors about racial or ethnic bias is constitutionally required if counsel so requests and "special circumstances" making the issue part of the case are present. For example, where the defendant was a civil rights worker, examination about racial bias was required.[12] In other cases, a sensitive probe of racial or ethnic issues should be granted if counsel requests it.[13]

8. *Juror's ability to follow applicable legal principles.* Lawyers cannot ask the prospective jurors about their knowledge of principles of law. This has been the rule in New York for over a century.[14] *People v. Boulware* included prospective jurors' attitudes toward the law among areas that could not be the subject of counsel's inquiries:

> Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge, it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law. Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad.[15]

The Court added a wrinkle, however, when it said that it was permissible to ask if a prospective juror would have "any difficulty following the instructions of the court" and whether the juror would obey the court's instructions. Inevitably, questions exploring a juror's ability, or lack thereof, to follow instructions, explore the juror's attitude toward the law. Attitudes that may prevent the prospective juror from following the judge's instructions are relevant to the ability to be fair and unbiased. For example, some prospective jurors in narcotics cases have objected to classification of certain narcotics activities as crimes and the practice of using undercover officers or informers. Or, sometimes a prospective juror objects to the defendant's exercising his right not to testify, believing that an accused should offer an explanation.

Notwithstanding authority disallowing questions about attitude toward the law,[16] some questioning about legal principles is permitted. For example, the Fourth Department has held that it was error to deny the defense attorney the opportunity to question jurors on their ability to follow the *Molineaux* rule;[17] that it is permissible to ask jurors about the legal issue of eyewitness identification;[18] that questions about the burden of proof are proper (by implication);[19] and that it is proper to ask prospective jurors whether their associations with police officers would affect their ability to be fair.[20] The First Department has approved giving the defense the opportunity to ask if the jury could follow the instruction not to draw an adverse inference if the defendant did not testify[21] and has also allowed counsel to inquire about prospective jurors' views of the defendant's absence from the trial.[22] Both the First and Fourth Departments have allowed inquiries as to whether the juror could fairly evaluate the testimony of witnesses who have prior convictions.[23]

Even where questions about a prospective juror's attitude toward the law are not permitted, the trial judge, at the request of counsel, can give instructions on relevant legal principles before or during the *voir dire*.[24] The attorney can then properly ask if the panel members can follow the rule.[25] Such follow-up inquiries may disclose jurors' attitudes toward the law. Recent cases requiring unequivocal statements of impartiality, which include the ability to follow the law, make such a procedure not only proper but advisable.[26]

Questioning That Is Improper

Immaterial Questions

Whether a particular question in a specific case is material or immaterial is determined by the nature of the case and the prospective jurors. What is material in one case might not be so in another case. The First Department has held that open-ended questions about prospective jurors' familiarity with drug trafficking and law enforcement are not permitted, even in drug cases.[27] Nor are open-ended invitations to relate anecdotes and factual information permitted[28] or

questions seeking commitments based on hypotheticals.[29] Where an issue was removed from a case or a legal ruling prevented the jury from learning certain information, so that the jurors were not aware of the issue or information, made *voir dire* on those points unnecessary.[30]

Repetitive Questions

The judge determines whether counsel's questions are repetitive based on the questions that have already been asked and the information already elicited.[31]

The judge may interview a prospective juror at any time during the *voir dire* and can use a written questionnaire to gather information. All information disclosed by the judge's questioning is available to counsel. Counsel must take that information into consideration to avoid repetitious questioning. The judge's questions or instructions may be sufficient to justify limiting or precluding questions by counsel.[32] Follow-up questions designed to explore a prospective juror's responses or views will be more successful – both in passing muster with the judge and in supplying information – than questions that elicit answers already given to earlier questions.

> A prospective juror who cannot unequivocally declare lack of bias must be excused.

Judicial efforts to curb counsel's repetitious questioning have resulted in the imposition of time limits on counsel's *voir dire*. Fifteen minutes for each lawyer has been held appropriate, although the judge may extend the time.[33]

Conclusion

The judge and the lawyers have the same interests in the *voir dire* questioning: to disclose a prospective juror's bias and partiality, his or her inability to serve because of reasons personal to the juror, or the presence of statutory exclusions. The Court of Appeals has made clear that a prospective juror who cannot unequivocally declare lack of bias must be excused. Trial judges do not want problems based on a juror's hidden bias or inability to fulfill the obligations of a juror, which might result in long interruptions in the trial, substitutions of jurors, and possibly a mistrial. They do not want post-conviction and post-judgment motions or reversals on appeal based on conduct of jurors who should have been excused.

To accomplish the goals of *voir dire* and to persuade the court that a longer than usual time should be allotted for attorney *voir dire*, lawyers can do two things. First, they must be fully prepared with thorough knowledge of the case before jury selection begins. Second, they must frame questions likely to obtain information relevant to the case and to the goals of *voir dire*. Questions designed to obtain new and relevant information are likely to be allowed by the judge. The procedure for eliciting information from prospective jurors can and should be a joint venture between counsel and the judge.

Judges are well-advised to hold a pre-*voir dire* conference, where well-prepared lawyers can suggest questions to include in the judge's oral or written questions and can argue why their requested questions should be included. At this point there is no limitation based on repetitious questioning or time constraints – relevance is the sole test.

An objection by an adversary to a question's inclusion can be countered with a request for additional discovery in order to strengthen the argument in favor of asking the question. Alternatively, the pre-*voir dire* conference can lead to an agreement between the parties that a particular subject will not be raised at trial. When the judge includes counsel's requested comments or questions in the charge or questions, some of counsel's allotted time can be saved for use in follow-up questioning.

Counsel can also seek the judge's aid in questioning about principles of law. Counsel is prohibited from stating the legal principles in questions or asking jurors about their knowledge of the law. It may not be permissible to ask if a juror agrees with a rule. Counsel can, however, ask the judge to state the relevant legal principle for the jury panel and can then inquire if panel members can follow the law. In response to such questions jurors frequently disclose that they cannot follow the law because they do not agree with the law or cannot understand it.

The importance of the *voir dire* necessarily brings about disputes about how it should be conducted. For example, the time allotted to counsel is often a subject of contention. The use of hypotheticals and references to specific anticipated evidence is subject to adverse judicial rulings. Examination about relevant legal principles is often foreclosed.

Revising the approach to the questioning will enable counsel to ask the questions relevant to uncovering bias or inability to fulfill the function of a juror. Careful preparation is of course the essence of representation, and it is crucial for asking the right questions about the prospective juror's personal lives and beliefs. With careful preparation and well-thought-out questions, the judge and the lawyer can cooperate in exploring bias and each prospective juror's ability to fulfill the role of a sworn juror. ■

1. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143–44 (1994).
2. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986); *People v. Johnson*, 94 N.Y.2d 600, 610–11, 709 N.Y.S.2d 134 (2000); *People v. Blyden*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982); *People v. Branch*, 46 N.Y.2d 645, 652, 415 N.Y.S.2d 985 (1979);

People v. Boulware, 29 N.Y.2d 135, 139–40, 324 N.Y.S.2d 30 (1971), *cert. denied*, 405 U.S. 995 (1972).

3. *Boulware*, 29 N.Y.2d at 139–40; *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001); *People v. Porter*, 226 A.D.2d 275, 641 N.Y.S.2d 283 (1st Dep't 1996); *People v. Rampersant*, 182 A.D.2d 373, 581 N.Y.S.2d 784 (1st Dep't 1992).

4. *People v. Corbett*, 68 A.D.2d 772, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980).

5. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118 (4th Dep't), *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 10 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003) (reasonable limits imposed on questions concerning eye-witness identification); *People v. Diaz*, 258 A.D.2d 356, 685 N.Y.S.2d 667 (1st Dep't), *leave denied*, 93 N.Y.2d 969, 695 N.Y.S.2d 55 (1999) (precluded questions about evidence that the prosecutor had not yet decided to use); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (curtailed questions about the defendant's right not to testify); *People v. Rodriguez*, 240 A.D.2d 683, 659 N.Y.S.2d 495 (2d Dep't), *leave denied*, 90 N.Y.2d 909, 663 N.Y.S.2d 521 (1997) (precluded questions about self defense).

6. *Boulware*, 29 N.Y.2d at 139–40; *see Carter*, 285 A.D.2d 384; *Byrd*, 284 A.D.2d 201.

7. CPL §§ 270.15(1), 270.20(1)(b).

8. Persons who have received a certificate of Good Conduct or a Certificate of Relief from Civil Disabilities that includes jury service are qualified to serve.

9. *People v. Mendoza*, 191 A.D.2d 648, 595 N.Y.S.2d 113 (2d Dep't), *leave denied*, 81 N.Y.2d 1017, 600 N.Y.S.2d 205 (1993).

10. *People v. Maragh*, 94 N.Y.2d 569, 708 N.Y.S.2d 44 (2000).

11. *People v. Arnold*, 96 N.Y.2d 358, 365–66, 729 N.Y.S.2d 51 (2001).

12. *Ham v. S.C.*, 409 U.S. 524 (1973).

13. *People v. Rubicco*, 34 N.Y.2d 841, 359 N.Y.S.2d 62 (1974) (denial of a request by an Italian defendant to question about ethnic prejudice was an error in the exercise of discretion); *People v. Blyden*, 79 A.D.2d 192, 436 N.Y.S.2d 492 (4th Dep't 1981), *rev'd*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982) (where defendant, victim and witnesses were all African American, it was error not to excuse a prospective juror who did not state he would be fair despite his adverse view of minorities).

14. *People v. Conklin*, 175 N.Y. 333, 341, 67 N.E. 624 (1903).

15. *Boulware*, 29 N.Y.2d at 141 (internal marks and citations omitted).

16. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118, *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 9 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003); *People v. Coleman*, 262 A.D.2d 219, 692 N.Y.S.2d 352 (1st Dep't), *leave denied*, 94 N.Y.2d 798, 700 N.Y.S.2d 431 (1999); *People v. Swift*, 260 A.D.2d 157, 687 N.Y.S.2d 363 (1st Dep't), *leave denied*, 93 N.Y.2d 930, 693 N.Y.S.2d 513 (1999). *See also People v. Glover*, 206 A.D.2d 826, 616 N.Y.S.2d 128 (4th Dep't), *leave denied*, 84 N.Y.2d 935, 621 N.Y.S.2d 532 (table), (1994) (counsel cannot ask about the juror's understanding of the presumption of innocence); *People v. Corbett*, 68 A.D.2d 772, 778–79, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980). In 1985, when the Legislature amended CPL § 270.15 to add subsection (1)(c), the Assembly memorandum stated that the amendment was intended to save time and authorized "the Court *not* [to] permit . . . questions relating to a juror's knowledge of or attitude regarding rules of law such as the presumption of innocence, burden of proof, reasonable doubt, etc" (emphasis added). The Practice Commentary to CPL § 270.15 states that the statute was intended to codify the case law. Preiser, Practice Commentary, McKinney's Cons. Laws of NY Book 11A, Criminal Procedure Law § 270.15 at 275–76 (2002).

17. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (4th Dep't 2005).

18. *Martinez*, 298 A.D.2d 897.

19. *People v. Horning*, 284 A.D.2d 916, 728 N.Y.S.2d 319 (4th Dep't 2001), *leave denied*, 97 N.Y.2d 705, 739 N.Y.S.2d 106 (2002).

20. *People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855, 661 N.Y.S.2d 181 (1997).

21. *People v. Maldonado*, 271 A.D.2d 328, 706 N.Y.S.2d 876 (1st Dep't), *leave denied*, 95 N.Y.2d 867, 715 N.Y.S.2d 222 (2000); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1996).

22. *People v. Castro*, 295 A.D.2d 219, 743 N.Y.S.2d 714 (1st Dep't), *leave denied*, 98 N.Y.2d 729, 749 N.Y.S.2d 479 (2002).

23. *People v. Evans*, 242 A.D.2d 948, 662 N.Y.S.2d 651 (4th Dep't), *leave denied*, 91 N.Y.2d 834, 667 N.Y.S.2d 687 (1997); *Porter*, 226 A.D.2d 276.

24. The idea of charging on the elements of the crime during the *voir dire* is coming into its own. *See People v. Andrews*, 2006 WL 1544053 (2d Dep't 2006) (pre-*voir dire* instruction on elements of the crime is not error); *People v. Miller*, 30 A.D.3d 444, 815 N.Y.S.2d 827 (2d Dep't 2006) (instruction during *voir dire* about acting in concert is proper. The defense, having consented to the giving of the charge, made no objection to its contents).

25. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (2005).

26. *See People v. Chambers*, 97 N.Y.2d 417, 740 N.Y.S.2d 291 (2002); *People v. Bludson*, 97 N.Y.2d 644, 736 N.Y.S.2d 289 (2001).

27. *People v. Green*, 3 A.D.3d 428, 770 N.Y.S.2d 621 (1st Dep't), *leave denied*, 2 N.Y.3d 800 781 N.Y.S.2d 299 (2004); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001).

28. *Byrd*, 284 A.D.2d 201; *see People v. Salley*, 25 A.D.3d 473, 808 N.Y.S.2d 664 (1st Dep't 2006).

29. *Salley*, 25 A.D.3d 473; *People v. Jackson*, 306 A.D.2d 910, 762 N.Y.S.2d 462 (4th Dep't), *leave denied*, 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2003); *People v. Woolridge*, 272 A.D.2d 242, 707 N.Y.S.2d 634 (1st Dep't 2000); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dep't), *leave denied*, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998).

30. *People v. Stanard*, 42 N.Y.2d 74, 396 N.Y.S.2d 825, *cert. denied*, 434 U.S. 986 (1977).

31. *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001).

32. *People v. Dinkins*, 278 A.D.2d 43, 717 N.Y.S.2d 167 (1st Dep't 2000), *leave denied*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998); *People v. Garrow*, 151 A.D.2d 877, 542 N.Y.S.2d 849 (3d Dep't), *leave denied*, 74 N.Y.2d 948, 550 N.Y.S.2d 282 (1989); *see People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855 (1997), *cert. denied sub nom. Bennett v. N.Y.*, 524 U.S. 918 (1998); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1st Dep't 1996).

33. *People v. Jean*, 75 N.Y.2d 744, 551 N.Y.S.2d 889 (1989).

BY DAVID PAUL HOROWITZ

Out With the Bad and In With the Good

New Depositions Rules to Take Effect October 1, 2006

Introduction

While this may come as a shock to some readers, it has been the consensus among both practitioners and members of the judiciary for many years that the conduct of attorneys at New York State court depositions has deviated from the stated goal of the CPLR, "to create an environment conducive to open, expansive disclosure during the taking of a deposition."[1] Even those in the deepest stages of denial must have been persuaded by the article that appeared in the *New York Law Journal* on May 14, 2004, "Judge Sanctions Attorney, Client Over Behavior." The article began:

> A Supreme Court judge has sanctioned an attorney $8,500 for frivolous conduct ranging from attempts to harass his opponents and barking like a dog at a witness during a deposition.[2]

While the dog-barking case hopefully represented the nadir of state court deposition practice (though many practitioners would dispute this), it is telling that many who read the article reacted with a chuckle, rather than recoiling in horror. Thus, the state of deposition practice in New York State courts.

Well, no more. On October 1, 2006,[3] a new Part 221 to the Uniform Rules for Trial Courts will take effect. Overnight, many all-too-common deposition practices will be barred, and our state court deposition landscape will resemble, in many key respects, that which exists in the rarefied atmosphere of the federal courts, perhaps best explained by the oft-cited opinion in *Hall v. Clifton Precision*.[4] More on that later. First, the new rules.[5]

The New Rules, Title 22 N.Y. Comp. Code R. & Regs.

PART 221. UNIFORM RULES FOR THE CONDUCT OF DEPOSITIONS

§ 221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Interplay With CPLR 3115

Section 221.1(a) bars objections at depositions except for those set forth in CPLR 3115(b), (c), and (d).[6] CPLR 3115 is titled "Objections to qualification of

person taking deposition; competency; questions and answers."

CPLR 3115(b)

CPLR 3115(b) provides:

> (b) Errors which might be obviated if made known promptly. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

CPLR 3115(b) provides that objections as to form must be made at the deposition, or the objection is waived. Accordingly, the defending attorney and any other non-questioning attorneys must be alert to make form objections, on the record, at the time the question has been posed and, preferably, before the answer has been given by the witness. This objection is generally voiced as "objection to the form," or "objection, form."

When an objection to form is made, the questioner has the choice of inquiring as to what it is that is objectionable about the question, and then reformulating the question based upon the objection, or standing by the question as posed, in which case the witness must answer, over the objection. Note, however, that many practitioners believe, and some judges agree, that where permitting the witness to answer a question where an objection to form has been made, and where to answer the question may cause, as even the new rule acknowledges, "significant prejudice," the witness may properly be directed not to answer the question. More on this next issue.

Objections to the form of the answer are a little more difficult to pin down, but are worthy of attention. Where a party fails to object to unresponsive answers at the deposition, thereby allowing an opportunity for the objec-

A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.

tion to be cured with a responsive answer, the result may be the admission of the otherwise objectionable testimony at trial.[7] This objection is generally voiced as "move to strike as non-responsive."

CPLR 3115(b) also provides that any other types of errors that may be obviated by prompt objection are waived if they are not promptly raised. For example, a party's failure to object to a deposition proceeding in the absence of an interpreter has been deemed a waiver of a subsequent claim that the witness did not understand the questions asked.[8]

CPLR 3115(c)

CPLR 3115(c) provides:

> (c) Disqualification of person taking deposition. Objection to the taking of a deposition because of disqualification of the person by whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

CPLR 3115(c) requires that if there is a basis for objecting to the qualification of the person taking the deposition, the objection is waived unless it is made prior to the start of the deposition or as soon after the commencement as the reason for the disqualification becomes known, or could be discovered with reasonable diligence. Timely objection to the qualifications of the person taking the deposition may preclude the use of the transcript at trial.[9]

CPLR 3115(d)

CPLR 3115(d) provides:

> (d) Competency of witnesses or admissibility of testimony. Objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.

CPLR 3115(d) provides that objections to the competency of a witness or to the admissibility of testimony are not waived by the failure to object ''unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.''

Speaking Objections

The limitation on speaking objections set forth in § 221.1(b) may be the hardest requirement of the new rules for practitioners to absorb and put into practice.

Why are speaking objections problematic, and how does one state an objection "succinctly"? As the leading federal case on deposition conduct, *Hall v. Clifton Precision*, states,

> [O]bjections and colloquy by lawyers tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony. Since most objections, such as those grounded on relevance or materiality, are preserved for trial, they need not be made. As for those few objections which would be waived if not made immediately, they should be stated pithily.[10]

How do you make the objection without suggesting an answer? *Hall* is instructive as to what *not* to do:

> I also note that a favorite objection or interjection of lawyers is, "I don't understand the question; therefore the witness doesn't understand the question." This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer.[11]

As for the making of statements on the record, the same court wrote:

> The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

Remember, there is a court reporter taking down everything said at the deposition while the record is being made, including speaking objections.

Conclusion (For Now)

Can an old dog learn new tricks? Only time will tell. Are the new rules, despite their clear pronouncements, destined to be followed more in the breach, as has been the case with the existing body of case law on deposition practice and sanctions and penalties related to depositions? Again, only time will tell. If you are a poster child for bad behavior at depositions, is it time to reconsider your ways? You bet!

Next issue: Sections 221.2 and 221.3, including the making of objections and situations when a witness may, under the new rules, be directed not to answer a question, will be covered. Until then, behave yourselves. ■

1. *Mora v. St. Vincent's Catholic Med. Ctr.*, 8 Misc. 3d 868, 800 N.Y.S.2d 298 (Sup. Ct., N.Y. Co. 2005).

2. NYLJ, May 14, 2004, p. 1, col. 4.

3. Certainly the Chief Administrative Judge of the State of New York did not intend that the window between promulgation and enactment should be used to continue to engage in bad behavior.

4. 150 F.R.D. 525 (E.D. Pa. 1993).

5. Two additional rule changes will take effect at the same time. The first, having to do with preliminary injunctions, reads as follows:

> § 202.7 Calendaring of Motions; Uniform Notice of Motion Form; Affirmation of Good Faith
>
> (f) Upon an application for an order to show cause or motion for a preliminary injunction seeking a temporary restraining order, the application shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law.

The Second, pertaining to Preliminary Conferences, reads:

> § 202.26 Pretrial Conference
>
> (e) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations, or accompanied by a person empowered to act on behalf of the party represented, will be permitted to appear at a pre-trial conference. Where appropriate, the court may order parties, representatives of parties, representatives of insurance carriers or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to also attend in person or telephonically at the settlement conference. Plaintiff shall submit marked copies of the pleadings. A verified bill of particulars and a doctor's report or hospital record, or both, as to the nature and extent of injuries claimed, if any, shall be submitted by the plaintiff and by any defendant who counterclaims. The judge may require additional data, or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this paragraph may be deemed a default under CPLR 3404. Absence of an attorney's file shall not be acceptable excuse for failing to comply with this paragraph.

6. CPLR 3115(a) provides that all objects other than those set forth in CPLR 3115(b)–(d) are preserved for trial. CPLR 3115(e) pertains to objections to the form of written deposition questions.

7. *Saturno v. Yanow*, 58 A.D.2d 968, 397 N.Y.S.2d 250 (4th Dep't 1977) (testimony was properly admitted at time of trial under spontaneous declaration exception to the hearsay rule, where counsel taking the deposition of deponent, who died prior to trial, failed to object to the unresponsive answer, and thus the objection was obviated or waived).

8. *Sheikh v. Sinha*, 272 A.D.2d 465, 707 N.Y.S.2d 241 (2d Dep't 2000) (plaintiff's attempt to amend his deposition answers in opposition to defendant's summary judgment motion was rejected, since plaintiff failed to object at the time of the deposition to proceeding without an interpreter).

9. *Wilkinson v. British Airways*, 292 A.D.2d 263, 740 N.Y.S.2d 294 (1st Dep't 2002) (the trial court precluded the introduction of the videotaped deposition testimony where plaintiff's counsel administered the oath to the witness after being cautioned by defendant's counsel, who objected that the procedure was improper).

10. 150 F.R.D. 525 (E.D. Pa. 1993).

11. *Id.*

Removal of Personal Injury Actions to New York Federal District Courts

By Robert A. Barrer

Removing a personal injury action to federal district court, based upon diversity of citizenship, seems pretty straightforward.[1] First, determine whether there is complete diversity and if the amount in controversy has been met. Second, if the case is removable, then a notice of removal is prepared and filed, and you are now in federal instead of state court. Right? Unfortunately, it is not always that easy to make the determination of removability.

The state Legislature made the removability question for New York personal injury cases more difficult with its 2003 amendments to § 3017(c) of the New York Civil Practice Law and Rules.[2] By mandating that personal injury complaints in New York may no longer contain a monetary amount in the *ad damnum* clause, the Legislature accomplished two things: First, the special protection afforded to medical and dental malpractice cases was removed; the CPLR now treats all personal injury cases the same. Second, the Legislature created an unintended problem for defense counsel seeking to remove these cases to federal district court.[3] It is now

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impossible to simply look at a New York personal injury complaint and determine whether the requisite amount in controversy has been met.

This article examines the law of removal in relation to New York personal injury cases, provides a primer of the basics of removal practice, and suggests how practitioners may properly analyze personal injury cases, determine removability based upon diversity of citizenship and amount in controversy and, where indicated, effect timely and successful removal. Practitioners will also find an eight-point checklist for removal in the accompanying sidebar (see page 38).[4]

Basic Removal Practice

Standard removal of a personal injury case based upon diversity of citizenship should bring back memories of the first year of law school civil procedure class. You will recall that if there is complete diversity, *i.e.*, all plaintiffs are of diverse citizenship from all defendants, and the amount in controversy exceeds the current jurisdictional amount exclusive of interest and costs,[5] then the action is one that could have been brought in federal district court, and it can be removed.[6]

Making the determination of complete diversity requires examining the citizenship of the parties. For an individual, the inquiry is not complicated; this information is usually provided in the summons or the complaint. Citizenship is, of course, based upon domicile, which is in turn determined based upon "the place where a person has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning."[7] For a corporate party, citizenship is determined both by its state of incorporation[8] and the state where it maintains its principal place of business.[9] Assuming the existence of complete diversity, and further assuming that the defendant or defendants are not New Yorkers (because in-state defendants may not remove),[10] the question then becomes one of numbers. Namely, has the requisite amount in controversy been pleaded? Accordingly, if "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," then your action meets the basic test of removability.[11]

Some Additional Considerations

There are, of course, some caveats to these basic principles. No diversity action may be removed if it has been pending for more than one year.[12] Although an action may be one in which there is complete diversity, the courts in the Second Circuit have imposed a non-statutory requirement that removal is not permitted unless all defendants consent in a writing directed to the court.[13] Thus, in a multi-defendant action where you do not represent all defendants, you are required to seek out consent to removal or face a motion to remand.

Even where there is not complete diversity, removal can still be effected. The careful practitioner will examine the pleading to see whether a reasonable argument can be made that there has been "fraudulent joinder" of a non-diverse defendant or defendants. The fraudulent joinder doctrine "is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal jurisdiction. Under the doctrine, courts overlook the presence of a non-diverse defendant if from the pleadings there is no possibility that the claims against that defendant could be asserted in state court."[14] "[A] plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy."[15]

The removal clock is ticking and the courts "strictly construe" the requirements that the defendant must follow in order to permit removal.

Last, removal must be timely, meaning that the notice of removal is filed within 30 days of service or the determination of removability, whichever comes first.[16] Although a body of case law had developed suggesting that the 30-day period begins to run from first *receipt* of the pleading rather than actual perfected service,[17] the U.S. Supreme Court rejected this view in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*[18] Accordingly, the time to remove begins to run from the time of proper and perfected service. Once service has been made, the pleading must be carefully reviewed, because time is running.

As the Second Circuit stated in *Whitaker v. American Telecasting, Inc.*,[19]

> [t]he history and text of . . . [28 U.S.C.] section 1446(b) clearly make the defendant's receipt of "the initial pleading" the relevant triggering event, which is any pleading (and not necessarily the complaint) containing sufficient information to enable the defendant to intelligently ascertain the basis for removal.[20]

Whether the pleading contains sufficient information necessary to determine removability will, of course, be case-specific. However, since the removal clock is ticking and the courts "strictly construe" the requirements that the defendant must follow in order to permit removal,[21] the determination must be made expeditiously.

Notwithstanding the bright-line test enunciated by the Court in *Murphy Bros.*, the prudent practitioner should not rely upon a determination (possibly made much later) of whether any given method of service was properly made. Rather, the practitioner should endeavor to remove immediately upon learning of the existence of the otherwise removable case in which the client is

a named defendant, rather than waiting for confirmation of formal service of process.[22] To do otherwise is to take an unnecessary risk and chance the loss of a federal forum.

Removal Procedure

Assuming that all the formalities of removability have been met, the removing party must prepare, serve and file a notice of removal containing "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action."[23] The notice of removal must be accompanied by a Civil Cover Sheet Form JS 44 (available on the Web sites of the Administrative Office of the U.S. Courts as well as the various district courts)[24] together with the statutory filing fee of $350.[25] Practitioners should check with the clerk of the court to which they are removing the action to determine the current policy of the clerk regarding electronic case filing and any additional requirements that may be imposed. Most courts now require that an additional copy of the papers be supplied in portable document format (.pdf) for uploading to the electronic case filing database.

Upon filing with the clerk of the district court, copies of the removal papers should be filed with the county clerk of the county in which the action was originally commenced and, if a request for judicial intervention has been filed, copies should be filed with the supreme court clerk.[26] Removal is effected upon the filing with the state court clerk(s).[27] Thereafter, proof of the state court filings should be filed with the district court clerk.

Prior Practice Dealing With a Summons With Notice

New York permits an action to be commenced by the filing and service of a summons with notice as opposed to the more traditional summons and complaint.[28] Although this method of commencement is permitted, and has been since 1979, the leading commentator on New York practice strongly argues against it and suggests that a poor complaint, amended as of right when the drafter has had a chance to reflect, is a far better choice than a summons with notice that runs with it the risk that the "notice" contained in the document is insufficient.[29] Regardless, the summons with notice is a reality and, when it is used to commence an action, the practitioner looking to remove must still perform the same analysis of removability because that ever-present removal clock is ticking.

Before the 2003 amendment to CPLR 3017(c), a summons with notice might typically contain the following information: (a) the name and residence of the plaintiff; (b) the name and address of the defendant; (c) the basis for venue, a "notice" stating the nature of the action; and (d) the amount demanded in case the clerk would be in a position to enter a default. Assuming all this information was present, it was sufficient to determine removability. However, what if the summons with notice did *not* contain an amount demanded because it was a medical or dental malpractice case or because the plaintiff's attorney merely stated that the amount demanded exceeded the jurisdiction of all lower courts?

A poor complaint is a far better choice than a summons with notice that runs with it the risk that the "notice" contained in the document is insufficient.

Removal is permitted when the defendant (and, of course, only a defendant can remove a case) becomes aware that the case is removable. The removal statute expressly provides that the threshold determination of removability is made based upon a review of the "initial pleading."[30] Yet, if the initial pleading is not removable, the action can still be removed within 30 days of receipt "through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[31]

In *Whitaker*,[32] the Second Circuit examined the law relating to removal in a case commenced with a summons with notice. The *Whitaker* case involved removal accomplished within 30 days of service of the complaint which disclosed removability but a full six months after commencement of the action. The court reviewed the conflicting decisions of the various New York federal district courts on the question of whether the "initial pleading" referenced in the removal statute had to be a complaint as opposed to a summons. Based upon the available legislative history and the language used by the Supreme Court in *Murphy Bros.*, the court concluded that the "initial pleading" could be either document.[33]

Thereafter, the court turned its attention to the information necessary to be included in the summons and held that defense counsel must be able to "intelligently ascertain" removability from the face of such pleading *without* any corresponding duty to further investigate the facts, including the residence of the parties.[34] Where the

Removal of Personal Injury Actions to New York Federal District Courts

There are several issues that must be examined and certain steps that must be followed by the practitioner who hopes to properly and timely remove a personal injury action from a New York state court to federal district court. The following issues and steps should be promptly examined upon receipt of the pleading from your client. Failure to act promptly and diligently can lead to a successful motion to remand the action back to state court.

1. Determine the date when your client first became aware that an action had been commenced against it, noting that it is possible that this date may occur before completion of formal service. Because the time within which to remove is very short (30 days), consider the commencement of the removal period from the client's first knowledge rather than relying upon possibly incorrect calculations relating to the proper completion of formal service of process.
2. Determine if there is complete diversity between the plaintiff and all defendants. Remember, in-state defendants cannot remove to federal court. Further, consider whether there is a good faith basis to argue that a New York defendant has been "fraudulently joined" such that this defendant's citizenship can be ignored.
3. Determine whether the amount in controversy *exceeds* the sum of $75,000, exclusive of interest and costs. Remember, an action seeking exactly $75,000 is not removable because the amount in controversy must *exceed* the jurisdictional amount in 28 U.S.C. § 1332.
4. Determine, in the case of multiple defendants, whether all defendants consent to the removal to federal court. Once the determination is made, secure formal written consents to the removal and arrange for their filing with the Clerk of the Court either at the time of the filing of the notice of removal or shortly thereafter. One recalcitrant defendant can stand in the way of removal.
5. Determine, in the case of an action that was not recently commenced, *e.g.*, your client was named as a third-party defendant, whether more than one year has elapsed since the action was commenced. If more than one year has elapsed, the action is not removable based upon diversity of citizenship.
6. Determine, in the case of a pleading without an *ad damnum* showing that the jurisdictional amount has been satisfied, whether the injury to the plaintiff is "worth" more than the jurisdictional amount. This can be accomplished by service of a demand pursuant to CPLR 3017(c) *and* also with direct inquiries to the plaintiff's attorney requesting medical records, photographs or a bill of particulars or interrogatory answers describing the nature of the injuries. The plaintiff's attorney should be informed immediately that you want to remove the action and are seeking information from which you can meet your obligations under both 28 U.S.C. § 1441 and Fed. R. Civ. P. 11. Follow up on your inquiries so that there can be no question raised later whether you acted diligently.
7. Once the determination has been made to remove, prepare a notice of removal that complies with 28 U.S.C. § 1446(a) and file the notice (with copies of all state court papers attached) with the clerk of the federal district court. You will need a filing fee (currently $350) together with a Civil Cover Sheet. Check with the clerk of the federal district court for electronic filing requirements. A copy of the notice of removal must be served on the plaintiff or the plaintiff's attorney as well as all other parties or their counsel.
8. Following removal, file a notice with the state court (both county clerk and supreme court clerk) showing that removal has occurred thereby divesting the state court of jurisdiction and file proof of service with the federal district court clerk.

summons included an amount demanded far in excess of the jurisdictional limit, but did not include the address of each defendant, removability was not disclosed and the removing defendant was held to have acted properly by waiting until receipt of the complaint that actually disclosed the addresses of the defendants.

Removal Practice Following Amendment of CPLR 3017(c)

With the amendment to CPLR 3017(c), the practitioner can now face a complaint containing complete information on citizenship, a description of an accident or occurrence with resulting personal injuries and the familiar statement that the amount in controversy "exceeds the jurisdiction of all lower courts." Inasmuch as there is no other "pleading" yet to be served by the plaintiff and you want to remove the case to federal district court, what should you do?

First, consider serving a demand for "the total damages to which the pleader deems himself entitled," under CPLR 3017(c).[35] Advise the plaintiff's attorney that you want to remove the case and need the information in

order to determine removability. If there is no response, follow up promptly and keep following up until an answer is received. By taking this course of action, it cannot be said that you were not diligently trying to comply with the applicable procedure for obtaining information from which you can "intelligently ascertain" removability. Your correspondence will be evidence of your intent and can be used as exhibits in the event that motion practice is required.[36]

Second, if you do not want to have a formal demand in the file and you want to act with extreme caution, consider writing a letter advising the plaintiff's attorney that you believe there is complete diversity of citizenship and you need to determine the proper amount in controversy. Request copies of photographs of the injuries, medical reports or any other documents that will assist you in determining whether the case is one that is "worth" more than $75,000, exclusive of interest and costs. Further, advise the plaintiff's attorney that you are relying on him or her to provide you with this information promptly, so you can exercise your client's right to remove the case to federal district court.

The response to your CPLR 3017(c) Demand will more than likely contain a large number. However, what if the number "to which the pleader deems himself entitled" is below or exactly $75,000? If so, the action is not removable and you can rest assured that this is not a big case. If the number exceeds the $75,000 figure, remove within 30 days of receipt. Similarly, if you elect to request photographs or medical records, or you receive a bill of particulars in response to your demand, examine the injuries described and make a determination of value. If the case is a small scar, you may have difficulty coming to the conclusion that the action is removable. By contrast, if there is a back injury and surgery, it is a safe bet that the plaintiff's attorney will not argue that you have valued the case too high.

The courts that have addressed the issue since the amendment to CPLR 3017(c) accord with the practices suggested above. For example, in *Gonzalez v. Rajkumar*,[37] an action was commenced; the complaint alleged "serious injuries" under the New York no-fault statute. The defendant served a CPLR 3017(c) Demand with the answer and then removed the case within 30 days of receipt of the response indicating that the amount sought was $10 million. Based upon these facts, the court denied a motion to remand, holding that a defendant should not have to guess about removability and that following the procedure specified in the CPLR was the proper method for ascertaining the amount demanded.

The same result was obtained in *Yonkosky v. Hicks*.[38] There, the court rejected the assertion of the plaintiffs' attorney that the normal 30-day removal time limit found in 28 U.S.C. § 1446(b) applied where the state court complaint filed by that attorney complied with CPLR 3017(c) and did not contain a specific amount in controversy. The court also rejected the argument of the plaintiffs' attorney that the defendants were under a duty to advise that removal was contemplated when pressing (with three letters and a motion) for a response to the CPLR 3017(c) Demand.

In contrast, in two cases in which the defendant precipitously removed an action to federal district court without first serving a CPLR 3017(c) Demand, the U.S. District Court for the Western District of New York granted motions of the plaintiffs to remand, specifically citing the availability of the procedure for obtaining a demand figure. In *Robins v. Harb*,[39] the court concluded that the complaint, which did "not identify the plaintiff's injuries in great detail," was an insufficient basis upon which to make the removability determination.[40]

The remedy for precipitous removal? Remand was granted with leave to remove following receipt of the response to the CPLR 3017(c) Demand. In so ruling, the court specifically held that the response to the demand would constitute an "other paper" within the meaning of 28 U.S.C. § 1446(b). Similarly, in *Setlock v. Renwick*,[41] the court held that a statement in the complaint that the plaintiff "was injured in and about her body and limbs and was rendered injured and disabled for a considerable

When presented with a pleading or paper from which removability can be intelligently ascertained, act promptly.

period of time and continues to be so" was insufficient to determine that the amount in controversy exceeded the jurisdictional amount. The result? Again, remand to state court with leave to remove within 30 days after receipt of the response to the CPLR 3017(c) Demand.

In *Vasquez v. J.M. Products, Inc.*,[42] the attorney for the defendant did not employ the CPLR 3017(c) Demand procedure, instead "making several attempts to ascertain the amount of damages" presumably by letter or telephone inquiry. The defendant's attorney alleged that those efforts were "deliberately and intentionally ignored." However, when the plaintiff's attorney showed the defendant's attorney "photographs depicting scarring on large portions of the plaintiff's body which he claimed was permanent," counsel was then in a position to make the removability determination. Removal within 30 days of "becoming aware" that the damages in the action exceeded the jurisdictional amount was therefore held to be timely.[43]

Is a motion to remand always required for precipitous removal? Perhaps not. The Eastern District of New York *sua sponte* remanded five personal injury cases to state court in a three-month period, finding that the court should not be burdened with overseeing discovery of disputes that may be outside the jurisdiction of the federal courts.[44] Rather, the proper course for defendants seeking to remove is to ascertain removability by determining whether the damages sought exceed the jurisdictional limit found in 28 U.S.C. § 1332.[45]

Conclusion

Removal of a personal injury case to federal district court can be accomplished with a minimal amount of effort and expense. As discussed above, when presented with a pleading or paper from which removability can be intelligently ascertained, act promptly. When the pleading or paper does not disclose removability, take immediate steps to make the determination by serving a CPLR 3017(c) Demand and request copies of photographs, medical records or other documents that show the severity of the injury. Upon receipt of such information, act promptly and your removal will be effected seamlessly. ■

1. The federal courts are courts of limited jurisdiction. For cases in which there is complete diversity of citizenship and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs, 28 U.S.C. § 1332 provides a jurisdictional basis. For cases which arise under the constitution, laws or treaties of the United States, 28 U.S.C. § 1331 provides a jurisdictional basis. There are a myriad of other jurisdictional statutes that provide a basis upon which to commence an action in federal district court. *See* ch. 85, tit. 28 U.S.C.; 28 U.S.C. §§ 1330–1369. This article focuses exclusively on diversity cases because of the problem raised by the amendment to the CPLR that prohibits the inclusion in a complaint of an amount of money sought for personal injury cases. For the latest word from the Supreme Court on removability based upon federal question jurisdiction, see *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

2. 2003 N.Y. Laws Ch. 694 (eff. Nov. 27, 2003). CPLR 3017(c) provides:

> In an action to recover damages for personal injuries or wrongful death, the complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled. If the action is brought in the supreme court, the pleading shall also state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction. Provided, however, that a party against whom an action to recover damages for personal injuries or wrongful death is brought, may at any time request a supplemental demand setting forth the total damages to which the pleader deems himself entitled. A supplemental demand shall be provided by the party bringing the action within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be served. A supplemental demand served pursuant to this subdivision shall be treated in all respects as a demand made pursuant to subdivision (a) of this section.

3. *See generally* Paul H. Aloe, *2002–2003 Survey of New York: Civil Practice*, 54 Syracuse L. Rev. 825, 835–36 (2004).

4. This checklist first appeared in the Summer 2006 edition of the New York State Bar Association's *Torts, Insurance & Compensation Law Section Journal*.

5. 28 U.S.C. § 1332(a) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

6. 28 U.S.C. § 1441(a) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

7. *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000) (citing *Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998)).

8. The New York Secretary of State has an excellent web site for checking corporate status of corporations licensed to do business in the State. If a corporation is listed, there will also be a listing of the principal place of business. *See* <http://www.dos.state.ny.us> follow "Search for Corporations or Business Entities."

9. 28 U.S.C. § 1332(c)(1).

10. 28 U.S.C. § 1441(b).

11. 28 U.S.C. § 1332(a).

12. 28 U.S.C. § 1446(b).

13. *See, e.g., Bashford v. Crown Fin. Group*, No. 05 Civ. 2217, 2005 U.S. Dist. LEXIS 15811, *8 (S.D.N.Y. Jul. 27, 2005); *Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp. 2d 222, 223–24 (N.D.N.Y. 2001); *Codapro Corp. v. Wilson*, 997 F. Supp. 322, 325 (E.D.N.Y. 1998).

14. *Briarpatch, Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004), *cert. denied*, 544 U.S. 949 (2005) (quoting *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460–61 (2d Cir. 1998)).

15. *Pampillonia*, 138 F.3d at 460–61.

16. 28 U.S.C. § 1446(b).

17. *See, e.g., Ward v. Aetna Life Ins. Co.*, No. 98-CV-0542E, 1998 WL 864874 (W.D.N.Y. Nov. 17, 1998); *Rosenthal v. Life Fitness Co.*, 977 F. Supp. 597, 598–99 (E.D.N.Y. 1997); *Botelho v. Presbyterian Hosp.*, 961 F. Supp. 75, 77 (S.D.N.Y. 1997); *Weimer v. City of Johnstown*, 931 F. Supp. 985, 989–90 (N.D.N.Y. 1996).

18. 526 U.S. 344 (1999).

19. 261 F.3d 196 (2d Cir. 2001).

20. *Id.* at 198.

21. *Codapro Corp.*, 997 F. Supp. at 324 (quoting *In re NASDAQ Market Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996)).

22. For example, while the removal clock is running you may be obligated to track down follow-up service by mail when service is made upon a person of "suitable age and discretion" under CPLR 308(2), or whether a person alleged to be a corporate representative meets the definition of a person authorized to receive service under CPLR 311(a)(1).

23. 28 U.S.C. § 1446(a).

24. *See* <http://www.uscourts.gov; http://www.nyed.uscourts.gov>; <http://www.nynd.uscourts.gov>; <http://www.nysd.uscourts.gov>; <http://www.nywd.uscourts.gov>. Not all federal district courts use the exact same form of Civil Cover Sheet. Make sure that you are using the correct form for the court to which you are removing your case.

25. 28 U.S.C. § 1914(a). Note, the filing fee increased from $250 to $350 effective April 1, 2006.

26. 28 U.S.C. § 1446(d).

27. *Id*.

28. CPLR 305(b).

29. David D. Siegel, New York Practice § 60, p. 87 (4th ed. 2005).

30. 28 U.S.C. § 1446(b).

31. *Id*. The ability to remove based upon a subsequent event or "paper" is subject to the outside period of one year for diversity cases.

32. 261 F.3d 196.

33. *Id*. at 202–205.

34. *Id*. at 205–206.

35. CPLR 3017(c).

36. One court, *Yonkosky v. Hicks*, 409 F. Supp. 2d 149 (W.D.N.Y. 2005), discussed in the text, has held that such a statement of intent to remove is not required. Although it may not be *required*, it is still strongly suggested that such a telegraphing of the intent to remove be made in order to avoid responding to unnecessary arguments on a motion to remand.

37. No. 04 Civ. 9405, 2005 WL 1593008 (S.D.N.Y. Jul. 6, 2005).

38. 409 F. Supp. 2d 149 (W.D.N.Y. 2005).

39. No. 05CV53S, 2005 WL 976526 (W.D.N.Y. Apr. 26, 2005).

40. At oral argument, the Court was advised by counsel for the plaintiff that the injury resulted in a scar on the ankle of unknown severity. This too was an insufficient basis upon which to remove. *Id.* at *3.

41. No. 04-CV-0079E, 2004 WL 1574663 (W.D.N.Y. May 21, 2004).

42. No. 04Civ.3019, 2004 WL 1124646 (S.D.N.Y. May 20, 2004).

43. *Id*. at *6–*8. Interestingly, in *Beres v. New Buffalo Corp.*, No. 05-CV-0523E, 2006 WL 354793 (W.D.N.Y. Feb. 14, 2006), the Court held that although there was authority to *permit* a defendant to establish the amount in controversy through reference to materials obtained in discovery, there was no *requirement* on the part of a defendant to do so. For a defendant seeking to remove, the best practice is to explore all possible options to ascertain the amount in controversy and act promptly upon receipt of the necessary information.

44. *Gershoff v. Stop & Shop Supermarket Co.*, No. CV 06-2262, 2006 WL 1367397 (E.D.N.Y. May 18, 2006); *Messina v. Stevens Appliance Truck Co.*, No. CV 06-1698, 2006 WL 1026415 (E.D.N.Y. Apr. 13, 2006); *Sonn v. Wal-Mart Stores, Inc.*, No. CV 06-1296, 2006 WL 752829 (E.D.N.Y. Mar. 23, 2006); *Myers v. Costco Wholesale Corp.*, No. CV 05-5698, 2006 WL 681201 (E.D.N.Y. Mar. 14, 2006); *DeMarco v. MGM Transport, Inc.*, No. CV 06-0307, 2006 WL 463504 (E.D.N.Y. Feb. 24, 2006).

45. In the cases remanded by the court, the state court complaints contained the familiar assertions that that the plaintiffs had either suffered "serious and severe personal injuries" or were rendered "sick, sore, lame, bruised and disabled" as a result of the negligence of the defendants.

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Update:

Did the Appellate Odds Change in 2005?

By Bentley Kassal

These are relevant and comparative appellate statistics, mostly in percentages, that enable appellate counsel to give a fair, reasonable and statistically accurate – and logical – response to inquiring clients who ask the inevitable question "What are our chances on appeal?" It is no longer necessary to play a guessing game – here are the facts and figures!

As in three previous articles on this subject, the selected statistics presented below relate to the principal New York State courts as well as two U.S. Circuit Courts of Appeal – the Second Circuit and the District of Columbia – that will be of significant interest to New York litigators. These figures are derived, respectively, from the official data issued by the New York State Office of Court Administration and the Administrative Office of the United States Courts. In order to present a truer and more pragmatic picture, only those dispositions that are "on the merits," namely "Affirmed," "Reversed" and "Modified," are included. The categories "Remanded," "Dismissed" and "Other" are excluded from these statistics because of the myriad of other factors underlying those determinations.

As to the New York State appellate courts, the statistics include both civil and criminal appeals for all state courts:

1. *New York Court of Appeals* – "Avenues to the New York Court of Appeals," with general comments.
2. *The Four Departments of the Appellate Division of the New York State Supreme Court*, with general comments.
3. *The Two Appellate Terms* of the New York State Supreme Court for the First and Second Departments of the Appellate Division (the only two in New York State), with general comments.

In addition, statistics for the United States Circuit Court of Appeals for the Second Circuit and for the District of Columbia are presented.

Readers will note that the statistics for both the state and the U.S. Circuit courts now cover a five-year period. The items that are excluded are based on different and varying factors, which, as explained above, are not accurate for the category "dispositions on the merits after argument or submission," which is the real basis of the theme of this article.

New York Court of Appeals

Comparison of the percentages for appellate statistics for the five-year period of 2005, 2004, 2003, 2002 and 2001 are:

Civil Cases

Year:	2005	2004	2003	2002	2001
Affirmed	55	58	51	47	48
Reversed	35	37	39	44	44
Modified	10	5	10	9	8

Criminal Cases

Year:	2005	2004	2003	2002	2001
Affirmed	70	81	70	70	69
Reversed	25	15	21	28	29
Modified	5	4	9	2	2

Avenues to the Court of Appeals in 2005[1]

A. Civil Appeals

Permission of Court of Appeals	69 (70)
Permission of Appellate Division	27 (13)
Dissents in Appellate Division	17 (31)
Constitutional Question	8 (6)

B. Criminal Appeals

Permission of Court of Appeals	50 (32)
Permission of Appellate Division	8 (14)

Comments – Significant Other Statistics[2]

1. Time for Deciding Appeals[3] in 2005, compared with (2004).

The average time from:

(a) Argument or submission to disposition in normal course was 36 (46) days;

(b) Filing a notice of appeal to calendaring for oral argument was 5.7 (6.2) months;

(c) Readiness (all papers served and filed) to calendaring for oral argument was 1.3 (1.5) months;

(d) Filing of notice to appeal to the public release of decision was 257 (284) days.

2. Total Filings.

(a) In 2005, there were 284 (296)[4] notices of appeal and orders granting leave to appeal; 213 (235) were civil and 71 (61) criminal.

These figures again support the long-time call for a Fifth Department.

3. Dispositions in 2005.

(a) 196 (185) appeals were decided, including 137 (136) civil and 59 (49) criminal and 142 of the 196 were unanimous.

(b) 1,289 (1,222) motions were decided, with the average time from return date to disposition 58 (56) days for civil and for all motions 48 (47) days.

(c) Motions for leave to appeal, civil cases – there were 961 (901) applications and 61 or 6.3% (75 or 8.3%) granted.

(d) Review of determinations of State Commission on Judicial Conduct – 1 (2) determination(s) and 1 removal (2 suspensions ordered).

(e) Rule 500.27 Certifications – Discretionary jurisdiction to review certified questions from certain federal courts and other courts of last resort. 4 cases were accepted in 2005, 4 in 2004 and 5 in 2003.

The Four Departments of the Appellate Division: Statistics

Civil statistics for 2005
(2004, 2003, 2002 and 2001 in parentheses):

Dep't:	First	Second	Third	Fourth
Affirmed	66 (66) (69) (68) (67)	61 (62) (59) (62) (60)	81 (78) (79) (78) (78)	70 (70) (66) (63) (62)
Reversed	21 (21) (18) (18) (19)	27 (28) (29) (28) (29)	10 (11) (11) (11) (12)	13 (12) (19) (17) (18)
Modified	13 (13) (13) (14) (14)	12 (10) (12) (10) (11)	9 (11) (10) (11) (10)	17 (18)(15) (20) (20)

Criminal statistics for 2004
(2003, 2002 and 2001 in parentheses):

Dep't:	First	Second	Third	Fourth
Affirmed	88 (93) (93) (93) (93)	90 (90) (90) (88) (89)	87 (87) (86) (85) (88)	89 (87) (88) (87) (89)
Reversed	3 (2) (2) (3) (3)	5 (6) (6) (7) (6)	7 (6) (8) (6) (5)	3 (4) (3) (5) (4)
Modified	9 (5) (5) (4) (4)	5 (4) (4) (5) (5)	6 (7) (6) (9) (7)	8 (9) (9) (8) (7)

The Four Departments of the Appellate Division: Comments

The civil percentages for 2005 are generally similar to those for the previous four years with no significant variances. As to the criminal statistics, the only noteworthy change pertains to the 88% criminal case affirmances in the First Department, which is about 5% less for 2005 than the 93% for each of the previous four years.

The Second Department, as usual, had the enormous total of 10,746 (11,088 in 2004) dispositions, both civil and criminal, more than 3.6 times the total of 2,981 (3,005 in 2004) dispositions for the First Department. Nevertheless, as to the number of oral arguments, the First Department had 1,154 which is about the same number as 2004 (1,198) in contrast with the 2,377 for the Second Department (1,991 for 2004), representing a significant increase in the Second Department of almost 20% over 2004.

(*Note:* These figures again support the long-time call for a Fifth Department. The population in the Second Department is almost one-half of the entire state.)

Appellate Terms of the First and Second Departments: Statistics

Statistics for the Appellate Term are presented for the second time in this form, now divided into "civil" and "criminal" for comparison with prior years:

Civil statistics for 2005
(2004, 2003, 2002 and 2001):

Dep't:	First	Second
Affirmed	62 (73) (67) (59) (62)	52 (57) (62) (51) (56)
Reversed	25 (17) (24) (26) (23)	35 (34) (34) (38) (36)
Modified	13 (10) (9) (15) (15)	13 (9) (4) (11) (8)

Criminal statistics for 2005
(2004, 2003, 2002 and 2001):

Dep't:	First	Second
Affirmed	72 (80) (80) (73) (75)	70 (57) (62) (51) (56)
Reversed	23 (16) (12) (22) (23)	25 (34) (34) (38) (36)
Modified	5 (4) (8) (5) (2)	5 (9) (4) (11) (8)

Appellate Terms of the First and Second Departments: Comments

Similar to the Appellate Division, Second Department, the Appellate Term, Second Department in 2005 had a much greater number of total dispositions, 1,616, in contrast with 443 for the First. Of the total for both departments, 2059, the Second Department's total represented 78%, with the First at 22%. However, significantly, the figures are reversed for oral arguments, with the Second having 268 or about 40% and the First, with 409, having about 60% of the total.

Again, the statistical studies reported by the Office of Court Administration do include two other groupings: "dismissed" and "other." As noted however, because decisions under these two categories, in general, may not be what are deemed "dispositions on the merits" in that "dismissals" may result from several factors, including non-appealable orders, they are, therefore, not treated herein as determinations on the merits. So, too, the category "other," which also includes stipulations or settlements after the filing of the records on appeal, is not utilized in this study.

As to 2005 civil statistics, in comparison with re-adjusted categories and numbers for prior years, the First Department consistently has significantly higher affirmance rates. The Second Department's civil affirmance rate for 2005 remained relatively the same as that for 2004. However, in comparing the First with the Second for 2005, the affirmance rate in the First is 10% higher than the Second; it was 16% higher in 2004.

As to 2005 criminal statistics, the First Department, with an affirmance rate of 72%, is the lowest in five years for that Department and, consistently, much higher than that of the Second Department.

U.S. Circuit Courts of Appeals for the Second Circuit and District of Columbia

12-month Period Ending September 30, 2005 – appeals terminated on the merits; civil cases only[5]

Second Circuit[6]

Affirmed	78	(80)	(74)	(77)	(73)
Dismissed	20	(19)	(25)	(21)	(25)
Reversed	2	(1)	(1)	(2)	(2)

District of Columbia[7]

Affirmed	83	(85)	(80)	(99)	(90)
Dismissed	5	(3)	(2)	(1)	(3)
Reversed	12	(12)	(18)	(–)	(7)

Circuit Courts of Appeals: Comments

In the comparison of the civil statistics for the Second Circuit with those for the New York Court of Appeals, it should be noted that generally the Circuit Court has a significantly higher affirmance rate than that of the New York Court of Appeals, and on a relatively constant basis.

Administrative Appeals for the Second Circuit and District of Columbia Circuit[8]

For the first time, selected percentage statistics for 2005 for administrative appeals are presented for these two courts:

Second Circuit		District of Columbia	
Affirmances	74	Affirmances	68
Dismissals	25	Dismissals	10
Reversals	1	Reversals	22

It is interesting to note that the Second Circuit's total terminated administrative appeals, for the year 2005, is more than five times than that of the District of Columbia (370).

Incidental Data Regarding Circuit Courts

1. Total Appeals Terminated for All Circuit Courts (excluding the Federal Court) 61,975. Of the above total, the four Circuits with the highest volume of appeals and their percentage of all Circuit appeals:
   - Ninth 13,399 or 22% (California, Oregon, Washington, Nevada, Idaho, Arizona, Montana)
   - Fifth 7,496 or 12% (Texas, Louisiana, Mississippi)
   - Eleventh 7,578 or 12% (Florida, Alabama, Georgia)
   - Second 6,501 or 10% (New York, Vermont, Connecticut)
2. Total Administrative Appeals Terminated for All Circuit Courts – 10,960. Of the above total, the four Circuits with the highest volume:
   - Ninth 5,134 or 47%
   - Second 2,005 or 18%
   - Eleventh 622 or 6%
   - Third 590 or 5% (Pennsylvania, New Jersey, Delaware)

Reference Sources

The reports containing the above statistics are directly available. For the New York state courts, the information may be obtained on the Internet at <www.nycourts.gov/reports/indexshtml>. For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its Web site <www.uscourts.gov> where the map of the geographic boundaries of the Circuit Courts is also available at <http://www.uscourts.gov/images/CircuitMap.pdf>. ■

1. In numbers, with 2004 figures in parenthesis.
2. From the Annual Report of the Clerk of the Court of Appeals for 2005.
3. Excluding constitutional questions, stipulations for judgment absolute and "other."
4. Figures in parentheses are for 2004.
5. These figures only include those specifically set forth herein and do not include "other." Like the state appellate courts, "other" and "remanded" are similarly excluded.
6. For the 12-month period ending September 30, 2005. Includes only "other U.S. Civil" and "other U.S. Private" proceedings.
7. The consistently higher affirmance rate is attributable to the fact that most of their cases involve the review of decisions of federal administrative agencies with a different standard of judicial review.
8. In general, for New York litigators, these are the two most important Circuit Courts, and their appellate statistics will have the most significance. It is also to be noted that the Court of Appeals for the Federal Circuit is not included herein since it has a very limited, nationwide jurisdiction. Its cases involve specialized areas, such as those pertaining to patent laws, cases from the Court of International Trade and the Court of Federal Claims. Its statistics do not include "other U.S. Civil" or "other private civil" which are regular and significant activities of the other Circuit Courts.

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A New Weapon for Objectants?

Probate Contests and Waiver of the Attorney-Client Privilege

Few legal protections are more widely recognized and relied upon than the attorney-client privilege. It is "the oldest among common-law evidentiary privileges [and] fosters the open dialogue between lawyer and client that is deemed essential to effective representation."[1] However, the Surrogate's Court practitioner should beware: recent decisions reveal not only that a decedent's privilege survives his death and may be asserted or waived by his executor,[2] but also that an objectant to probate may be able to waive the decedent's privilege as well.

A probate proceeding, whether contested or not, is a truth-finding process whereby the court determines whether the proffered will is a valid testamentary instrument.[3] SCPA 1408(1) obligates the Surrogate's Court in every probate proceeding to "inquire particularly into all the facts and [to] be satisfied with the genuineness of the will and the validity of its execution."[4]

This being the case, in the discovery stage of a contested probate proceeding, "CPLR Article 31 and SCPA 1404 are interpreted liberally to provide for disclosure," the objective being "to reveal, not conceal, facts regarding the validity of a will. Surprise at trial is to be avoided, and evidence that is material and necessary will be subject to disclosure under the liberal interpretation given the disclosure statutes."[5]

Such liberality is evident in one court's recent discussion of the scope of document discovery in a contested probate proceeding:

> As to document production in contested probate proceedings, among those items discoverable are documents which contain information as to: (i) a proponent's knowledge of decedent's assets prior to the will execution; (ii) the value of decedent's estate; (iii) whether decedent divested himself of assets in the years prior to his death; and (iv) any financial records of decedent or a proponent which might reveal information of this nature. Moreover, all transactions, financial and otherwise, between a decedent and a party alleged to have exerted domination over him are materials subject to inquiry where undue influence has been charged.[6]

However, such liberality can be tempered by the attorney-client privilege, which is frequently asserted in probate contests by a decedent's representative and which, according to CPLR 4503(a)(1), applies "[u]nless the client waives [it]."[7]

The decedent's best interests, and thus those of the decedent's estate, guide the application of the privilege to estate matters.[8] In discerning the best interests of the estate, the Legislature and the courts recognize "the notion that the client's wish for confidence comes to an end with his death, save for matters that will disgrace his memory."[9] "Indeed, [a] decedent would expect the confidentiality of [privileged] communications to be lifted *in the interests of resolving disputes over her Will and having the truth determined.*"[10]

The Legislature has given effect to this expectation by enacting CPLR 4503(b), which states:

> Wills. In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

This exception to the attorney-client privilege, as amended through the years, is part of an "apparent legislative trend toward the freer admissibility of evidence ordinarily considered to be confidential."[11]

The courts, too, have given effect to this expectation, particularly through recent decisions regarding waiver of the privilege. Prior to these decisions, some authority held in dicta that the ability to waive the attorney-client privilege died with the decedent, thus depriving a personal representative of the right to waive on the decedent's behalf.[12] However, in *In re Colby*,[13] a

2001 decision, Surrogate Roth determined that an executrix could waive the decedent's attorney-client privilege in a fraud action brought on the decedent's behalf because "the purpose of the privilege, namely, to protect the client, . . . supports such conclusion."[14] Surrogate Roth explained, "Since the client could have waived the privilege to protect himself or to promote his interest, it is reasonable to conclude that, after his death, his personal representative stands in his shoes for the same purposes."[15]

The following year, in *Mayorga v. Tate*,[16] a legal malpractice case brought on a decedent's behalf, the Second Department also considered an executor's ability to waive his decedent's privilege. Tracing the privilege's historical development, the court noted that "the common law has always provided that an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client"[17] and agreed with Surrogate Roth's conclusion that "there is no appellate authority in New York to support the proposition that the New York Legislature has enacted any statute that requires a departure from the common-law rule in this respect."[18] It found that the cases that do support such a departure "unquestionably embrace a rule which is contrary to the common law, . . . and thus contradict the . . . Court of Appeals decision in *Spectrum Sys. Intl. Corp. v. Chemical Bank* in which it was expressly held that CPLR 4503 must be regarded as a mere codification of the common law."[19] In sum, the Second Department held that a decedent's personal representative has the right to waive on the decedent's behalf, explaining that "it makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her decedent, where such prohibition operates to the detriment of decedent's estate."[20]

Recently, two surrogate's courts have adopted the views expressed in *Mayorga* and *In re Colby* by recognizing that an objectant had the right to waive the decedent's attorney-client privilege in a probate proceeding when it was in the best interests of the estate. One of these cases, *In re Bronner*,[21] involved a probate proceeding in which the objectant claimed, over the proponent's denial, that he had an interest in certain personal property of the decedent. The proponent claimed sole title to the subject asset.

The objectant moved to compel disclosure by a certain non-party witness, to wit, an attorney whom the decedent merely consulted about her testamentary plan shortly before she ultimately retained a different attorney to draft her will. Apparently, the decedent told the first attorney that she intended to give the objectant an interest in the property at issue, but told the second attorney, who actually drafted her will, the opposite. The proponent argued that the communications between the decedent and the first attorney were privileged and could not be discovered.

In deciding the issue, the Nassau County Surrogate's Court initially found that the communications in question were indeed privileged and that they did not fall under the narrow CPLR 4503(b) exclusion because the attorney whom the decedent first consulted did not actually prepare the proffered will. The court then explained that neither the decedent nor her preliminary-executrix had waived the privilege.[22]

Nevertheless, the court went on to hold that

> the objectant may waive the attorney-client privilege on behalf of the decedent in the interests of the estate in the truth-finding process. Contrary to the proponent's assertion, it would appear to be in the best interests of the estate that the entire substance of the [consultation with the first attorney] be divulged, to be evaluated by the trier of the fact in ascertaining the decedent's true intent, particularly since the decedent gave conflicting statements as to her wishes within a relatively short period of time.[23]

In *In re MacLeman*,[24] another probate proceeding, the Westchester County Surrogate's Court considered whether an objectant could compel the decedent's attorney to disclose documents concerning communications the latter had with the decedent. The proponent argued that they were protected by the attorney-client privilege. The court allowed the disclosure, stating:

> To the extent that the [objectant] seeks the production of documents related to the "preparation, execution or revocation" of the propounded instrument, a statutory exception to the attorney-client privilege exists in this will contest (*see* CPLR 4503[b]). *To the extent that the [objectant] seeks production of documents which relate to the valuation of decedent's assets, [the] objectant in the instant will contest[] is entitled to waive on decedent's behalf any attorney-client privilege applicable to the content of those documents*.[25]

In support of its holding, the court cites *Bronner* and *Mayorga*.

While the *Bronner* and *MacLeman* courts might have been among the first to explicitly allow an objectant to waive a decedent's attorney-client privilege in a probate proceeding, such decisions are not based on novel logic. To the contrary, they are based on precisely the same logic on which the common law rule allowing an executor to waive the decedent's attorney-client privilege is based,[26] to wit, to promote a decedent's best interests, and thus, those of his estate. From this flows the assumption that a person would want his confidences to be overridden in a probate proceeding in order to enable a court to properly discern and effectuate his true intent with regard to the disposition of his property after death.[27] The values underlying such logic and assumption – and of every probate proceeding – are the freedom of testation and the importance of carrying out the testator's intent. The holdings of *Bronner* and *MacLeman* are consistent with prior case law in that they are motivated by a pursuit of the truth about the testator's intentions and the instrument alleged to effectuate such intentions.[28]

Moreover, although the *Bronner* and *MacLeman* decisions contain no explicit reference to the well-settled "at issue"

waiver doctrine, one could argue that they are nothing more than applications of it to probate proceedings. Under such doctrine, an "at issue" waiver may be found, *inter alia*, "where . . . defense and application of the privilege would deprive the adversary of vital information."[29] In each of these decisions, it appears that the court found the confidential communications at issue to be vital to the objectant because the court commented on their relevancy to the particular objections to probate and, by implication, to the validity of the propounded will.[30]

In point of fact, the Third Department in *In re Seelig*[31] implicitly recognized the applicability of the "at issue" waiver doctrine to probate proceedings.[32] There, the court considered whether the decedent's attorney-client privilege should be waived because the privileged communications under scrutiny were vital to the objectant's claim of undue influence. Ultimately, the court found no waiver, but only after it determined that such communications were not "vital" to the objectant. It stated, "[W]hile we agree that an invasion of the privilege may be necessary to determine the validity of a claim or defense alleging undue influence, we fail to conclude, upon our review of the privileged documents, that they contain any such vital information."[33]

Apparently, no other appellate division decisions address this point within the context of a contested probate proceeding. However, the law is continually evolving with a view towards more liberal disclosure. That being said, one thing is clear: regardless of whether waivers authorized under the *Bronner* and *MacLeman* decisions are properly based upon the "at issue" waiver doctrine or some other theory, the Surrogate's Court practitioner must appreciate their potential to empower an objectant to pierce the otherwise impenetrable barrier to disclosure created by the decedent's attorney-client privilege. ■

1. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991) (internal citations omitted).
2. *See Mayorga v. Tate*, 302 A.D.2d 11, 14–15, 19, 752 N.Y.S.2d 353 (2d Dep't 2002); *In re Colby*, 187 Misc. 2d 695, 698, 723 N.Y.S.2d 631 (Sur. Ct., N.Y. Co. 2001).
3. *See* SCPA 1408; *In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) ("The legislature in enacting SCPA 1408(2) has charged the court, in a probate proceeding, whether contested or not, with the responsibility of, inter alia, determining whether the testator at the time of the execution of the purported will was in all respected competent to make a will"); *In re Wharton*, 114 Misc. 2d 1017, 1020, 453 N.Y.S.2d 308 (Sur. Ct., Westchester Co. 1982) ("In the absence of objections, it is the duty of the Surrogate to satisfy himself that the instrument offered for probate was duly executed in conformance with statutory requirements").
4. SCPA 1408(1); *see In re Carter*, 123 Misc. 2d 940, 941, 475 N.Y.S.2d 230 (Sur. Ct., Yates Co. 1984).
5. 8 Warren's Heaton on Surrogate's Court Practice § 112.02(8) (2005).
6. *In re MacLeman*, 9 Misc. 3d 1119(A) at *4, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005) (internal citations omitted).
7. CPLR 4503(a)(1).
8. *See, e.g.*, *Mayorga*, 302 A.D.2d at 14 (noting the common law rule that "an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client"); *Colby*, 187 Misc. 2d at 697–98 (using decedent's interests to determine whether decedent's representative may waive the privilege).
9. *In re Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965); *see In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (discussing logic behind CPLR 4503(b)).
10. *In re Bronner*, 7 Misc. 3d 1023(A) at *4, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005) (internal citations omitted) (emphasis added); *see In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (discussing "the notion that the decedent would expect the seal of confidentiality to be lifted in the interests of resolving disputes over his will").
11. *Snider*, NYLJ, Nov. 15, 1995, p. 37.
12. *See, e.g.*, *In re Weinberg*, 133 Misc. 2d 950, 952, 509 N.Y.S.2d 240 (Sur. Ct., N.Y. Co. 1986).
13. 187 Misc. 2d 695, 723 N.Y.S.2d 631 (Sur. Ct., N.Y. Co. 2001).
14. *Id.* at 698.
15. *Id.*
16. 302 A.D.2d 11, 752 N.Y.S.2d 353 (2d Dep't 2002).
17. *Id.* at 14.
18. *Id.*
19. *Id.* at 15 (internal citation omitted); *see also Spectrum Sys. Int'l Corp.*, 78 N.Y.2d at 377.
20. *Mayorga*, 302 A.D.2d at 11–12, 18. The Second Department goes on to say: "That an executor . . . may exercise authority over all the interests of the estate left by the [decedent], and yet may not incidentally have the right, in the interest of that estate, to waive the [attorney client] privilege . . . would seem too inconsistent to be maintained under any system of law." *Id.* at 19 (brackets in original) (quoting 8 Wigmore, Evidence § 2329, at 639 (1961)).
21. 7 Misc. 3d 1023(A), 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
22. *Id.* at *3.
23. *Id.* at *4 (emphasis added).
24. 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005).
25. *Id.* at *5 (emphasis added).
26. *See, e.g.*, *Mayorga*, 302 A.D.2d at 14 (setting forth provisions of common law).
27. For an excellent discussion of the application of this public policy to a probate proceeding, see *In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (allowing objectant in probate contest to waive the decedent's statutory psychologist-client privilege).
28. *See id.*; *In re Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965). Interestingly, the Second Department recently affirmed a decision in a discovery proceeding in which the fiduciary of a decedent's estate was permitted to waive the decedent's privilege because the privileged evidence "constituted the best evidence of the decedent's intent in [disposing of his property]. *Moreover, the decedent would likely have waived the privilege herself because the dispute involved her only heirs.*" *In re Bassin*, 28 A.D.3d 549, 550, 813 N.Y.S.2d 200 (2d Dep't 2006) (emphasis added). Clearly, probate and discovery proceedings can be governed by similar policy concerns.
29. *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834, 835, 468 N.Y.S.2d 895 (2d Dep't 1983); *see Goetz v. Volpe*, 11 Misc. 3d 632, 812 N.Y.S.2d 294 (Sup. Ct., Nassau Co. 2006) (finding an "at issue" waiver); *Bolton v. Weil, Gotshal & Manges LLP*, 4 Misc. 3d 1029(A), 798 N.Y.S.2d 343 (Sup. Ct., N.Y. Co. 2004) (same). Such waiver may also be found when a client places the subject of a privileged communication in issue. *See, e.g.*, *id.* at *3.
30. *Bronner*, 7 Misc. 3d 1023(A) at *4 ("Contrary to the proponent's assertion, it would appear to be in the best interests of the estate that the entire substance of the [privileged communication with the attorney] be divulged, to be evaluated by the trier of fact in ascertaining the decedent's true intent, particularly since the decedent gave conflicting statements as to her wishes within a relatively short period of time."); *MacLeman*, 9 Misc. 3d at *5 ("To the extent that the [objectant] seeks production of documents which relate to the valuation of assets . . . the objectant in [a] will contest [] is entitled to waive the privilege applicable to the content of those documents").
31. 302 A.D.2d 721, 724, 756 N.Y.S.2d 305 (3d Dep't 2003).
32. Courts have also applied the "at issue" waiver doctrine to discovery and turnover proceedings. For example, in a turnover proceeding brought by an estate fiduciary against a decedent's attorney-in-fact alleged to have improperly transferred decedent's property to himself, the First Department overturned a Surrogate Court's decision denying the respondent's motion to compel production of certain privileged communications. *In re Kislak*, 24 A.D.3d 258, 261, 808 N.Y.S.2d 174 (1st Dep't 2005)). The First Department held that "invasion of the privilege is required to determine the validity of the [petitioner's] claim or defense and application of the privilege would deprive [respondent] of vital information." *Id.*; *see In re Puckett*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 920 (Sur. Ct., Nassau Co. 2005).
33. *Seelig*, 302 A.D.2d at 724 (citing *New York TRW Title Ins., Inc. v. Wade's Canadian Inn & Cocktail Lounge, Inc.*, 225 A.D.2d 863, 638 N.Y.S.2d 800 (3d Dep't 1996) (discussing the "at issue" waiver doctrine)).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am working on a hotly contested civil action arising from a commercial real estate deal gone awry. The trial is several months away, and the parties are now engaged in settlement discussions, which are pretty far along.

At her deposition, several months ago, my client's in-house counsel testified that the contract that underlies the case was "fully" executed when it crossed her desk. However, my file contains a copy that was received from the other party during discovery which is signed by one of its officers, but not by one of my client's, as opposed to the one that my client's in-house counsel produced, which bears signatures from both sides.

I recently learned from another source, namely my client's former office manager, that the contract was not signed at the time in question by the officer whose signature appears on the document, which raised the possibility that in-house counsel intentionally lied at her deposition. When I confronted her about it, she was evasive, leading me to conclude that indeed she may have lied.

I am close to settling the case, but I am unclear as to what my obligations are to the other side. How sure do I have to be that in-house counsel lied at her deposition? If she did lie, how much am I required to reveal in our negotiations? What do I do if the negotiations break down?

Sincerely,

Perplexed by Possible Perjury

Dear Perplexed:

You raise an interesting and crucial question: whether a lawyer engaged in settlement negotiations is obligated to reveal the client's past false deposition testimony. To further complicate matters, your client is no ordinary witness, but a lawyer who is also an officer of the court. This raises another layer of ethical questions meriting discussion.

Although the Disciplinary Rules as set forth in the New York Code of Professional Responsibility (22 N.Y.C.R.R. § 1200 *et seq.* ("the Code")) as well as case law provide guidance to the lawyer in such situations, there remains a tension between the lawyer's obligation to preserve client confidences and secrets and the lawyer's obligation as an officer of the court to preserve the integrity of the legal system. Moreover, when it comes to reporting misconduct by another lawyer, the rule is subjective and fails to define what constitutes "knowledge" or a "substantial question as to another lawyer's honesty, trustworthiness or fitness," and therefore it can be confusing as to what kinds of facts trigger the reporting requirement. DR1-103(A). In fact, the lawyer's failure to proceed cautiously may result in harm to the client, denial of a fee, and even disciplinary charges.

DR 7-102(A)(4) provides, in pertinent part, that in representing a client a lawyer may not "knowingly use perjured testimony or false evidence." In addition, a lawyer may not: "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal"; "knowingly make a false statement of law or fact"; "create or preserve false evidence"; or "counsel the client to engage in illegal or fraudulent conduct." *See* DR 7-102(A)(3), (5), (6), (7).

Moreover, the Code further provides that a lawyer who receives information clearly establishing that a client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except where the information is protected as a confidence or secret." DR 7-102(B)(1). Thus, while you have reason to believe that your client may have committed perjury in a deposition, the source of this knowledge may be protected as a confidence or secret.

This in turn raises DR 4-101, which governs confidences and secrets of a client, and which makes it clear that a confidence or secret relating to a client's past behavior may not be revealed. However, because a lawyer cannot aid the client in perpetrating a fraud, DR 4-101(C)[1] provides that a lawyer *may* reveal a client confidence or secret under the following circumstances: when permitted by the Disciplinary Rules or required by law or court order; to the extent necessary to withdraw a written or oral opinion he or she previously gave, once the lawyer learns that the opinion or representation was based on materially inaccurate information or is being used in furtherance of a crime or fraud; or learns about the intent to commit a crime and possesses information necessary to prevent the crime.

In your inquiry, you have identified a situation where the client (who happens to be an attorney) made the false representation. Thus, although you did not make a false representation to another, the misrepresentation that your client made is a material factor that is still being relied upon by the other side, and may be relied upon by a tribunal if the case goes to trial.

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

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As demonstrated by the foregoing, the Disciplinary Rules that deal with false or fraudulent testimony are found throughout the Code, but unfortunately are not clear as to what should be done, and indeed seem to be somewhat inconsistent. Specifically, two of the Rules state that a lawyer *may* be permitted to withdraw or *may* reveal confidential information (DR 2-110(C); DR 4-101(C)(2), (3), (5)); however, DR 7-102(B)(1) states that a lawyer can call upon a client to rectify such fraud on a third person or tribunal and *may* reveal the same if the client refuses, *except* if the information is protected as a confidence or secret. In contrast, the remaining Rules cited above use prohibitive language such as "shall not." Thus, they seem to indicate that lawyers *may* use discretion and judgment in determining whether to distance themselves from a client or witness intent on presenting false evidence. Moreover, if they take such action they must do so in a way that will not harm the client's interests. However, the predominant idea found throughout the Code is that a lawyer must not assist the client in fraudulent or criminal behavior.

This difficult situation has been the subject of both case law and bar association ethics opinions.

Although the most probative case law in this area has arisen in criminal cases, an attorney's duties as an officer of the court are not dependent upon the burden of proof. In fact, case law indicates that an attorney must always act in manner befitting an officer of the court, while at the same time zealously advocating on behalf of the client.

The lead case in this area is *Nix v. Whiteside* (475 U.S. 157 (1986)). In *Nix*, the United States Supreme Court rejected the criminal defendant's argument of ineffective assistance of counsel where the attorney advised his client to testify truthfully to avoid perjuring himself. The defense attorney also advised his client that if the client perjured himself, the attorney would withdraw from the representation. The Supreme Court agreed with the attorney's actions and stated:

> Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.
>
> . . .
>
> An attorney's duty of confidentiality which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

More recently, two criminal cases with similar issues were decided in the New York Court of Appeals and the Appellate Division, First Department. Both cases are instructive as to what an attorney must do in order to walk the fine line between protecting a client confidence or secret while ensuring that a fraud is not committed on the court. In *People v. DePallo* (96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001)), a criminal defendant was convicted of, *inter alia*, second degree murder, robbery and burglary. The defendant unsuccessfully appealed on the ground of ineffective assistance of counsel. His attorney had advised him that he could not participate in perjury of any kind, and had further advised him that he had to testify truthfully. He then allowed his client to testify in narrative form. After the client testified, the attorney advised the judge that his client had admitted his involvement in the crime.

Citing *Nix*, the Court of Appeals held that "an attorney's duty to zealously represent a client is circumscribed by an 'equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds upon the court' . . . [and] an 'attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response.'" The Court also noted that counsel's withdrawal from the case "would do little to resolve the problem and might, in fact, have facilitated any fraud defendant wished to perpetrate on the court."

The *DePallo* court left open the question as to whether the attorney properly disclosed that the client was involved to the judge who later sentenced the defendant. This issue was addressed by the Appellate Division, First Judicial Department in *People v. Darrett* (2 A.D.3d 16, 769 N.Y.S.2d 14 (1st Dep't 2003)). Darrett appealed his murder conviction on the ground of ineffective assistance of counsel based on the fact that his attorney had repeated, *ex parte*, their off-the-record conversations to the judge conducting a suppression hearing, to the effect that Darrett might commit perjury[2] (he never did). That judge later referred to these conversations during the sentencing hearing. In returning the case for another suppression hearing before a different judge, the court explicitly set forth the following road map regarding the obligations of an attorney who finds him/herself in such situations: advise the client against the perjury; advise the client to testify truthfully; memorialize the conversations with the client; try to dissuade the client against the perjury; and make every effort to limit the amount of information provided to the fact finder in such circumstances.

In some instances attorneys have been (and in all likelihood will continue to be) disciplined for failing to disclose witness or client perjury, or for assisting in the presentation of fraudulent evidence. Interestingly, in two notable cases, *In re Geoghan* (253 A.D.2d 205, 686 N.Y.S.2d 839 (2d Dep't 1999)) and *In re Friedman* (196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dep't), *appeal dismissed, motion dismissed*, 83 N.Y.2d 888, 613 N.Y.S.2d 125, *cert. denied*, 513 U.S. 820 (1994)), each attorney repre-

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is it proper to use the word *garnishee* as a verb, as it was used in this example: "The Plaintiff proceeded to garnishee the assets of the defendant"?

Answer: Legal dictionaries define *garnishee* as a noun, not a verb. *Black's Law Dictionary* (Sixth Edition) defines the verb *garnish* as: "To warn or summon" or "to issue process of garnishment against a person." *Words and Phrases* defines the verb *garnish* as, "To warn or give notice to a debtor to answer the writ served." According to these definitions, the sentence that the correspondent submitted should read, "The Plaintiff proceeded to garnish the assets of the defendant."

The verb *garnish* is derived from the Old French verb *garnir*, which came into Middle English meaning "to embellish or equip." In lay English, it retains that meaning today; thus one "garnishes" food by decoration, as with parsley. But the Old French verb also meant "to warn or summon," and that sense has evolved into the current legal meaning, "to attach wages or other property belonging to a debtor." There is another, chiefly British, meaning for *garnish*. As a noun, it can mean "an unauthorized fee formerly extorted from a new inmate by the keeper (or other prisoners) of an English jail."

Black's defines the noun *garnishee* as "the person against whom process of garnishment is issued; one who has money or property in his possession belonging to a defendant or who owes the defendant a debt, which money, property, or debt is attached." *Black's* defines the noun *garnishment* as the procedure by which the garnishing is accomplished, which – in some states – is called a "trustee process." Finally, a *garnishor* is the creditor who initiates garnishment to obtain the property or credits of a debtor-garnishee.

However, lay dictionaries throw a monkey wrench into this neat list of categories. They list *garnishee* as both a noun and as a verb synonymous with *garnish*. That, no doubt, is the reason for the correspondent's question. *Webster's Third New International Dictionary* (1993 Edition) defines *garnishee* as a verb: "to serve with a garnishment so as to attach wages or other property belonging to a debtor." It is apparently used this way by a majority of the public who use the term in a legal sense.

The person who submitted this question asked why, if *garnish* is the proper verb, do many judges and legal scholars use *garnishee* instead? The answer lies in usage, the most powerful linguistic force. Some time in the past an appellate judge may have incorrectly used *garnishee* as a verb in writing an opinion. That opinion was quoted in subsequent opinions, and *garnishee* became a verb as well as a noun, for legal writers tend to slavishly adopt the exact language of the opinion cited as precedent, under the rule of *stare decisis*.

Similar changes in category often occur in both legal and lay English. For example, consider the word *assault*, which started out as the noun form of the verb *assail*. Now that verb, which derived from the Latin verb *assalire*, has virtually disappeared, and the word *assault* has become both a verb and a noun.

Those in the legal profession who use the verb *garnishee* as a synonym of – and in preference to – the verb *garnish* are contributing to the ambiguity of legal language. All persons who prefer exactness and clarity in language should distinguish between the verb *garnish* and the noun *garnishee*.

Question: I have seen *allude* used as a synonym of *refer*, as in, "He alluded to the defendant's previous police record." Is this usage correct?

Answer: These two verbs are not synonyms, but they do have one characteristic in common, which may cause some people to assume they are synonymous: both verbs mean "to call attention" to something. But "to allude" is to call attention indirectly; and to "refer" is to call attention directly to what is mentioned. To imply or hint is *to allude*; to identify directly is *to refer*. *The American Heritage Dictionary* says in a "Usage" note that "*allude* and *allusion* are often used where the more general terms *refer* and *reference* would be preferable."

Then there is *elude*, which I have been told has been misused to mean "allude." That is undoubtedly just a misspelling due to the similarity of the sound of the verbs *allude* and *elude*; if you pronounce the first "e" as a schwa (uh) sound, the verbs sound alike. But the verb *elude* has nothing except the sound in common with *allude*. To *elude* means "to avoid capture, or to avoid detection."

From the Mailbag:

My thanks to Skaneateles attorney Dave Prestemon for his e-mail. After reading the "Language Tips" column about the verbs *come* and *go* in the July/August issue, he wrote:

> I realized [after reading your column] that what matters is the orientation of the speaker at the time the action is to be taken, not at the time the words are spoken. For example, I might be out of town when I tell you, "Come to my house tomorrow at eight and we'll talk about it." But even if I were talking face-to-face with you, I would never say, "Go to my house," if I expected to be there when you arrived.

Potpourri:

Recently a reporter interviewed an individual about why a local restaurant had experienced a drop in popularity. The answer, "Nobody goes there any more. It's too crowded."

That answer was like one that Yogi Berra gave a reporter, who had asked about the conversation at a White House dinner that Yogi had attended. Yogi retorted: "How could you get a conversation started in there? Everybody was talking too much." ■

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

President's Message
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where it has provided corporate documents to an employee's counsel to aid in the employee's defense. Moreover, the Memorandum authorizes federal prosecutors to press for waivers by corporations of the attorney-client privilege and work-product rule and encourages the discharge of corporate officers or employees based solely on their exercise of the constitutional privilege against self-incrimination, undoubtedly on the advice of counsel.

In late 2005, the Association responded to concerns about the adverse effects of these practices. Then-President A. Vincent Buzard formed the Task Force on Attorney-Client Privilege, chaired by Stephen D. Hoffman. The Task Force was charged with reviewing the issues associated with these practices and issuing a report and appropriate recommendations.

Recognizing the seriousness of these issues, the Task Force acted quickly. By April of this year, the Association, armed with the Task Force's report, approved by the House of Delegates, submitted to the United States Sentencing Commission the proposed 2004 amendment to the Commentary of Section 8C2.5 of the United States Sentencing Guidelines. Our comments vigorously opposed the proposal that a corporation's waiver of the attorney-client privilege and work product protections in connection with government criminal investigations be considered as a ground for reduction in sentence. In response to our comments, as well as those by other groups, including the American Bar Association, the Sentencing Commission revised the commentary to the Sentencing Guidelines to eliminate any reference to waiver of the attorney-client privilege or work-product doctrine.

The revisions were a singular victory for our Association, our profession and our clients. But we did not stop there. In June, the Association strongly urged the government to immediately discontinue the above-mentioned practices that deprive corporate employees of their right to counsel – in particular, pressuring corporations to refuse to pay the legal expenses of their employees in criminal investigations, in exchange for favorable treatment.

It is axiomatic that the right to counsel, together with the related protections afforded by the attorney-client privilege, is essential to the proper functioning of our system of justice. The legal system functions best when persons with legal needs receive fearless representation from competent counsel. For those employees who cannot afford to hire their own defense counsel, the government's policy deprives them of counsel altogether during the critical investigative stages before the right to appointed counsel attaches. Even for those employees who have means, it often will be difficult if not impossible to afford a lawyer with special expertise in white-collar criminal investigations and prosecutions and to finance the extensive legal work typically required to wage an effective defense to white-collar criminal allegations. In short, the government policy deprives individuals of effective representation to which, in many cases, they typically would otherwise be entitled under their employment contracts or the policies of their employer. That's why we strongly opposed it.

Our stance coincided with U.S. District Judge Lewis A. Kaplan's June decision in *United States v. Stein*, which involved the refusal of accounting firm KPMG to pay the legal fees of its partners and employees who were not cooperating with federal prosecutors. After a full hearing, Judge Kaplan found that KPMG took this position in response to the government's indication that KPMG would obtain leniency for its refusal to make legal representation available to these partners and employees. Judge Kaplan then held that the Thompson Memorandum's policy on indemnification violates the Fifth and Sixth Amendments of the Constitution.

With our position thus solidified, we joined the American Bar Association's Task Force on the Attorney-Client Privilege in urging the ABA to oppose such prosecutorial tactics. I addressed the ABA House of Delegates in support of this joint resolution at its Annual Meeting this past August. The ABA adopted our position on this vital issue, condemning the effort by federal prosecutors to prevent companies from paying the defense costs of their employees in criminal cases.

But this fight is not over. We must remain vigilant against attacks on the attorney-client relationship and other threats to the independence of the bar, and raise our voices when necessary. We shall do so. ■

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New Law Student Members
1/1/06 - 8/30/06 _____ 478

Total Regular Members
as of 8/30/06 _____ 66,464

Total Law Student Members
as of 8/30/06 _____ 2,519

Total Membership as of
8/30/06 _____ 68,983

sented clients in civil litigations and was disbarred for such conduct.

In *Geoghan*, the attorney was disbarred for, *inter alia,* filing criminal charges to gain leverage in a civil lawsuit, misrepresenting the extent of his client's injuries to his adversary in an effort to obtain a settlement, and indicating that once the settlement was paid he would instruct his client to give false and misleading testimony before the grand jury. In *Friedman*, the attorney was disbarred for a pattern of misconduct constituting intentional acts of dishonesty over a ten-year period, including knowingly filing a false affidavit, giving false testimony at a hearing before a federal judge, soliciting false testimony from a witness, failing to supervise his investigator, failing to disclose information that he was required to reveal by law, and failing to disclose to the court that a witness gave false testimony.

Attorneys have also been disciplined for failing to disclose client or witness perjury when they are in the midst of civil discovery or depositions. For instance, in *In re Janoff* (242 A.D.2d 27, 672 N.Y.S.2d 89 (1st Dep't 1998)), an attorney was suspended for four years based on his conviction for insurance fraud. He had knowingly allowed clients to give false information to doctors, failed to correct clients' false deposition testimony, submitted false bills of particulars and false medical reports. The foregoing misconduct constituted conduct involving fraud, deceit, dishonesty or misrepresentation; participation in the creation of false evidence; intentionally assisting the client in illegal or fraudulent conduct; and conduct reflecting adversely on his fitness to practice law.

However, a 1996 opinion from the New York County Lawyers' Association (NYCLA) Professional Ethics Committee demonstrated how fine the line can be when an attorney, otherwise not involved in any deceit, becomes privy to a client's misrepresentations. The Committee considered a lawyer's obligation to correct prior deposition testimony which the lawyer later learns (from the client) was false. NYCLA Eth. Op. 712, 1996 WL 592653 (1996). This opinion concluded that the fact that the deposition testimony was false was itself a protected confidence and secret and could not, without more, be disclosed to an adverse party. The NYCLA Ethics Committee concluded that "the inquirer may not directly or indirectly use the client's untrue statement in negotiations or at trial, or otherwise vouch for or affirm the false testimony of the client," but also opined that the lawyer could not disclose the fact that the testimony was false.

Although NYCLA Ethics Opinion 712 would seem to be on point given the situation you have presented, it may be subject to reevaluation in light of the decision law and disciplinary cases cited above. Those cases clearly indicate that as an officer of the court a lawyer may not allow or aid the client in the submission of false or perjured testimony.

There is another factor that militates against inaction on your part. As mentioned above, DR 7-102(A)(3) provides that a lawyer may not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal. This provision would thus apply to all such procedural and substantive obligations, as they may be imposed by rule or statute, including those found in the Civil Practice Law and Rules. Therefore, a lawyer's ongoing duty to supplement and correct discovery responses under CPLR 3101(h) cannot be separated from this Disciplinary Rule, and indeed should be seen as being incorporated by reference.

Accordingly, a lawyer who becomes aware of false deposition testimony should correct it to the extent required by law. This would mean advising your in-house attorney/client to correct the deposition testimony. Failing that, you may be obliged to do it yourself by contacting your adversary and possibly the Court. As for negotiating a settlement, it is clear that you can neither rely on, nor use that portion of the deposition testimony in the negotiation process. However you proceed, be mindful that your actions must cause the least amount of harm to your client.

The Forum,
by Deborah A. Scalise
Jones Garneau, LLP
Scarsdale, N.Y.

1. Some additional rules not which are not discussed herein because of space limitations also merit consideration in this sensitive area. *See* DR 1-102(A)(4) (lawyer shall not engage in conduct that constitutes dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(5) (lawyer shall not engage in conduct that is prejudicial to the administration of justice); DR 1-102(A)(7) (lawyer shall not engage in conduct that reflects adversely on fitness to practice); DR 1-104(E) (lawyer shall comply with the DRs even if he or she acted at the direction of another person); DR 2-109 (lawyer shall not bring a case or assert a claim in bad faith); DR 2-110(A)(2) (lawyer *may not* withdraw from representation without taking steps to avoid the foreseeable prejudice to the rights of the client); DR 2-110(B)(2) (lawyer's withdrawal is mandatory if the lawyer knows or it is obvious that continued employment will violate a DR); DR 2-110(C) (lawyer's withdrawal *is permitted* when the client: insists upon presenting an unwarranted claim or defense; persists in a course of action that the lawyer reasonably believes is criminal or fraudulent; insists that the lawyer pursue illegal conduct or conduct prohibited by the DRs; has used the lawyer's services to perpetrate a crime or fraud); DR 7-102(A)(3) (lawyer shall not conceal or fail to disclose that which he or she is required to reveal by law); DR 7-106(C)(1) (lawyer shall not allude to any matter that he or she has no reasonable basis to believe is relevant or that will not be supported by evidence); DR 7-106(C)(7) (lawyer shall not intentionally violate an established rule of procedure or evidence).

2. For a discussion as to the standard as to when an attorney must disclose, see *Grievance Committee v. Doe*, 847 F.2d 57 (2d Cir. 1988), where the court held that an attorney who received information that his adversary's witness lied at a deposition, and failed to disclose that information to the court, had to have had actual knowledge of fraud – not just a mere suspicion of the perjury – to be required to report such information to the court.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

We represent a large local corporation as sole outside counsel, and the fees generated are quite significant to our firm. I am the partner in charge, and responsible for the assignment of this client's matters. For the past two

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years, a senior associate in our firm (let's call him "Brad") has worked closely with me in serving this client. As time went by, Brad began to fill in for me at meetings held at the client's place of business. Nearly all of those sessions included the client's General Counsel/Vice President for Legal Affairs (I'll identify her as "Linda").

Brad has just informed me that Linda wants him to become the principal attorney on the client's account. According to Brad, we really have no choice in this matter. Should I refuse to go along with this "takeover," Linda will (again, according to Brad) begin using other law firms. In addition, our firm allocates credits in favor of the person who brings in a client's business. Under our system, I am now, as the lead attorney, receiving all the credit for billings that result from this client's matters. That credit will go to Brad if he becomes lead counsel.

As if this were not enough, Brad further advised me that Linda has told him that she will send her company's matters to his next firm (as long as no conflicts exist), should he be fired or choose to leave. However, he insisted that he is happy with our firm, and wants to stay.

Both Brad and Linda are single, and I suspect they are romantically involved. Aside from my own personal losses, I believe there are risks for the firm if the proposed change is made. His statements to the contrary notwithstanding, Brad could leave and take the client with him. Even if this does not happen, there could be a bad ending to the affair, which could also result in the loss of this important client.

This is a mess, but my initial reaction was that I have no choice but to go along. However, my own ego and wallet aside, I have started to feel that there is something unethical about all of this. I have thus far avoided contacting Linda for verification of Brad's story, because I am still trying to decide how to handle things if he accurately reported her wishes. Any advice you can provide would be most appreciated.

Sincerely,

Partner With a Problem

• Such (*That*) is the way it is: Never use the legalism "such" as an adverb or use a "such" that can mean more than one thing. And "such" cannot displace "very," as in, "She's such a good writer." Use a comparison instead: "She's such a good writer that . . . ."

• Complete your prepositions: "The opinion was notable for his disagreement and disrespect for his colleagues." *Becomes:* "His opinion was notable for his disagreement with and his disrespect for his colleagues."

• Complete comparisons concisely with apostrophes: "The partner's writing is as powerful as a novelist." *Becomes:* "The partner's writing is as powerful as a novelist*'s*." (Translation: "as that of a novelist" *or* "as a novelist's writing.")

Absolute Comparisons. Don't use comparisons as absolutes: "Good style books are found at *better* book stores everywhere." *Becomes:* "Good style books are found at the *best* book stores everywhere." Bifocal glasses help many *older* people." *Becomes:* "Bifocal glasses help many *old* people."

Double Comparisons. Don't use double comparisons: "more better," "most coldest."

Logic in Sentencing

Legal writing must be precise. These examples raise common precision errors:

"This Article 78 petition must be dismissed due to a fatal defect." (A defect in the petition? A defect in the record below?)

"Objectant's papers [or *motions*] argue that . . . ." *Becomes:* "Objectant argues that . . . ." (Litigants, not their papers, argue.)

"The principle in *Hadley v. Baxendale* (1854) holds that . . . ." *Becomes:* "The principle in *Hadley v. Baxendale* (1854) is that . . . ." (Principles don't hold; only courts hold.)

"The *Huntley* hearing found the confession admissible." *Becomes:* "After a *Huntley* hearing, the court found the confession admissible." (Courts, not hearings, decide cases.)

"The holding in *X v. Y* held that . . . ." *Becomes:* "The *X v. Y* court held that . . . ." (Courts, not holdings or cases, decide cases.)

"Judge X rendered a cold-blooded ruling." (Judge X, but not her rulings, might be cold-blooded.)

Fake Logic

Some profundities state propositions so obvious they must be banned from good writing: "Further developments can happen." "It's impossible to predict." "It's too early to tell." "It remains to be seen." "Only the future can tell." "This may occur in the foreseeable future." "Whether that'll happen is unknown." "Anything can happen."

Can anything happen? Maybe. But compared to what? ■

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BY GERALD LEBOVITS

Comparisons and Logic

Lawyers spend their careers analogizing and distinguishing statutes, cases, contracts, and facts. Lawyers specialize in comparison and contrast. Anything can happen when lawyers compare apples with aardvarks.

Comparisons

"To" and "with" comparisons. To compare something "to" something else is to liken one person or thing to another. To compare something "with" something else is to note similarities or differences.

Logical Comparisons:

Comparisons must make sense: "The court was overturned." (With what? A bulldozer? *Better:* The court's "decision" was overturned.) "The test balanced the interests." (Incorrect relationship: Courts use tests to balance interests. Tests themselves can't balance.) "New York's death-penalty law differs from 36 other states." (Incorrect category: A law isn't a state.)

Superlative Comparisons:

• The better advice: Use superlatives ("est" or "most") to compare three or more items. Use comparisons ("er" or "more") for one or two. Play by the numbers: "The best of the two opinions is *Gideon v. Wainwright*." *Becomes:* "The better of the two opinions is *Gideon v. Wainwright*." "Ms. X is the quicker of the three court attorneys in the Appellate Division." *Becomes:* "Ms. X is the quickest of the three court attorneys in the Appellate Division."

• Most-good advice: Don't use "mostly" if you mean "the greatest degree." "Those most [not *mostly*] affected by the decision took it the worst."

• Almost-right advice: Don't use "most" instead of "almost." "Most every Legal Aid Society lawyer is underpaid." *Becomes:* "Almost every Legal Aid Society lawyer is underpaid."

Complete Comparisons:

• For "better" or "worse": "Judge X's elder [not *older*] brother's writing is better." Better than what? If "better" refers to "writing," then better than whose writing?

• Than: "Judge X is closer to her husband than her law clerk." *Becomes*, we hope: "Judge X is closer to her husband than *to* her law clerk."

• That: "The color of her robes is darker than her purse." *Becomes:* "The color of her robes is darker than *that of* her purse."

• Relatively: "The District Court judge has a relatively light caseload." *Becomes:* "District Court Judge X's caseload is light relative to [or *compared with*] District Judge Y's caseload." (In the first sentence, the reader doesn't know to whom or to what "relative" applies. Relative to or compared with his brother-in-law's? Relative to or compared with Judge X's caseload last term?)

• Morph your "mores": "The associate enjoys writing more than her." (More than the associate enjoys her? Or more than she enjoys writing? If the latter, rewrite: "The associate enjoys writing more than *she does*.")

• Ellipses. Don't end with a subjunctive-case personal pronoun in formal writing. "The court reporter is a better typist than he." *Becomes*, by clarifying the ellipticism: "The court reporter is a better typist than he *is*." Without clarifying the ellipticism, your reader might believe that you mean "than he was" or "than he used to be."

• More-important comparisons: Prefer "more important" to "more importantly."

• Final comparisons: The final part of a comparison should agree with every part of a sentence. *Incorrect:* "That assistant district attorney is one of the best, if not the best, writer in New York State." *Correct:* "That assistant district attorney is one of the best writers in New York State, if not the best."

> Good style books aren't found at "better" book stores. They're at the best stores.

• Same comparisons: When comparing elements of the same kind, use "any other" or "anyone else": "Judge Y's opinion is better than any opinion I have ever read." *Becomes:* "Judge Y's opinion is better than any *other* opinion I have ever read." "Judge X writes better than any [add *other*] judge." (Without the addition, the sentence means that Judge X writes better than any judge, including Judge X.) "Judge Y was as happy as anyone [add *else*] about the verdict." ("Anyone," but not "anyone else," includes Judge Y.)

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