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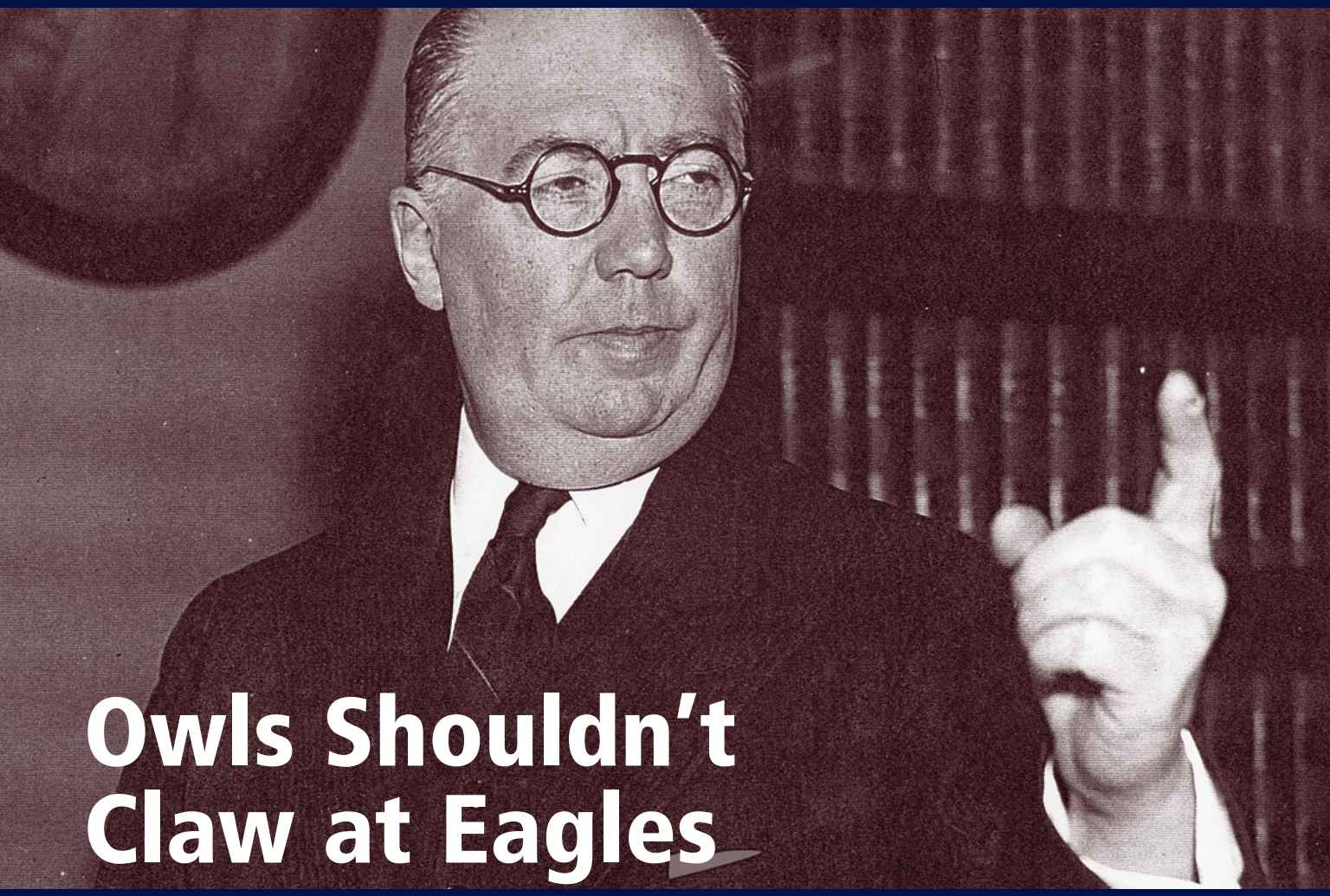
NEW YORK STATE BAR ASSOCIATION

Journal



Owls Shouldn't Claw at Eagles

Big Ed Reilly and the Lindbergh Kidnapping Case

by William H. Manz

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CONTENTS

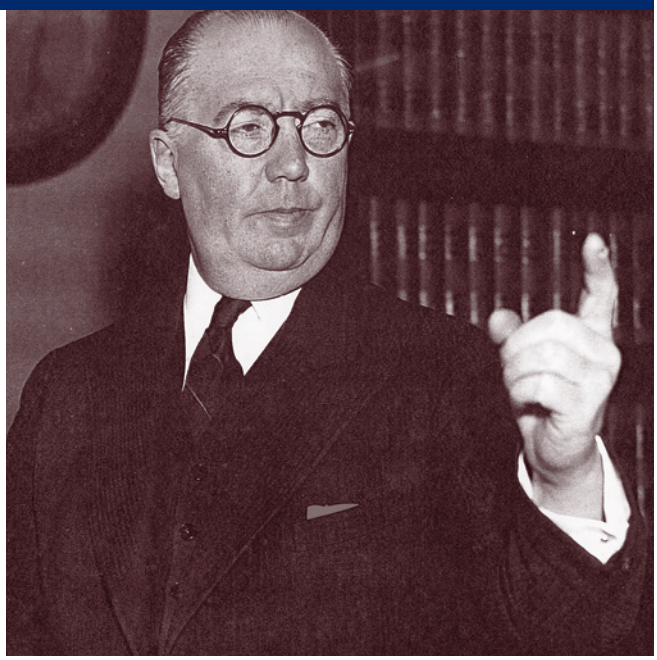
JUNE 2005

OWLS SHOULDN'T CLAW AT EAGLES

Big Ed Reilly and the Lindbergh Kidnapping Case

BY WILLIAM H. MANZ

10



DEPARTMENTS

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A. VINCENT BUZARD

The Year Ahead

As I begin my year as President of the New York State Bar Association, I do so with a great sense of gratitude for this extraordinary opportunity to serve the profession and our system of justice. Our Bar Association is not only the largest voluntary state bar association in the country, the members of our Association are known historically, and currently, as the leaders of the profession. When I go to meetings with leaders of other state bar associations, I am struck by how far ahead we are in so many areas.

I also have a strong sense of the tradition of our 130-year-old Association and the extraordinary leaders who have gone before me and who have included Supreme Court Judges, Governors of the State, Attorneys General and 12 members of the Court of Appeals, in addition to simply outstanding lawyers in their time. I have a strong sense of humility in that given our tradition and the strength of our members, I realize many people could have fulfilled this role, but somehow it has come to me for one year. I also have a strong sense of duty and responsibility to do no harm to the Association during my stewardship, but also to improve our work in carrying out our commitment to our members and to the public and, at least in some small way, to leave the Association stronger. All of these thoughts also give me a strong sense of urgency because I know I only have one year, which will go by in what will seem like an instant, as it did when I was President of the Monroe County Bar Association.

Because my time will pass so quickly, I have tried, while I was President-Elect, to plan as much as possible what I want to accomplish. In so doing, I have relied on my experience in bar work over the last 30 years, but I have also attempted to listen to others to obtain new ideas and hear what people are thinking. As President-Elect I convened town hall meetings with members of associations to listen to their concerns and to throw out my own ideas, and I have learned a great deal from them. I attended section meetings and focus groups. I also solicited opinions from all the members for whom we have e-mail addresses and in January I convened a meeting of past presidents to hear their views. Those efforts reinforced my previous notions about what we should be doing, but I also obtained new ideas and additional priorities.

Bar association work to me can be truly exhilarating, depending on how it is approached. If the goal is to simply do everything the way it has been done in the past, then the primary duty of a bar president is to make sure that the dates are changed on the same invitations that are used every year. If, on the other hand, we use the opportunity to think outside the box and think more creatively and boldly, then improvements can be made in what we do and we can add new approaches and initiatives.

The functioning of our legal system depends upon public understanding and trust, and we are in the best position to promote it. Our priority as a bar association, I believe, must be to continually work to increase public comprehension of how vital the legal system is in society and daily life and how we as lawyers fulfill our essential roles. When the legal system and the profession are attacked or misunderstood, then we must be at the forefront to educate and to debunk myths – charges of judicial activism, talk of a so-called litigation explosion, the false impression that the legal process causes job growth to decline, health care costs to rise, and so on. This is not only our public responsibility, but also our duty to our members to protect and restore their pride in what they do in making the legal system function. I

want you to know that, as your President, I will seize every opportunity to explain to the broadcast and print media the legal system and the lawyer's role in it and seize every opportunity to answer unwarranted attacks on the legal system, judges, and lawyers. I have a fair amount of experience dealing with the media and being on the air, and I relish the task. I have a number of other ideas, including launching a statewide "Ask-a-Lawyer" column and a statewide people's law school, and we will be looking for other creative ways to explain our side of the story.

Also, we will be establishing a legal advertising task force to develop rules and standards and a mechanism for limiting lawyer advertising to the full extent permitted by the First Amendment. Most of our members, I believe, agree that inappropriate lawyer advertising is detrimental to a public understanding of what we do. It is a source of great frustration to the profession. Furthermore, convincing people that there is not a litigation crisis when advertisements by lawyers seemingly promise large amounts of money is extremely difficult.

The extent to which the men and women who are lawyers properly perform their function – zealously within the bounds of law and our professional responsibility – determines whether our system of law does justice and fosters public confidence. In that connection, we must continue to provide the best possible continuing legal education and promote professional responsibility and also emphasize the core values of our profession, commonly referred to as professionalism. Some may believe that the practice of law is now simply a business, which must never be the actual case. However, there is a business side to the practice of law, which must be carefully handled so as to permit us to be the learned profession that we must be. In that connection, we are working to rebuild and strengthen our efforts in law practice management and, at the same time, provide specific ways of helping our members observe the highest professional standards.

Providing legal services to the poor remains a priority issue, as funding continues to dwindle. We will continue to press the legislature for funding, but we also will be exploring and launching new methods of providing legal services to the poor, such as use of settlement funds and class actions and utilizing senior lawyers and in-house lawyers in providing assistance to those in need.

Protecting the public from the unauthorized practice of law must again be embraced by our Association as one of our core missions. The purpose is not to protect the work of lawyers, but rather, to protect the public from harm caused by those who are essentially doing legal work, but without the training or responsibility. I will be appointing a task force to quickly investigate what needs to be done and to report back and act upon on it.

We must continue the extraordinary efforts begun by Lorraine Power Tharp and carried forward by Tom Levin and now further emphasized by Ken Standard in improving diversity in our Association and particularly in our leadership. I will continue to treat diversity as a priority.

Even though I could hardly be accused of being of the computer generation or even especially literate in computers, I do recognize the extraordinary tool that the computer presents to us for communication and will pursue further use of technology to deliver Association services to you and keep you up-to-date on developments. In that connection, I have already used e-mail addresses to solicit our members to nominate themselves or others for committee membership. I have been extremely gratified as I go through the responses of the new people we have picked up for committee assignments. I also believe that using the computer in this way sends a message to our members that we care and we are listening to them. My request for their comments on my priorities and on programs not only provided me with their information, but shows that we were listening. I will be doing more of that this year.

Anyone who is reading this message and who has any doubt about whether we have your e-mail address, please provide it by e-mail to mis@nysba.org. Otherwise, you will be missing out on a great deal of communication. I have also come to recognize that instant information regarding new cases in practice would be helpful and we will be exploring ways to use the Internet for instant legal updates.

I know that other issues will emerge and we will be looking at them and actively working on them, but these are my preliminary thoughts about what we want to get done and they are already underway. I would greatly appreciate hearing from you about what you think we should be doing or doing better and I look forward to meeting you this year. ■

A. VINCENT BUZARD can be reached at president@nysbar.com.

NYSBACLE

Schedule of Spring & Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

+Closing or Selling a Law Practice
(half-day program)
Fulfills NY MCLE requirement (4.0): 1.0 in ethics and professionalism; 3.0 in practice management and/or areas of professional practice
June 17 Rochester

Labor and Employment Law for the General Practitioner and Corporate Counselor
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 6.5 in practice management and/or professional practice
June 15 Rochester

+Real Estate Titles and Transfers
Fulfills NY MCLE requirement (7.5): 1.0 in ethics and professionalism; 6.5 in practice management and/or areas of professional practice
June 16 Tarrytown

+Emerging Environmental Topics for Corporate Lawyers
Fulfills NY MCLE requirement (6.5): 6.5 in practice management and/or areas of professional practice
June 13 Albany

+Advanced Document Drafting for the Elder Law Practitioner
Fulfills NY MCLE requirement (7.5): 7.5 in practice management and/or areas of professional practice
June 13 Syracuse
June 14 Uniondale, LI
June 15 Albany

Ethics and Professionalism
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism
June 16 Melville, LI, Rochester
June 17 Albany

Partial Fall 2005 Schedule

+Collection and Enforcement of Money Judgments (video replay)
August 11 Jamestown

+Three Hot Topics in Criminal Law (video replay)
(half-day program)
September 16 Canton

Benefits, Health Care and the Workplace
September 19 Albany
September 21 New York City
September 29 Rochester

+First Corporate Counsel Institute
(two-day program)
Note: CLE seminar coupons and complimentary passes CANNOT be used for this program
September 22–23 New York City

When Your Client's Problems Become Your Problems and Meet the AUSAs
September 23 New York City

Federal Sentencing Guidelines After *Booker*, *Fanfan* and Their Progeny: Update and Advice from Experts and Key Figures
September 23 New York City
October 12 Albany
October 14 Buffalo

Drafting Enforceable Employee Non-Competition Agreements
(one-hour program)
October 6 Telephone Seminar

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

+Tenth Annual New York State and City Tax Institute
October 6 New York City

Update 2005
(live sessions)
October 7 Syracuse
November 4 New York City
(Video replay sites to be announced)

+Ethics and Professionalism (video replay)
October 14 Canton

Medical Malpractice Litigation
October 14 Buffalo; New York City
October 21 Albany; Long Island

Premises Liability
October 14 Albany; Long Island
October 21 Syracuse
October 28 Buffalo; New York City

Practical Skills – Basic Matrimonial Practice
October 18 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

+Seventh Annual Institute on Public Utility Law
October 28 Albany

New York Appellate Practice
October 21 Albany
October 28 Tarrytown
November 10 Uniondale, L.I.
December 1 New York City
(More dates and locations to be announced)

Mental Health Courts: Better Outcomes from the Legal and Mental Health Systems
(half-day program)
November 4 New York City

Practical Skills – Purchases and Sales of Homes
November 15 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

+Third Annual Sophisticated Trusts and Estates Institute
(two-day program)
Note: CLE seminar coupons and complimentary passes CANNOT be used for this program
November 17–18 New York City

Some of the topics to watch for this fall:

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Ethics for Real Estate Lawyers

Discovery Proceedings

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http://www.nysba.org/CLE/spring2005 or
http://www.nysba.org/CLE/fall2005
(Note: As a NYSBA member, you'll receive a substantial discount)

William H. Manz
<manzw@stjohns.edu> is Senior Research Librarian at St. John's University School of Law. He received his law degree from St. John's and his undergraduate degree from the College of the Holy Cross. Mr. Manz is author of *Gibson's New York Legal Research Guide* (William S. Hein & Co., Inc. 2004). The author wishes to thank Mark Falzini, archivist at the New Jersey State Police Museum, for making available original documents dealing with Edward J. Reilly.

Owls Shouldn't Claw at Eagles

Big Ed Reilly and the Lindbergh Kidnapping Case

By William H. Manz

Ist das nicht der schoene Reilly?
Ja, das ist der schoene Reilly.
Ist his record rated highly?
Ja, his record's rated highly.[1]

Last year, Scott Peterson, represented by high-profile California defense attorney Mark Geragos, was tried, convicted, and sentenced to death for the murder of his wife and unborn child. Seventy years ago in Flemington, New Jersey, amidst even greater media hysteria, another client of a noted criminal lawyer, German-born carpenter Bruno Richard Hauptmann, the alleged kidnap-killer of the Lindbergh baby, also received a death sentence. His attorney, Edward J. Reilly, was indeed "rated highly," but Hauptmann partisans have since condemned him as "Death House," a syphilitic alcoholic whose failings helped doom his client to the electric chair.[2] Even the more dispassionate observers have found much to criticize,[3] raising the question of how such a noted defense attorney's performance could have fallen so far below expectations.

The "Bull of Brooklyn"

The 53-year-old Reilly was one of the best-known criminal lawyers in the New York City area when he took over the Hauptmann defense. A life-long Brooklyn resident, he had graduated from Boys High School, worked as a clerk at the Metropolitan Life Insurance Co., earned his law degree from St. Lawrence University, and was admitted to the bar in 1904. He was an assistant attorney general during the administration of Governor John Alden Dix. In World War I, Reilly saw service with the artillery and military intelligence.

Reilly was large and ponderous in appearance, standing six feet tall and weighing about 200 pounds. He has been variously described as looking like a "retired policeman with a flair for clothes"[4] and the "Rich Uncle" in the "Monopoly" game.[5] Reilly had a ruddy, fleshy face and his thinning hair was slicked back over his head. Known as the "Beau Brummel of Brooklyn," he favored cutaway coats, striped trousers, spats, and a fresh flower in his buttonhole. The attorney "was addicted to public dinners and robust amusement,"[6] and loved "thick crowds, bright lights, and sweet music,"[7] although he professed to enjoy quiet evenings at home.

The jovial Reilly was widely popular; newspaper columnist and future television show host Ed Sullivan regarded him as a "swell person."[8] However, not everyone was taken by his persona. Reilly's judicial ambitions allegedly went unrealized because Brooklyn's Democratic political boss, John H. McCooey, disliked the attorney's sense of humor and his habit of handing out exploding cigars. McCooey's sensibilities may also have been offended by Reilly's marital misadventures. Reilly behaved like a Hollywood celebrity in an era when Irish-Catholic lawyers and politicians kept their personal indiscretions to themselves. In 1914, his wife of eight years, Elizabeth, sued for a divorce citing his affair with a waitress. A year later he wed 19-year-old Vivien Ellis, although remarriage was barred by Roman Catholic law. In 1923, she too sued Reilly for a divorce, claiming he'd had two affairs, and had consorted with additional women on trips to Hollywood. Undaunted, Reilly married yet again in 1929. His new wife was the chic French-born Fleurette Scheldon.

As a young lawyer, Reilly attended the Triangle Shirtwaist trial and studied Max Steuer's successful defense of the factory owners. He observed that Steuer never took notes, didn't shout, and seized upon small points and magnified them. In his own cases, Reilly is said to have avoided elaborate preparation, often coming into court with little more than a cursory knowledge of the case.[9] He relied on his good memory, the ability to spot weak points in the prosecution's case, his cross-examination skills, and an ability to sway the jury. Naturally, this did not always work. At the trial of an undertaker accused of strangling his daughter-in-law, Reilly expressed doubts about a medical examiner's claim that only two or three fingers pressed to the windpipe could cause strangulation. When the doctor demonstrated on a court attendant, the man became unconscious.

Reilly's courtroom style was as flamboyant as his attire. An amateur actor in his youth, he incorporated a theatrical flair into his courtroom presentations. His oratory might feature appeals to home, family, and common sense. On cross-examination, his questions could be filled with sarcasm and innuendo. Ed Sullivan maintained that witnesses would think, "His quiet voice can't be on the level – he's got a bombshell up his sleeve."[10] Another observer noted, "His gruff voice is always insinuating, making even his most simple questions sly and frighteningly important."[11] However, Reilly's oratorical abilities sometimes failed him. Once, when attempting to win clemency for convicted murderer John Farina, he angered Governor Alfred E. Smith by the use of the words "turning on the current." An angry Smith retorted: "Stop a minute right there. I don't turn on the current."[12] The hapless Farina was executed two days later.

In his prime, Reilly had a busy criminal practice. Besides homicide cases he handled many less serious offenses, including cocaine possession, bribery, and loan sharking. His practice also included an assortment of civil cases, such as domestic relations, real estate deals, and even an unsuccessful $100,000 lawsuit against the Metropolitan Life Insurance Co. on behalf of a woman who had been subjected to an "unwanted embrace" by one of its agents.[13] Reilly's interests also extended to military law, and he once assisted in the court martial defense of the captain of the *U.S.S. Colorado* after it ran aground off Battery Park.

Reilly's courtroom style was as flamboyant as his attire.

It has been reported that Reilly was friendly with big-name Brooklyn crime bosses, and counted them among his clients.[14] If so, he appears never to have actually represented one in a major court proceeding. When Black Hand leader Frankie Yale needed an attorney for his friend Al Capone after the 1925 killing of rival gangster Richard "Pegleg" Lonergan, he hired Reilly's rival, Samuel Liebowitz. In 1936, when Charles "Lucky" Luciano was prosecuted during District Attorney Thomas E. Dewey's campaign against "compulsory prostitution," attorney George Morton Levy acted as his defense counsel; Reilly's role was limited to the unsuccessful defense of Luciano underling Jack Ellenstein, accused of booking women into disorderly houses.

An Ace Defender

Reilly had won his reputation by winning acquittals in many well-publicized Brooklyn homicide cases. The one Anna Hauptmann mentioned when she told her husband, Bruno, that Reilly would lead his defense was the case of 19-year-old Cecelia McCormick. In 1933, McCormick faced first-degree murder charges after smuggling a gun into the Raymond Street jail, which her husband, inmate Andrew McCormick, then used to fatally shoot the head keeper before turning it on himself and committing suicide.[15] Reilly won the case by maintaining that Cecelia had suffered from "confusional insanity," and that the weapon was meant for use in a suicide pact. He also claimed that the fatal bullets may have been fired by another guard, and that the state was "whitewashing the case" and attempting "to pin the whole mess on this little girl."[16]

His string of acquittals for sympathetic women defendants began in 1912 with Winifred Ankers, a young hospital maid charged with fatally poisoning nine infants with oxalic acid. Reilly successfully demonstrated that the hospital had carelessly stored the poisonous compound in the same closet as crystals used in baby formula, and charged that Ankers' confession had been coerced by police threats to take away her own 10-month-old infant. In 1914, he defended Rosa Traina Bellina, an attractive 20-year-old mother of two, accused of shooting artist James Montiglia, for whom she had been posing for a "Madonna and Child" picture. After her common-law husband left her, and her grandmother threw her out, Bellina turned to the artist for help, only to be laughed at and insulted. She later claimed to have no memory of the shooting, and Reilly's defense stressed the shabby treatment his client had received from Montiglia.

In a 1922 case that attracted national attention, Reilly defended Olivia M.P. Stone, a Cincinnati nurse who had killed attorney Ellis G. Kinkead, a former Cincinnati city solicitor, in broad daylight on a busy Brooklyn street. After Kinkead left Stone for another woman, she followed him to Brooklyn and shot him five times with a .38 Colt. Reilly told the jury that Stone was "an honorable woman whose mind could stand the strain no longer," and produced an alienist who testified that she had suffered a "brain explosion."[17] After the not guilty verdict, the defendant was showered with flowers by women spectators, and celebrations broke out in the courtroom and among the estimated 500 people waiting in the courthouse rotunda.

A year later, courtroom celebrations again erupted when the jury returned a not guilty verdict in the case of 46-year-old Mary Lonergan. Mrs. Lonergan, the mother of 14 (including future Yale-Capone victim, "Pegleg" Lonergan), had been accused of fatally shooting her husband, ex-prize fighter John Lonergan, an alleged brute who regularly beat her and the children. Other women for whom Reilly won acquittals included: Margaret Tompkinson, who claimed she'd acted in self-defense after her husband had attacked her with an axe (1927); Jennie Muzzio, who shot her brother-in-law after he'd threatened her during an argument (1932); and Margaret Kiernan, who shot her policeman husband five times with his service revolver after he'd returned home from spending Christmas Day with his girlfriend (1932).

In these cases, Reilly benefited from the "unwritten law" that resulted in so many acquittals of women that *Palsgraf* trial judge Justice Burt Jay Humphrey once remarked, "When a man kills a woman it is just murder, but when a woman kills a man it is just a brainstorm on her part."[18] However, Reilly was also successful with male clients. In February 1927, Harold P. Webster was convicted of only second-degree murder for beating his mother-in-law to death after Reilly argued he was too much of a weakling ever to have the "sand" to commit premeditated murder.[19] Three months later, jubilant New Utrecht High School students carried 18-year-old Walter Goldberg from the courtroom after Reilly won a directed verdict of not guilty in the shooting of a female classmate. Another acquittal occurred in 1930 when Reilly convinced the jury that newly retired policeman Frank Schepp was temporarily insane when he shot his estranged wife during a quarrel.[20]

Reilly told the jury that the defendant was "an honorable woman whose mind could stand the strain no longer," and produced an alienist who testified that she had suffered a "brain explosion."

One of Reilly's most remarkable acquittals came at the trial of George Small, in 1930. Small, an escaped convict, had been interrupted by police during a hold-up. When he hijacked a passing car and fled, a running gun battle ensued that ended when Small was cornered and shot several times. Afterwards, it was discovered that a woman bystander had been fatally shot, and Small was charged with her murder. Reilly argued that the case was a "frameup," and the victim had really been shot by a

policeman.[21] Judicial reaction to the not guilty verdict is not recorded, but shortly before the Hauptmann trial, Reilly infuriated Kings County Judge Franklin Taylor by winning acquittals in successive trials for the same killing (one accused murderer said the killing took place during a struggle, while the other claimed he wasn't there). Addressing the second jury, Taylor said, "Gentlemen, the same lawyer defended both men. Gentlemen, two murderers have been let go."[22]

However, employing Reilly as defense counsel was no guarantee of an acquittal. In a 1927 case that bears a superficial resemblance to Hauptmann's in that it involved a foreign-born defendant accused of a crime that shocked the community, Reilly defended Ludwig Halversen Lee, a down-on-his-luck Norwegian cabinetmaker employed as a janitor and accused of murdering and dismembering two women – his employer-landlady and her neighbor. The crime came to the attention of police when human body parts were discovered in Battery Park, in Grand Army Plaza, behind a Brooklyn theater, and on the lawn of a local Catholic church.

At trial, Reilly charged that the case had been built with planted evidence and attempted to cast suspicion on one victim's estranged son, a grade school drop-out with an arrest record. The prosecution argued that Lee had hoped to use the contents of one victim's bank account to finance his passage back to Norway, and presented a large body of circumstantial evidence, including a blood-stained axe. The jury convicted Lee in three hours and 36 minutes, and he went to the electric chair on August 2, 1928, still insisting on his innocence.

Lee's fate was shared by numerous other Reilly clients, causing authors seeking to disparage his legal abilities to stress that one of his nicknames was "Death House." This name was commonly used in conversation by reporters who covered the Hauptmann trial,[23] but those that usually appeared in print were "Big Ed" and the "Bull of Brooklyn." "Death House" was never used in the *New York Times* or Reilly's hometown *Brooklyn Daily Eagle*, although a variant, "Electrocution Reilly," appeared in a *New Yorker* profile. The nickname has been variously ascribed to courtroom losses coming either early or late in his career, but the best explanation probably comes from Reilly himself, who observed that he never refused assignments of even the most hopeless cases.

Among the roster of hopeless causes who preceded Ludwig Halversen Lee to the electric chair were: Bernard Carlin, who celebrated his release from the reformatory by buying a gun, going home, and shooting his mother five times (1909); Frank Schleiman, who killed a man during a bungled house burglary (1910); Thomas "Bangor

Charles Lindbergh on the witness stand.
Photo courtesy of the New Jersey State Police

Billy" Barnes, a yeggman convicted of murdering a suspected informant (1910); civil engineer Robert Kane, who fired four bullets into his former lover (1915); Giovanbatista Ferraro, who shot his boss after being demoted (1919); Frank J. Kelly, who murdered a maid during a house burglary and then claimed he had been under the hypnotic control of a female accomplice (1920); Peter Nunziato, a 17 year old convicted of the mugging-related killing of a professor from the Manhattan Jewish Theological Institute (1923); John Farina, a participant in the cold-blooded daylight shooting of two bank couriers (1925); and George Ricci, who claimed he'd killed his former employer because he'd had "illicit relations" with Ricci's wife (1927).

The Trial of the Century

Reilly, who had once said he would "relish the opportunity to [lynch] the 'Lindbergh baby snatchers'" once they were apprehended,[24] became involved in the Hauptmann defense because of the Hearst newspapers. According to novelist and Hearst reporter Adela Rogers St. Johns, his services were obtained for Hauptmann by John Aloysius Clements, a reporter who had once covered Brooklyn.[25] Reilly replaced Hauptmann's original attorney, the less-experienced James Fawcett, who had reportedly displeased Anna Hauptmann by appearing too deferential toward the prosecutor, New Jersey Attorney General David Wilentz. By bringing in Reilly, William Randoph Hearst was certainly not trying to help Hauptmann. Instead, he was hoping for an edge in reporting the case, and Reilly was experienced, available, and likely to provide good copy.

Assisting Reilly were three New Jersey attorneys, C. Lloyd Fisher, who would become the leading champion of Hauptmann's cause and a severe Reilly critic, and Frederick Pope and Egbert Rosecrans, both grandsons of Civil War generals. Reilly referred to his colleagues as "country lawyers," and unsurprisingly, there were periodic rumors about dissention among the defense team. Fisher later complained that Reilly never really conferred with his co-counsel, ignored their advice, and that they often came to court with no idea what Reilly planned to do that day.[26]

As expected, Reilly provided the press with a media show and highly quotable lines. Attempting to do something to counter the avalanche of anti-Hauptmann publicity, he pledged to name the real kidnappers, predicted "bomb shells," and promised surprise witnesses. The big promises continued right to the end of the trial when he threatened that there would be "no ice cream for [eccentric go-between Dr. John] Condon" in his summation.[27] Unfortunately, the hype never lived up to the reality; one reporter observed, "We jeer when Reilly threatens witnesses with a grand display of firecrackers and all he hands out are damp squibs."[28]

Reilly had correctly predicted that the case would be his most difficult, and that because of all the pre-trial publicity, his client would have to prove his innocence.[29] He also correctly perceived the major weaknesses in Wilentz's case. However, circumstances prevented Reilly from successfully using such favorite ploys as arousing jury sympathy for his client. Even George Small, charged with shooting an innocent bystander in his gun battle with police, elicited some sympathy since his bullet wounds had left him severely disabled. Unfortunately, there was nothing sympathetic about the uncharismatic Hauptmann, a veteran of Kaiser Wilhelm II's army, who had arrived in the United States illegally after escaping from a German prison.

Another Reilly tactic was to attack the victims. At the Stone trial, he characterized the murdered attorney, Kinkead, as a roué and drug addict, and his widow as a "woman of the underworld,"[30] an approach obviously unavailable when the victim was the young son of the most admired man in America. Another tactic was to attack the prosecution's witnesses. Stone trial witness, U.S. Attorney James R. Clark of Cincinnati, was condemned as "the most crooked liar and monumental perjurer who ever sat in a witness chair."[31] However, at the Hauptmann trial, efforts to discredit the star state witness, Bronx educator Dr. John H. Condon, were undermined by Lindbergh. When asked if he thought it peculiar that a man from the Bronx he did not know would

call claiming to have a ransom note, he answered: "Not under those circumstances, no; something like that had to happen."[32] Lindbergh also dismissed suggestions that his household staff could have been involved, testifying that he did not think that former maid Violet Sharpe, who had killed herself while under police investigation, had any connection with the kidnapping.[33] Reilly also targeted the quality of police investigations, but his attempt to impugn the work of the New Jersey State Police was met by Lindbergh's statement that "we have very fine police."[34]

Reaction to Reilly's cross-examination of the revered aviator was predictable. After their courtroom encounter, one Hearst headline read "Lindy's Mind Puts Reilly in Shadow,"[35] and reporter James Cannon compared the attorney to a blinking owl futilely clawing at a soaring eagle. Faith in Lindbergh was so strong that his testimony that Hauptmann's was the voice of the kidnapper – relying on only two words spoken with a foreign accent: "Hey Doctor,"[36] heard when the ransom was paid two years earlier – brought the following reaction from Adela Rogers St. Johns: "Lindbergh KNOWS that is the voice of the kidnapper."[37]

In some previous cases, Reilly had overcome apparently damning physical evidence. When defending George Small, he claimed that a ballistic expert's findings were part of a police cover-up. During the Stone trial, when his client was confronted with letters that threatened the victim, she was able to simply deny they were in her handwriting. Such tactics could not work at the Hauptmann trial. Two noted handwriting experts, father and son Albert D. and Albert S. Osborne, testified that the ransom notes were written by Hauptmann, and a "wood expert," Arthur Koehler, maintained that his exhaustive scientific investigation proved conclusively that one kidnap ladder rail had been made from a board from Hauptmann's attic. Reilly could not hope to match the caliber of these experts, and the witnesses he did put on the stand suffered credibility problems because their examination of the evidence was far more limited than that of the state's experts.

Reilly did find weaknesses in the testimony of some major prosecution witnesses. He pressed the Lindbergh baby's nurse, Betty Gow, about how one of the child's thumb guards could possibly have lain undiscovered on the Lindbergh driveway for over a month after the kidnapping before she found it. And he forced Condon into a series of answers consisting of "I don't know" and "I don't remember." However, the lasting image of the Gow cross-examination was that of a plucky Scottish girl standing up to a Brooklyn bully. As for Condon, afterwards he would brag, "I toyed with the Bull of Brooklyn."[38]

Reilly is often criticized for failing to establish that elderly witness Amadeus Hochmuth, who claimed he'd seen Hauptmann on the road to the Lindbergh estate, had poor vision. Early in his career, Reilly had won a murder case by demonstrating that an eyewitness could not read the clock on the courtroom wall, but here, Judge Thomas Trenchard interrupted questions about Hochmuth's vision, saying, "He says his eyes are all right."[39] The defense had some success with a few of Wilentz's weaker witnesses. It produced three men who testified that Millard Whited, who also claimed he'd seen Hauptmann near the Lindbergh home, had an extremely poor reputation for veracity. Reilly was also able to demolish the testimony of Henry and Erna Jung, who had been produced by Wilentz to bolster the reputation of Hauptmann's former business partner, the deceased Isidor Fisch, the alleged source of the ransom money found in the carpenter's garage.[40] However, discrediting the likes of Whited or the Jungs accomplished little because they were hardly essential to Wilentz's case.

In contrast, some of Reilly's ill-chosen witnesses undermined the entire defense effort. As veteran defense attorney Samuel Liebowitz noted at the time of the trial: "I have known cases in which one or more witnesses called by the defense made such a poor impression upon the jury that all the defense witnesses – good as well as bad – were discredited in the jury's mind."[41] A defense witness who fared particularly poorly under cross-examination was Sam Streppone, whose credibility collapsed

> "Hauptmann Defense Hires 'Ace' Lawyer: Veteran of 2,000 Homicide Trials Takes Case; Fawcett Out."
>
> – Headline in the *Washington Post*, November 3, 1934.

when Wilentz brought out that he'd been in mental institutions at least five times, most recently in July 1934.[42]

Not content with attempting to establish that Isidor Fisch was the sort of shady character who would handle "hot" ransom money, Reilly tried to tie him into the kidnapping itself by producing witnesses like cabdriver Philip Moses, who performed an impromptu Will Rogers imitation while testifying. Another witness-stand disaster was August von Henke, who said he'd seen Hauptmann in the Bronx on the night of the kidnapping. Wilentz forced him to admit that he'd used three different names;[43] the prosecutor also pressed the increasingly angry witness to admit that his "restaurant" was really a speakeasy that had upstairs rooms where "whites and blacks mingle[d]."[44]

The use of such witnesses dismayed both Hauptmann and co-counsel C. Lloyd Fisher. Earlier, Fisher was mystified and angered when Reilly, trying to show that Lindbergh had once believed a "gang" was responsible for the kidnapping, inexplicably asked the aviator if now in his *opinion* Hauptmann was the kidnapper. In another incident Fisher became incensed and left the courtroom when Reilly conceded that a badly decomposed child's body found in the woods near the Lindbergh estate was that of the Lindbergh child. Because Wilentz's case depended on demonstrating that the Lindbergh baby was murdered, Fisher believed that the concession would send Hauptmann straight to the electric chair. Ordinarily, conceding such a point would be a major error but, in Reilly's defense, he was aware that Lindbergh, in whom the jury appeared to have absolute faith, had identified the body as that of his child at the time of its discovery.

Reilly was on stage too long – six weeks – before a tough audience, and his distinctive style did not wear well.

Another problem was Reilly's methods. His practice of forgoing rigorous preparation worked well enough when the key issue was not whether his client had committed a homicide, but the defendant's state of mind. However, Hauptmann's defense required presenting credible alternative suspects for the crime. Reilly was also on stage too long – six weeks – before a tough audience, and his distinctive style did not wear well. All-male[45] Brooklyn juries may have enjoyed him, but he alienated the eight men and four women from rural Hunterdon County. One reporter maintained that during Reilly's summation, the women jurors had a "pouty almost angry look,"[46] and after the trial, a male juror complained that Reilly had gone out of his way to show his contempt for them. The effect of long-term exposure to Reilly is also reflected in press reports. Comments were initially positive, such as the report that the local townsfolk liked his "booming ways" and were awed by "his spats, his nifty derby and the carnation that blooms perpetually in his buttonhole."[47] Within a few weeks, the same reporter was calling Reilly a "big league mouthpiece,"[48] and claiming his voice has "the sating arrogance of a small tent talker."[49]

The trial's media circus was a fatal distraction for the publicity-loving Reilly. He may have found little time to consult with his co-counsel, but he wasted few opportunities to give interviews and appear on radio broadcasts. In one episode, Fisher reported that during a minor fire at the courthouse he saw Reilly posing for pictures while perched on a fire engine, wearing a fireman's hat.[50] His best-known publicity ploy was ordering special stationery with his name and local address in red ink on the letterhead and a picture of the alleged kidnap ladder printed in the left margin.[51]

It has also been charged that Reilly was not really committed to his client, and rarely saw him. The log of visitors to Hauptmann's cell does indicate that Reilly was there only 10 times.[52] This may or may not show a lack of commitment, but it certainly didn't help Reilly's direct examination of Hauptmann, where good communication between attorney and client is essential. Also cited is a memo from an FBI trial observer stating that Reilly had expressed dislike for his client and hoped he'd go to the electric chair.[53] Reilly's loyalty is additionally questioned because all or part of his fee was allegedly paid by the anti-Hauptmann Hearst newspaper chain. During the trial, one Hearst reporter did brag that his paper had paid Reilly's $7,500 retainer, but novelist St. Johns quotes her boss, William Randoph Hearst, as saying that "we cannot be in the position of paying money to defend a man accused by our public servants."[54] Reilly himself later claimed to have lost money defending the case and after the trial sued the Hauptmanns for the balance of his claimed $25,000 fee.

Another explanation for Reilly's questionable performance at the trial was his well-documented fondness for alcohol. Co-counsel C. Lloyd Fisher said that Reilly drank liquor from a teacup during lunch, and that he was drunk virtually every evening.[55] Other references to Reilly's drinking include St. Johns' report that he "was always at his worst" right after lunch,[56] complaints by Hauptmann that Reilly was drunk on the few occasions when he came to his cell,[57] and Fleurette Reilly's charges of "habitual intoxication,"[58] made when she filed for a separation soon after the trial. Another Reilly weakness – women other than his wife – provided additional distrac-

tion. According to Fisher, he had two "secretaries" with dubious office skills, and nearly turned the residence where he was staying "into a disorderly house."[59]

The Aftermath

Soon after her husband's conviction, Anna Hauptmann, who had been disgusted by Reilly's efforts at self-promotion, dismissed him, although the attorney maintained he'd really left the case because of the pro-Nazi sympathies of some Hauptmann supporters.[60] While engaging in a messy dispute with his former client over his bill, Reilly returned to his more usual type of cases – most notably the hopeless defense of Anthony "Tough Tony" Garlaus and several accomplices, charged with murdering a patron during a bar hold-up; they went to the electric chair on July 1, 1937.

Several weeks after the Hauptmann trial, Reilly checked himself into the Mt. Sinai Hospital Pavilion complaining that he'd been unwell during the trial, and needed a "rest." Far worse was to come. During 1936, Reilly was observed to be drinking heavily and acting erratically. Depressed and withdrawn, he obsessively reviewed the Hauptmann trial record looking for some mistake he might have made, and wrote checks for which no funds existed. On one occasion, his physician, Dr. Mortimer Sherman, claimed Reilly had booked the Grand Ballroom at the Waldorf, planning to host a banquet for every chorus girl in New York City.[61] Finally, on January 30, 1937, at the request of his mother, Reilly was committed to the Kings County Hospital. Dr. Sherman blamed Reilly's condition on the loss of the Hauptmann case and domestic difficulties – the separation suit by his wife, Fleurette, who charged that not only was Reilly always drunk, but that he used his office for "obscene and improper conduct and practices."[62]

While committed, Reilly began a campaign to win his freedom, writing without success to Court of Appeals Judge Frederick Crane and noted defense attorney Max Steuer. In January 1938, he filed a writ of habeas corpus with the Appellate Division, and in March convinced a Suffolk County jury he should be released from Kings Park State Hospital. His application was opposed by the hospital superintendent Dr. Charles S. Parker, who stated that Reilly suffered from a "general paresis,"[63] and the assistant district attorney, who claimed Reilly was "suffering from the ravages of a certain social disease that made him a mentally sick person."[64]

Reilly's commitment and the paresis diagnosis are sometimes referred to by Hauptmann verdict critics when arguing that the German carpenter did not get a fair trial. However, if Reilly's judgment was impaired during the trial, it was probably not the result of tertiary syphilis. Tertiary syphilis is a progressive disease, and treatments during the 1930s were very limited. Reports that Reilly showed his "old-time wit" at the trial where he won his freedom is inconsistent with tertiary syphilis,[65] as is his post-commitment level of activity. It contrasts markedly with that of the era's best known tertiary syphilis victim, Al Capone. Capone suffered a breakdown while at Alcatraz, was restored to a semblance of normality, but thereafter declined into a childlike state before dying of cardiac arrest in 1947.[66] Thus, although Reilly's extra-marital affairs may well have caused him to become infected with syphilis, his breakdown and commitment were more likely to have been the result of depression and heavy drinking.[67]

Whatever Reilly's failings, no defense attorney could have won an acquittal for Bruno Richard Hauptmann.

After returning to his law practice, Reilly sued the publishers of *Liberty* magazine for running an article by New Jersey Governor Harold Hoffman, which referred to the lawyer as "Death House."[68] He also filed suit against his former assistant, Maurice Edelbaum, whom he charged with taking assets of the law firm, and Dr. Sherman, who had helped commit him. None of these suits proved successful, but less than a month after his release, Reilly successfully defended a property owner in a slip-and-fall action.[69] A year later, he won a $12,500 verdict in an estate case.[70] He never regained his status as a high-profile criminal defense attorney, but as late as 1943–44, he assisted with criminal appeals.[71] Reilly also continued having affairs. When his long-suffering wife finally sued for divorce in 1945, she charged he'd been living with a model.[72] Reilly lived only a short time after the divorce, dying of a cerebral thrombosis on Christmas Day, 1946.[73] He received a Roman Catholic funeral at the Church of the Nativity, attended by several of his former legal and political colleagues, and was buried in Brooklyn's Holy Cross Cemetery.

Whatever Reilly's failings, no defense attorney could have won an acquittal for Bruno Richard Hauptmann. Wilentz had the unimpeachable witness Charles A. Lindbergh, a mountain of circumstantial evidence, unlimited funds (C. Lloyd Fisher estimated that New Jersey spent $2 million on the case),[74] and highly regarded expert witnesses. Subsequent research has also revealed that much exculpatory evidence was withheld from the defense,[75] and there have been charges that the prosecution presented fabricated or doctored evidence, including the ladder rail, handwriting samples, and Hauptmann's

work records. Regardless of the outcome though, had Hauptmann been represented by an attorney who relied more on careful preparation than theatrics, and who was more visibly dedicated to his client's cause, in the words of Adela Rogers St. Johns, people would have felt that the German carpenter "had a better shake."[76]

As for Reilly, when he took the case, he declared it to be "a lawyer's dream – the murder trial of the century."[77] Instead it was the wrong case in the wrong place, and the beginning of the end of his career as a big-time criminal lawyer. As attorney Leslie Abramson once commented on the love of fame – "sometimes it eats you."[78] ■

1. From *Du Schoene Hauptmann Trial*, *reprinted in* Stanley Walker, Mrs. Astor's Horse 162 (1935).

2. *See*, *e.g.*, Anthony Scaduto, Scapegoat (1976). Reilly's alleged failings were one basis of an unsuccessful civil rights action brought by Anna Hauptmann in the early 1980s. *See Hauptmann v. Wilentz*, 570 F. Supp. 351 (D.N.J. 1983).

3. *See, e.g.*, Lloyd Gardner, The Case That Never Dies 276–77, 282, 336 (2004) (hereinafter "Gardner"). Professor Gardner, however, does point out instances where Reilly performed well. *See id.* at 345–48.

4. *My Case is Half Hare, Half Hound Says Hauptmann's Aid* [sic], N.Y. World Telegram, Dec. 28, 1934, at 17.

5. Gardner, *supra* note 3, at 243.

6. *Profiles: For the Defense*, New Yorker, Jan. 12, 1925, at 22, 24 (hereinafter "*Profiles*").

7. James Cannon, *Lindy's Chair Fails to Lure Young Visitor*, N.Y. Evening J., Jan. 7, 1935, at 12 (city ed.).

8. Ed Sullivan, *In a Little Jersey Town*, Wash. Post, Jan. 12, 1935, at 6.

9. For discussions of Reilly's style and methods, see generally *Profiles supra* note 6; *Reilly's Victories Won on Errors of State*, N.Y. Evening J., Jan. 11, 1935, at 10 (city ed.).

10. Ed Sullivan, *In a Little Jersey Town*, Wash. Post, Jan. 12, 1935, at 6.

11. James Cannon, *Reilly Like Owl, Claws at Eagle; But Lindbergh Soars to Safety*, N.Y. Evening J., Jan. 5, 1935, at 3 (afternoon ed.).

12. *Smith Hears Plea for Diamonds*, N.Y. Times, Apr. 29, 1925, at 23.

13. *See $100,000 Suit for Embrace*, N.Y. Times, Sept. 21, 1926, at 7; *see also Anderson v. Metro. Life Ins. Co.*, 128 Misc. 144, 218 N.Y.S. 494 (Sup. Ct., Kings Co. 1926) (dismissing the case on the grounds that a principal is not liable for the unauthorized acts of its agent), *aff'd*, 220 A.D. 779, 222 N.Y.S. 763 (2d Dep't 1927).

14. *Profiles*, *supra* note 6, at 25.

15. Gardner, *supra* note 3, at 219 (quoting H. Stockberger, Conversation between Mr. and Mrs. Hauptmann (Nov. 3, 1934)).

16. *M'Cormick Case Ready for Jury*, N.Y. Times, Oct. 6, 1933, at 38.

17. *Shrieking Denial, Nurse Collapses*, Wash. Post, Apr. 4, 1922, at 3.

18. James Fuller, *Veteran Jurist is 70 Today*, L.I. Daily Press, Apr. 23, 1936, at 1, 2. Of course, there were limits as to how far juries would go. Reilly could do nothing for Anna De Hall, convicted in 1931 in the so-called "Dream Killer" case. Here, one of De Hall's sons had confessed to killing his brother while sleepwalking, but changed his story and blamed his mother after receiving a long prison sentence.

19. *See Webster is Guilty in the Second Degree*, N.Y. Times, Feb. 18, 1927, at 1, 14.

20. *See Wife Slayer Acquitted*, N.Y. Times, Dec. 4, 1930, at 33.

21. *See Convict Acquitted in Woman's Murder*, N.Y. Times, Dec. 18, 1930.

22. *Reilly Gets 2 Clients Acquitted; Irate Court Calls Both Killers*, Brooklyn Daily Eagle, Oct. 4, 1934, at 3.

23. Letter from C. Lloyd Fisher to Gov. Harold G. Hoffman (Sept. 3, 1938) (on file at the New Jersey State Police Archives).

24. *Lively Debate on 'Lynch Law' Merits Is Held*, Brooklyn Daily Eagle, Nov. 29, 1933, at 3.

25. Adela Rogers St. Johns, The Honeycomb 351–52 (1969) (hereinafter "St. Johns").

26. C. Lloyd Fisher, I Appeal!, pt. 1, at 18, 20 (unpublished manuscript on file at the New Jersey State Police Archives) (hereinafter "Fisher, I Appeal!").

27. *Reilly Ready to Turn Guns on 'Jafsie'*, N.Y. Evening J., Feb. 11, 1935, at 3 (city ed.).

28. Sheilah Graham, *Lawyer's Open Rage Shock to Briton*, N.Y. Evening J., Jan. 8, 1935, at 3 (city ed.).

29. *My Case is Half Hare, Half Hound Says Hauptmann's Aid* [sic], N.Y. World Telegram, Dec. 28, 1934, at 17.

30. *Paints Miss Stone a Wronged Woman*, N.Y. Times, Mar. 30, 1922, at 7.

31. *Id*.

32. Record at 186, *State v. Hauptmann*, 180 A. 809 (N.J. 1935) (hereinafter "Record").

33. *Id*.

34. *Id*. at 205.

35. Gilbert Seldes, *Lindy's Mind Puts Reilly in Shadow*, N.Y. Evening J., Jan. 5, at 6 (city ed.).

36. Record, *supra* note 32, at 113.

37. Adela Rogers St. Johns, *Mute Evidence Louder Than Words to Writer*, N.Y. Evening J., Jan. 23, 1935, at 2 (city ed.).

38. *'I Toyed With the Bull of Brooklyn,' Jafsie Boasts*, N.Y. Evening J., Jan. 11, 1935, at 3 (city ed.).

39. Record, *supra* note 32, at 455.

40. *See* Gardner, *supra* note 3, at 345–48.

41. Samuel Liebowitz (as told to Tyrell Krum), *Liebowitz Sees Jury Cleaving Twisted Knot*, N.Y. Evening J., Feb. 7, 1935, at 12 (city ed.).

42. Record, *supra* note 32, at 3641, 3644.

43. *Id*. at 3128.

44. *Id*. at 3127.

45. Women were not permitted to sit on New York juries until 1937. *See* 1937 N.Y. Laws ch. 513.

46. Elsie Robinson, *Reilly Draws Masterful Word Picture, Says Author*, N.Y. Evening J., Feb. 19, at 8 (city ed.).

47. James Cannon, *Reilly Slicker to Natives*, N.Y. Evening J., Jan. 3, 1935, at 8 (city ed.).

48. James Cannon, *Characters in Bruno Trial Fit Roles Too Perfectly, Says Writer*, N.Y. Evening J., Jan. 19, 1925, at 3 (sports complete ed.).

49. James Cannon, *Trial Seen as Side Show With Bruno as Freak Exhibiting Both Tender and Sardonic Faces*, N.Y. Evening J., Jan. 25, 1935, at 17 (final night extra ed.).

50. Fisher, I Appeal!, *supra* note 26, pt. 1, at 4.

51. *See Ladder, Red Ink on Paper Used by Reilly in Fan Mail Replies* (press clipping on file at the New Jersey State Police Archives). A sample of the stationery is also on file at the Archives.

52. Visitors Log, Wilentz Collection (on file at the New Jersey State Police Archives).

53. FBI Memorandum (Jan. 22, 1936), *cited in* Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann and Bigelow Cases*, 18 N.Y.U. Rev. L. & Soc. Change 831 (1990/1991).

54. St. Johns, *supra* note 25, at 351.

55. Letter from C. Lloyd Fisher to Gov. Harold Hoffman (Sept. 3, 1938) (on file at the New Jersey State Police Archives).

56. St. Johns, *supra* note 25, at 386.

57. Harold G. Hoffman, *The Case of Mr. Reilly*, at 3 (draft of *Liberty* magazine article on file at the New Jersey State Police Archives).

58. *Reilly and Wife Ask Separation*, N.Y. Herald-Trib. (undated clipping on file at the Brooklyn Public Library).

59. Letter from C. Lloyd Fisher to Gov. Harold G. Hoffman (Sept. 3, 1938) (on file at the New Jersey State Police Archives).

60. *See* Edward J. Reilly, *Will Lindbergh Save Hauptmann?*, Liberty, Oct. 5, 1935, at 8.

61. Florence Wessels, *Reilly, Noted Hauptmann Counsel, Now Insane, Retries Old Cases*, N.Y. Evening J., Jan. 2, 1938 (unpaginated press clipping).

62. *Reilly, Hauptmann Lawyer, is in Hospital as a Mental Patient Following Breakdown*, N.Y. Times, Jan. 31, 1937, at 1.

63. *Reilly is Found Sane; Freed from Hospital*, N.Y. Times, Mar. 24, 1938, at 24.

64. *Reilly Shows Old Time Wit in Court Fight* (undated press clipping on file at the Brooklyn Public Library).

65. E-mail from Dr. Edward Tramont, National Institute of Health, to the author (Jan. 19, 2005).

66. *See* Robert J. Schoenberg, Mr. Capone: The Real and Complete Story of Al Capone 342–53 (1993).

67. E-mail from Dr. Edward Tramont, National Institute of Health, to the author (Jan. 20, 2005).

68. Memo from Bill Conklin to Gov. Harold Hoffman (Oct. 11, 1938) (on file at the New Jersey State Police Archives).

69. *See Reilly Back in Court, Wins First Case*, Brooklyn Daily Eagle, Apr. 20, 1938, at 1.

70. *See Reilly Makes Comeback, Wins $12,500 Verdict*, Brooklyn Daily Eagle, Apr. 1, 1939, at 1.

71. *See People v. Palmer*, 292 N.Y. 506, 53 N.E.2d 846 (1944) (first-degree murder conviction); *People v. Lewis*, 291 N.Y. 731, 52 N.E.2d 955 (1943) (first-degree murder); *People v. Larkin*, 266 A.D. 787, 41 N.Y.S.2d 920 (2d Dep't 1943) (second-degree grand larceny).

72. *See Mrs. Reilly Wins Divorce by Default*, Brooklyn Daily Eagle, Apr. 3, 1945, at 2.

73. New York City Department of Health, Borough of Brooklyn, Certificate of Death, Edward J. Reilly, No. 24,694 (Dec. 28, 1946).

74. Fisher, I Appeal! , *supra* note 26, pt. 1, at 1.

75. Louis M. Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That 'Will Not Die,'* Geo. L.J. 1, 11 (1977).

76. St. Johns, *supra* note 25, at 370.

77. *Profiles, supra* note 6, at 22.

78. Linda Deutsch, *Legal Hotshot's Star Has Fallen*, Newsday.com, formerly *available at* http://www.newsday.com.

"Sorry, I just get a little sentimental whenever I see my first filing."

BY DAVID PAUL HOROWITZ

David Paul Horowitz <dh15@nyu.edu> practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

HIPAA . . . Help!

This cry is often heard when practitioners, both plaintiffs' and defendants', attempt to obtain medical information in personal injury cases.

In 1996 Congress passed the Health Insurance Portability and Accountability Act, commonly referred to as HIPAA; the act's requirements mandating federal minimum standards of privacy protection for patients' health information came into effect in 2003. HIPAA preempts state law unless a state enacts state standards more stringent than the federal requirements. Laudable in intent, particularly in light of recent concerns over identity theft, HIPAA has impacted on litigation practice in New York, primarily in the personal injury field. The consequences of HIPAA are in flux and, keeping in mind the time-lag between the writing of this article and its publication, recent cases should be monitored and decisions carefully considered. Courts have enacted local rules addressing HIPAA issues, and many are in transition.[1]

Current issues include medical record authorizations, trial subpoenas for medical records, attorney interviews with treating physicians, and general issues of privilege. Each will be addressed separately, below.

Medical Record Authorizations

The first hint that most practitioners received that there was something called HIPAA, and that it would impact on their practices, came to personal injury litigators who suddenly started receiving rafts of complicated and verbose "HIPAA compliant" authorization forms from medical providers, especially hospitals. This complicated the already laborious procedure for obtaining individual authorizations signed by the client for each medical provider, where universally accepted, generic authorization forms, including Blumberg forms, were utilized.

Fortunately, two events coincided to ease this pain and, in fact, make life immeasurably easier for practitioners. The first was the development, by a committee chaired by Chief Administrative Judge Jacqueline Silbermann of New York County Supreme Court, Civil, of a universal, HIPAA compliant authorization form, designated OCA Official Form No. 960, acceptable to the court, medical providers, and the bar. The form has met widespread acceptance, and is available for download at the OCA Web site.[2] In addition to having a judicial imprimatur to facilitate acceptance, the wide circulation of this form has given it a familiar feel, further encouraging acceptance.

The second event was the enactment of legislation known colloquially as the "Sklar Bill," after State Supreme Court Justice Stanley Sklar, who had advocated for the passage of the bill for eight years. The new law permits a client to sign a limited power of attorney which, in turn, permits the attorney to sign authorizations for medical records on the client's behalf, eliminating the need to send authorizations to the client, have the client execute them in front of a notary, and then return the executed authorizations to the attorney. The law also permits a distributee of a decedent to obtain records relating to the decedent without having to first obtain authority from the surrogate's court, traditionally in the form of limited letters of administration. The law permits the distributee to attach a copy of the decedent's death certificate to an authorization signed by the distributee and, thereby, obtain the records.

Trial Subpoenas

Traditionally, state courts in New York have routinely "so ordered" subpoenas seeking records, including medical records, where there was no legal requirement that the subpoena be "so ordered," and without any require-

ment that an authorization be furnished. "Although a subpoena signed by the attorney would suffice under the applicable statute,[3] the presentment agency is following the common practice of having the subpoena 'so ordered' by a Court. Apparently, medical service providers will more likely respond to a subpoena 'so ordered' by the Court as opposed to one signed solely by an attorney. Courts generally sign such subpoenas since it aids in compliance with a lawful subpoena and avoids possible motion practice."[4]

However, the interplay of CPLR 3122(a) and HIPAA posed issues for courts issuing "so ordered" subpoenas for medical records. The first court to examine the impact of HIPAA on a party's request to have a subpoena for medical records "so ordered" was *Campos v. Payne*.[5] The court refused, citing both a failure to comply with CPLR 3122(a), which requires a statement, omitted in the subpoena served, "in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization from the patient," and for failing to furnish a HIPAA compliant authorization. The court concluded:

> Accordingly, the Court cannot "so order" the subpoena without the authorization of the party whose records are sought. To do so would be to sanction an end run around the privacy protections established both by Congress and the State legislature. Production of the records can be accomplished either by complying with CPLR 3120 and 3122, or by bringing a motion on notice to all parties. Furthermore, even if the court were inclined to "so order" the subpoena, the subpoena in this case is defective in that it lacks the bolded language mandated by CPLR 3122.[6]

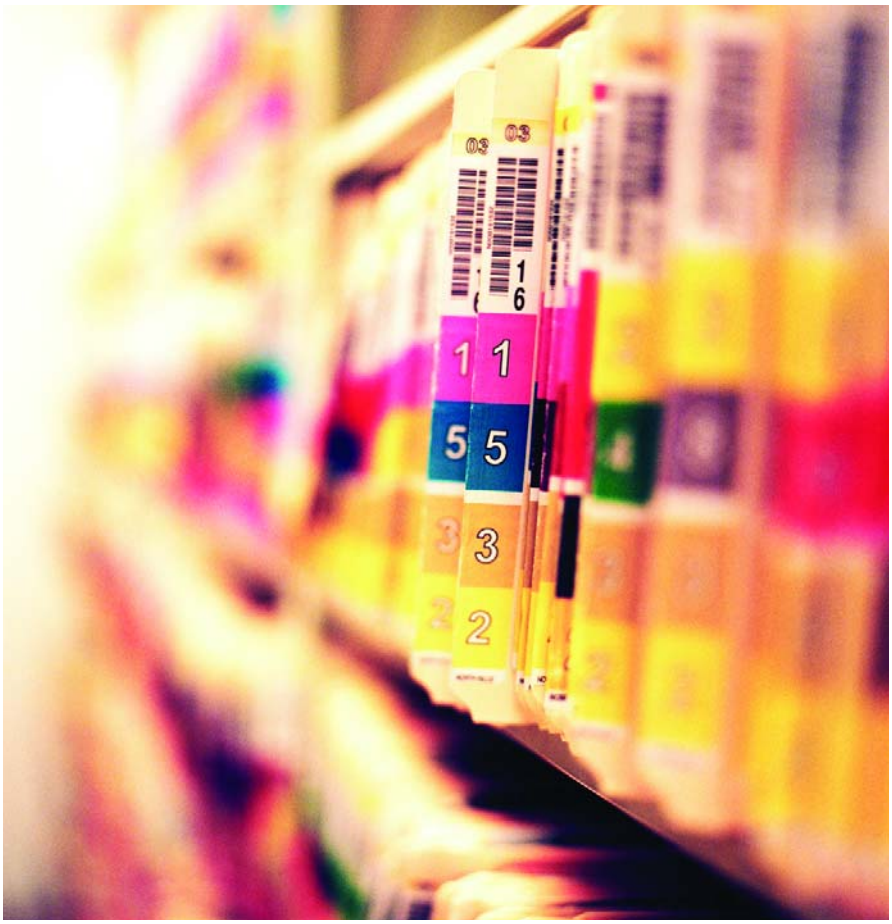
In a second decision, *In re C.D.*,[7] the trial court was confronted with a subpoena sought on the eve of trial, apparently without an authorization from the patient, and framed the issue before it as being "one of providing notice and adequate opportunity to the person whose records are being subpoenaed to be heard. The Courts are in a position to fashion appropriate procedures to guarantee such notice and opportunity while taking into consideration the needs and practices in their particular Courts."[8] In *C.D.*, the court signed the subpoena, and issued with it an order and notice, to be served, along with the subpoena, by the requesting party upon both the record custodian and opposing counsel, notifying them that the records had been subpoenaed, and providing an opportunity to be heard, at a date and time set forth on the notice, on the issue of whether the records should be disclosed.[9]

The *Campos* decision is not without critics, and the Advisory Committee on Civil Practice has proposed an amendment to CPLR 3122(a) that clearly provides that a court has the authority to order the production of medical records without the patient's consent. "The proposed amendment to CPLR 3122(a) resolves the uncertainty [in *Campos v. Payne*] by providing that a medical provider served with a subpoena *ducus tecum* must respond if served with a demand and either an accompanying authorization for the release of the medical record *or a court order*."[10]

Once the records are subpoenaed into court, they may be inspected and copied. "[T]he clerk's function is only to receive the records and document who is seeking to view or copy the subpoenaed records. After September 1, 2003 all medical records delivered to the court will have had to have contained the proper authorizations and will be subject to examination and copying by opposing counsel."

Local rules are in place in many courts addressing HIPAA compliance in the issuance of subpoenas for medical records. In the City Trial Part, the following rule is currently in effect:

> Be Prepared: Do not wait until the eve of the trial to get prepared. It is counsel's obligation, well before a case is scheduled for trial, to ascertain the availability of all witnesses and the sufficiency of all subpoenaed documents. Counsel should subpoena all required documents in [] sufficient time to have same available for trial without delay. Subpoenas for medical records must be accompanied by an appropriate HIPPA form. In order to avoid a delay in processing a request for a ''court ordered'' sub-



poena for medical records it is strongly suggested that counsel use the HIPAA OCA Official Form No. 960, which can be obtained from the Court website, or from the clerk in Room 217, or from the IA-3 clerk in Room 407.[11]

Interviews with Treating Physicians

The traditional bar to medical malpractice defense counsel interviewing a plaintiff's treating physician was relaxed by the Second Department in 1989.[12] *Levande* permitted such interviews once the note of issue was filed, without any need for an authorization from the plaintiff. This practice conflicted with HIPAA's requirements, and a number of trial courts have examined the issue, with a split in the decisions as to whether or not to allow the interviews, and, for those courts that do permit them, without agreeing on a uniform approach. A recent front page article in the *New York Law Journal*[13] analyzed the current split in opinion between the medical malpractice judges in New York County.

The first court to grapple with HIPAA's impact on post-note-of-issue interviews was Justice James Dollard, who issued guidelines in an unpublished opinion, *Beano v. Post*,[14] which were subsequently incorporated into, and expanded by, Justice Joseph J. Maltese in *Keshecki v. St. Vincent's Medical Center*.[15] *Keshecki* required:

> 1. Defense counsel must obtain an authorization separate and apart from any other authorization; and
>
> 2. The authorization on its face should state in BOLD letters that the purpose of the disclosure is not at the request of [the plaintiff] patient; and
>
> 3. The purpose should be stated in BOLD print that: "The purpose of the information is to assist the defendant in defense of a lawsuit brought by the plaintiff"; and
>
> 4. The authorization must contain the name and business address of the person to whom the health care provider or hospital employee may give an interview and identify the persons or entities the interviewer is representing (see 45 CFR § 164.508[c][iii]); and
>
> 5. The authorization must conform to all of the core elements and requirements of 45 CFR § 164.508[c]; and
>
> 6. There shall be a separate authorization for each interview and the authorization shall not be combined with a subpoena, which only acts to intimidate the doctor.
>
> Within five days after the interview, whether in person or on the telephone or by any other manner which technology allows, the defendant must provide the plaintiff with:
>
> 1. Any and all written statements, materials or notations and any document obtained from the interviewed health care provider; and
>
> 2. Copies of any memoranda, notes, audio or video recording, which records any oral or written statements made of the health care provider.[16]

Keshecki further held that interviewing counsel did not have to disclose "their observations, conclusions, impressions or analysis of any of the statements."[17]

Thereafter, *Keshecki* has generally been followed, with some variations, by decisions in Kings County,[18] Monroe County,[19] New York County,[20] and, most recently, Suffolk County.[21] A noteworthy distinction is contained in Justice Sklar's decision in *Smith v. Rafalin*,[22] where he held: "Accordingly, the desire of both sides to have access to a medical provider militates in favor of an informal interview at the physician's office. Fairness in providing equal access to the physicians militates in favor of permitting continuation of interviews by defense counsel. Not only have the majority of my distin-

guished colleagues who have written decisions on this subject of which I am aware agreed, but Justice Lunn made the critical point in his decision in *Steele v. Clifton Springs Hospital*,[23] that we are required to permit the continuation of *ex parte* interviews of subsequent treaters by defense counsel until the appellate cases permitting them are overruled binding appellate authority."[24] Justice Sklar further held that all material gathered by interviewing counsel was protected by attorney work product, and did not have to be exchanged.

However, Justice Eileen Bransten in New York County has not followed *Keshecki*, voicing concern over the potential effect of post-note-of-issue interviews: "Private interviews outside the patient or patient representative's presence present very troubling confidentiality problems. In the course of private interviews a treating physician may release information about a patient that has not even been communicated to that patient. Additionally, there is a very real risk that defense counsel may inquire into matters that do not relate to the condition at issue and, unlike in the context of judicially supervised disclosure proceedings, no one is present to ensure that the patient's rights are not violated. While it is clear that certain privacy rights are waived by commencement of a medical malpractice action, it is equally clear that there are limitations on the waiver."[25]

Pointing out that the defendants failed to explain why the information sought was not obtained during disclosure, and further failed to explain how the information sought was material and necessary to the defendants preparation for trial, Justice Bransten concluded:

> This Court will not sanction a post-note-of-issue request to obtain information from a witness who was never even deposed. Doing so would authorize post-note-of-issue discovery without fidelity to the discovery devices, without the consent of both parties and without a showing of the "unusual or unanticipated circumstances," required for obtaining information once the note of issue has been filed. It would improperly allow a party to do indirectly that which it cannot do directly and could unfairly cause surprise at trial.[26]

Justice Alice Schlesinger has expressed the preference that permission to speak to treating physicians be sought during formal disclosure, prior to filing the note of issue.

Privilege

One final consideration: HIPAA may provide a basis for asserting privilege barring the release of certain records, independent of, and perhaps to a greater extent than, state law. This was suggested recently, in *dicta*, by the First Department.[27] In a case where the plaintiff was injured in a cardiac rehabilitation center, plaintiff's counsel sought the names of other patients who were present in the center at the time the accident occurred, presumably as potential witnesses to the accident or notice witnesses of the allegedly dangerous condition. The First Department held that this would violate the physician-patient privilege of the other patients in the rehabilitation center, since disclosure of their patient status in such a facility was equivalent to disclosing that they suffered from a cardiac condition.

The court went on to refer to the modern trend towards increasing the protection of patient confidentiality, embodied in HIPAA, and, while the issue was not raised by the defendant, the court, in *dicta*, opined that HIPAA would bar the release of the requested information.

There will undoubtedly be developments in this area. Reader inquiries and submissions of HIPAA problems and issues will be appreciated. ■

"Private interviews outside the patient or patient representative's presence present very troubling confidentiality problems."

1. *See, e.g.*, Rule 9(c) of the IA-3 City Tap Rules, *infra*.
2. <www.nycourts.gov/litigants/forms/shtml>.
3. *See* CPLR 2302(a).
4. *In re C.D.*, 6 Misc. 3d 1034A, 2005 N.Y. Misc. LEXIS 417 (Fam. Ct., Orange Co., Mar. 8, 2005).
5. *Campos v. Payne*, 2 Misc. 3d 921, 766 N.Y.S.2d 535 (N.Y. City Civ. Ct. 2003).
6. *Id.* at 926–27.
7. *In re C.D.*, 6 Misc. 3d 1034A.
8. *Id.*
9. *Id.*
10. Report of the Advisory Committee on Civil Practice, January 2005, pp. 5–8. In the interest of full disclosure, I am a member of the Advisory Committee and support the proposed amendment.
11. Rule 9(c) of the IA-3 City Tap Rules.
12. *Levande v. Dines*, 153 A.D.2d 671, 544 N.Y.S.2d 864 (2d Dep't 1989).
13. Daniel Wise, *Courts Split on Privacy Act Effect on Discovery*, N.Y.L.J., Mar, 29, 2005, p. 1, col. 3.
14. Index No. 5694-2001, Mar. 12, 2004, Queens County Supreme Court.
15. *Keshecki v. St. Vincent's Med. Ctr.*, 5 Misc. 3d 539, 785 N.Y.S.2d 300 (Sup. Ct., Richmond Co. 2004).
16. *Id.* at 544–45.
17. *Id.*
18. *O'Neil v. Klass*, N.Y.L.J. Nov. 19, 2004, p. 17 (Sup. Ct., Kings Co.) (Rosenberg, J.).
19. *Steele v. Clifton Springs Hosp. & Clinic*, 6 Misc. 3d 953, 788 N.Y.S.2d 587 (Sup. Ct., Monroe Co. 2005).
20. *Smith v. Rafalin*, 6 Misc. 3d 1041A, 2005 N.Y. Misc. LEXIS 546 (Sup. Ct., N.Y. Co. Mar. 24, 2005).
21. *Valli v. Viviani*, 2005 N.Y. Misc. LEXIS 575 (Sup. Ct., Suffolk Co. 2005).
22. 6 Misc. 3d 1041A.
23. 6 Misc. 3d 953, 788 N.Y.S.2d 587 (Sup Ct., Monroe Co. 2005).
24. *Valli*, 2005 N.Y. Misc. LEXIS 575.
25. *Brown v. Horbar*, 6 Misc. 3d 780, 792 N.Y.S.2d 314 (Sup. Ct., N.Y. Co. 2004).
26. *Id.* (citation omitted).
27. *Gunn v. Sound Shore Med. Ctr. of Westchester*, 5 A.D.3d 435, 772 N.Y.S.2d 714 (2d Dep't 2004).

2004 Case Update – Part II

Uninsured, Underinsured, Supplementary Uninsured Motorist Law

By Jonathan A. Dachs

Many developments in the field of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from 2004 were covered in last month's issue of the *Journal*. In this issue, we will discuss several additional general issues that pertain to both uninsured and underinsured motorist claims, and will also address issues more specific to each of these separate categories of coverage.

General Issues[1]

Petitions to Stay Arbitration: Arbitration vs. Litigation

In *Russell v. New York Central Mutual Fire Ins. Co.*,[2] the court held that insofar as the insured's endorsement provided for more than the minimum amount of uninsured motorist coverage mandated by Insurance Law § 3420(f)(1), and the insured did not exercise his option to arbitrate the dispute, the dispute could be resolved through an action at law instead of arbitration.

In *Sclafani v. Allstate Ins. Co.*,[3] the court held that where there is a dispute arising under the right of an insured to payment of SUM benefits, or as to the amount of those

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benefits, the insured will always have the right to initiate legal action, or, in the alternative, to demand arbitration.

Two examples of SUM lawsuits are *Mendoza v. Allstate Ins. Co.*[4] and *Brathwaite v. New York Central Mutual Fire Ins. Co.*[5] In both of those cases, the courts considered the issue of whether the plaintiff sustained a "serious injury" as defined in the No-Fault Law[6] – a condition precedent to a valid UM/SUM claim.

Filing and Service

Civil Practice Law and Rules 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within 20 days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[7]

In *Allstate Ins. Co. v. Duffy*,[8] the court held that where the issue of whether the insured/claimant is entitled to uninsured/underinsured motorist benefits under a particular policy relates to "whether certain conditions of coverage were satisfied, not whether the parties agreed to arbitrate"; the insurer must seek a stay of arbitration within the 20-day limitation period set forth in CPLR 7503(c).[9]

In *State Farm Mutual Auto. Ins. Co. v. Dowling*,[10] the insurer's application to stay arbitration was deemed untimely, the court noting that "[i]t does not avail petitioner that it timely commenced a proceeding to stay the arbitration in Queens County, that the Queens County court ordered to be transferred to New York County, and that it instituted the instant stay proceeding only because of ministerial difficulties it encountered in effectuating the transfer."

In *State Farm Mutual v. Kathehis*,[11] the court noted that when the 20th day after receipt of the demand for arbitration is a Sunday (or Saturday or public holiday), according to General Construction Law § 25-a, the petition to stay arbitration may be filed the next business day.

In three cases that originated from the Supreme Court, Westchester County (Nastasi, J.), the Appellate Division, Second Department addressed the proper way to commence a special proceeding to stay arbitration. In *Allstate Indemnity Co. v. Martinez*,[12] the court noted that "[u]nder New York's commencement-by-filing system, in order to commence a special proceeding, the petition must be filed with the Clerk of the Court and the filing fee paid." Further, "when service of process is made without filing, the resulting proceeding is a nullity, it not having been properly commenced, and such nonfiling constitutes a nonwaivable jurisdictional defect." In this regard, *One Beacon Ins. Co. v. Daly*[13] and *Progressive Northeastern Ins. Co. v. Frenkel*[14] should be reviewed. Although in *Martinez* and *Daly* the court affirmed the denials of the petitions because the petitioner failed to demonstrate that the petition had been filed with the county clerk, in *Frenkel* the court reversed on the basis of evidence, upon renewal, that established such a filing.

In *Liberty Mutual Ins. Co. v. Tigre*,[15] the court held that where a petition was filed on June 25, 2004, but bore a return date of June 27, 2004, a period of just two days, and there was no affidavit of service in the record, and on June 30, 2004, the petitioner served an amended petition bearing a return date of July 27, 2004, the petition was jurisdictionally defective because it failed to give adequate notice of the return date, and the amended petition was jurisdictionally defective because it was improperly served by regular mail on the respondents' attorney.

In *Nationwide Ins. Co. v. Singh*,[16] the claimant's counsel sent to the insurer, by certified mail, return receipt requested, a letter enclosing a no-fault application and "Notice of Intention to Make Claim and Arbitrate," which was skillfully created so as to appear virtually identical in appearance, content, layout and color to the Blumberg form entitled "Notice of Intention to Make Claim." More than three months later, and after the insurer disclaimed coverage on the grounds of late notice, counsel served a demand for arbitration upon the insurer. Within 20 days of receipt of the demand – but nearly four months after receipt of the notice of intention – the insurer commenced a proceeding to stay arbitration. The claimant cross-moved to dismiss the stay proceeding on the ground that it was not timely commenced following the undisputed receipt of the notice. In opposition to the cross-motion the insurer argued, incorrectly, in an affirmation of its counsel, that the notice of intention to arbitrate was not a formal demand to arbitrate against which a proceeding to stay would be required. Counsel did not, however, argue that the notice was misleading or deceptive. The supreme court, *sua sponte*, raised the issue and held that the notice of intention to arbitrate, in its timing and circumstances, was intended to mislead. Thus, the court measured the 20-day period from the subsequent demand for arbitration and granted the petition.

On appeal, however, the Second Department reversed that determination. Despite recognizing that "service intended to conceal a notice of intention to arbitrate and to precipitate an insurer's default will not be given preclusive effect when the notice is buried among unrelated documents or is served on a remote office of the insurer," citing several of the cases cited above, the court noted that "these cases were not decided in a vacuum." The court further stated that "[t]he issue of misleading tactics had to be raised by the petitioners who tardily sought to stay arbitration, and had to be supported by someone with knowledge of the facts on the basis of which they contended that they had been misled." Noting that the insurer never claimed to have been misled and that, therefore, no affidavit was submitted by an

insurance company employee to support such a contention, the court reversed and denied the petition. Interestingly, the court focused solely upon the fact that the claimant's counsel, to his credit, did not bury the notice among a sheaf of other documents, and that service of the notice to the insurer's North Syracuse office did not adversely affect its ability to respond promptly to it; the court did not comment at all on the misleading and deceptive nature of the notice itself.[17]

Burden of Proof

An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[18]

Arbitration awards are subject to great judicial deference, therefore, "it is imperative that the integrity of the process . . . be zealously safeguarded."

In *GEICO v. Burrell*,[19] the petitioner submitted proof of coverage on the offending vehicle by State Farm. In opposition to the petition, State Farm asserted that it had disclaimed coverage on the ground, *inter alia*, of late notice of claim. The supreme court granted the petition, without a hearing, on the basis of its finding that State Farm's disclaimer was invalid. On appeal, the Second Department reversed and held that an evidentiary hearing on the issue of whether State Farm validly disclaimed coverage was necessary.

In *New York Central Mutual Fire Ins. Co. v. Hall*,[20] the petitioner submitted the police accident report, which indicated coverage for the offending vehicle by Allstate and a copy of a letter from Allstate disclaiming coverage to its insured. The court held that this evidence raised a question of fact as to whether Allstate timely and validly disclaimed coverage for the offending vehicle and, therefore, remitted the case for an evidentiary hearing on the timeliness and validity of Allstate's disclaimer, to which the proposed additional respondents would be joined as parties.

In *Liberty Mutual Ins. Co. v. Morgan*,[21] however, the court held that the petitioner, which submitted *only* a copy of the other insurer's disclaimer letter (and no police report or DMV record indicating the existence of coverage in the first instance), "failed to establish its entitlement to a stay of arbitration" and, therefore, upheld the denial of the petition to stay the uninsured motorist claim.

In *AIU Ins. Co. v. Marciante*,[22] the proof established that the tortfeasor's insurer's purported cancellation was defective and invalid. Thus, the policy would have remained in effect until its stated termination date unless another event, such as the insured's procurement of replacement coverage, excused the provision of a proper notice of cancellation. Since the insurer did not produce any documents showing that the tortfeasor had actually acquired other insurance, it failed to establish that it was relieved of its obligation to defend and indemnify the tortfeasor.

In *New York Central Mutual v. Coriolan*,[23] the court held that the insurer's *prima facie* showing of coverage was rebutted by testimony of the other insurer's claims representative, as corroborated by the documentary evidence, that several searches of the company's records were conducted and no policy could be located.

In *State Farm Mutual Auto. Ins. Co. v. Jackson*,[24] the court held that a jury trial may be requested where there is a factual issue preliminary to arbitration pursuant to an uninsured or underinsured motorist claim.

Waiver of Right to Appeal

In *Windsor Group v. Gentilcore*,[25] the court reiterated the established rule that where the parties participate in the arbitration that was the subject of an unsuccessful petition to stay arbitration, without seeking interim relief (*i.e.*, a stay of the hearing), the unsuccessful insurer waives its right to appellate review of the denial of its petition, and its appeal must be dismissed.[26]

Default – Limits of Coverage

In *Kleynshvag v. GAN Ins. Co.*,[27] the court was faced with the interesting question of what limits of coverage to apply in a direct action against an insurer to recover on a judgment obtained against its purported insured where the insurer contended that it never issued a policy to the "insured," but a finding of coverage was rendered against the insurer by default in a proceeding to stay arbitration. Although the supreme court held that "faced with the task of ascertain[ing] the terms of a policy which, in fact, does not appear to exist," the logical conclusion was to limit the insurer's liability to the statutory minimum automobile liability insurance limits set forth in Vehicle & Traffic Law § 311(4)(a) (*i.e.*, $25,000), the Appellate Division disagreed. In the view of the Second Department, under the circumstances of this case, which included the fact that the insurer was made a party respondent to the proceeding to stay arbitration and knowingly chose not to participate therein, the insurer chose not to seek to vacate the default judgment against it for some five years (and such motion was denied), and the insurer failed to meet its burden to prove any limita-

tion on the plaintiff's right to recover. "Plaintiff's recovery should not have been limited to the statutory minimum of $25,000 but, instead should have been allowed to the full extent of the judgment in the underlying action to recover damages for personal injuries," *i.e.*, $125,000.

Arbitration Awards: Issues for the Arbitrator

In *Karadhimas v. Allstate Ins. Co.*,[28] the court vacated an arbitration award in which the arbitrator considered and ruled upon the issue of whether there was physical contact with the claimant's vehicle, notwithstanding the fact that the insurer never sought to stay arbitration prior to the hearing. Repeating the rules that "an arbitrator may not decide the question of whether there was contact with a 'hit and run' vehicle on the ground that lack of contact constitutes a 'contractual coverage defense' and not a 'liability defense,'" and "where the insurance carrier's application to stay arbitration is untimely, '[t]he arbitrator may not decide this issue by creating an artificial distinction between contractual issues and liability issues,'"[29] the court noted that "[t]he arbitrator could determine liability and dismiss the claim based upon a determination that the claimant's negligence was the sole proximate cause of the accident," but that "the arbitrator was required to base his determination upon a finding that there was in fact contact with an unidentified vehicle." Thus, the court remanded the matter for a rehearing before a different arbitrator on the questions of negligence and comparative negligence.

Scope of Review

In *Lumbermen's Mutual Casualty Co. v. City of New York*,[30] the court noted that "[p]ursuant to CPLR 7511(a), an application to vacate an arbitrator's award must be made by a party within ninety days after [its] delivery to [that party]." Moreover, the court added that "the fact that the arbitrator's decision was served on the petitioner by mail did not extend its time to commence [the] proceeding by five days, as the provision of CPLR 2103 extending time for service made by mail 'is expressly restricted to service "in a pending action"' (citations omitted)."

In *NCO Financial Systems, Inc. v. Pettas*,[31] the court reiterated that "even though CPLR § 7511(a) imposes a 90 day limit to modify or vacate an arbitration award, a respondent may wait until the prevailing party moves to confirm the award to seek that relief" by way of a cross-motion to vacate.

In *State Farm Mutual Auto. Ins. Co. v. Perez*,[32] the court stated,

> Arbitration awards are subject to great judicial deference, therefore, "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." As a result, an arbitrator must grant a fundamentally fair hearing. "A fundamentally fair hearing requires notice, an opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decision makers are not infected with bias."

In that case, the SUM arbitrator rejected certain of the claimant's medical evidence on the basis that it did not contain an original signature but rather a rubber-stamped signature. The court held that, in so doing, the arbitrator failed to take into account a subsequently submitted, properly sworn and signed affidavit, which reaffirmed the doctor's stamped report and thus cured the defect with the authenticity of that report. Moreover, the court noted that although the arbitrator had given notice in her "Pre-Hearing Memorandum" that she would not consider reports that were "dictated but not read," she gave no notice regarding her objection to stamped material, which, in the view of the court, was not equivalent. Whereas the use of the phrase "dictated but not read" indicates "a tolerance for uncorrected errors and an indifference to significant matters of legal import," the use of a signature stamp "does not necessarily suggest that the physician did not read his own report, only that he did not sign every copy. The stamping of a copy after the original has been signed is a common practice." The court found that the arbitrator's rejection of relevant and material evidence, and her "unsupported and conflicting conclusions," resulted in the denial of a fair hearing "due to the appearance of bias" and, accordingly, vacated the arbitrator's award and directed that a new hearing be held.

In *Reilly v. Progressive Ins. Co.*,[33] the claimants' attempted to vacate an arbitrator's award against them, which denied their claims for UM benefits, on the ground that the arbitrator was not impartial and that his determination was irrational. The partiality argument was based upon the fact that the arbitrator and the attorney for the insurer allegedly kissed each other hello prior to the commencement of the hearing, and that during the hearing, the arbitrator referred to defense counsel by her first name. The court rejected the claimants' contentions and affirmed the award because the claimants "waived their

right to object to the determination on the ground of partiality by participating in the arbitration without objection after observing the conduct they believed revealed such partiality." The court also found the arbitrator's award to have been rational.

In *Kaufman v. Allstate Ins. Co.*,[34] the court held that the arbitrator's denial of a request for an adjournment did not constitute either an abuse of discretion or misconduct sufficient to warrant vacatur of an award.

Actions Against Insurance Agents/Brokers

In *Utica First Ins. Co. v. Floyd Holding, Inc.*,[35] the court held that if an insurance broker was negligent in making a representation on an insurance application that resulted in the insurer disclaiming coverage, the insured would be entitled to indemnification from the broker for any liability incurred in the underlying action against the insured.

In *Venditti v. Liberty Mutual Ins. Co.*,[36] the court noted that the allegation that an insurance agent or broker breached the common-law duty to obtain requested coverage "sets forth a claim in tort which requires the application of the three-year limitations period."[37]

The arbitrator's "unsupported and conflicting conclusions," resulted in the denial of a fair hearing.

In *Rendeiro v. State-Wide Ins. Co.*,[38] the court held that "[a]lthough an insurance broker is generally considered to be an agent of the insured, a broker will be held to have acted as the insurer's agent where there is some evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred.'"

Conflicts of Law

In *GEICO v. Nichols*,[39] the issue was whether to apply New York law or Florida law to resolve a dispute over the retroactive cancellation of a policy on the ground of material misrepresentation on the application for insurance. Florida law allows such retroactive cancellations, but New York law does not. Because the policy at issue was issued in Florida, to residents of Florida, covered vehicles registered in Florida, referenced and incorporated Florida law, and the only connection between the policy and New York was that the insured was driving the vehicle in New York at the time of the accident, the court applied Florida law and found it to be controlling under New York's conflict of law rules.

Statute of Limitations

In *Allcity Ins. Co. v. Cedena*,[40] the court explained that

> [a] demand for arbitration of an uninsured motorist's claim is subject to the six-year Statute of Limitations, which runs from the date of the accident or from the time when subsequent events render the offending vehicle "uninsured." . . . Where a claim is filed more than six years after the accident date, therefore, the party bringing said claim is "required to come forward with legally sufficient proof that a later accrual date applies."

In *Provenzano v. Ioffe*,[41] the court rejected the plaintiff's contentions that his personal injury action against the tortfeasor was tolled, pursuant to CPLR 204(b), during the time period that he attempted to arbitrate a claim for uninsured motorist benefits against his insurer. In the view of the court CPLR 204(b) did not apply, because the demand for arbitration did not concern a personal injury claim asserted in a common-law negligence action but, rather, the plaintiff's contractual rights to uninsured motorist benefits under his insurance policy.

Thus, it is incumbent upon the claimant's attorney to protect against the statute of limitations by commencing a lawsuit against the tortfeasor within three years of the date of the accident, even if the framed issue hearing is still pending.[42]

Uninsured Motorist Issues

Prompt Written Notice of Denial or Disclaimer

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the state of New York and the insurer will be estopped from disclaiming liability or denying coverage if it fails to comply with this statute. The timeliness of an insurer's disclaimer or denial is measured from the point in time when it first learns of the grounds for the disclaimer or denial.[43]

In *Baust v. Travelers Indemnity Co.*,[44] the court reiterated the rule that a disclaimer after the date of an accident relates back to the date of the accident and renders the vehicle uninsured at the time of the accident for the purposes of a UM/SUM claim.[45]

In *2833 Third Avenue Realty Assoc. v. Marcus*,[46] the court held that a delay of 37 days in issuing a disclaimer based upon the insured's failure to give timely notice of claim and failure to forward the summons and complaint, as required by the policy, was unreasonable as a matter of law because the grounds for the disclaimer were evident from the face of the late notice of claim.

In *Progressive Northeastern Ins. Co. v. Cirocco*,[47] a delay of "over 80 days" after receiving notice of the facts upon which the disclaimer was based was held to be unreason-

able as a matter of law. The court further noted that the insurer offered no explanation or excuse for waiting "more than 60 days" before commencing its investigation into the facts that supported its exclusion from coverage.

In *Mann v. Gulf Ins. Co.*,[48] the court held that an excess liability insurer's delay of four months in disclaiming liability after learning that the insured's vice president and claims manager has ascertained that brokers to whom notice was allegedly sent were not the insurer's agents, was unreasonable as a matter of law. In *U.S. Underwriters Ins. Co. v. City Club Hotel*,[49] the court held that a four-to-five-month delay in investigating the terms of a lease was unreasonable as a matter of law, particularly where another ground for disclaimer existed. And, in *New Hampshire Ins. Co. v. Zurich Ins. Co.*,[50] a delay of either 111 days or 58 days was held to be unreasonable as a matter of law.[51]

On the other hand, in *New York Central Mutual Fire Ins. Co. v. Majid*,[52] the court held that a disclaimer issued 31 days after the insurer's completion of its investigation was not unreasonably late. It was not unreasonable for the insurer to investigate the claim and to consult with counsel regarding the livery vehicle exclusion prior to disclaiming coverage based thereon.[53]

In *New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire*,[54] the court held that a 49-day delay in issuing a disclaimer based upon an exclusion for bodily injuries to employees of the insured was not unreasonable because there was confusion as to the identity of the injured party's employer.[55]

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Insurance Law § 3420(d), a distinction must be made between (a) policies that contain no provisions extending coverage to the subject loss, and (b) policies that do contain provisions extending coverage to the subject loss, and that would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Insurance Law § 3420(d) may be dispensed with.[56]

In *Liberty Mutual Ins. Co. v. McDonald*,[57] the court held that

> [w]here an insurer attempts to disclaim coverage under a policy of liability insurance by invoking the terms of an exclusion, including an exclusion for nonpermissive use, it must do so "as soon as is reasonably possible" after learning of the grounds for disclaimer. However, where the nonpermissive use falls outside the policy's coverage and the denial of the claim is based upon lack of coverage, estoppel may not be used to create coverage regardless of whether or not the insurance company was timely in issuing its disclaimer.[58]

Florida law allows such retroactive cancellations, but New York law does not.

In *Ambrosio v. Newburgh Enlarged City School District*,[59] the court noted that the insured and an additional insured have independent duties to provide timely notice of an occurrence to the insurer.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured. However, where the insured is the first to notify the insurer, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer.[60] In *GEICO v. Jones*,[61] the court held that "in order for a disclaimer letter to be valid against an injured party, the notice of disclaimer must specifically advise the claimant that his or her notice of claim was untimely." Thus, where the injured party provided notice to the insurer pursuant to Insurance Law § 3420(a)(3), but the disclaimer letter was based solely upon the insured's failure to timely notify it of the accident, the disclaimer was held to be invalid.[62]

In *First Central Ins. Co. v. Malave*,[63] the court held that because the claimant did not exercise his right pursuant to Insurance Law § 3420(a)(3) to provide independent notice to the insurer, the disclaimer letter, which stated untimely notice by the insured as the ground for disclaimer without any reference to untimely notice by the claimant, was proper.[64]

In *New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire, Inc.*,[65] the court held that

> [i]n order to disclaim coverage on the ground of an insured's lack of cooperation, the carrier must demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation, (2) the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) the attitude of the insured, after cooperation was sought, was one of willful and avowed obstruction.[66]

Moreover, inaction by the insured, by itself, will not justify a disclaimer of coverage on the ground of lack of cooperation.[67]

In *Blue Ridge Ins. Co. v. Jiminez*,[68] the court noted that "[a] 'reservation of rights' letter does not constitute an effective notice of disclaimer."[69]

In *Scappatura v. Allstate Ins. Co.*,[70] the court noted that property damage claims do not fall within the ambit of Insurance Law § 3420(d).

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order effectively to cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules, and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, and whether the policy was written under the Assigned Risk Plan or was paid for under a premium financing contract.

A proper notice of cancellation must also adequately specify the reasons for the cancellation. In *Lumbermen's Mutual Casualty Co. v. Brooks*,[71] the reason for the cancellation stated on the notice was "Producer's Account Closed" and the insured was referred to Code No. 4, which stated, in pertinent part, "after the issuance of the policy . . . discovery of an act or omission, or a violation of any policy condition that substantially and materially increases the hazards insured against, and which occurred subsequent to inception of the current policy period." The court held that this notice was deficient because it did not specify the act or omission or violation. Moreover, the court held that the notice did not mention the real reason for the cancellation, which was that the policy had been procured by a brokerage that had allegedly engaged in fraudulent policy procurement practices – a ground that nevertheless would have been inadequate as a basis to terminate the policy in the absence of any demonstrable link between the asserted fraud and the procurement of the particular policy at issue.

In *Badio v. Liberty Mutual Fire Ins. Co.*,[72] the court noted that

> [t]he insurer has the burden of proving the validity of its timely cancellation of an insurance policy. An insurer is entitled to a presumption that a cancellation notice was received when "the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed." In order for the presumption of receipt to arise "office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed."[73]

In *Badio*, the court held that the insurer presented sufficient evidence of its office mailing practice through the testimony of an employee who possessed personal knowledge of the office mailing practice, including how the mail was picked up and counted and how the names and addresses on each item were confirmed.

The court further noted that "[a]n insured's denial of receipt, standing alone, is insufficient to rebut the presumption," and that "[i]n addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed."

And, in *York v. Allstate Indemnity Co.*,[74] the court specifically held that the insurer's proof that it mailed a copy of the notice of cancellation to the address shown on the insured's signed application established that it effectively canceled its policy, regardless of whether or not the address on the policy was the correct address of the insured at the time the notice was mailed, because the carrier was not notified that the address shown on the policy was incorrect.

In *MetLife Auto & Home v. Agudelo*,[75] the court held that Vehicle & Traffic Law § 313(1)(a)

> "supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively." . . . This provision "places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter, and protects innocent third parties who may be injured due to the insured's negligence."[76]

In *AIU Ins. Co. v. Marciante*,[77] the court held that "[a] supervening policy of liability insurance terminates a prior insurer's obligation to indemnify irrespective of the prior insurer's noncompliance with the notice requirements of section 313 of the Vehicle & Traffic Law."[78]

Stolen Vehicle

In *New York Central Mutual Fire Ins. Co. v. Dukes*,[79] the court reiterated that Vehicle & Traffic Law § 388(1) creates a presumption that the driver of a vehicle was using the vehicle with the owner's express or implied permission, which may only be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent. Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use.

Moreover, the court held that the issue of whether the vehicle was stolen or being used without permission at the time of the accident was within the scope of the order of reference to the Judicial Hearing Officer to hear and determine the issue of "insurance coverage" insofar as the petition affirmatively alleged that the vehicle owned by its insured was stolen at the time of the accident, and the petitioner raised no objection at the hearing to the admission of evidence on the issue of permissive use.

An owner of a vehicle that is used without the owner's permission may still be held liable if he or she violated the provisions of Vehicle & Traffic Law § 1210(a), the "key in the ignition" statute.

In *Merchants Ins. Group v. Haskins*,[80] the court applied Vehicle & Traffic Law § 1210(a) to hold the insurer of a stolen vehicle responsible to cover the loss of a motorist injured in an accident with the stolen vehicle where the evidence established that a permissive user of the vehicle (the vehicle owner's friend) left the vehicle parked on a public roadway with the keys on the dashboard, thus precipitating the theft.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.[81]

In *Metropolitan Property & Casualty Co. v. Sands*,[82] the court noted that where the determination that there was not physical contact between the claimant's vehicle and an alleged hit-and-run vehicle is supported by a fair interpretation of the evidence adduced at the hearing, that determination should not be disturbed on appeal.[83]

Another requirement for a valid hit-and-run claim is the filing of a statement under oath concerning the details of the claim. In *Empire Ins. Co. v. Dorsainvil*,[84] the court held that the claimant's failure to file a sworn statement under oath providing details of a hit-and-run accident constituted a breach of a condition precedent to coverage and, therefore, vitiated coverage under the individual motorist endorsement of the policy.

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent."

In *Eagle Ins. Co. v. Hamilton*,[85] the court held that where an insured policyholder is entitled to UM coverage, as opposed to SUM coverage, from his or her own insurer, and the alleged tortfeasor's insurer has paid into the New York Public Motor Vehicle Liability Security Fund (known as the PMV Fund), but has been declared insolvent after the underlying accident, the injured policyholder's recourse is not against his or her own insurer for UM coverage but against the PMV Fund. The court then discussed the question of what is to occur if the Superintendent of Insurance, as administrator of the PMV Fund, denies the claimant recovery from the fund. Specifically, the court inquired whether this would be a denial of coverage within the meaning of Insurance Law § 3420(f)(1), thereby triggering the claimant's right to UM coverage from his own insurer. Insofar as the only evidence in the record on the issue of whether the superintendent was denying the claim was a letter from the superintendent stating that coverage from the PMV Fund was being denied "at this time" due to "financial strain," the court referred the question of whether the denial of recovery from the PMV Fund is a denial of coverage, to the supreme court for determination at a hearing, at which the superintendent would be joined as a party.

> The insurer has the burden of proving the validity of its timely cancellation of an insurance policy.

This decision was rendered after granting the superintendent's motion to reargue or clarify the court's prior order, rendered in February 2004.[86]

In *Metropolitan Property & Casualty Ins. Co. v. Carpentier*,[87] the court reiterated that where the insured purchased SUM coverage, as opposed to merely compulsory UM coverage, "the insured is entitled to seek such benefits under the insolvency of the alleged tortfeasor's insurer and need not proceed against the PMV Fund."[88]

In *Pomerico v. ELRAC Inc.*,[89] the court held that once the tortfeasor's insurer became insolvent, the tortfeasor became an uninsured person for purposes of Insurance Law § 5208 and, thus, the injured party was entitled to compel the Motor Vehicle Accident Indemnification Corp. (MVAIC) to represent the tortfeasor.

Underinsured Motorist Issues

Trigger of Coverage

In *Russell v. New York Central Mutual Fire Ins. Co.*,[90] the court held that "[a]n insurer's duty to pay SUM benefits

does not arise until the insured demonstrates that the limits of his or her bodily injury coverage exceeds the same coverage in the tortfeasor's policy."

In *Rodriguez v. Metropolitan Property & Casualty Ins. Co.*,[91] the court held that where the claimants failed to provide the documentation to establish that their bodily injury coverage exceeded the policy limits available to the tortfeasor, their action to recover SUM benefits was properly dismissed.

Consent to Settle

The Regulation 35-D SUM endorsement requires that the claimant obtain consent to any settlement with the tortfeasor(s) as a condition precedent to an underinsured motorist claim.

In *State Farm Mutual Auto. Ins. Co. v. Lucano*,[92] the court rejected the claimant's contention that her belated verification that no excess insurance was available excused her failure to obtain the petitioner's consent to her settlement of the underlying action and execution of a general release because that fact did not obviate the prejudice to the petitioner's subrogation rights since the tortfeasors were not judgment-proof.

Exhaustion of Underlying Limits

By statute and by the terms of the applicable SUM endorsement, no obligation exists under an underinsured motorist policy unless and until the underlying limits of the tortfeasor's insurance coverage have been exhausted by the payment of judgments or settlements.

In *Russell v. New York Central Mutual Fire Ins. Co.*,[93] the court held that a valid underinsured motorist claim does not arise until the limits of all available bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

In *Webb v. Lumberman's Mutual Casualty Co.*, the court reminded that the underinsured motorist scheme "requires primary insurers to pay every last dollar and requires plaintiffs to accept no less, prior to the initiation of an underinsurance claim."[94] In that case, the court found that the dismissal of the underlying personal injury action against the tortfeasor on the ground that there was no causal connection between the defendant's negligence and the claimant's alleged injuries precluded such exhaustion and, therefore, eliminated the claimant's entitlement to SUM benefits.

In *Liberty Mutual Ins. Co. v. Doherty*,[95] the court held that the underinsured motorist benefits provision of the policy was triggered when the claimant exhausted, through a settlement, the bodily injury liability policy limits under the policy of the offending vehicle, which was less than the liability coverage provided under the SUM policy. The court further held that the claimant was not also required to exhaust the liability coverage limits under a separate policy for the operator of the offending vehicle prior to pursuing a claim for underinsured motorist benefits. ■

1. This section continues the discussion of "General Issues" from Part I in the May 2005 issue of the *Journal*.
2. 11 A.D.3d 668, 783 N.Y.S.2d 404 (2d Dep't 2004).
3. 3 Misc. 3d 634, 777 N.Y.S.2d 251 (Sup Ct., Richmond Co. 2004).
4. 13 A.D.3d 594, 786 N.Y.S.2d 341 (2d Dep't 2004).
5. 13 A.D.3d 405, 785 N.Y.S.2d 707 (2d Dep't 2004).
6. Ins. Law § 5102(d).
7. *State Farm Mut. Auto. Ins. Co. v. Kankam*, 3 A.D.3d 418, 770 N.Y.S.2d 714 (1st Dep't 2004).
8. 5 A.D.3d 476, 772 N.Y.S.2d 588 (2d Dep't 2004).
9. *See In re Steck*, 89 N.Y.2d 1082, 1084, 659 N.Y.S.2d 839 (1996).
10. 5 A.D.3d 277, 774 N.Y.S.2d 679 (1st Dep't 2004).
11. 4 Misc. 3d 1012A, 791 N.Y.S.2d 874 (Sup. Ct., Bronx Co. 2004).
12. 4 A.D.3d 422, 771 N.Y.S.2d 378 (2d Dep't 2004).
13. 7 A.D.3d 717, 776 N.Y.S.2d 829 (2d Dep't 2004).
14. 8 A.D.3d 390, 777 N.Y.S.2d 652 (2d Dep't 2004).
15. 6 Misc. 3d 1035A, 2004 N.Y. Misc. LEXIS 3027 (Sup. Ct., Queens Co. 2004).
16. 6 A.D.3d 441, 776 N.Y.S.2d 291 (2d Dep't 2004).
17. *See* N. Dachs & J. Dachs, *Tricks of the Trade: Let the 'Trickster' and 'Trickee' Beware*, N.Y.L.J., May 11, 2004, p. 3, col. 1.
18. *See Liberty Mut. Ins. Co. v. Morgan*, 11 A.D.3d 615, 782 N.Y.S.2d 662 (2d Dep't 2004); *AIU Ins. Co. v. Marciante*, 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004); *N.Y. Cent. Mut. v. Coriolan*, 5 A.D.3d 493, 772 N.Y.S.2d 827 (2d Dep't 2004).
19. 11 A.D.3d 463, 783 N.Y.S.2d 379 (2d Dep't 2004).
20. 7 A.D.3d 629, 775 N.Y.S.2d 890 (2d Dep't 2004).
21. 11 A.D.3d 615.
22. 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004).
23. 5 A.D.3d 493.
24. 12 A.D.3d 1142, 784 N.Y.S.2d 410 (4th Dep't 2004).
25. 8 A.D.3d 582, 778 N.Y.S.2d 713 (2d Dep't 2004).
26. *See Commerce & Indus. Ins. Co. v. Nester*, 230 A.D.2d 795 (2d Dep't 1996), *aff'd*, 90 N.Y.2d 255, 660 N.Y.S.2d 366 (1997); *see also One Beacon Ins. Co. v. Bloch*, 298 A.D.2d 522, 748 N.Y.S.2d 783 (2d Dep't 2002).
27. 13 A.D.3d 588, 789 N.Y.S.2d 160 (2d Dep't 2004).
28. 9 A.D.3d 429, 781 N.Y.S.2d 41 (2d Dep't 2004).
29. *Nationwide Ins. Co. v. McDonnell*, 272 A.D.2d 547, 548, 708 N.Y.S.2d 146 (2d Dep't 2000).
30. 5 A.D.3d 684, 774 N.Y.S.2d 758 (2d Dep't 2004).
31. N.Y.L.J., Mar. 23, 2004, p. 20, col. 5 (Sup. Ct., Nassau Co. 2004).
32. N.Y.L.J., Mar. 5, 2004, p. 20, col. 1 (Sup. Ct., Nassau Co. 2004) (citations omitted).
33. 5 A.D.3d 776, 773 N.Y.S.2d 608 (2d Dep't 2004).
34. 9 A.D.3d 431, 779 N.Y.S.2d 788 (2d Dep't 2004).
35. 5 A.D.3d 762, 774 N.Y.S.2d 565 (2d Dep't 2004).
36. 6 A.D.3d 961, 774 N.Y.S.2d 849 (3d Dep't 2004).
37. *Id.* at 962 (citing *Santiago v. 1370 Broadway Assoc.*, 96 N.Y.2d 765, 766, 725 N.Y.S.2d 599 (2001)).
38. 8 A.D.3d 253, 777 N.Y.S.2d 323 (2d Dep't 2004).
39. 8 A.D.3d 564, 780 N.Y.S.2d 19 (2d Dep't 2004).
40. 6 Misc. 3d 1007A (Sup. Ct., Kings Co. 2004).
41. 12 A.D.3d 353, 784 N.Y.S.2d 138 (2d Dep't 2004).

42. *See* Mitchell S. Lustig & Jill Lakin Schatz, *Representing the SUM Claimant: Beware the Statute of Limitations*, N.Y.L.J., Dec. 6, 2004, p. 4, col. 4.

43. *See Moore v. Ewing*, 9 A.D.3d 484, 781 N.Y.S.2d 51 (2d Dep't 2004); *79th Realty Co. v. Wausau Ins. Co.*, 7 A.D.3d 507, 776 N.Y.S.2d 96 (2d Dep't 2004); *Alvarez v. Allstate Ins. Co.*, 5 A.D.3d 270, 773 N.Y.S.2d 298 (1st Dep't 2004); *N.Y. Cent. Mut. Fire Ins. Co. v. Majid*, 5 A.D.3d 447, 773 N.Y.S.2d 429 (2d Dep't 2004).

44. 13 A.D.3d 788, 786 N.Y.S.2d 604 (3d Dep't 2004).

45. *Id. See In re Vanguard Ins. Co. (Polchlopek)*, 18 N.Y.2d 376, 275 N.Y.S.2d 515 (1966). Note: The *Baust* decision contains the puzzling statement that the SUM insurer "could have protected itself from recovery of benefits in this situation by 'exclud[ing] from the definition of an uninsured auto those autos upon which a disclaimer of coverage is made subsequent to an accident.'" The basis and validity of this statement is unclear given the existence of the standard, mandatory SUM endorsement of Regulation 35-D.

46. 12 A.D.3d 329, 784 N.Y.S.2d 863 (1st Dep't 2004).

47. 4 A.D.3d 530, 771 N.Y.S.2d 717 (2d Dep't 2004).

48. 3 A.D.3d 554, 771 N.Y.S.2d 176 (2d Dep't 2004).

49. 369 F.3d 102 (2d Cir. 2004).

50. N.Y.L.J., July 27, 2004, p. 19, col. 3 (Sup. Ct., Nassau Co. 2004).

51. *See also Heegan v. United Int'l Ins. Co.*, 2 A.D.3d 403, 767 N.Y.S.2d 861 (2d Dep't 2003) (no excuse by insurer for failing promptly to commence investigation); *Martin v. Safeco Ins. Co. of Am.*, 1 Misc. 3d 912A, 781 N.Y.S.2d 625 (Sup. Ct., N.Y. Co. 2004) (disclaimer untimely where insurer waited 47 days before commencing investigation and an additional 21 days before issuing disclaimer).

52. 5 A.D.3d 447, 773 N.Y.S.2d 429 (2d Dep't 2004).

53. *See also Lake Carmel Fire Dep't, Inc. v. Utica First Ins. Co.*, 2 Misc. 3d 1004A, 784 N.Y.S.2d 921 (Sup. Ct., Queens Co.) ("It is perfectly reasonable that the insurer verify the surrounding facts so that, if it chooses to disclaim, it does so on the basis of concrete evidence").

54. 5 A.D.3d 449, 773 N.Y.S.2d 431 (2d Dep't 2004).

55. *See also Blue Ridge Ins. Co. v. Jiminez*, 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004) (27-day delay was reasonable as a matter of law); *Pub. Serv. Mut. Ins. Co. v. Harlen Hous. Assoc.*, 7 A.D.3d 421, 777 N.Y.S.2d 438 (1st Dep't 2004) (27- or 37-day delay was not unreasonable).

56. *See Greenidge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430 (S.D.N.Y. 2004); *Atl. Mut. Cos. v. Ceserano*, 5 A.D.3d 382, 773 N.Y.S.2d 80 (2d Dep't 2004) (no duty to disclaim where "coverage did not exist under the terms of the policy in the first instance"); *Nat'l Union Fire Ins. Co. v. Utica First Ins. Co.*, 6 A.D.3d 681, 775 N.Y.S.2d 175 (2d Dep't 2004) ("Disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under such circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed."); *see also N.H. Ins. Co. v. Zurich Ins. Co.*, N.Y.L.J., July 27, 2004, p. 19, col. 3 (Sup. Ct., Nassau Co. 2004).

57. 6 A.D.3d 614, 775 N.Y.S.2d 83 (2d Dep't 2004) (citations omitted).

58. *Id.* at 615 (citations omitted).

59. 5 A.D.3d 410, 774 N.Y.S.2d 153 (2d Dep't 2004).

60. *See Hereford Ins. Co. v. Mohammod*, 7 A.D.3d 490, 776 N.Y.S.2d 87 (2d Dep't 2004).

61. 6 A.D.3d 534, 774 N.Y.S.2d 435 (2d Dep't 2004).

62. *See also Halali v. Evanston Ins. Co.*, 8 A.D.3d 431, 779 N.Y.S.2d 119 (2d Dep't 2004).

63. 3 A.D.3d 494, 771 N.Y.S.2d 141 (2d Dep't 2004).

64. *See also Viggiano v. Encompass Ins. Co.*, 6 A.D.3d 695, 775 N.Y.S.2d 533 (2d Dep't 2004); Mitchell S. Lustig & Jill Lakin Schatz, *Disclaimers of Coverage for Late Notice*, N.Y.L.J., June 7, 2004, p. 1, col. 1.

65. 5 A.D.3d 449, 773 N.Y.S.2d 431 (2d Dep't 2004).

66. *Id.* at 450 (citing *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168–69, 278 N.Y.S.2d 793 (1967)).

67. *See Pawtucket Mut. Ins. Co. v. Soler*, 184 A.D.2d 498, 499, 584 N.Y.S.2d 192 (2d Dep't 1992); *see also Baust v. Travelers Indem. Co.*, 13 A.D.3d 788, 786 N.Y.S.2d 604 (3d Dep't 2004) (defendant failed to meet "heavy" burden of providing willful and avowed obstruction on the part of plaintiff as a matter of law where plaintiff allegedly refused to attend numerous IMEs); *N.Y. Cent. Mut. Fire Ins. Co. v. Bresil*, 7 A.D.3d 716, 777 N.Y.S.2d 174 (2d Dep't 2004) (refusal to answer questions and referral to attorney do not reflect attitude of willful and avowed obstruction); *Blinco v. Preferred Mut. Ins. Co.*, 11 A.D.3d 924, 782 N.Y.S.2d 483 (4th Dep't 2004); *Warnock v. Blue Ridge Ins. Co.*, 6 A.D.3d 697, 775 N.Y.S.2d 158 (2d Dep't 2004); *MetLife Auto & Home v. Burgos*, 4 A.D.3d 477, 772 N.Y.S.2d 357 (2d Dep't 2004); *see also* N. Dachs & J. Dachs, Thrasher *Threshold Thriving*, N.Y.L.J., Mar. 15, 2005, p. 3, col. 1.

68. 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004).

69. *See Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *Haslauer v. N. Country Adirondack Coop. Ins. Co.*, 237 A.D.2d 673, 654 N.Y.S.2d 477 (3d Dep't 1997); *Aetna Cas. & Sur. Co. v. Rosen*, 205 A.D.2d 684, 613 N.Y.S.2d 664 (2d Dep't 1994).

70. 6 A.D.3d 692, 775 N.Y.S.2d 162 (2d Dep't 2004).

71. 13 A.D.3d 198, 786 N.Y.S.2d 482 (1st Dep't 2004).

72. 12 A.D.3d 229, 785 N.Y.S.2d 52 (1st Dep't 2004).

73. *Id.* (quoting *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829, 414 N.Y.S.2d 117 (1978)).

74. 8 A.D.3d 663, 780 N.Y.S.2d 357 (2d Dep't 2004).

75. 8 A.D.3d 571, 780 N.Y.S.2d 21 (2d Dep't 2004).

76. *See also Am. Home Assurance Co. v. Manzo*, 12 A.D.3d 369, 783 N.Y.S.2d 304 (2d Dep't 2004).

77. 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004).

78. *Id.* at 267 (citing *Employers Commercial Union Ins. Co. v. Firemen's Fund Ins. Co.*, 45 N.Y.2d 608, 611 (1978); *Kaplan v. Travelers Ins. Co.*, 205 A.D.2d 501, 503, 612 N.Y.S.2d 658 (2d Dep't 1994)).

79. 14 A.D.3d 704, 789 N.Y.S.2d 267 (2d Dep't 2005).

80. 11 A.D.3d 694, 783 N.Y.S.2d 400 (2d Dep't 2004).

81. *See Utica Mut. Ins. Co. v. Leconte*, 3 A.D.3d 534, 770 N.Y.S.2d 750 (2d Dep't 2004).

82. 5 A.D.3d 601, 772 N.Y.S.2d 850 (2d Dep't 2004).

83. *See also Merch. Mut. Ins. Group v. Idore*, 10 A.D.3d 613, 781 N.Y.S.2d 674 (2d Dep't 2004).

84. 5 A.D.3d 480, 772 N.Y.S.2d 565 (2d Dep't 2004).

85. __ A.D.3d __, 791 N.Y.S.2d 605, 2005 N.Y. App. Div. LEXIS 2630 (2d Dep't 2005); *see also Agway Ins. Co. v. De Leon*, 5 Misc. 3d 1018A (Sup. Ct., Queens Co. 2004).

86. 4 A.D.3d 355, 773 N.Y.S.2d 68 (2d Dep't 2004).

87. 7 A.D.3d 627, 777 N.Y.S.2d 146 (2d Dep't 2004).

88. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dep't 2002); *Allcity Ins. Co. v. Cedena*, 6 Misc. 3d 1007A (Sup. Ct., Kings Co. 2004).

89. 1 Misc. 3d 908A, 781 N.Y.S.2d 627 (Civ. Ct., Queens Co. 2004).

90. 11 A.D.3d 668, 783 N.Y.S.2d 404 (2d Dep't 2004).

91. 7 A.D.3d 775, 776 N.Y.S.2d 868 (2d Dep't 2004).

92. 11 A.D.3d 548, 783 N.Y.S.2d 618 (2d Dep't 2004).

93. 11 A.D.3d 668.

94. __ F. Supp. 2d __, 2004 U.S. Dist. LEXIS 12942 (W.D.N.Y. July 2, 2004); *Fed. Ins. Co. v. Watnick*, 80 N.Y.2d 539, 546, 592 N.Y.S.2d 624 (1992).

95. 13 A.D.3d 629, 789 N.Y.S.2d 55 (2d Dep't 2004).

Proposed Amendment to EPTL 4-1.4

Expand Grounds for Parental Disqualification

By Ilene S. Cooper and Staci A. Graber

A parent is disqualified from inheriting as a distributee of the estate of a deceased child when the parent has failed to support or has abandoned the child, according to the current provisions of section 4-1.4 of New York's Estates, Powers and Trusts Law (EPTL).[1] The statute is silent, however, where a parent is found to have permanently neglected or abused a child. Indeed, while such circumstances may result in criminal prosecution or the termination of parental rights pursuant to Social Services Law § 384-b,[2] they have no impact upon the post-mortem right of a parent to inherit as a distributee of a child's estate.

The matter is undoubtedly one of legislative oversight rather than intent, and requires rectification. Given the growing number of reported cases of abuse, children today are in need of every additional protection the law can provide.

Toward this end, in 2002, the Executive Committee of the Trusts and Estates Law Section of the New York State Bar Association voted in support of a proposed amendment to EPTL 4-1.4(a) to include a finding of abuse pursuant to Social Services Law § 384-b as a separate and distinct ground for disqualification of a parent as an intestate distributee of a child's estate. Upon consideration of this proposal, the New York State Bar Association's House of Delegates expanded its terms to encompass any of the instances where parental rights are terminated pursuant to § 384-b of the Social Services Law. That proposal, which was passed by the New York State Senate (2005 Sen. Bill #43), and is now before the New York State Assembly reads as follows:

> Section 1. Section 4-1.4 of the estates, powers and trust law is REPEALED and a new section 4-1.4 is added to read as follows:
>
> Section 4-1.4. Disqualification of parent to take intestate share.
>
> (a) No distributive share in the estate of a deceased child shall be allowed to a parent if a parent, while such child is under the age of twenty-one years:
>
> (1) has failed or refused to provide for the child or has abandoned such child, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child; or
>
> (2) has been the subject of a proceeding pursuant to Section 384-b of the Social Services Law which:
>
> (A) resulted in an order terminating parental rights, or
>
> (B) resulted in an order suspending judgment, in which event the Surrogate's Court may make a deter-

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mination disqualifying the parent on the grounds adjudicated by the Family Court, if the Surrogate's Court finds, by a preponderance of the evidence, that the parent, during the period of suspension, failed to comply with the Family Court order to restore the parent-child relationship.

(b) Subject to the provisions of subdivision eight of two hundred thirteen of the civil practice law and rules, the provisions of subdivision (a)(1) of this section shall not apply to a biological parent who places the child for adoption based upon (1) a fraudulent promise, not kept, to arrange for and complete the adoption of such child, or (2) other fraud or deceit by the person or agency where before the death of the child, the person or agency fails to arrange for the adoptive placement or petition for the adoption of the child, and fails to comply timely with conditions imposed by the court for the adoption to proceed.

(c) In the event that a parent or spouse is disqualified from taking a distributive share in the estate of a decedent under this section of 5-1.2, the estate of such decedent shall be distributed in accordance with 4-1.1 as though such spouse or parent had predeceased the decedent.

Historical Perspective

The concept of disqualification originated in 1929 pursuant to § 87 of the Decedent's Estate Law (DEL), and initially affected only a spouse's right to inherit. Thereafter, the statute was amended several times, resulting in the addition of subdivision (e), which enumerated not only grounds for the disqualification of a spouse, but also the forfeiture of a parent to share in the estate of his or her child. Subdivision (e) provided, in part, that no distributive share in the estate of a child would be allowed to a parent who has neglected or refused to provide for the child during infancy or who has abandoned the child during infancy. The intent of the amendment was twofold: to deprive a parent of a distributive share, and to prevent a parent from profiting from his or her own wrong, according to the 1889 decision in *Riggs v. Palmer*.[3] In such cases, disqualification resulted in the distribution of the child's estate as though the parent predeceased the child.

No definitions were provided in DEL § 87 for the terms "neglect" or "abandonment." The terms were, however, defined in DEL § 133(4)(c), currently EPTL 5-4.4, as a "voluntary breach or neglect of duty to care for and train the child and a duty to supervise and guide his growth and development."[4] Early cases further interpreted abandonment to include "neglect and refusal to perform natural and legal obligations to care and support, withholding his presence, his care, opportunity to display voluntary affection, and neglect to lend support and maintenance."[5] Under both DEL §§ 87 and 133, neglect, refusal to support, and abandonment are separate and distinct grounds for disqualification. Although the separate ground of neglect was omitted from the recodification of DEL § 87 to EPTL 4-1.4, decisions continue to find neglect a ground for disqualification under EPTL 4-1.4(a), relying upon public policy and the principles established in *Riggs*.[6]

In *Riggs*, a beneficiary under a will was convicted of murdering the testator so that he could accelerate the distribution of the estate for his benefit. At the time of the decision, no specific statute was in place to provide guidance to the court regarding disqualification; only general laws of devolution of property existed. Notwithstanding the lack of statutory specificity, the court held that "it could not have been the intention of the legislature in the general laws passed for the devolution of property by will or descent, that they should operate in favor of one who murdered his ancestor in order to come into possession of his estate." The court was not concerned with the general language contained in the existing laws but rather with public policy.[7]

In *Riggs*, a beneficiary under a will was convicted of murdering the testator so that he could accelerate the distribution of the estate for his benefit.

Since the opinion in *Riggs*, courts have created a distinction between those persons who act with intent to cause harm and those who commit acts that are accidental, involuntary, or performed in self-defense. The rationale for these decisions is that one who acts under the latter circumstances does not do so with the requisite intent to cause harm to another.[8] The same result arises where a defendant-beneficiary is determined to be incompetent or insane. Such person is not considered to act with the intent to profit from a legal wrong, and thus, the principles of *Riggs* are inapplicable.

Nevertheless, the basis for disqualification has been extended to include those persons who act with reckless disregard for the life of another. For example, in *In re Wells*,[9] the defendant-beneficiary was convicted of manslaughter in the second degree, a non-intentional felony. The court found that the defendant was not entitled to share in the decedent's estate, concluding that while the crime was not considered an intentional felony, it involved a "reckless and conscious disregard for the life of another."[10] Section 15.05(3) of the New York Penal Code defines recklessness as conduct by a person who "is aware of and consciously disregards a substantial and unjustifiable risk that a result will occur and that such cir-

cumstance exists." Because the defendant in *Wells* was consciously aware of the risk and possible result of her actions, her conviction of second-degree manslaughter barred her from inheriting from the decedent's estate despite the lack of intent.[11]

In a similar case, *In re Estate of Grant*,[12] a man was convicted of second-degree manslaughter in the death of his wife and was barred from receiving both his distributive share in his wife's estate and the proceeds of a life insurance policy on her life. The court explained that although the second-degree manslaughter conviction did not automatically bar inheritance because it is not an intentional crime, public policy dictates that the principle of disqualification be applied to prohibit a beneficiary from profiting from such reckless conduct which caused another's death.

It is clear that the trend in case law sustains the settled principle that prohibits one from profiting from wrongful conduct, whether intentional or reckless, at the expense of an innocent victim's estate, and, perhaps more important in this context, expands the application of this rule when the interests of justice and public policy so require.

> less than eighteen years of age whose parent or persons legally responsible for his care inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates substantial risk of death, or . . . protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ.[15]

The court opined that there is no specific requirement of the use of force in the definition of an abused child and that it is the actual or potential impact on the child as opposed to the per se seriousness of the injury that forms the predicate for abuse. In view of the purpose of the Family Court Act to protect children from injury or mistreatment, physically, mentally, and emotionally, the court terminated the father's parental rights. Significantly, the court terminated the mother's parental rights as well due to a failure on her part to protect her son from the abuse of his father.[16]

In *Mark G. ex rel. Jones v. Sabol*,[17] the court disqualified both parents from inheriting from the child's estate, albeit the father and not the mother was found guilty of manslaughter in the child's death. As to the mother, the court concluded that she had "contributed significantly to the child's death" in that she had previously inflicted physical abuse upon him during his lifetime and had stood by and took no affirmative steps to protect her child from the abusive conduct of his father that resulted in his death. The result was largely influenced by the court's sense of morality, as it held: "While the instant situation may not be exactly what the drafters [of EPTL 4-1.4] had in mind, it clearly fits within the ambit of the statute in wording and in spirit . . . as a matter of case and statutory law, *morality and common sense*."[18]

A parent whose parental rights are terminated should be disqualified as a distributee of the child's estate.

To this extent, both statute and evolving judicial precedent support the conclusion that a parent whose parental rights are terminated on the grounds of permanent neglect or abuse of a child should be disqualified as a distributee of the child's estate on the grounds that such conduct evinces a reckless disregard for the child's life.[13]

Disqualification should apply as equally to the parent who actually abuses or neglects a child as to the parent who remains idle and allows the abuse and neglect to occur. Both parents have a duty to care for and protect their child; both have intentionally or recklessly failed to fulfill that role.

A number of cases speak to this issue. For example, in *In re Shane T.*,[14] the Commissioner of Social Services filed a petition against the natural parents of Shane T., who was 14, seeking an adjudication that the boy was an abused child. The child was continually called "fag," "faggot," and "queer" by his father both at home and in public, and his mother ignored the boy's pleas to intervene. The continual humiliations and accusations caused the child considerable stomach pain and other physical and emotional illnesses that would likely require years of psychiatric care.

In the decision, the court referenced the Family Court Act's definition of abuse, which states that an abused child is one

The proposed EPTL statute formally legislates the foregoing views by accommodating statutory and judicial precedent supporting disqualification on the grounds of intentional or reckless conduct, as well as moral and public sentiment to ensure the well-being of society's children. Additionally, it preserves the constitutional concerns of due process by relying upon the procedural safeguards requisite to a termination of parental rights pursuant to Social Services Law § 384-b.

Termination of Parental Rights

Once a child is placed in foster care after complaints of abuse or neglect are brought before the court,[19] an authorized agency, such as the Administration for Children's Services (ACS) or the Department of Social Services (DSS), will evaluate the home situation and make a rec-

ommendation to the court as to necessary steps to be taken by the parent to strengthen the parental relationship. The agency will recommend the specific requirements of the parent in order to regain custody of the child. Additionally, the parent is required to partake in one or more of the following, among others: parenting skill sessions, domestic violence classes, and substance abuse classes. Section 384-b requires that a parent be given a minimum of one year to comply before it can be determined that the parent has failed to comply with the court's requirements to plan for the child's future and safe return to the home.

If the detrimental circumstances have gone unchanged, to the extent that it would not be in the best interests of the child to return to the parent, a petition, which specifically states the agency's recommendations and the diligent efforts made to cure the household conditions, is filed with the family court, which begins the proceeding for the commitment of the guardianship and custody of the child.

Once the parent is served with a summons, an attorney may be assigned for those parents who cannot afford private counsel. A fact-finding hearing then takes place to determine whether the allegations made in the petition are supported by clear and convincing evidence.

Once the cause of action is established, the law requires that there be a dispositional hearing, at which termination is based upon abuse or permanent neglect. A dispositional hearing is not required, but may be had, in the case of termination based upon abandonment or mental illness or retardation.[20] Generally, in the latter circumstances, once a cause of action for termination is established, the child is freed for adoption. The quantum of proof at the dispositional hearing is clear and convincing evidence.

At the conclusion of the dispositional hearing, the court may dismiss the petition if the allegations are not established; enter a suspended judgment[21] for a period of no more than one year, unless exceptional circumstances are found; or commit the guardianship and custody of the child, which terminates the parents' rights and frees the child for adoption.

In the event that a suspended judgment is entered, the parent must take steps as directed by the court to reestablish the parent-child relationship. At the conclusion of its terms, however, the judgment is not self-executing, and steps must be taken by the agency to either extend the judgment or move to have it "violated."[22] If the agency fails to do anything, the proceeding is dismissed and the agency must institute a new proceeding for termination of parental rights. If the agency acts, it, and not the parent, must establish by a preponderance of the evidence that the parent failed to comply with the requirements of the suspended judgment.[23] If the agency succeeds in its proof, termination of parental rights, as previously adjudicated, will be effected.

> Disqualification should apply equally to the parent who remains idle and allows the abuse and neglect to occur.

A Case for Amending EPTL 4-1.4

Disqualification of a parent whose parental rights have been terminated is supported by case law and public policy. Indeed, in a parent-child relationship the argument for disqualification is stronger than that in the spousal relationship given the duty of the parent to care for and protect the child, and the likelihood of serious harm or death to a child who is victimized and lacks the wherewithal to leave home or seek help. The proposed amendment to EPTL 4-1.4 would serve as a deterrent to parental conduct that endangers the welfare of a child.

As a general rule, the family court would adjudicate the issue of abuse, to which the surrogate's court would defer as being the court with the greater expertise to make such findings. This would guarantee that no undue burdens would be placed on the surrogate's court to make these determinations on its own.

Where a finding is made to commit the guardianship and custody of a child and to free the child for adoption, disqualification, under the proposed amendment, would automatically occur. In those cases where a child dies during a period of suspended judgment, the proposed amendment provides that the surrogate's court conclude the proceeding and render a determination based on the record developed by the family court and any additional evidence – such as the number of parental attempts during the period to fulfill the conditions of the family court order – needed to render a just decision limited solely to the issue of whether a parent should be disqualified on the grounds of abuse.

Today, with cases of child abuse and neglect frequently in the news, we recoil at the thought of innocent children suffering, either physically or emotionally, at the hands of a friend, family member or, worse, a parent. Despite offering no tolerance for such abuse, New York law inexplicably stops short of providing safeguards post-mortem. The proposed amendment would remedy this situation by providing a framework by which a court may disqualify a parent whose parental rights are terminated. Unfortunately, until this promising legislation is passed, such parents may continue to inherit from their child's estate. ■

1. EPTL 4-1.4(a) provides, in pertinent part, that "[n]o distributive share in the estate of a deceased child shall be allowed to a parent who has failed or refused to provide for, or has abandoned such child while such child is under

the age of twenty-one years, . . . unless the parental relationship and duties are subsequently resumed and continue until the death of the child."

2. Social Services Law § 384-b authorizes termination of parental rights based upon a finding of abandonment, permanent neglect, parental mental illness or retardation, and severe or repeated abuse. Although the proposed amendment to EPTL 4-1.4(a), as passed by the House of Delegates and New York State Senate (*see infra)*, would require disqualification whenever parental rights are terminated pursuant to Social Services Law § 384-b, it had its genesis with case law regarding forfeiture and the notion that one may not profit from intentional or reckless harm caused to another, as in the case of parental abuse and permanent neglect.

3. 115 N.Y. 506 (1889).

4. DEL § 133; *see also In re Herbster's Estate*, 121 N.Y.S.2d 360 (Sur. Ct. 1953).

5. *Id.*

6. 115 N.Y. 506; *see also In re Loud's Estate*, 70 Misc. 2d 1026, 334 N.Y.S.2d 969 (Sur. Ct., Kings Co. 1972).

7. The principle in *Riggs* has been codified to a limited extent in EPTL 4-1.6 which provides that a joint tenant convicted of murder in the first degree or second degree as defined in Penal Law §§ 125.27, 125.25, respectively, shall not be entitled to the distribution of any moneys associated with that tenancy except for the moneys contributed by the convicted joint tenant.

8. *See, e.g., In re Fitzsimmons' Estate*, 64 Misc. 2d 622, 315 N.Y.S.2d 590 (Sur. Ct., Erie Co. 1970).

9. 76 Misc. 2d 458, 350 N.Y.S.2d 114 (Sur. Ct., Nassau Co. 1973).

10. *See also In re Savage*, 175 Misc. 2d 880, 670 N.Y.S.2d 716 (Sur. Ct., Rockland Co. 1998).

11. 5 Warren's Heaton on Surrogate's Courts, § 74.13[1], at p. 74-42; *see also Savage*, 175 Misc. 2d 880.

12. *In re Estate of Grant*, N.Y.L.J., Apr. 12, 1984, p. 12 (Sur. Ct., Bronx Co.).

13. *See* Social Services Law § 384-b(8)(a) defining a "severely abused" child as one who is abused "as a result of the reckless or intentional acts of the parent."

14. 115 Misc. 2d 161, 453 N.Y.S.2d 590 (Fam. Ct., Richmond Co. 1982).

15. Family Court Act § 1012(e)(i).

16. *See also In re Custody & Guardianship of Marino S., Jr.*, 181 Misc. 2d 264, 274, 693 N.Y.S.2d 822 (Fam. Ct., N.Y. Co. 1999), *aff'd*, 293 A.D.2d 223, 741 N.Y.S.2d 207 (1st Dep't 2002); *Mark G. ex rel. Jones v. Sabol*, 180 Misc. 2d 855, 694 N.Y.S.2d 290 (Sup. Ct., N.Y. Co. 1999).

17. 180 Misc. 2d 855.

18. *Id.* at 860.

19. *See* Family Court Act art. 10.

20. Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, N.Y. St. B.J., May 2001, at p. 46.

21. In a case where a judgment is suspended, the court has entered a judgment terminating parental rights but has suspended the effect of the judgment pending parental attempts to restore the parent-child relationship. *See In re Grace Q.*, 200 A.D.2d 894, 607 N.Y.S.2d 457 (3d Dep't 1994).

22. *Id.*

23. *Id.*

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Estate Planning in the Face of Divorce: An Ounce of Prevention . . .

As a trusts and estates attorney, my exposure to matrimonial disputes generally begins after one of the parties has died. That is unfortunate. Bitter experience teaches that we lawyers often do our clients' families (excluding the soon-to-be ex-spouse) a great disservice when we fail to promptly focus on the potential estate-related problems engendered by separation and divorce.

Review the Plan

One of the first items of business when separation or divorce is contemplated should be to review the client's testamentary plan. Your client should revoke any existing will that favors the anticipated ex-spouse and execute a new will with a minimum elective share clause[1] bequeathing the minimum required by law. If there is an untimely death during the divorce proceeding, even intestacy is preferred to a will that leaves everything to the other spouse, especially if your client has children from a prior marriage. In discussing the client's estate plan, ask:

- Is there a revocable lifetime trust favoring the spouse? If there is, amend or revoke it.
- Are there jointly held assets? If there is a house, condo or co-op apartment owned as tenants by the entirety, you probably cannot do anything about it without the other spouse's cooperation, but a standard minimum elective share bequest clause will offset the value of the survivor's interest.
- Are there life insurance policies naming the soon-to-be ex-spouse as beneficiary? If so, change the beneficiary to a trust for your client's children or, at the very least, to the executors/administrators of the estate.
- Are there retirement plan accounts? If so, change the beneficiary designation where possible. Certain beneficiary designations in plans that are subject to ERISA may not be changed without the spouse's consent. Other designations can and should be changed promptly.
- Are there any Totten trust accounts naming the other spouse as beneficiary? If so, change the account title or amend the client's will to expressly revoke each such account.[2]
- Is there a pre-nuptial or post-nuptial agreement with the spouse? If there is an existing agreement, you need to review it as it may restrict the client's ability to make some of the changes discussed in this article.

You will have to adapt these general recommendations to the specifics of your client's situation. However, the principal assets of the typical client, such as a house, life insurance, retirement plan and bank and securities accounts, can and should be dealt with on an expedited basis.

If estate planning is not something you do, then refer the client to one of your partners or to an estate planning lawyer so that a prompt review of the client's assets can be undertaken and any necessary changes timely implemented. The failure to promptly and properly deal with these issues can cause disastrous results if the client dies unexpectedly during the course of the matrimonial proceeding, or thereafter, without reassessing whom the natural objects of his or her bounty are and redirecting the distribution of assets to them. Even an interim revised plan is better than leaving one in place that does not reflect the client's changed circumstances.

We start with the premise that until a court of competent jurisdiction renders a decree of divorce or annulment, the parties are still spouses.[3] Because spouses, whether or not in the throes of a matrimonial proceeding, are entitled to certain statutory rights on the death of the other, planning for such a

The good news is that, if you and the client do nothing and the client survives until the marriage is dissolved but then dies, the former spouse has no claim in intestacy.

possibility should be one of the first matters discussed.

These rights include a distributive share in intestacy, an elective share, and so-called exempt property. If the client dies without a will during the course of a matrimonial proceeding, the surviving spouse, if there are issue, is entitled to $50,000 plus one-half of the residue, or 100% if there are no issue.[4] If there is a will, the surviving spouse is entitled to whatever is bequeathed to him or her, but no less than his or her elective share amount under EPTL 5-1.1-A (the greater of $50,000 or one-third of the net estate). For deaths occurring after September 1, 1994, the old elective share trusts (one-third of the net estate in trust for the spouse for life, remainder to whomever) no longer satisfy the elective share requirements of EPTL 5-1.1-A. In addition, the spouse is entitled to the "exempt property" described in EPTL 5-3.1.[5]

Good News, Bad News

The good news is that, if you and the client do nothing and the client survives until the marriage is dissolved but then dies, the former spouse has no claim in intestacy. If there is a will, any dispositions to the former spouse or nomination of him or her as fiduciary are deemed revoked under EPTL 5-1.4.[6] In effect, EPTL 5-1.4 creates a conclusive presumption that where a testator, after executing a will, unless the will expressly provides otherwise, is divorced, the marriage is annulled, is declared a nullity, or is dissolved on the ground of absence, then any dispositions to the former spouse or nomination of him or her as fiduciary are revoked and the dispositions are treated as if the former spouse predeceased the testator.

The bad news is that under current New York law, EPTL 5-1.4 and the conversion by operation of law of a tenancy by the entirety into a tenancy in common[7] are the full extent of the "revocatory effect" of a divorce. In other words, unless you and the client take affirmative action to make the necessary title and beneficiary changes, unintended consequences will result.

When reviewing a matrimonial client's estate plan, you should inquire whether the client has created any revocable lifetime trusts, which have become increasingly popular will substitutes. Often when the client has created a lifetime trust, the will is a simple one that merely "pours over" any non-trust assets to the pre-existing trust. Under current law, the dissolution of the marriage has no effect on dispositions under a trust because EPTL 5-1.4 currently has no application to lifetime trusts.

Similarly, since there is no automatic revocation of Totten trust accounts, beneficiary designations of life insurance policies, annuities, retirement accounts and other death benefits which pass independently of the client's will, it is imperative that you review with the client those policies, accounts and death benefits, the current beneficiaries, and the client's choice of new beneficiaries.

Jointly owned property presents special problems, because each joint tenant owns a one-half undivided interest in the whole with a right of survivorship. Although a co-tenant cannot unilaterally affect the ownership of the other co-tenant's interest, he or she can destroy the right of survivorship by transfer or conveyance of his or her interest.[8]

An example of the disastrous consequences that can result from a lack of adequate planning is *Storozynski v. Storozynski*.[9] There, the husband and wife were divorced in November 2000, but the husband never changed the beneficiary designations (from the wife) on his life insurance policies and his IRA accounts. The husband died in October 2002. When the wife sought to collect the life insurance and IRA account proceeds, the husband's estate sought to enjoin collection based on vague waiver language contained in the parties' divorce agreement. The Appellate Division held that the wife was entitled to the proceeds and that the agreement was insufficient as a waiver because the insurance and the IRA account were not specifically mentioned and a waiver of such rights may not be inferred.

Needless to say, but for the current privity rules, this can be a malpractice claim waiting to happen.

Over the past several years, bills have been introduced in the New York State Assembly[10] to extend the revocatory effect of a divorce beyond a will. However, to date, no bill has passed both houses of the state legislature. Even if passed, the "revocatory effect" legislation only solves part of the problem when the marriage is dissolved. It would still have no application if the client dies during the course of the matrimonial proceeding.

When it comes to advising clients who are experiencing marital difficulties, an ounce of prevention can avoid potentially weighty, unintended results. ■

1. Examples of such clauses may be found in many of the leading will drafting treatises such as Klipstein & Bloom, *Drafting New York Wills: Law and Forms* § 10.07 Form 1 (3d ed. 2004).

2. EPTL 7-5.2(2) requires that the will specifically describe the account as "being in trust for a named beneficiary in a named financial institution."

3. The myriad of circumstances where a "spouse" is disqualified under the EPTL are beyond the scope of this article. In sum, EPTL 5-1.2 provides that: "A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that" the surviving spouse is disqualified as such by virtue of divorce, annulment, declaration of the nullity of the marriage, a decree of separation rendered against the spouse, abandonment by the survivor which continued until death, or the failure of the spouse to support the other spouse, provided that the spouse had a duty and the means to do so.

4. EPTL 4-1.1.

5. The exempt property consists of, *inter alia*, (a) $15,000 in money or other property; (b) furniture, utensils, a sewing machine, appliances, computers, and clothing of a value up to $10,000; (c) books, pictures, video and computer tapes, discs and software of a value up to $1,000; (d) domestic animals with food, farm machinery, a tractor and lawn tractor, of a value up to $15,000; and (e) a car of a value up to $15,000.

6. This is contrary to what had been the common law rule in New York. Prior to September 1, 1967 (the effective date of chapter 952 of the Laws of 1966, which added EPTL 5-1.4), a decree of divorce or annulment, by itself, did not effect a revocation of a testamentary disposition in favor of a spouse. *In re Hollister*, 18 N.Y.2d 281, 274 N.Y.S.2d 585 (1966), *overruled in part on other grounds by In re Maruccia*, 54 N.Y.2d 196, 445 N.Y.S.2d 73 (1981). EPTL 5-1.4 provides:

> (a) If, after executing a will, the testator is divorced, his marriage is annulled or its nullity declared or such marriage is dissolved on the ground of absence, the divorce, annulment, declaration of nullity or dissolution revokes any disposition or appointment of property made by the will to the former spouse and any provision therein naming the former spouse as executor or trustee, unless the will expressly provides otherwise, and the provisions, dispositions and appointments made in such will shall take effect as if such former spouse had died immediately before such testator.
>
> If a provision, disposition or appointment is revoked solely by this section, it shall be revived by testator's remarriage to the former spouse.
>
> (b) The provisions of this section apply to the will of a testator who dies on or after its effective date, notwithstanding that the will was executed and the divorce, annulment, declaration of nullity or dissolution was procured prior thereto.

7. *Freeman v. Freeman*, 112 A.D.2d 805, 492 N.Y.S.2d 307 (4th Dep't 1985).

8. *In re Suter*, 258 N.Y. 104 (1932).

9. 10 A.D.3d 419, 781 N.Y.S.2d 141 (2d Dep't 2004).

10. *See, e.g.*, A4037 of 2001 which was referred to the judiciary committee and not reported out of committee. In 1995, as A7862, the bill passed the Assembly but did not pass the Senate.

Kinship Proceedings

Proving the Family Tree

By David N. Adler

Kinship remains a subject of keen interest to our society. A recent bestseller, *In Praise of Nepotism*,[1] analyzes the historical, sociological and political aspects of kinship networks. Thousands of families have traced their genealogical roots to locate family origins. State-of-the-art medical technology and genetic engineering may be on the verge of altering our traditional understanding of next of kin. When legal issues arise, kinship proceedings provide the formal mechanism to determine blood relatives and establish proof of heirship.

In cases that require intestate administration, the accounting proceeding is the stage at which all activities and issues must be finally resolved. As part of the accounting, the fiduciary must make a final determination of whom the decedent's heirs are so that assets can be distributed and the fiduciary can be discharged.[2]

In many estates, the heirs have either been known to the fiduciary or have been established through affidavits at early stages of the administration. When some questions of lineage do remain, the fiduciary has usually done preliminary research and made reference to "alleged heirs" or to heirs who may exist but are "unknown."

Typically, "alleged heirs" often consist of cousins who have come forward with a claim, but the validity of their status is not clear and questions remain about whether there may be other heirs with equal or superior claims. (See sidebar on page 44 for a description of the statutory standards.) The relative remoteness of their lineage, coupled with their potential right to inherit, requires a formal kinship proceeding to confirm their status.

At this point, counsel representing "alleged heirs" objects to the fiduciary's proposed accounting, asserting that the "alleged heirs" are, in fact, the heirs and are entitled to inherit their appropriate percentages of the estate.[3] The interested parties are any alleged claimants (heirs), other claimants, the fiduciary, and the attorney general of New York State because the state maintains an interest in the outcome of this proceeding.[4] If heirship is ultimately unproved or partially proved, a certain fraction of the estate may pass to New York State.[5]

As a matter of course, the court appoints a guardian *ad litem* to represent the interests of any potential unknown heirs.[6] In many kinship matters, the fiduciary is often the counsel to the public administrator, either because no one else has taken the initiative to resolve the estate, or the heirs involved are sufficiently distant.[7] As part of his or her relief, the claimant requests a kinship hearing to determine the identity of the distributees.

The burden of proof is at all times on the claimant, or alleged heir. The standard of proof is a preponderance of the evidence. This standard is based upon a degree of probability and has been defined as "persuading the triers of fact that the existence of the fact is more probable than its non existence."[8] Ultimately, a claimant must demonstrate that he or she was either the closest blood relative to the decedent, or among a class of equally close blood relatives as defined in the parameters of Estate, Powrers and Trusts Law 4-1.1 (EPTL).[9]

Discovery

Once issue has been joined, the matter is traditionally referred to a referee who conducts a hearing and reports to the surrogate's court.[10] The referee is normally a member of the Law Department, and is required to conduct the proceeding in the same manner as a court trying an issue

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without a jury.[11] Initially, the referee may set up a pretrial conference, grant time for discovery, if necessary, and set a date for a hearing.[12] The date set for a hearing is crucial, because all proof must be completed by the claimant within one year of that date, or objections will be dismissed.[13] Often, kinship proceedings take more than one day and may run over many months. Still, that hearing date starts the running of the one-year statute of limitations.

The Civil Practice Law and Rules apply as they would in any civil trial.[14] The discovery devices are also fully available, yet, practically speaking, are extremely limited. This is not a traditional hearing or trial. Often, all other interested parties have absolutely no knowledge regarding any aspects of a claimant's lineage. Thus, discovery here is often not focused on the adversary but consists of a thorough investigation of family information and relationships from a variety of sources. The admissibility of this evidence is discussed below, but the key element is that the focus should be on searching both for individuals who know the claimant's family history, and for various documents reflecting that history.

Where to Look

The personal effects of the decedent are usually an excellent starting point. Normally, these are in the possession of the fiduciary, often the public administrator. Once the authority of counsel to represent a claimant is established, these effects must be made available for review. They may consist of letters, photographs, address books, personal notes, vital statistics records, or other important memoranda. Counsel's own investigation is often more effective. The search for those with knowledge of the family may include relatives, neighbors, clergy, business associates, friends, or employees. Not every individual is expected to have a full and thorough knowledge of the entire family, maternal and paternal sides. Yet, to the extent that isolated areas of knowledge can be acquired from sufficient people, an entire family portrait may be pieced together.

The search for documentary evidence is equally important. Documents can establish tangible proof of the existence and identification of decedent's blood relatives, thereby providing the necessary link in the genealogical chain to the claimant. This evidence includes vital statistics records (birth, death, and marriage), census records, cemetery (burial) records, naturalization and immigration records, court records (surrogate, matrimonial, adoption), church records, Holocaust records, and military records. The nature of records essential to an individual case varies, but it is only limited by one's imagination.

Many records can be obtained by a letter that requests such records, describes the reasons for the request, accompanied by payment of the appropriate fee. If records are not forthcoming or sealed, a court order may be issued and will often produce the records. It may be advisable to retain a certified genealogist to assist counsel in the search. A genealogist is acutely aware of the necessary steps in establishing heirship, may have more ready access to sources of information that are difficult to reach, and can ordinarily complete a search within a set time frame. Upon all evidence, both oral and documentary, constituting proof of kinship being marshaled, the hearing can proceed.

Manner of Proof – Testimonial Evidence

The admissibility of oral testimony offered as proof of any aspect of family relationship is subject to two severe limitations. The first, generally referred to as the Dead Man's Statute, is codified at CPLR 4519. It provides that a party or person interested in an event is incompetent to testify concerning any personal transaction or communication with the decedent.[15] A kinship hearing is clearly within the parameter of events covered by the statute;[16] the claimants or individuals seeking to inherit are clearly interested in the event because they stand to gain or lose by operation of the judgment.[17]

Unfortunately for the claimant, the concept of transaction or communication is broadly defined. It applies to a wide range of behavior involving the claimant and the decedent, including all forms of conduct and language. It embraces every "variety of affairs which can form the subject of negotiations, interviews, or actions between two persons."[18] Thus, the claimant cannot testify to *any* conversation or correspondence between the decedent and himself.

> When legal issues arise, kinship proceedings provide the formal mechanism to establish proof of heirship.

Individuals not interested in the event (those who do not stand to inherit) are not barred from testifying. For example, a claimant's spouse or friends, if present at a certain conversation between the claimant and the decedent, can provide admissible testimony about their personal knowledge of an event. If the decedent constantly referred to the claimant as his or her "favorite cousin" or "sole surviving cousin," the claimant cannot testify but friends or a spouse would be able to substantiate that statement.

Exception to Hearsay Rule

The second limitation concerns the concept of hearsay. Hearsay consists generally of statements made out of court that are offered for the truth of their contents.[19] Much information pertaining to one's family history may

be received this way as a function of word of mouth. Hearsay evidence is traditionally excluded unless the particular hearsay falls within one of the exceptions to the general rule of exclusion. Fortunately, one exception to the hearsay rule concerns declarations of pedigree or family descent.[20]

The conditions of admission for pedigree declarations consist in the fact that the original declarant is dead, was related by blood or marriage to the family of whom he or she spoke, and made these pedigree declarations before this kinship proceeding arose.[21] These declarations may be written as well as oral. A proper foundation must be laid to incorporate all of these criteria before testimony is received.[22] In the simple case, the submission of a death certificate, birth certificate or marriage certificate should suffice. Here, a witness could testify about family infor-

Statutory Foundation for Kinship Proceedings

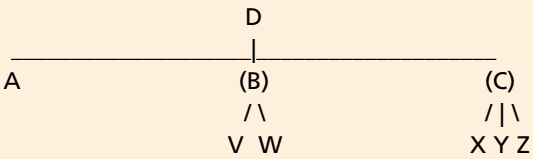
The framework for analyzing kinship issues is provided by the Estates, Powers and Trusts Law, specifically EPTL 4-1.1, which identifies the priorities among claimants who seek to inherit from an estate and specifies formal rules for the inheritance process.

The statute effectively describes how to build a "family tree," providing schemata for the proximity of family ties and identifying the "distributees" who qualify as heirs of the decedent.[1]

Spouses and children have the highest priority. The spouse receives the first $50,000 and half the balance of the net estate after deducting traditional debts, taxes and expenses.[2] Issue of the decedent receive the other half. "Issue," by definition, are descendants from a common ancestor.[3] They are often the decedent's children. If there are no issue, the spouse receives everything. If there is no spouse, the issue inherit everything.[4]

If no spouse and no issue survive, the priority for inheritance consists of, in descending order, parents, siblings/nieces/nephews, grandparents, uncles/aunts/first cousins, and first cousins once-removed.[5]

If issue inherit, they generally take "by representation," which essentially means an equal distribution at each generational level.[6] Suppose that the decedent, D, is survived by one child A; V and W, who are children of predeceased child B; and X, Y, and Z who are children of predeceased child C. A chart for this scenario would look like this:



There are three lines of inheritance. If all children (A, B, C) survive the testator, each is entitled to one-third of the net estate. At A's generational level, only A survives, so A takes his one-third share. The next complete surviving generational level is that of the testator's grandchildren, V, W, X, Y, and Z. The remaining two-thirds is divided equally among each member of that level, so that V, W, X, Y and Z each take two-thirds divided by five units or two-fifteenths of the net estate each.

A decedent's relatives of the half blood are treated as if they were relatives of the whole blood.[7] Thus, siblings who share just one parent may inherit as if they were full siblings.

If grandparents or their issue (uncles/aunts of the decedent) are the only survivors, the maternal and paternal sides are divided in half with respective issue sharing only their respective half. In the absence of issue on one side, the other side's issue could share in the whole. These rules of intestate succession provide the numerical guidelines for distribution of the decedent's property, and they further place a legislative imprimatur on the priority of the familial relationships.

1. EPTL 1-2.5, 2-1.1.
2. EPTL 4-1.1(a)(1).
3. EPTL 1-2.10.
4. EPTL 4-1.1(a)(2), (3).
5. EPTL 4-1.1(a)(4), (5), (6), (7).
6. EPTL 1-2.16.
7. EPTL 4-1.1(b).

mation that he or she received from a predeceased relative of the family.

Finally, any individuals, interested or not, may testify regarding their own heirship status.[23] For example, if asked to identify one's parents, siblings, grandparents, uncles, aunts, etc., one may testify as to their *own* personal knowledge of family relationships. Yet, for the claimant, such testimony stops at identifying any relationship with the decedent. Any third party not interested in the event has extremely wide latitude with respect to testimony, including transactions or communications with the decedent, or declarations of pedigree overheard from predeceased individuals. This underscores the importance of an investigation to locate a variety of disinterested individuals who can freely and openly provide links in the family chain.

Manner of Proof – Documentary Evidence

The admissibility of documentary evidence offered to establish any facet of heirship is geared to its authenticity. There is a preference for original documents. The Best Evidence Rule is reflective of historical case law that whenever parties seek to prove the contents of a writing, they must produce the original or satisfactorily account for its absence.[24] In the absence of original documents, the problem of reliability becomes an issue.

Public documents may be received into evidence if they are properly authenticated.[25] It is acknowledged that originals of public documents are extremely impractical to procure and that copies validated by the appropriate custodian or authorized agent are the equivalent of the originals. CPLR 4540 sets out the applicable methods of authentication of copies, certified, exemplified and sworn.[26] Birth, death, marriage, court, voter registration, naturalization and military records are of this type.

A range of documents may be best described as semi-public. They are not official public documents but are issued by institutions and have a mechanism by which an authorized agent can certify them. These include church, cemetery and baptismal records. Census records may be admitted on judicial notice.

Private documents contain a greater possibility of inaccuracy because there is no formal mechanism for authentication in place.[27] These documents often consist of material found among the decedent's personal effects such as letters, telephone books, holiday cards, and personal notes. These documents may be admitted into evidence in the following ways: the means of authenticating private documents consist of the testimony of a witness who saw that person write or sign the document; as an admission made by an adversary; by circumstantial evidence; or by proof of handwriting.[28] For handwriting proof, a lay witness may be used.[29] Photographs may also be authenticated by the testimony of a witness familiar with the subject portrayed.[30]

Finally, the ancient document rule operates as a presumption of authenticity and greatly aids in the admission of older documents in kinship proceedings.[31] The rule states that when the writing is 30 or more years old, is in the possession of the natural custodian, and is free from indications of fraud or invalidity, it proves itself.[32] Essentially, the document is self-authenticating. A natural custodian in this type of proceeding could be any range of institutions or agencies, including the decedent, if documents of this type were found among the personal effects in the decedent's household. Physical review of the document for tampering or damage is a condition precedent to its admission.

Foreign documents also require authentication in accordance with CPLR 4542. One primary feature of this statute consists in the affixation of an "apostille," which is a certification of validity practiced in a variety of European countries and approved in U.S. courts.[33]

Closing the Class

Despite extensive discovery and marshaling of evidence, certain aspects of the family tree may remain open. An alleged distributee may be missing (whereabouts unknown) or it may not be sufficiently proved that the heirs before the court are in fact the *only* heirs. This situation occurs commonly in dealing with Holocaust survivors or severely fragmented families. Years ago, this often created an insurmountable problem to establishing the right to inherit the entire estate: a fraction of said estate pertaining to the "open," not sufficiently proven, side of the family might have been payable to New York State under the theory of escheat.

Fortunately, the legislature chose to rectify this situation in SCPA 2225. This section creates a presumption that "the distributees before the court are the only distributees" (the only ones entitled to inherit) if certain conditions are met.[34] The conditions are two-pronged and they specifically pertain to the time elapsing from the decedent's death, coupled with an appropriate search for existing heirs.

Part (a) of SCPA 2225, in dealing with a single alleged heir, requires that at least three years must elapse from the death of the decedent along with a diligent search having been conducted to discover the status of the missing heir.[35] If no evidence has been found, that individual may be presumed dead. Here, presumption of death is defined as one predeceasing the decedent without issue.[36]

Part (b) of SCPA 2225 pertains to a determination that no other distributees, other than those already before the court, exist. This also involves the three-year time period elapsing from the date of death of the decedent, but requires a more exhaustive diligent search, using all available sources.[37] Because this section provides a broader-based exclusion of any and all heirs not before the court, it requires a higher degree of proof.

The sources composing the diligent search consist of all aspects of attempts to locate, including the discovery devices referred to above. An abbreviated definition of due diligence is contained in the Uniform Rules.[38] Although specifically applicable to probate in that context, it encompasses the most basic elements of a diligent search including interviewing friends, relatives and neighbors, inspecting personal effects, and reviewing motor vehicle, post office and voter registration records. The use of the Internet as an inventory of last names and addresses is also noted and continues to expand as a research option. The degree of diligence required is often analyzed in relation to the size of the estate.[39] Generally, the greater the value of the estate, the more comprehensive the diligence required by the court in efforts to locate the missing or alleged heirs and satisfy the statutes. Finally, the use of a genealogist as an expert in matters of kinship is often indispensable to completing a truly diligent search. The genealogist may marshal all forms of evidence and provide opinion testimony regarding heirship status.[40]

> The preparation of a detailed family tree is essential to success in the world of kinship.

In conjunction with SCPA 2225, EPTL 2-1.7 also creates a presumption of death if after three years of continuous *unexplained* absence, a diligent search fails to locate a particular individual. The individual is presumed to have died three years after the unexplained absence, or less than three years if it can be established that the individual was exposed to a specific peril.[41] Other presumptions may also aid in the proof of aspects of family status: every person is presumed legitimate or born in wedlock;[42] a marriage ceremony is presumed to have been legally performed;[43] a male under the age of 14 and a female under the age of 12 are presumed not capable of having children;[44] a person who would have been more than 100 years old at the time of the decedent's death is presumed to have predeceased the decedent.[45]

These statutes provide a means to prove a negative – the non-existence of other distributees. They are useful tools for reaching a final resolution and determination of heirs. The three-year statutory period from death should always be kept in mind before initiating proceedings so that its application is not limited. Upon proof that no heirs exist other than those before the court and in the record, the class of heirs may be closed.

The Proceeding

The kinship proceeding itself is generally referred to as a hearing, although it contains elements of a trial. It functions as an end in itself, retains the full force of judicial sanction, and may be set up by filing a Note of Issue and Certificate of Readiness in certain counties.

The venue for such a proceeding is normally the surrogate's court in the county of the decedent's domicile.[46] Occasionally, the hearing or any part of it may be conducted outside this venue upon application to the court. The grounds for this removal, referred to as a commission, are covered by CPLR 3108 and are geared to the unavailability of witnesses within New York State. Here, the court travels to the witness if the witness cannot travel to the court. Common reasons justifying unavailability consist of age, infirmity, and political barriers.[47] The coordination and production of witnesses who are often from different parts of the country or the globe should be confirmed as early as possible. Travel factors and living accommodations pending the duration of the hearing should be anticipated before scheduling.

Family Tree

The preparation of a detailed family tree is essential to success in the world of kinship. The family tree consists of an outline from a chronological perspective of all family relationships.[48] It should contain names, name changes, dates of birth, death, marriage, and issue produced per person. The tree proceeds both downward from the oldest common ancestor, laterally incorporating those with equal degrees of lineage. It should provide a clear, unbroken connection from one generation to another and among members of the same generation. It is traditionally offered into evidence at the beginning of the hearing, not for the truth of its contents which remain to be proven, but for identification purposes. It is an invaluable tool in consolidating the objects of a claimant's proof, and thus it should accurately reflect the testimonial and documentary evidence. As a practical matter, all interested parties at the hearing rely on the family tree as a physical guideline to the claims.

The order of testimony may provide distinct advantages in attempting to prove elements of the family tree. The burden of going forward is always on the claimant. Disinterested witnesses are often viewed as possessing the highest degree of credibility, particularly those not married to, or children of, the claimant. Yet, disinterested witnesses may only be able to provide testimony concerning limited aspects of the family. This, when coupled with other factors, can be sufficient and highly influential.

Many practitioners believe it is most beneficial to open with strong disinterested witnesses to confirm various aspects of the family tree. It is always advisable to have the claimant appear and testify. If multiple claimants exist, and are all part of the same nuclear family or on the

same generational level and possess the same knowledge, it may only be necessary to produce one claimant. Although claimants are limited in testifying about their relationship to the decedent, they may testify about their own pedigrees. The genealogist is often used as a clean-up hitter to fill in any holes in the family framework, close the class, if required, and possibly provide a summary and confirmation of prior testimony. The above is merely suggestive; any order that counsel deems most appropriate for proving the case at hand may be used.

As with any hearing or trial, the depth and certainty of knowledge and its lucid presentation are most effective as an offer of proof. In kinship, precise testimony is particularly crucial because the nature of the proceeding incorporates specificity of names and dates, not merely general descriptions.

Documentary evidence may be submitted and offered for proof at various phases of the proceeding, but it is often most advisable to submit all documents at the end of testimony, as exhibits. It is prudent to have all documents numbered and have numbered copies, in addition to a copy of the family tree, distributed to all interested parties at the outset. The court normally requests copies of all documents approximately one to two weeks before the hearing. Only originals or copies with the appropriate authentication will be accepted into evidence after all interested parties have reviewed them and declined to object.

Conclusion

At the completion of all testimony and offers of proof, all parties rest and the referee typically reserves decision. Within 30 days of the hearing, the referee is required to issue a report indicating the findings of fact and conclusions of law.[49] The report specifies the identity and relationship of the decedent's heirs based upon the evidence submitted. Any interested party may then make a motion either confirming or denying, in whole or in part, the findings of the referee. If no motion or objection is made, the report is deemed confirmed. At this point the surrogate reviews the report, and if it is found legally sufficient, the surrogate issues a decree reflecting the report's findings and conclusions.[50]

Finally, funds are distributed to the appropriate individuals in the amounts or percentages dictated in the decree, and in accordance with the rules for intestate succession. The legal determination of the heirs at law of a particular decedent has thus been established and the question of who maintains the right to inherit has been answered. ■

1. Adam Bellow, In Praise of Nepotism (2003).
2. Surrogate's Court Procedure Act 2215(1) (SCPA).
3. Uniform Rules for Surrogate's Court § 207.41.
4. SCPA 316.
5. SCPA 2222(1), (2), (3). In the event that property has already passed to New York State, and heirs are subsequently located, a kinship hearing may be initiated by a petition for withdrawal of funds from the State Comptroller.
6. SCPA 315(2)(a)(iii).
7. SCPA 1001, 1112.
8. *See* Richardson on Evidence § 3-206 (11th ed.); *see also* Uniform Commercial Code § 1-201(8) (UCC).
9. *See* Turano, McKinney's Practice Commentary, EPTL 4-1.1 (2003).
10. SCPA 506(1).
11. SCPA 506(3), (6)(a).
12. SCPA 510.
13. Uniform Rules for Surrogate's Court § 207.25(a).
14. SCPA 506(3).
15. CPLR 4519. For an in-depth analysis, see Professor Radigan, *New Rules on Surrogate's Court Assignments Prompt Review of Issues in Dead Man's Statute*, N.Y. St. B.J. (June 2003).
16. *In re Christie's Estate*, 167 Misc. 484, 4 N.Y.S.2d 484 (1938).
17. *Hobart v. Hobart*, 62 N.Y. 80, 81, 83 (1875).
18. *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884).
19. *See* Richardson on Evidence § 8-101 (11th ed.) (hereinafter "Richardson").
20. *See* Richardson § 8-901.
21. *See* Richardson § 8-903; *see also Aalholm v. People*, 211 N.Y. 406, 412, 105 N.E. 647 (1914).
22. *See* Richardson § 8-904; *see also Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).
23. *See* Richardson § 8-911.
24. *See* Richardson § 10-101; *see also Schozer v. William Penn Life Ins.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994).
25. *See* Richardson § 10-108.
26. CPLR 4540; *see* Richardson § 9-202.
27. *See* Richardson § 9-101.
28. *See* Richardson § 9-103.
29. *See* Richardson § 7-318(a)(i), (ii).
30. *See* Richardson § 4-212; *see also Moore v. Leaseway Transp. Co.*, 49 N.Y.2d 720, 426 N.Y.S.2d 259 (1980).
31. *See* Richardson § 3-124; *see also Fairchild v. Union Ferry Co.*, 121 Misc. 513, 518, 201 N.Y.S. 295 (1923) *aff'd*, 212 A.D. 823, 207 N.Y.S. 835, *aff'd*, 240 N.Y. 666, 148 N.E. 750 (1925).
32. *In re Brittain*, 54 Misc. 2d 965, 283 N.Y.S.2d 668 (1967).
33. Weinschenk, *An Update on Kinship Proof in Surrogate's Court*, N.Y.L.J., Oct. 9, 1992, p. 1.
34. *See* Turano, McKinney's Practice Commentary, SCPA 2225 (2002).
35. SCPA 2225(a).
36. *Id.*
37. SCPA 2225(b).
38. Uniform Rules for Surrogate's Court § 207.16(d).
39. *In re Whelan*, 93 A.D.2d 891, 461 N.Y.S.2d 398 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 657, 476 N.Y.S.2d 290 (1984).
40. *See* Richardson § 7-301.
41. EPTL 2-1.7(b).
42. *See* Richardson § 60; *see also In re Matthews' Estate*, 153 N.Y. 443, 47 N.E. 901 (1897).
43. *See* Richardson § 65; *see also Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929).
44. EPTL 9-1.3(e)(1), (2).
45. *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).
46. SCPA 205(1).
47. CPLR 3108; *Kelleher v. Mazzaro*, 175 A.D.2d 352, 572 N.Y.S.2d 429 (3d Dep't 1991).
48. Uniform Rules for Surrogate's Court § 207.16(c).
49. SCPA 506(3).
50. SCPA 506(4), (6)(a), 2215(1).

MEET YOUR NEW OFFICERS

President
A. Vincent Buzard

A. Vincent Buzard, a Rochester partner in the statewide law firm of Harris Beach LLP, took office on June 1 as president of the 71,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Buzard at the organization's 128th annual meeting, held this past January in Manhattan.

Buzard has held various leadership positions in the Association during the past 20 years, including serving on the Executive Committee as a member-at-large, as vice president representing the Seventh Judicial District, and as Association secretary. Buzard has served as a member of the House of Delegates, chair of the New York State Conference of Bar Leaders, and co-chair of both the Lawyers in the Community and Medical Malpractice committees. He chaired the House of Delegates and co-chairs the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor). He also chaired the special committees to Review Attorney Fee Regulation, Legislative Advocacy, and Cameras in the Courtroom.

As chair of the Special Committee on Cameras in the Courtroom, Buzard led a comprehensive study of audio-visual coverage of trials in other states and interviewed scores of New York judges and attorneys who had participated in televised trials during the decade-long cameras in court "experiment." The committee determined that "there is no pattern of specific harm in specific cases and no substantial evidence that cameras adversely affect the outcome of trials." In March 2001, as the result of Buzard's passionate advocacy, the House of Delegates reversed its long-standing position that cameras could only be allowed in New York courtrooms with the consent of both parties, and voted to recommend returning cameras without the consent provision but with appropriate safeguards.

Buzard also presented the report of the Special Committee on Legislative Advocacy at the January 2002 meeting of the House of Delegates. The House adopted the report, and it is being implemented.

During his tenure as president of the Monroe County Bar Association (MCBA), Buzard emphasized raising the visibility of the MCBA and improving the public's understanding of the legal system and the profession. The programs initiated during his term included a "People's Law School," the "Ask a Lawyer" column in the local newspaper, a "Tools for School" project to distribute backpacks and school supplies to underprivileged students, the student mentoring program at School 29, and revision of the MCBA's judicial evaluation process, creating safeguards against gender, racial or other bias. Buzard established a Special Committee on Day Care and an ombudsman program to deal with client complaints in order to avoid unnecessary grievances. He arranged for the entire Appellate Division, Fourth Department to appear before the local bar. He established relationships with print and broadcast media, and was regularly quoted in the media on behalf of the MCBA and the profession. He continues to work in both radio and television, including as host of public affairs programs and as a commentator, and received the Adolf J. Rodenbeck Award for his outstanding contributions to the community and the profession.

Buzard's community activities include membership in the City of Rochester Cultural Center Commission and the Monroe County Sports Development Authority; he has served on the Rochester Board of Ethics. He is a member of the Governor's Fourth Department Judicial Screening Committee to review candidates for judicial appointment, and serves as a referee for the New York State Judicial Conduct Commission. Buzard served on Chief Judge Judith S. Kaye's Special Committee on the Establishment of Commercial Courts in the State of New York.

A trial lawyer for more than 35 years, Buzard's practice focuses on complex civil litigation including commercial and municipal matters. In addition, he chairs his firm's Appellate Practice Group. He also represents people who are seriously injured, with a particular emphasis on those who have suffered brain injuries. He is a past president and a former board member of the New York State Head Injury Association, and has lectured extensively on trial practice and representation of people with head injuries.

Buzard received his undergraduate degree from Wabash College and earned his law degree from the University of Michigan Law School, with honors.

President-elect
Mark H. Alcott

Mark H. Alcott, the new president-elect of the 71,000-member New York State Bar Association, was elected by the House of Delegates, at the Association's 128th annual meeting. Alcott, a resident of Larchmont, N.Y., is an honors graduate of Harvard College and earned his law degree from Harvard Law School. As president-elect, Alcott will chair the House of Delegates and co-chair the President's Committee on Access to Justice. In accordance with NYSBA bylaws, he becomes president of the Association on June 1, 2006.

Alcott currently serves on the Association's 26-member Executive Committee, which oversees the management and administration of the state bar within policies determined by the House of Delegates. He is a vice president, representing the First Judicial District, a position in which he has served since June 2001.

In his more than 35 years in the Association, Alcott has held many leadership positions and launched a number of initiatives. During his tenure as chair of the Commercial and Federal Litigation Section, section members worked on more than 100 projects through 44 committees and task forces. Alcott also chaired a section task force that proposed creation of a statewide commercial court, and served on the committee established by Chief Judge Judith S. Kaye that implemented that proposal.

Alcott chaired the Association's special committees on Continuing Legal Education and Administrative Adjudication, which, after an extensive, year-long study, recommended major changes in the administrative rules and procedures used in five state agencies (Motor Vehicles, Health, Family Assistance, Workers' Compensation and Environmental Conservation).

In addition to his state bar activities, Alcott is involved in civic and philanthropic affairs. He is a past recipient of the American ORT Jurisprudence Award. He is a Fellow of The New York Bar Foundation and the American College of Trial Lawyers, where he served two terms as chair of the Downstate New York Committee and four years as chair of the college's International Committee.

Alcott plays an active role as a federal and state mediator with the U.S. District Court for the Southern District of New York and the Commercial Division of the New York Supreme Court. Alcott lectures on litigation issues in the U.S. and abroad. He is frequently invited to argue model cases at legal meetings and conventions.

Secretary
Kathryn Grant Madigan

Kathryn Grant Madigan, a partner in the Binghamton law firm of Levene Gouldin & Thompson, LLP, was re-elected secretary of the New York State Bar Association.

Madigan graduated Phi Beta Kappa from the University of Colorado at Boulder, where she received the 1975 Pacesetter (Outstanding Senior) Award, and was point guard for the Lady Buffs basketball team. She earned her law degree from Albany Law School.

The Binghamton resident has held a number of leadership positions within the Association, serving 11 years on the Executive Committee, currently as secretary, and formerly as vice president for the Sixth Judicial District and as a member-at-large.

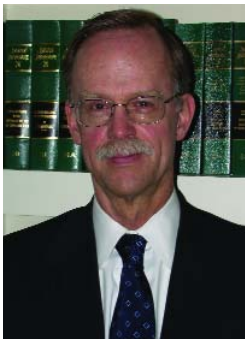
As chair of the Special Committee on Association Publications, Madigan led the 2004 search for the new editor-in-chief of the *Journal,* the Association's flagship publication. She is the former chair of the Membership Committee and the Elder Law Section, and chaired the section's Litigation Task Force, which recommended the historic *NYSBA v. Reno* lawsuit. A member of the Special Committee on Balanced Lives in the Law, Madigan spoke on work/life balance at this year's Young Lawyers Section Annual Meeting Program. She serves on the committees on Bylaws, Diversity and Leadership Development, Membership, and the Special Committee on Fiduciary Appointments.

The founding chair of the Committee on Attorneys in Public Service, Madigan served on the Executive Council of the New York State Conference of Bar Leaders (NYSBCL), Task Force on Solo and Small Firm Practitioners, Committee on the Future of the Profession, and Nominating Committee. A long-time mentor for the Young Lawyers Section, Madigan has been a member of the House of Delegates for 18 years. She is a Life Fellow of The New York Bar Foundation and chair of the Sixth District Fellows.

A past president of the Broome County Bar Association, Madigan remains active on its CLE Committee. Under her leadership, the local bar twice received NYSCBL's Award of Merit. A noted lecturer in the field of estate planning and elder law, Madigan is a member of the Administrative Board for the Offices of the Public Administrator, a Fellow of the American College of Trust and Estate Counsel, a member of the National

Academy of Elder Law Attorneys and a Fellow of the American Bar Foundation.

Madigan received the 2000 Kate Stoneman Award from Albany Law School and the 1987 NYSBA Outstanding Young Lawyer Award; she is listed in *America's Best Lawyers*. She is a trustee of the Binghamton University Foundation, a past chair of the Harpur Forum, and a trustee of the United Health Services Foundation, where she chairs its Nominating and Personnel committees. Madigan performs at the annual Broome County Chamber of Commerce Dinner as a *Live Wire Player*, and is immediate past president of the Chamber's Live Wire Club.



Treasurer
James B. Ayers

James B. Ayers, a partner in the Albany law firm of Whiteman Osterman & Hanna, LLP, has been re-elected treasurer of the 71,000-member New York State Bar Association. A resident of Guilderland, Ayers received his undergraduate degree from Colgate University and earned his law degree from Columbia Law School.

Ayers has served in the public sector as: confidential law assistant to the state Supreme Court, Appellate Division; assistant counsel to Gov. Nelson A. Rockefeller; counsel, Temporary State Commission on Constitutional Tax Limitations; and special counsel to the Deputy Majority Leader, New York State Senate. Prior to joining Whiteman, Osterman & Hanna, he was a partner in the Albany law firm of DeGraff, Foy, Holt-Harris, Kunz & Devine.

An active member of the Association, Ayers has served as treasurer since 2002. Prior to that he served three years as vice-president of the Third Judicial District. In addition, Ayers chaired the Trusts and Estates Law Section and has served on its Executive Committee since 1984. He is a member of the Albany County and American Bar associations and a Fellow of the American College of Trust and Estate Counsel.

In addition to his professional affiliations, Ayers has been active in various civic groups, including serving on the boards of directors of the American Red Cross, Salvation Army, Historic Albany Foundation and Kattskill Bay Association, and on the board of trustees of the Westminster Presbyterian Church.

BOOK REVIEW

BY HENRY G. MILLER

LexisNexis® AnswerGuide™ New York Civil Disclosure by David Paul Horowitz

David Paul Horowitz has given the New York Bar a very useful guide to civil practice in his new text, *LexisNexis® AnswerGuide™ New York Civil Disclosure*. David is ideally suited for the task. In addition to being a plaintiff's lawyer concentrating in tort claims such as products liability and medical malpractice, he is an adjunct professor of law at New York Law School where he teaches New York Practice. He also serves on the Advisory Committee on Civil Practice for the Office of Court Administration. His new book will be not only a blessing to the newly admitted but also a great tool for seasoned advocates.

At the very start of the book, we are shown how to use Lexis.com® with the text. The old veterans of the Bar will have to learn a few new tricks. David shows us how.

In each chapter, we are given not only an overview, but most important, a checklist on how to deal with each and every aspect of civil practice, including such topics as interposing objections to disclosure commands, protective orders, attorney work product, material prepared in anticipation of litigation and, of course, the ever-important subject of conducting oral depositions.

Busy lawyers want to know if a new book passes the test of being truly useful. This book passes. Topics can be easily located. Checklists serve as blueprints on how to approach each and every problem. Practice tips abound and caveats are very useful.

What makes the text particularly relevant is that the citations are authoritative and recent. In short, this book is up to date in the always rapidly changing world of New York's civil procedure. Mr. Horowitz should be commended for generously citing other sources, such as *New York Civil Practice: CPLR (Weinstein, Korn and Miller)*. There are cross-references at the end of each chapter.

One example may suffice to show the usefulness of this text. Chapter 14, dealing with objections at depositions, is extremely thorough. There is a checklist for interposing and responding to objections, and a list as to when to raise objections or delay them until trial. We're told what objections must be made at deposition. Checklists are there. Citations to the appropriate CPLR sections are there. Cross-references at the end of each section are there, including obtaining the latest information on LexisNexis. There's even a section on dealing with obstreperous conduct and heaven knows, unfortunately, we need that. All this is dealt with in under 20 pages.

I very much recommend this text to my colleagues. It makes an excellent desk reference on practice issues. It makes a fine companion when going to depositions. In its paperback format, it fits easily and lightly into one's bag.

My compliments to David Horowitz for a job well done. ■

HENRY G. MILLER, is the senior member of the White Plains, New York, law firm of Clark, Gagliardi & Miller, P.C. He is the author of *On Trial: Lessons From a Life in the Courtroom*, ALM Publishing, New York, and a past president of the New York State Bar Association. He is a graduate of St. John's University and St. John's University School of Law, and attended Columbia University and New York University.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I recently met with a new client (let's call him A. Fineman), reviewed his assets and financial situation (both present and predicted for the future), and was engaged to draft a will and a complicated estate plan. We agreed on a $3,000 flat fee for my services, rather than an hourly rate. In arriving at this figure I took into account several factors, including my estimate that it would take approximately 10 hours to do the work. This was to include the initial drafting, revisions after client review, and the eventual signing of the will and related forms (healthcare proxy, power of attorney, living will, HIPAA authorization). Mr. Fineman paid the full fee, in advance. However, just as I was about to start work on his file, I learned by sheer chance that another lawyer in my firm had just finished putting together a will and an estate plan for a client with circumstances very similar to Mr. Fineman's.

I obtained a redacted copy of my partner's work, and it appears as if I can revise and adapt it for Mr. Fineman's needs in about two hours. (Word processors make a big difference these days.) At my usual hourly rate, and even factoring in the additional time for client meetings and the formal execution of the documents, the most my client would pay would be about two-thirds of the agreed-upon fee – which I believe had been very reasonable in the first place. I should add that if my time had exceeded my estimate, I would not have requested any additional payment beyond the $3,000. Under these circumstances, what should I do regarding my present relationship with Mr. Fineman, and do I have an obligation to return any of the prepaid fee?

Thank you for your advice.

Yours sincerely,
Wanting to Be Fair

Dear Wanting to Be Fair:

Your concern about charging more than you might have had you known about your partner's work in advance is commendable. It is clear that there is no need to remind you about EC 1-5, which teaches that a lawyer should maintain high standards of professional conduct. The question is, now that all the facts are known, what is the right course of conduct?

DR 2-106(A) prohibits a lawyer from entering into an agreement for, charging or collecting an excessive fee. This is defined in DR 2-106(B), as follows: "A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." A series of factors are then set forth as to what comprises a reasonable fee. The time and labor required to complete the matter is the first factor set forth in DR 2-106(B). Certainly, applying this consideration, your fee did not appear to be excessive at the time of "entering into, charging" and "collecting" that fee based upon your good-faith estimate of how much time would be needed.

That does not end the matter, however. EC 9-6 establishes the benchmark for attorney conduct: "Every lawyer owes a solemn duty to uphold the integrity and honor of the profession . . . to inspire the confidence, respect, and trust of clients and of the public." To uphold that integrity, it appears that one of two courses of action would be appropriate, depending upon your initial discussions with the client.

If the description of services that you gave to your client focused on your estimate that it would take approximately 10 hours to do the work agreed upon, but it actually took less time than that, you have a duty to so advise the client and to offer a reasonable refund when he comes in to execute the documents you had prepared. Failing to do this would result in your having collected an excessive fee. Moreover, you would have made a misrepresentation to your client, however inadvertently.

Even if you were not specific as to hours, but hours were nonetheless a factor in setting your fee (as one component of arriving at a reasonable figure, as set forth in DR 2-106(B)), you should still advise your client of the lesser amount of time expended. A refund likely would be in order. However, without an initial representation and fee quote based primarily and/or expressly on the hours to be expended, you would be able to discuss the value of the final product as well, and not focus on time alone. This would permit you to explain that the preexisting work done by a member of your firm has value, and that the client has benefited from the use of that work. This might affect the size of the refund.

This is akin to a fee charged by a speaker at corporate events, which is the same notwithstanding the fact that the speaker gives the same speech (with minor alterations) each time. It is

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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the value of the speech for which the speaker is paid, and no discount is expected or given because presentations have been made elsewhere. One might even suggest that DR 2-106 be amended to add another factor to those to be considered in establishing a reasonable fee, "the value of the work already existing in the firm that is used in performing the service."

Yet another factor may be involved. If additional work is performed beyond what was initially discussed (for example, material changes are requested by the client, additional documents are prepared or reviewed), you still must tell the client that less time was needed to complete the matter as originally described, and that a refund would be in order – but that the required additional services warrant an additional/revised fee. There is nothing improper in applying any overpayment to the charge for new services, as long as the client, with full understanding, agrees.

There are those who might argue that the client should be called immediately when it becomes clear that a quoted fee is too high, and a refund made at once, even before the matter is concluded. However, while it is probable that no client would reject a refund, this makes any additional conversation about a revised fee, because of additional work, awkward after the work is completed.

In sum, each situation in which a quoted fee appears to be too high in light of new information or changed circumstances should be carefully evaluated, in terms of what was said to the client and what is reasonable – and what would be the right and professional thing to do.

The Forum, by
Miriam M. Netter, Esq.
Miriam M. Netter, Attorney at Law
Delmar, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I seem to have been born with a silver foot in my mouth. Every time one of my litigation clients asks for my frank evaluation of his or her case, I, fool that I am, do exactly that. The last such client to request my opinion, a professional accused of malpractice, blanched when I gave him my honest assessment of his liability. He accused me of not believing in his cause, and took his business elsewhere. Another client, after requesting and receiving my evaluation of what was his clear malpractice, thanked me for my candor and requested a final bill before firing me and retaining the services of my suite-mate (let's call him Raw-Meat Ralph), a fiery litigator who tells his clients what they want to hear.

It seems that all that my clients want to hear is good news. Would I be doing them a disservice by telling them what they want to hear? And am I doing my own practice a disservice by telling them the truth?

Sincerely,
Raw Meat Wannabe

"At ease, Shipley, you're a partner now."

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is the word *ways* correct in the sentence, "There's a long ways to go"?

Answer: That expression is generally considered colloquial or vernacular (*colloquial* being "informal," and *vernacular* "language common to a region or a group of people"). For example, *The American Heritage Dictionary of the English Language* (2000) considers *ways* a singular noun "acceptable, but usually considered informal."

"There's a long ways to go" seems to be either informal or vernacular, depending on whether it is in use nationally or only regionally. Google's only listing for *ways* is a line from a Louis Armstrong tune, "A long ways from Paris Ave."

On the other hand, *Webster's Third New International Dictionary*, Unabridged (1993), usually the most avant-garde of modern dictionaries, lists *ways*, without categorizing it, in the expression "a long ways from home." *Webster's* only comment is that *ways* is a grammatical plural used as a singular.

The word *ways* originated in Old English as the verb *wegan*, from ancient Gothic, meaning "to move." The noun *way*, first spelled as *weg* in Chaucer's time, originally meant "movement" and then broadened to indicate "a thoroughfare designed for transportation." Dictionaries now list many more meanings for the noun *way*, *Webster's* devoting almost a page to definitions.

How did *way* become *ways*? Ernest Weekley's usually helpful *Etymological Dictionary of Modern English* says only of *ways* that it is interchangeable with *-wise* in the expressions "likewise" and "endwise." If so, analogy to those suffixes may have influenced the plural form. My guess is that *ways* originated because the expression, "a long way away" seemed awkward and somewhat confusing. Adding an *s* to the first *way* avoids the repetition.

The adverb *anyways* seems to have originated in New England as a vernacular expression, but it is now used throughout the country. *Webster's* calls it an archaic Middle English word meaning "in any respect," and *The American Heritage Dictionary* dismisses *anyways* as a "non-standard" substitute for *anyway*, which means "nevertheless, in any case," as in, "I'm going to do it anyways." However, the commonly heard expression, *no way*, appears to be in no danger of adding an *s*.

One more point: When the expression *any way* means "any method," it is written as two words.

Question: Would you agree that the following sentence was not a good one to use in a brief in which one was responding to an accusation of disingenuity? The sentence was, "Appellee is clueless about the pragmatic ambivalence of deontic utterances."

Answer: This sounded like a trick question, but Pittsburgh correspondent Norma Chase assures me that it was not. Most readers will agree it was not a good sentence to use in a brief – or elsewhere. The adjective *deontic* is a Greek derivative meaning "obligatory," a common and easily understood adjective, which should be substituted.

The phrase *pragmatic ambivalence* is used in the field of linguistics that deals with language as it is used in a social context to describe the tendency to say one thing and mean another. The entire sentence calls to mind the question a reader submitted about the phrase *enlightened obfuscation*, which was discussed in the May "Language Tips" column, on page 48. (Whether the language is "enlightened" may be arguable, but it is certainly obfuscatory.)

If the brief-writer wanted to appear learned without communicating, he has accomplished his purpose. If he intended to persuade a judge to his point of view, he has failed.

As I responded to Ms. Chase's question, I recalled Daniel McDonald's advice in his article, "The Art of Avoiding the Question." which appeared in the semantic journal *et cetera* (Spring 1990, page 8). Lawyers may find his advice helpful. His first suggestion: When you are in a group of people, you can avoid answering a question by pretending not to hear it. Then someone else in the group is forced to answer. You win; he loses.

Some other suggestions: Challenge the questioner by asking, "Why do you ask?" Or gain time by asking what is meant by a term ("What do you mean by 'the pragmatic ambivalence of deontic utterances'?") If your questioner is a lawyer, ask, "What do you think?" This will provoke a long discussion, during which the original question may be forgotten.

Or, argue that the issue is complex; then use long sentences replete with high-flown, abstract language so that your questioner is bored to death and wants only to get away. Changing the subject altogether may succeed: "I'm sure your son is ready for college now; how time flies." (Asking people about their children is a great diversionary tactic.)

McDonald's final suggestion is not recommended here: "Lie." ■

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 new book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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CONTINUED FROM PAGE 64

Innumerable, numerous. Things "innumerable" can be counted, but only with great difficulty. "Innumerable" does not mean "countless." "Numerous" means many.

Instinctive, intuitive. "Instinctive" behavior is inborn. "Intuitive" behavior is unreasoned. *Correct*: "After the witness instinctively blinked and swallowed, the trial judge intuitively suspected that the witness was lying."

Intra, inter. "Intra" means "within" or "inside." "Inter" means "between" or "among." An intramural Moot Court competition, for example, is a competition held within a school for students of that school only. An intermural Moot Court competition is held for students of more than one school.

Involve. To "involve" means "to envelop." It does not mean to "cause," "concern," "imply," "mean," "result in," or "use." *Incorrect*: "The case involved a civil-rights dispute." ■

1. Anonymous, *reprinted in* Street News, New York City, 5th Issue 2000, at 3, col. 2.

2. *See People v. Jorge*, 159 A.D.2d 237, 238, 552 N.Y.S.2d 217, 218 (1st Dep't) (mem.) (emphasis in original), *lv. denied*, 76 N.Y.2d 859, 561 N.E.2d 899, 560 N.Y.S.2d 999 (1990).

3. *People v. Jorge*, 161 A.D.2d 372, 372, 555 N.Y.S.2d 116, 117 (1st Dep't 1990) (mem.) (emphases in original).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is Glebovits@aol.com.

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BY GERALD LEBOVITS

Problem Words and Pairs in Legal Writing — Part IV

This series of columns will help you decide which word to use. But once you've resolved the issue of word choice, be careful to use the rite (wright? write? right?) homonym and homophone. Homonyms are words that have the same form as other words but which have different meanings ("through" the wall or "through" with work). Homophones are words that are pronounced the same but are spelled differently ("aid" and "aide"; "dear" and "deer"; "hear" and "here"; "aisle" and "isle"; "bee" and "be").

The Spell Checker Poem makes it clear how errors can go undetected:

> I have a spelling Checker;
> It cam with my PC.
> It clearly marks for my revue,
> Mistakes I cannot sea.
> I've run this poem threw it;
> I'm sure your pleased to no.
> Its letter perfect in it's weigh;
> My Checker tolled mi sew!
>
> Two rite with care is quite a feet,
> Of witch won should bee proud.
> And we mussed dew the best wee can,
> Sew flaws are knot aloud.[1]

One New York judicial opinion innocently explains the nature of homophone errors, in a sense. In 1988 a court reporter transcribed a trial judge's instruction to a jury in a criminal case that "each defendant is presumed to be innocent *in a sense*."[2] The Appellate Division affirmed the conviction but chastised the judge. After the Appellate Division's opinion was published, the prosecution moved to correct the opinion. Here's how the Appellate Division decided the motion, amending its opinion "in fairness to the parties, and indeed to the trial judge":

> Essentially, the People confront us with the same problem which confounded Frederick, the love-starved hero of *The Pirates of Penzance*, whose life, as all Savoyards know, was severely complicated by the failure of his nurse, in his infancy, to understand his dying father's wish that Frederick be apprenticed to a pilot. Due to a sad misunderstanding, the nurse apprenticed Frederick to a pirate, with dire consequences that are only resolved in the last act. Thus the People urge here that Justice [Edward J.] McLaughlin, in his charge to the jury, did not say that the defendant is presumed to be innocent "*in a sense*," but merely repeated the word "*innocence*." There is no suggestion that this was done through "innocent merriment," in the sense used by *The Mikado*.[3]

If, whether. "If," when compared with "whether," means "if and only if." "Whether," when compared with "if," means "whether or not." Attorney: "Judge, please let me know if (or *whether?*) you want me to brief the issue." The "if" requests an answer only if the judge wants a brief. The "whether" requests an answer to the attorney's question no matter what. Law clerk: "Your opinion writing will be competent if (or *whether?*) you practice writing." For most people, it is "if." Only stars write competently whether or not they practice writing.

Illegal. Anything against the law, including the civil law, is illegal. If you mean illegal in the penal sense, prefer "criminal" to "illegal."

Impediment, obstacle. An "impediment" hinders action. An "obstacle" blocks action.

Imply, infer. To "imply" is to suggest or express indirectly. To "infer" is to surmise or conclude. The writer implies; the reader infers.

Important, importantly? — the former. The pretentious "more importantly" is grammatically incorrect, a hypercorrection.

In, into, in to. "In" means "within." "Into" means "from outside to inside" or "from one point to another." The "in" in an adverb-preposition combination modifies a verb. *Correct*: "While drunk, Mr. X drove *in* his Corvette. In his stupor he drove *into* a van. But he turned himself *into* an honest citizen by turning himself *in to* the police."

Inequity, iniquity. An "inequity" is an inequality or unfairness in treatment. An "iniquity" is an evil deed.

Informant, informer. The two are synonymous; both give information. But only an informer gives information to law enforcement. Some information: New York courts habitually call informers "informants," as in "confidential informants," because "informer" has a pejorative connotation.

Ingenious, ingenuous, disingenuous. Something or someone "ingenious" is innovatively smart. Someone "ingenuous" is candid and guileless. "Disingenuous" people hide their feelings and thoughts. A "disingenuous" argument might be a correct argument, but it is not a candid argument.

CONTINUED ON PAGE 59

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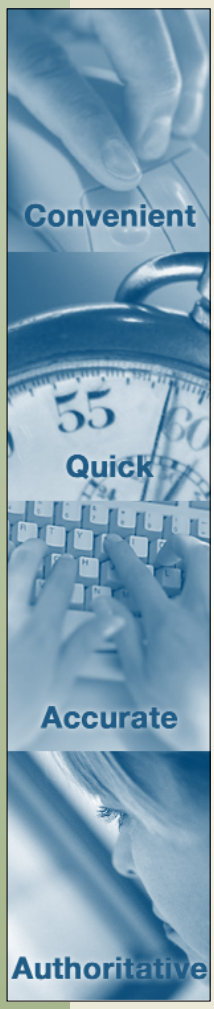

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