NEW YORK STATE BAR ASSOCIATION

Journal

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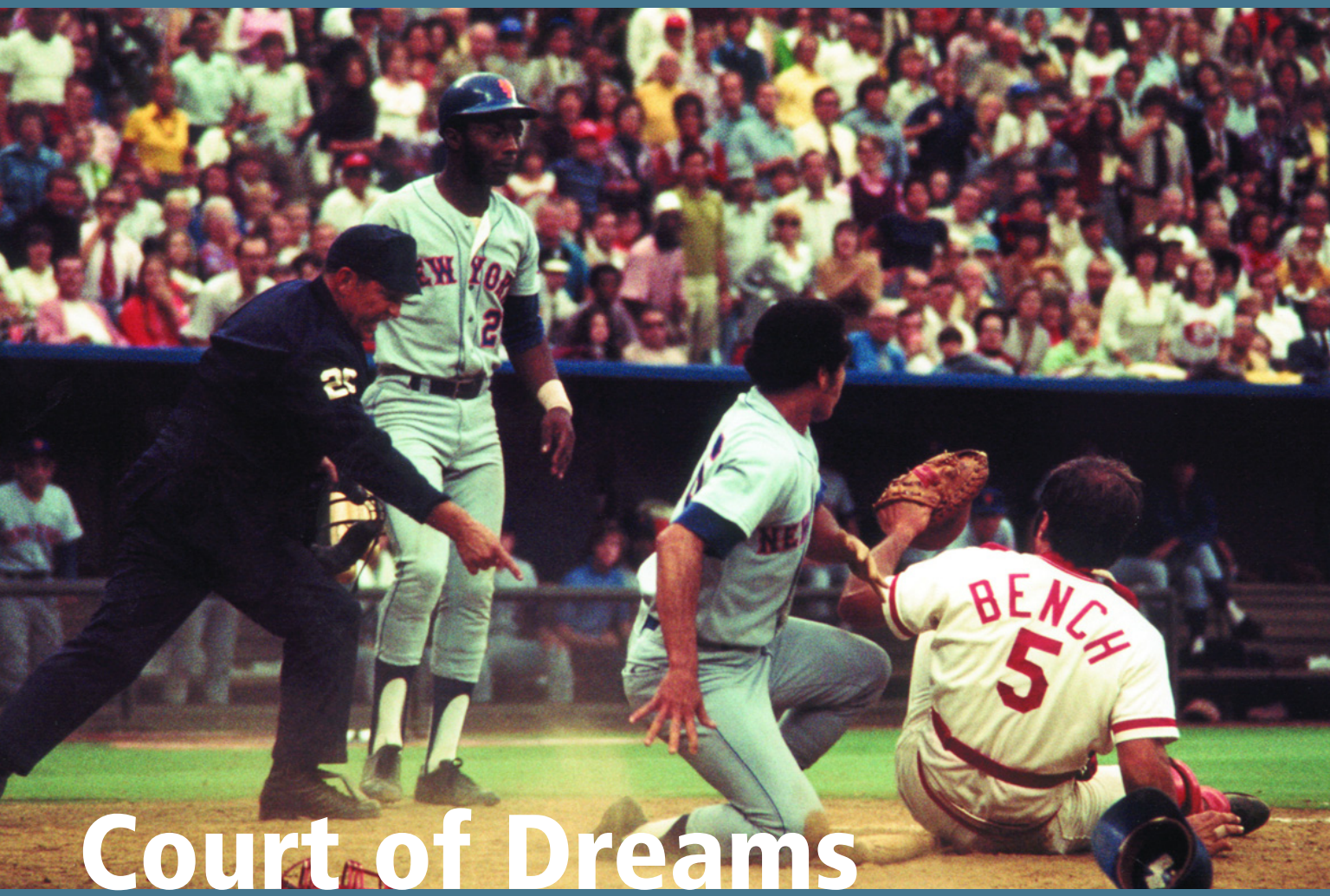

Court of Dreams

An improbable victory in the national pastime, high drama in the executive branch, and passing notes behind the high court bench.

Skip Card

Also in this Issue

BESTSELLERS
FROM THE NYSBA BOOKSTORE

March-April 2005

Business, Corporate, Tax

Limited Liability Companies
Updated for 2004, this practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence.
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Preparing For and Trying the Civil Lawsuit, Second Edition
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New York Lawyer's Deskbook, Second Edition
Updated with 2004 Supplement
WINNER OF THE ABA'S CONSTABAR AWARD
The Second Edition consists of 25 chapters, each covering a different area of practice.
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Updated with 2004 Supplement
The *Formbook* is a companion volume to the *NY Lawyer's Deskbook* and includes 21 sections, each covering a different area of practice.
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Real Estate Transactions — Residential Property
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PN: 42144 / **Member $72** / List $80 / 400 pages

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This monograph provides an overview of the major issues in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise.
PN: 40374 / **Member $72** / List $80 / 296 pages

Trust and Estates/Elder Law

Elder Law and Will Drafting
Elder Law and Will Drafting provides a clear overview for attorneys in this practice and includes a sample will and representation letters, numerous checklists, forms and exhibits.
PN: 40824 / **Member $72** / List $80 / 250 pages

Probate and Administration of Decedents' Estates
This book provides a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms.
PN: 41964 / **Member $72** / List $80 / 184 pages

NEW!

CIVIL ADVOCACY AND LITIGATION

Depositions: Practice and Procedure in Federal and New York State Courts
This detailed text covers all aspects of depositions. Topics include pre-trial discovery schedules, appropriate and inappropriate behavior at depositions, and motions for protective orders.
PN: 4074 / **Member $50** / List $65 / 450 pages

FAMILY AND MATRIMONIAL LAW

Adoption Law: Practice and Procedure in the 21st Century with Forms on CD-ROM
Forms on CD
This new reference completely updates and expands *Adoption Law in New York*, adding new chapters and including over 250 pages of forms.
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Forms on CD
This book examines in detail situations that arise during lease negotiations and numerous issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant.
PN: 4041C / **Members $155** / List $200 / includes 1,344-page book

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BY SKIP CARD

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DEPARTMENTS

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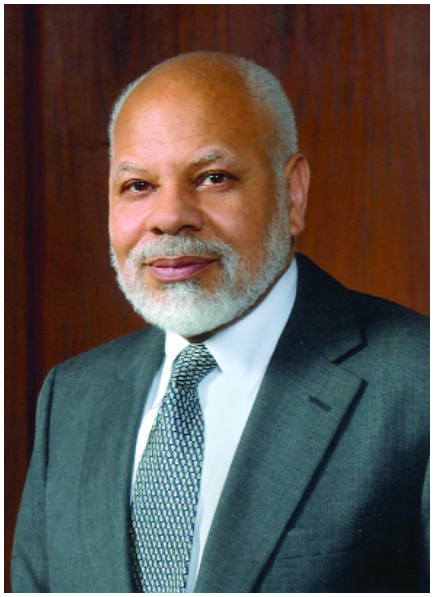
COVER PHOTO COURTESY OF THE CINCINNATI REDS

BY KENNETH G. STANDARD



A Matter of Justice

"While it is easy enough to agree that judicial independence is essential in order to uphold the rule of law, more challenging by far is the task of putting these precepts into practice."

– Supreme Court Justice Sandra Day O'Connor

Between unpacking from our very successful Annual Meeting week in New York and repacking to attend the National Conference of Bar Presidents and the American Bar Association House of Delegates meetings in Salt Lake City, I took two important trips to Albany. I testified on behalf of the Association in support of the judiciary budget at a legislative hearing. On a subsequent afternoon, I attended the Chief Judge's address on the State of the Judiciary.

It is incumbent upon us as lawyers to take every opportunity to advocate for the funding and other resources needed to enable the third branch of government to meet today's needs in our justice system. New York's court system is one of the busiest in the nation and, indeed, in the world, with almost four million civil and criminal case filings in 2003. As I told lawmakers in my testimony, we all rely on our justice system for the prompt, fair and effective resolution of critical criminal and civil matters. The courts are obligated to handle all cases which are filed, and must do so effectively. The 2005 budget request, in our view, is reasonable and necessary in light of these challenges.

The importance of the Bar's efforts in support of the judiciary involves more than the number of case filings and more than the dollars needed to fund the courts. It is a matter of doing justice and a matter of fostering public trust and confidence in our legal process. That is the message I also conveyed at the budget hearing. In a free society, the public, peaceful resolution of disputes ensures that all, including the weak, the poor and the unpopular among us, receive fair justice. The rule of law and a vibrant, open judicial system are how we assure that occurs. To be fair and effective, judicial decision making and judicial administration must be simultaneously independent of outside influences and considerations and yet accountable in their observance of the rule of law. For our democracy to work, our three branches of government must respect and maintain their separate but co-equal roles and they must have the resources to do so.

It was with these considerations in mind that I also spoke at the budget hearing about the Association's support for adequate funding for the Commission on Judicial Discipline. The Commission has experienced no growth in funding in the past 25 years and, as a result, has suffered a significant and debilitating reduction in staff as its caseload has more than doubled. The work of the Commission in maintaining the integrity of the judiciary is fundamental. That work needs to be supported with adequate funds for the Commission to fulfill its mandate and its role in promoting public trust and confidence in the legal system.

Working for the balance of judicial independence and accountability also was the objective when our Association promoted the creation of judicial campaign monitoring committees in coordination with local bars, and developed a guide for conducting such campaigns. It was with this view also that the Association submitted an *amicus curiae* brief to the U.S. Court of Appeals for the Second Circuit in 2003 in *Spargo v. New York State Commission on Judicial Conduct*, in which we contended that the political activity provisions of the New York Code of Judicial Conduct serve a compelling state interest.

The budget process and sound provisions for judicial conduct are not the State Bar's only concerns in this critical

balancing act. Another is the setting of judicial salaries. Our Association has a long-standing position calling for a regularized method for reviewing and adjusting judicial salaries, rather than relying on ad hoc actions. This need also was discussed by Chief Judge Kaye in her State of the Judiciary message, in observing that while many New York State judicial salaries were adjusted six years ago to achieve parity with the U.S. district court bench, no New York State judicial salaries have been raised since and they all now lag far behind federal levels. Unmistakably, judicial compensation is an indicator of the respect of society for our third branch of government. While mindful of today's fiscal constraints, certainly, the process of setting salaries should be designed to foster judicial competence and independence through a regular system of review and adjustment.

We, as lawyers, also must be attentive to the impact of legislative proposals on judicial independence. I read with interest Chief Justice Rehnquist's comments in his 2004 Year-End Report on the Federal Judiciary: "Although arguments over the federal judiciary have always been with us, criticism of judges, including charges of activism, have in the eyes of some taken a new turn in recent years." Among his concerns, he noted legislation introduced in Congress "that would limit the jurisdiction of federal courts to decide constitutional challenges to certain kinds of government action."

In recent years, in New York, in other states and nationally, the enactment of legislation imposing mandatory sentencing and other measures have eroded the ability of courts to take into account the individual circumstances of the cases and the defendants before them. Our Association often has been at the forefront in advocating for preservation of judicial discretion. One example of these efforts is our intensive work for reform of New York's drug laws, which, for the past 30 years, have resulted in unduly harsh sentences for low-level nonviolent offenders, impaired public trust in our government and failed to effectively deal with drug kingpins and the drug trade. We were pleased when, last year, the legislature took a number of constructive steps for reform, including decreasing sentences for nonviolent drug offenders, reducing the number of years required to be served in each of the mandatory sentencing categories, and providing for earlier prison release times and merit time for participation in treatment programs. We will continue to seek further action to provide for judicial discretion in sentencing and funding for treatment programs.

In a similar vein, U.S. Supreme Court Justice Sandra Day O'Connor observed in a recent speech, "Judicial independence is not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied. Nowhere is this interest more keenly exposed than in the judicial protection of human rights."

History, here in New York and nationally, is replete with examples, such as *Brown v. Board of Education*, where courts withstood public and political pressures directed against what were considered unpopular decisions, but today are considered to be landmarks of justice. Celebrations of such milestone decisions, such as the events last year marking the 50th anniversary of *Brown*, provide us with the opportunity to educate Americans about the importance of judicial independence – in the past, today and in the future – in confronting issues of individual rights and liberties and societal safety. At this time when people are especially frightened of terrorism, it is particularly important for us to speak up for the rule of law, for the presumption of innocence and the right of those accused to counsel and a prompt, public and fair trial. It is again a time when we must speak up for judicial independence.

In remarks a few months ago, a judicial advocate asked, "What about the lawyers? Are members of our profession engaged in the protection of our judicial system?" The advocate reported that he found little positive response across the country, while noting some exceptions, including the voices of judges and lawyers in New York.

The position of the New York State Bar Association can be simply stated: We will continue to speak out for the preservation of our justice system and the careful balancing of responsibilities so critical to the due administration of justice. Whether opposing FDR's court-packing plan in the 1930s, proposing a framework for reform of the Rockefeller drug laws today, or offering concrete recommendations on procedures for judicial selection, compensation, the Code of Judicial Conduct, sentencing legislation or other measures, we will be there. We will use our strongest assets – the knowledge, the experience, the minds and the courage of our members – to work to preserve the rule of law, to develop constructive measures to improve the administration of justice, and to advocate for these actions. Ours is a group effort, requiring statewide and grassroots action, as we deliver our message in discussions with lawmakers, with community leaders, and in the media. It is the lesson that we teach in promoting public understanding of these principles through our youth education initiatives and in other public forums. Ensuring that these concepts are maintained and strengthened is not an easy mission, but it's the right and only thing to do. ■

KENNETH G. STANDARD can be reached by e-mail at president@nysbar.com.

NYSBACLE

Tentative Schedule of Spring 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.

Using the Internet for Legal Research w/ Leigh Webber
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 5.5 in skills

March 31	New York City
April 1	Smithtown, LI
April 27	Rochester
April 28	Albany

†Benefits, Health Care and the Workplace

April 5	Rochester
April 13	Albany
April 20	New York City

Maintaining Ethics and Civility in Litigation: What Every Lawyer Needs to Know
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 in ethics and professionalism

April 8	New York City; Rochester
April 15	Albany; Uniondale, LI

Practical Skills: Family Court Practice – Custody, Child Protective Proceedings and Ethics
Fulfills NY MCLE requirement for all attorneys (7.5): 2.0 in ethics and professionalism; 3.0 in skills and 2.5 in practice management and/or professional practice

April 12	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

2005 Insurance Coverage Update – Personal Lines, Bad Faith and Other Developing Topics
Fulfills NY MCLE requirement for all attorneys (7.0): .5 in ethics and professionalism; 3.0 in skills and 3.5 in practice management and/or professional practice

April 15	New York City
April 29	Melville, LI; Syracuse
May 6	Albany; Buffalo

Federal Civil Practice: A Primer
Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 2.5 in skills and 3.5 in practice management and/or professional practice

April 22	New York City
April 29	Albany
May 6	Melville, LI; Rochester

Senior Housing Industry: An Evolving Business

April 22	Albany
May 13	New York City

Basic Securities Law for the Business Practitioner

April 28	New York City

†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

April 29	New York City
May 20	Melville, LI
June 17	Rochester

Three Hot Topics in Criminal Law
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 2.0 in ethics and professionalism; .5 in skills; and 1.5 in practice management and professional practice

April 29	Rochester
May 6	Albany
May 19	Uniondale, LI
May 20	New York City

What Immigration Law Practitioners Must Know About the New Labor Certification Regulations

May 4	New York City

DWI: The Big Apple V
(one-and-one-half-day program)
Note: CLE Seminar coupons and complimentary passes cannot be used for this program

May 5–6	New York City

Attorney Trust Accounts: Handling Clients' Funds in New York
(half-day program)
Live Presentations:

May 5	Rochester
May 26	New York City
June 2	Albany

Live Video Conference Presentations:

June 2	Buffalo; Syracuse

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

Proving and Defending Damages at Trial: Effective Trial Techniques for Plaintiff's and Defendant's Counsel
Fulfills NY MCLE requirement for all attorneys (6.5): 3.5 in skills; and 3.0 in practice management and/or professional practice

May 6	New York City
May 13	Buffalo; Melville, LI
May 20	Syracuse

Employment Law for the Corporate Counselor and General Practitioner

May 6	New York City
May 11	Albany
May 20	Rochester

The Nuts and Bolts of the Administration and Enforcement of Land Use Laws and Regulations

May 12	Syracuse
June 3	Albany; Buffalo; Tarrytown
June 9	Uniondale, LI

Successfully Handling an Equitable Distribution Case from Start to Settlement

May 13	Albany; Smithtown, LI
May 20	New York City
June 3	Rochester; Westchester

Practical Skills: Basic Elder Law Practice
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 0.5 in skills and 5.0 in practice management and/or professional practice

May 16	Melville, LI; Rochester; Syracuse; Westchester
May 18	Albany; New York City

Estate Planning and Will Drafting

May 19	Tarrytown
May 25	Albany; Melville, LI
June 1	Binghamton
June 2	Buffalo
June 7	Syracuse
June 8	New York City; Rochester

Practical Skills: How to Commence a Civil Lawsuit
Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 2.0 in skills and 3.5 in practice management and/or professional practice

May 24	Albany; Buffalo; New York City; Rochester; Syracuse; Uniondale, LI; Westchester

Emerging Environmental Topics for Corporate Lawyers

June 1	New York City
June 8	Melville, LI
June 10	Rochester; Tarrytown
June 13	Albany

Women on the Move III
(half-day program; reception to follow)

June 2	New York City

The Heart of the Case w/ James McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 in skills
Note: CLE Seminar coupons and complimentary passes cannot be used for this program

June 2	Syracuse
June 3	New York City

†Advanced Document Drafting

June 2	Tarrytown
June 7	Buffalo
June 9	New York City
June 13	Syracuse
June 14	Uniondale, LI
June 15	Albany

Practical Skills: Collections and the Enforcement of Money Judgments
Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 1.5 in skills and 3.5 in practice management and/or professional practice

June 6	Albany; Buffalo; Melville, LI; New York City; Syracuse; Westchester

Recent Developments in Shareholder Litigation and Enforcement Initiatives

June 10	New York City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Manhattan freelance writer **Skip Card** <skipcard@earthlink.net> is a former newspaper reporter for *The News Tribune* of Tacoma, Washington. He is currently completing *Take a Hike: New York City*, a regional trail guide to be published in early 2006 by Foghorn Outdoors.

Court of Dreams

By Skip Card

The personal papers of Justice Harry A. Blackmun add up to more than half a million notes and letters collected over a lifetime that included 24 years on the U.S. Supreme Court. But one small memo stands out.

Mets infielder Felix Millan avoids the tag by Reds catcher Johnny Bench in the ninth inning of Game 2. The Mets scored four runs in their final at-bat to cap a 5-0 win and even the series at 1-1. Photo courtesy of the Cincinnati Reds.

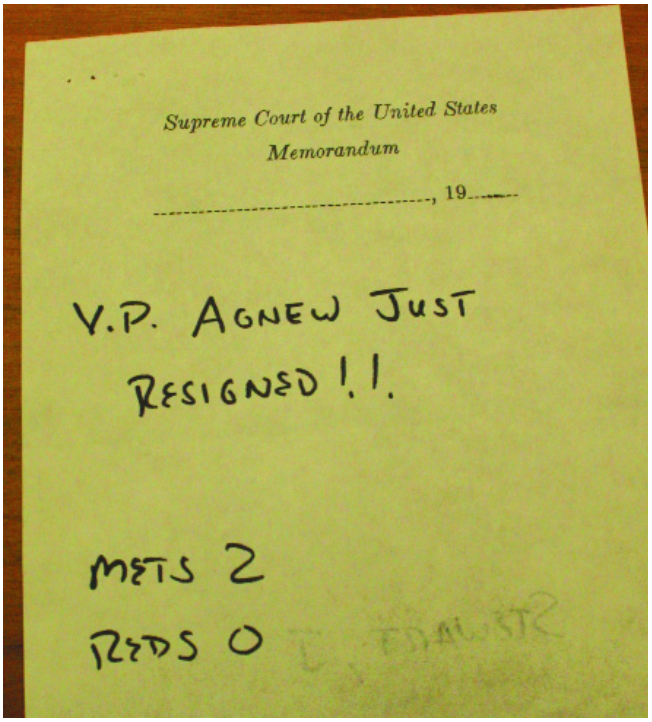


Photo by Avie Schneider, NPR.

It is written on palm-size notepad stationery topped with "Supreme Court of the United States Memorandum" in black italics. It is unsigned, but it was passed to Blackmun from Potter Stewart, a fellow justice and like-minded baseball fan. The note is undated, but it was penned around 2:30 p.m. on October 10, 1973, as the Cincinnati Reds and New York Mets were preparing for the second inning in the deciding fifth game of the National League Championship at Shea Stadium in Queens.

At that same moment in Baltimore, Vice President Spiro Agnew shocked Judge Walter E. Hoffman's courtroom by pleading no contest to one felony count of income-tax evasion.

"V.P. Agnew Just Resigned!!" the note reads. Below, in letters of equal weight, it adds, "Mets 2 Reds 0."

The note marks a uniquely American moment, a rare triple play involving the executive branch, high court and national pastime. Of all the Blackmun papers released March 4, 2004, five years after his death, few paint so vivid an image of Supreme Court justices as secretive schoolboys passing notes, or perhaps as just another group of guys stuck at the office when they would rather be watching a baseball game.

Potter Stewart would surely have preferred to be in the bleachers rather than on the bench that October day in 1973. Raised in Cincinnati, Stewart had been the son of the city's mayor, a part-time Cincinnati city councilman and a full-time Reds fan. During baseball season, he subscribed to Cincinnati newspapers to better track his team. He kept in his wallet a folded sheet of baseball's statistical probabilities, such as how likely a runner would be to score if he reached third base with no one out.

While the 58-year-old Stewart listened to that afternoon's oral arguments, his three clerks – Terry Perris, Andy Hurwitz and Fred Davis – were, at his request, monitoring the action at Shea Stadium on a small black-and-white television in the justice's chambers.

"He had asked us to keep tabs of the score of the Reds-Mets game while he was on the bench and we were at our desks doing our work, and to send into him via one of the pages half-inning reports of the score of the game. We did that throughout the playoffs while the Court was in session," recalled Perris, now a partner and tax law attorney with the Cleveland office of Squire Sanders & Dempsey. Perris keeps Stewart's handwritten request for ballgame scores under glass atop his credenza, a memento of his time with the justice.

Stewart's sympathies were clearly with the Reds, but his powers of observation and language often draw comparisons with Yogi Berra, the former Yankee catcher who in 1973 was managing the Mets. (The Court-watching Web site <www.oyez.org> in particular likes to compare Supreme Court justices to notable baseball personalities.) In a 1964 obscenity case, Stewart famously admitted that he may not be able to define obscenity but "I know it when I see it." The quote echoes Berra's quip, "You can observe a lot just by watching."

Justice Blackmun was a Chicago Cubs fan, although he and Chief Justice Warren E. Burger, friends from their childhood days in Minneapolis, were known as "the Minnesota Twins." Blackmun's beloved Cubs, as usual, were not in the playoffs in 1973. But in baseball terms, Blackmun was having a career year.

On January 22, 1973, Blackmun wrote the majority decision in *Roe v. Wade*, the landmark case that recognized a woman's right to abortion. The controversial ruling became a defining moment in Blackmun's 24-year career on the high court and sent shock waves through America's political and judicial landscape. Some have likened the ruling to New York Giants slugger Bobby Thompson's ninth-inning home run on October 3, 1951, a pennant-winning blast known as "The Shot Heard 'Round the World."

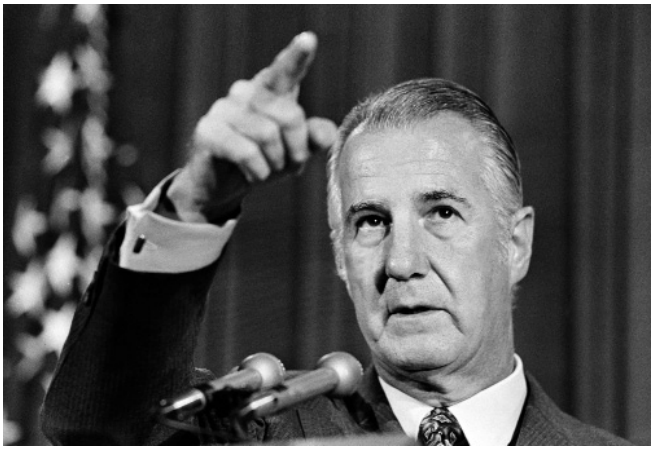
The October 10 contest between the Mets and the Reds wasn't just any ballgame. The winner would go to the World Series, and Reds fans had every reason to believe their team deserved victory.

Of all the Blackmun papers, few paint so vivid an image of Supreme Court justices as secretive schoolboys passing notes.

The Cincinnati Reds were in their Big Red Machine heyday and had finished the 1973 regular season atop the National League West with 99 wins and 63 losses. Pete Rose won the Most Valuable Player Award that year after finishing the season with a league-best .338 batting average and 230 hits. Reds pitcher Jack Billingham recorded a league-best seven shutouts.

The New York Mets, on the other hand, were upstart contenders. In last place in the National League East as late as August 10, the Mets vaulted to first place on September 21 and held on to capture the division title with an 82–79 win-loss record. (That record would have put them in fourth place had the Mets played in the National League West.) The Mets' bright spot was pitcher Tom Seaver, who led the league with a 2.08 earned-run average, 251 strikeouts and 18 complete games – good enough to win that year's Cy Young Award.

But the best-of-five series became an unexpectedly tough contest. On October 8, in Game 3, Rose ignited a fifth-inning brawl by punching Mets shortstop Buddy Harrelson. The next day, Rose hit a 12th-inning home run to tie the series at 2–2. For Game 5, the Mets sent Seaver to pitch on three days' rest. The Reds put Billingham on the mound.



On August 8, 1973, Vice President Agnew refuted allegations that he was involved in political payoffs, saying "absolutely not" when asked if he was giving any thought to resigning. Photo from AP/Wide World Photos.

The updates sent by Stewart's clerks were at times rather elaborate, particularly when the Reds were at bat. The first game memo, forwarded from Stewart down the bench to Blackmun and preserved in Blackmun's archives, is written in the crimped handwriting of Fred Davis, now a litigation partner in the office of Shearman & Sterling in Manhattan. It gives a batter-by-batter

description of the first half of the first inning, when Seaver had yet to find his rhythm:

> Rose grounded to 2nd.
> Morgan walked.
> Driessen singled and Morgan took 3rd.
> Driessen took 2nd on WP.
> Perez struck out swinging.
> Bench walked intentionally.
> Griffey flied to center w/ bases loaded.
> NO SCORE.

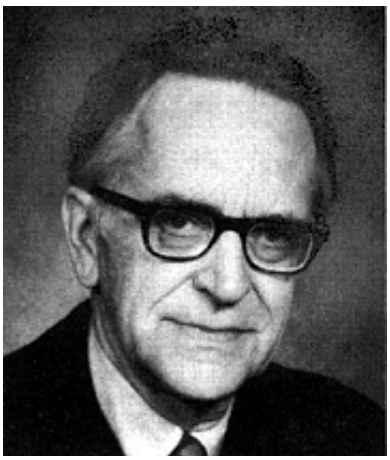
The Mets scored two runs in the bottom half of the first. As the inning wrapped up, NBC broke the news of Agnew's resignation. The Vice President's no-contest plea ended 65 days of defiantly claiming innocence of charges that he failed to report $29,500 of income received in 1967 while he was governor of Maryland. Agnew was fined $10,000 but spared a prison term on the condition he leave office.

"The Vice President had resigned. It was pretty cataclysmic news," recalled Davis. That summer, congressional hearings into the Watergate break-in had cast a cloud over President Richard Nixon, and critics were calling for impeachment. Washington had become a city of news junkies, and each day seemed to bring dramatic surprises.

"That year, all of us would spend an hour or two a day reading the paper," Davis said.

Court clerk Andy Hurwitz grabbed a felt pen and a Supreme Court memo pad and scribbled down the news out of both Baltimore and Queens. Observing proper Washington decorum, Hurwitz gave Agnew's announcement priority over the baseball score. For gravity, he added two exclamation points. A photograph of the note was featured in the *New York Times* when Blackmun's papers were released in 2004.

"The handwriting on the note is definitely mine," recalled Hurwitz, now a justice on the Arizona Supreme Court. "My son recognized it in the *Times*, and once I saw it, so did I."



Justice Harry Blackmun. (Courtesy of the U.S. Supreme Court)

Hurwitz folded the note, addressed it to "Stewart, J." and handed it to a Court page. The news reached the bench as the nine justices were hearing arguments in the fourth and final case of the day, *Espinoza v. Farah Manufacturing Co.*[1]

Cecilia Espinoza, a Mexican citizen living legally in the United States and the wife of a naturalized U.S. citizen, had been denied a job as a seamstress at the Farah plant in San Antonio, Texas. Farah, which blossomed as a clothing manufacturer by supplying khaki fatigues to the U.S. military in World War II, forbade employment to anyone who was not a U.S. citizen. Farah's San Antonio plant was hardly a hotbed of racism; up to 96% of its employees were Mexican-Americans, and Farah itself had been started by two Lebanese immigrants who learned the shirt-making trade in New York City. Still, Espinoza sued on the grounds that Farah's rule constituted discrimination based on her national origin and therefore violated Title VII of the 1964 Civil Rights Act.

Justice Potter Stewart. (Courtesy of the U.S. Supreme Court)

Arguing for the plaintiff was George Cooper, who had been one of Davis's tax law professors at Colum-bia University. Cooper argued that national origin and citizenship were inescapably linked, and a citizenship requirement imposed a burden on ethnic groups at the lowest rung of U.S. society. Resident aliens of Mexican ancestry living in Texas were simply the latest new arrivals to face discrimination, Cooper told the Court.

Some justices seemed impatient with Cooper's history lesson. The audiotape of the proceedings kept in the National Archives in Washington reveals a testy exchange with Justice Thurgood Marshall:

Cooper: "The ethnic group which is most harshly affected by a citizenship requirement is the ethnic group at a particular time and place that is most heavily made up of recent immigrants. In Boston in 1850, the ethnic group . . ."

Marshall: "We're not talking about 1850. We're talking about now."

Cooper: "Now, in . . ."

Marshall: "What is your ethnic group that you're talking about *now*?"

Cooper: "Yes, your honor. Now . . ."

Marshall: "We're talking about foreign people who haven't been naturalized."

Cooper: "Your honor, in . . ."

Marshall. "As opposed to foreign people who *have* been naturalized. And you're going to break those up into two separate groups?"

Cooper: "No, your honor. No, your honor."

Marshall: "I hope you don't try."

When the note announcing Agnew's resignation arrived on the bench, 13 minutes into Cooper's oral argument, shocked whispers picked up by the Court's open microphones can clearly be heard on the transcript tape. Davis, aware the note would cause a stir while his former professor was arguing his case, crept into the courtroom to watch the scene unfold and see how it affected Cooper's delivery.

"He noticed that they weren't paying attention," Davis recalled.

The note arrived as Cooper was explaining how Espinoza was unable to pass a citizenship test because she didn't speak English.

Cooper: "The mere fact that you can't speak English doesn't necessarily preclude you from being a citizen, unless you were born abroad. And it doesn't have anything to do with this job. That of course is crucial . . ."

Unknown justice, in a whisper: "The Vice President has resigned."

Cooper: ". . . to the extent that the citizenship requirement is unlawful because of its discriminatory impact, discriminatory effects. We don't say that it's *per se* unlawful. We say rather that it's unlawful . . ."

Unknown justice: "The Vice President has resigned."

Cooper: ". . . unless . . ."

Unknown justice: "What?"

Cooper argues onward, but murmuring and whispering continue. Cooper begins to sound like a frustrated schoolteacher dealing with distracted schoolboys. He pauses, then slows his speech to a crawl, hoping to regain the Court's attention.

Cooper: "In terms, in terms of ethnic . . . discrimination . . . again . . . the point is, your honors . . . that in each case the effect of the citizenship requirement will be to discriminate against a particular group which predominates in the alien population at the time."

Judicial Holdings

Few rules restrict what a Supreme Court justice can keep in his personal library, and Harry Blackmun's files in the Library of Congress are full of scraps of curious correspondence. Container 116, which includes folders of notes exchanged between justices during proceedings, makes for particularly good reading if you're a fan of courtroom apocrypha.

Many memos addressed to Blackmun bear a scrawled signature that looks like "Will" or "W" and likely came from Justice William O. Douglas. One scrap from November 16, 1971, reads, "Note 'blond' in second row center. She is here almost daily – at least since you came!"

Another is dated December 16, 1974: "We should not give this guy many points in his argument. But so far as his jacket is concerned, he comes out way above the average."

Chief Justice Warren Burger often sent notes to his childhood friend, Harry Blackmun.

March 4, 1974: "HAB, How would you like my job? WEB."

December 2, 1974: "Harry, Here's Bill's script. For me, it is as flat as a Swedish pancake. Not bad, just plain dull! Am I way off? WEB."

Several are curious keepsakes. One might wonder why Blackmun preserved a note dated December 8, 1971, written by the cleaning woman: "Mr. Justice, I am so sorry that I left the trash in your chair. I had to leave in a hurry. My mother had a heart attack 5:45 yesterday morning. Another girl took over my job. Please for give [sic] me."

And from November 1, 1992: "Harry: I think your hearing aid is emitting quite a high pitched sound. Can it be adjusted? Sandra."

Baseball notes between Blackmun and Potter Stewart continue through the 1980 season. On April 14, 1980, Stewart wrote:

> Harry,
>
> The Cincinnati Reds are off to a surprisingly impressive start: 4 straight wins, including 3 shutouts – and Seaver hasn't pitched yet. It's been my observation that in the Western Division of the N.L. the team that gets off to a fast start is hard to beat – e.g. the Los Angeles Dodgers 2 years ago.
>
> P.S.

Yet, the prize for the oddest item in any justice's library probably goes to Lewis Powell, whose papers and effects are kept at Washington and Lee University's School of Law. In an attempt to debunk what seemed a likely urban myth, an e-mail was sent to archivist John N. Jacob to inquire whether the Powell archives indeed contained the justice's old college jockstrap. Jacob replied:

"While I haven't conducted DNA tests, I have every reason to believe that we do, indeed, hold (I use the term advisedly) this item. (I attempted to send you a photo, but it was too big for your e-mail box – the photo, not the garment.)

"Powell, you may know, chose W&L because he was recruited for baseball (1st base). Alas, he was cut from the team and served as its manager."

Perris remembered the moment.

"He completely lost the attention of the bench as the justices talked among themselves about the contents of the note – certainly not the game score but the Agnew resignation," Perris said.

It's not certain Hurwitz's note to Stewart started the whispering. When the resignation was announced on television, Chief Justice Burger's clerk Joe Zengerle, a West Point graduate who had studied law at the University of Michigan, sent Burger a note reading, "Chief: NBC News just said Agnew just resigned." It's possible the notes reached Stewart and Burger about the same time, and the news started spreading along the bench from two sources. Both notes wound up in the hands of Blackmun, and both survive among his personal papers.

The whispers had stopped by the time Farah's attorney, Kenneth R. Carr, stepped up to speak. Carr's chief point was that, during congressional debate on the Civil Rights Act, a subcommittee chairman had plainly stated that "national origin" meant a person's country of birth or the country from which his ancestors came. Besides, Carr said, even the federal government required its employees to be citizens, another indication of legislative intent.

The Court sided with Farah. In an 8–1 decision announced November 19, Marshall wrote for the majority, "Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin. . . . [B]ut nothing in the Act makes it illegal to discriminate on the basis of citizenship."[2]

But Marshall's decision included a caveat: The Equal Employment Opportunity Commission could still charge an employer with discrimination if a citizenship requirement was "but one part of a wider scheme of unlawful national-origin discrimination."[3] That caveat deflected the main thrust of the ruling. Today, the EEOC Web site

points to *Espinoza v. Farah* as proof that non-citizens are entitled to federal protection against discrimination, and that a citizenship requirement is illegal in most cases if it is discrimination in disguise.

The Farah Manufacturing Co. changed over the decades, too. The clothing firm stubbornly kept production in the United States until 1987, when it opened two plants in Mexico. In 1998, the struggling Farah label was acquired by Tropical Sportswear International (TSI) and merged with Savane. TSI's production plants are outside the United States. Today, if you want a job sewing Farah slacks, being a U.S. citizen is clearly a disadvantage.

While Farah became a footnote, the Watergate scandal rewrote U.S. history. Two days after Agnew's 1973 resignation, President Nixon named Congressman Gerald Ford, the House of Representatives' minority leader, to be his new Vice President. Ford assumed the presidency on August 9, 1974, when Nixon resigned amid charges of a cover-up. Agnew died on September 17, 1996, at age 77, still bitter at the idea he had been fed to the wolves to divert attention from the scandal surrounding the President.

Attorney George Cooper married writer Judy Blume in 1987. Blume, one of America's most successful authors of books for children and young adults, claims to be a Mets fan.

Baseball endured. But on October 10, 1973, Reds fans had their hearts broken.

Mets ace Tom "Terrific" Seaver pitched 8 1/3 innings and gave up just seven hits and one earned run. Reds starting pitcher Billingham, roughed up for five earned runs in four innings (including three runs in the fifth before he could record an out), took the loss. The final score was Mets 7, Reds 2. Potter Stewart probably drove home in time to see the final innings.

"Everybody felt, including Stewart, that the better team lost," Davis said.

The 7–2 victory sent Mets fans into a frenzy. Jubilant New Yorkers, who had paid $3 for general admission seats (twice Shea Stadium's normal $1.50 price), poured onto the field in a riotous celebration after the last out. Hundreds of grassy chunks were ripped from the Shea turf as souvenirs. Some of those bits of sod still grow in New York lawns, small shrines to an improbable victory.

The Mets went to the World Series in 1973 but lost in seven games to the Oakland A's. The New York team later tanked, finishing at the bottom of the National League East in 1977, 1978, 1979, 1982 and 1983.

The Cincinnati Reds rebounded. The Reds won the World Series in 1975 and 1976, much to the delight of Potter Stewart, who continued to trade baseball notes with Blackmun. Several are preserved in Blackmun's files. One, dated October 23, 1975, after the Cincinnati Reds defeated the Boston Red Sox for the championship,

Agnew emerges from federal court on October 10, 1973, after pleading no contest to a charge of tax evasion and resigning from the Vice Presidency.
Photo from AP/Wide World Photos.

reads: "Dear Harry, Many thanks. It was a great Series, and the Reds were darn lucky to win. P.S."

Also in Blackmun's archives from that time is what appears to be marker for a friendly Series wager:

> Winner of World Series:
> Red Sox H.A.B $2.50
> Reds P.S. $4.00

Stewart retired from the Supreme Court in July 1981, amid a baseball labor strike. He died in 1985.

Blackmun retired from the Supreme Court in 1994, and later gave his personal papers to the Library of Congress. The vast collection includes six folders of newsletters from the Emil Verban Memorial Society, a group of dedicated Chicago Cubs fans. (Verban, the Cubs' hardworking second baseman from 1948 to 1950, is still very much alive, which tells you something about the society.) Blackmun, member No. 47 in the Washington, D.C., chapter, preserved each issue of the newsletter from 1982 to 1998. One of the final scraps of correspondence in his archives indicates that illness prevented Blackmun from attending the society's luncheon meeting.

Blackmun died March 4, 1999. As he requested, his personal papers were released five years later. His legacy consists of 530,800 items in 1,585 containers. One tiny note from October 10, 1973, rests among them.

You can look it up. ■

1. 414 U.S. 86 (1973).
2. *Id*. at 95.
3. *Id*. at 92.

BY DAVID PAUL HOROWITZ

Deposition Tips Your Parents Taught You

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. He welcomes comments, questions, and suggestions for future columns. Portions of these materials were used in the New York State Bar Association's 2003 "Winning Depositions" CLE Program, chaired by Mr. Horowitz.

Along with graying hair and creaky knees, ageing brings with it the realization that your parents were very smart people. Long before you read *To Kill a Mockingbird*, or saw your first episode of "L.A. Law," your parents knew you would one day be a lawyer. The proof? They told you nearly everything you need to know in order to conduct effective depositions (omitting only a few gems such as, "Move to strike as non-responsive"). Sadly, several years of law school and countless hours spent with "more experienced" attorneys convinced you that lawyers are different from other people ("we teach you to think like a lawyer"), and, therefore, should speak and act differently from other people. You listened to them, and ignored what your parents told you. Big mistake. If you keep in mind what your parents told you, and follow their advice, your deposition skills will rise to new heights.

For those of you who have forgotten, here is what your parents told you:

"You Catch More Flies With Honey Than Vinegar"

This is an oldie, but a goodie, and the one most often forgotten. Witnesses either believe that they are there to "tell the truth, the whole truth, and nothing but the truth," or believe that you, as opposing counsel, are Satan's representative on earth. Whichever of the two categories of witness you are facing, being nasty and unpleasant will not help you. Many attorneys believe, wrongly, that being a nice person can ruin a legal career. Nothing is further from the truth. Your parents were right all along, so keep the following points in mind:

- Outside of the people attending the deposition, no one will ever know if you are nice (although the court reporter will remember, and may gloss over some of your mistakes, and correct some of your malapropisms, when producing the transcript).
- Relaxing the witness is a good thing; engaging the witness in a conversation, on the record, is even better. Almost everyone is more giving and forthcoming when relaxed. Other than lawyers, everyone else in the world engages in conversations, not rapid-fire questions and answers (forget how you try to converse with your spouse or significant other).
- Fighting with the witness breaks the flow of your examination. It is difficult enough to remember to ask necessary questions, and remember to follow up on new, relevant, areas of inquiry, without getting involved in jousting contests with the witness. Remember, it is your examination: organized, well-thought-out, and clear deposition questions that elicit a series of non-responsive answers will hurt the witness at trial.
- If your goal is to prove that you are smarter than the witness, you will lose an important advantage. Ninety-nine times out of a hundred, a witness comes into a deposition already believing you are smarter. This advantage is yours to lose.
- When it is absolutely necessary to fight with the witness, remember, there is a record being made. Know when you are on and off the record, and, when on the record, keep your words neutral (making faces and rude gestures will not appear in the transcript, but can still come back to haunt you).

"Don't Take No for an Answer"

Actually, your parents meant to say, "Don't take 'I don't know' for an answer." While some witnesses believe that saying, "I don't know" makes them appear stupid and, consequently, will not answer that way (even when they truly don't know), many other witnesses fall into a gentle patter of answering many questions that way. Never, never accept this as the witness's "final answer." There are countless follow-up questions you can ask to elicit meaningful information:

- If you don't know the information now, did you once know it?
- If you don't know, who would know?
- If you don't know the name of a person who would know, is there a person with a particular job title or responsibility who would know?
- Is there a record that has that information?
- If you don't know of a record, who would know if there is a record that has that information?

"A Job Worth Doing Is Worth Doing Well"

While a mediocre deposition may not take as long as a superb one, once you factor in the travel time to and from the deposition, the fact that your fixed overhead for the deposition is the same (laundered shirt, shined shoes, two tokens, and hairspray), and the fact that you risk losing your job if the boss finds out you went shopping at Macy's for an hour and a half after the deposition was completed (because a competent deposition would have taken at least that much additional time), what have you really saved? And keep in mind that all the time in the world would not salvage a deposition for which you are not prepared. Still not convinced? Try these reasons on for size:

- An organized, focused deposition invariably proceeds faster than one that is not.
- With an organized deposition, you will have the exhibits you need at trial already identified and ready to be admitted into evidence.
- The witness will not resent your wasting her or his time and will be more likely to be forthcoming because you will appear to be in command of the relevant material.
- Opposing counsel will tread more carefully with you for the remainder of the case (and any other case you have together).
- If you do a shoddy job, your boss (or a trial judge, someday) may actually read the transcript and realize you are a moron.

"The Devil Is in the Details"

Washing behind your ears, tucking in the corners of your bed sheets, and buttoning all of the buttons on you shirt were a real drag as a kid, but aren't you now glad you learned to do them? Depositions are the same. There are any number of mundane, boring things you should do at a deposition that will contribute to its being a resounding success. Among these are the following:

- Review the file and, when you find what is missing (and there is always something missing), attempt to fill in whatever gaps exist before the deposition commences and, if the missing material is crucial and cannot be obtained or replicated, adjourn the deposition.
- Have all necessary exhibits organized (pre-marking them with the court reporter is a nice timesaver) and lay a proper foundation for the exhibit, on the record, so that the exhibit can go into evidence at time of trial.
- Follow up on new areas of inquiry that become apparent at the deposition. This is especially important if you have a script to follow: know when to deviate.
- Don't worry about finishing at a particular time, or even on the day of the deposition. If you ask relevant, well-thought-out questions, following up where necessary, you will have a wonderful, written record of the deposition. If you need more time, or an additional day, no reasonable court will refuse you, so take your time and control the pacing of the deposition.
- Learn as much as you can before the deposition commences. Don't limit yourself to the material in your file. If there are technical

Keep in mind that all the time in the world would not salvage a deposition for which you are not prepared.

issues, have an idea of the terms and concepts involved. While you will learn a lot from your witness during the deposition, and often a witness will want to teach you, having a solid foundation before the deposition will be of invaluable help.

"It's Not All About You"

While we all think we are hot stuff, the deposition room is not a courtroom (or theater) for you to star in. The witness should be the focus. Strut your stuff somewhere else.

- Consider wearing something other than your Armani suit and killer shoes. Try the Mr. Rogers-like approach, especially with an older or less educated witness. Wear a sweater (patches at the elbow help) and use a pen that cost less than $500. Not only will the witness relax, you will feel more comfortable and not have to kick yourself after the deposition for losing your Mont Blanc.
- Let the witness talk. You are not there to testify, and there is no jury there to hear what you say and confuse what you say with testimony. Let there be a discernible pause after the witness has given an answer. You will be surprised how often the witness will then resume talking, and give answers you would never have elicited by direct questioning.
- Show interest in what the witness does and who the witness is. If the witness has a job, ask about the job. If the witness is a retiree, ask about what the witness does with his or her time. Let witnesses present themselves as a three-dimensional persons. You can bet the attorney preparing the witness did not let the witness talk about this, and the witness will be appreciative and, perhaps, more forthcoming.
- Let the witness teach you. While you may know as much as or more than the witness does about the machine involved in the case or the surgery the doctor performed, showing off for the witness will usually make the witness less forthcoming. Hold back for a while and see what the witness tells you. Of course, there is nothing wrong with, every once in a while, letting slip to the witness that you know something about the matter at hand.
- We all have bad days. If you are having one, look for another attorney to take up the questioning to give you a chance to re-group. Ask another attorney who is present if you forgot something, or if there is something else you should go into. On rare occasions, an opponent will give you some assistance (and remember, a good record can serve your opponent's interests as well as yours).

"Early to Bed, Early to Rise . . ."

Perhaps nothing can put a group of inquisitive, intelligent, and well-rested people to sleep faster than a deposition. What chance do you have if you are exhausted? Often, being refreshed and alert plays a major role in any successful deposition. Some suggestions:

- Prepare ahead of time. Even if you are in bed for the proscribed time, knowing an important deposition is on the next morning, for which you are woefully unprepared, will make for a lousy night in bed.
- You will daydream during a deposition: everyone does. The trick is to realize you are doing it and stop. Have the reporter read back the last question and answer to give you time to re-group and re-focus.
- If you are tired or just bored, take a break. Take a quick walk outside or splash some water on your face.
- Arrive on time (early is better). If you need to go into a second day, you are far more likely to get a second day, over objection, if the record reflects that you started the deposition on time, not an hour and a half after the scheduled time.
- Be attuned to the others in the room. If opposing counsel is asleep, fine. If the witness is drowsy or punchy, ascertain if this is helping you (getting the witness to lower her or his guard) or hurting you (answers are unresponsive or make no sense). If it is hurting you, confer with your opponent outside of the hearing of the witness and suggest a break. The most dangerous thing is if the court reporter is asleep. You will have an incomplete or incorrect transcript (both are terrible).

"Beware of Strangers Bearing Gifts"

We are all susceptible to the narcotic effect of sumptuous offices, free coffee and Danish, and generous doses of flattery. Graciously accept opposing counsel's hospitality and pleasant chatter, but don't forget that you are in unfriendly territory.

- Beware the jolly, friendly, and outgoing witness. This person is not your friend, nor is he or she likely to be after the deposition. Your transcript will be full of unresponsive answers and meaningless chatter.
- Beware the jolly, friendly, and outgoing opponent. This person is not your friend, nor is he or she likely to be after the deposition You will read with amazement a transcript of the deposition where most of the answers to your questions come from the attorney, not the witness.
- Beware the flirtatious and sensuous court reporter. This person is probably not your friend, nor is he or she likely to date you after the deposition. Lord knows what will be in your transcript.
- Beware the overly helpful witness, especially the overly helpful expert witness (truly an oxymoron). You will read a transcript wherein you were skillfully diverted from your focus of inquiry to something benign or, worse, helpful to opposing counsel.
- Beware the questions your opponent suggests after objecting "to form." You will be amazed when you read the transcript to find subtle shifts in the question that lead the questioning down a fork in the road to nowhere.

"Less Is More"

Over a lawyer's career, the length of that lawyer's depositions, all things being equal, will often graph out as a standard bell curve. At first, like a deer caught in the headlights of an oncoming car, a new attorney wants to get out of the deposition room as quickly as possible, and depositions tend to be over almost before they start. Next, after having observed other, "more experienced" attorneys, and having been exposed to numerous areas and lines of (often irrelevant) questioning, an attorney's depositions balloon out, filling days and weeks. Finally, with the refinement of skills and the benefit of meaningful experience, an attorney's questioning will focus like a laser on the crucial areas of a case, moving from one element of a cause of action (or element of damages) to another. Such a deposition can take surprisingly little time, while having an extremely satisfying result.

- Understand what you have to prove or find out from the witness before you start the deposition. Usually, a witness will serve to provide testimony for one or more elements of a cause of action (or item of damages), and your focus should be on obtaining this testimony.
- Know when you have gotten a good answer and move on immediately to something else. In attempting to gild the lily, you will give the witness an opportunity to weasel out of the previous good answer.
- Keep pedigree/biographical questioning to a bare minimum (unless necessary for your case). What the witness studied in junior high school cannot possibly help your case. When, at 4:30 PM, you realize you still have to question the witness about how the accident happened, you will really be under the gun.
- If co-counsel, or another opposing party, has the primary interest in proving a particular element of a case, consider deferring to that attorney for questioning in that area. You can always ask any necessary follow-up questions after the other attorney has questioned the witness.

It must be made clear that you are not going to conclude the deposition until the witness gives you the answers and information to which you are entitled.

- When you have obtained the testimony you need, stop. Continued questioning will afford the witness the opportunity to muddy the waters and, with skilled coaching by opposing counsel, recant beneficial testimony previously (and perhaps painstakingly) obtained.

"Be Prepared"

Your parents, not to mention the Boy Scouts of America, were right. There is no doubt that, once you have a couple of depositions under your belt, you can wing a deposition. It happens every day. Sometimes you get lucky. More often, you don't. Unless you and lady luck have an ironclad agreement, don't wing it. Benefits of being prepared include: a good night's sleep both the night before and the night after the deposition, the respect of all in attendance, and steady employment. A few examples should suffice:

- Visit the scene of the occurrence, if necessary (yes, leave the sanctity of your office).
- Have case citations at the ready for issues on privilege and scope of the examination that are likely to arise.
- Know the applicable rules governing the deposition, not forgetting to look at the particular orders and stipulations applicable in your case.
- Familiarize yourself with terms of art and concepts involved in your case that are outside your experience.
- Anticipate evidentiary problems likely to arise at trial, and attempt to deal with them at the deposition.

"Because I'm the Parent, That's Why"

This is more a statement of fact than a helpful tip. While your parents were patient, and would explain things over and over again, there would invariably come a time when you, the apple of their eye, just didn't or wouldn't get it. Often there comes such a time (or times) during a deposition. It is now time to mothball Tip No. 1 and let the witness and/or opposing counsel know that you are in charge. It must be made clear that you are not going to conclude the deposition until the witness gives you the answers and information to which you are entitled. A few ways to do this without making your child, I mean the witness, hate you:

- Acknowledge the witness's incorrect/non-responsive answer, and ask the witness to listen carefully as you repeat the question (better yet, have the court reporter read back your question so that the witness doesn't think you changed the question) so the witness can give a responsive answer.
- Read back, verbatim from your notes, the prior answer given by the witness that you are now referring to and, when the witness or attorney disputes it, have the court reporter read it back. You will be surprised to find you need to do this only once or twice before the witness and the attorney believe anything you say about the witness's prior testimony.
- Don't make the mistake of going off the record when the going gets tough. Even the most obstreperous attorney will temper her or his remarks when a record is being made.
- Don't be afraid to take a break from the deposition to obtain authority for the position you are advocating, either by calling someone for information (for those of you who don't yet have the entire N.Y.S.2d on your Palm Pilot) or looking it up during lunch or a break.
- Never call the judge unless you absolutely have to, and never fail to call the judge when you absolutely have to. Very often, the ogre who has been tormenting you for the last hour and a half at the deposition will turn conciliatory and explain what a big mistake it all was when you actually call the judge (as opposed to whining that you are going to call the judge). I don't think there is a single judge who relishes taking these calls but, when called upon to do so, most listen patiently and make a ruling. Note that the decisions are not always correct, and you are in a bit of a bind when the judge orders you to do, or stop doing, something that you must do, or not do, to successfully complete your deposition. Having "charted your course," you are now obligated to follow it.

"Someday You'll Thank Me"

With age comes experience, and maybe even wisdom. You've developed enviable deposition skills. Your parents were right – so give them a call. ■

The *Daubert* Debacle

By Henry G. Miller

Daubert v. Merrell Dow Pharmaceuticals, Inc.[1] is considered by some to be a dyslexic decision. It rules one way but goes the other way.

Justice Blackmun, writing for the Supreme Court, found the 1923 decision *Frye v. United States*[2] too restrictive. *Frye*, decided by the Court of Appeals for the District of Columbia, had long been the Rosetta stone of deciphering whether expert opinion was admissible or not. A remarkably short case free of citations, *Frye* had been cited over and over throughout the country. It upheld the exclusion of expert testimony on a new procedure called the systolic blood pressure deception test. Since the test lacked "general acceptance," it was inadmissible. *Frye* concluded that "courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle . . . [however] the thing from which the deduction is made must be sufficiently established to have gained general acceptance."[3] Thus, general acceptance was the decisive element for 70 years.

Then along came *Daubert*. The children-plaintiffs sued the makers of Bendectin, an anti-nausea drug, for birth defects they allegedly sustained as a result of their mothers' ingestion of that product. The District Court for the Southern District of California granted the company's motion for summary judgment and the Court of Appeals affirmed. The standard of admissibility used by the lower courts was *Frye*'s "general acceptance."

The Supreme Court reversed, holding that "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence. Justice Blackmun wrote that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. Specifically, he held Rule 702 does not incorporate the general acceptance standard and such a requirement would be "at odds" with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion testimony.'"[4] Judge Jack Weinstein, a prolific and highly regarded thinker on the subject, is quoted by the Court: "The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts."[5] Justice Blackmun further referred to the "permissive backdrop" of the Rules. If Justice Blackmun had stopped there, there probably would be no *Daubert* controversy.

However, Justice Blackmun did continue to write. What we now have, depending on your viewpoint, is the *Daubert* Disaster or the *Daubert* Delight. In either case, it's a . . .

Revolution

Justice Blackmun went on to say the Court's ruling does not mean there are no limits on the admissibility of scientific evidence. Judges must ensure that scientific evidence

Henry G. Miller is a partner at Clark, Gagliardi & Miller, P.C., in White Plains. 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 attended Columbia University and New York University.

This article first appeared, in a slightly different form, in the NYSBA's Torts, Insurance and Compensation Law Section's Summer 2003 *Journal*.

is not only "relevant," but "reliable" as well. He added, "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist."[6] He then went on to list four considerations which bear on the admissibility of opinion evidence based on a scientific theory or technique: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it gives rise to a significant rate of error; and (4) amazingly, whether it has general acceptance. Back to *Frye* we go. Thus, in a ruling designed to liberalize *Frye*, the Court actually added factors over and above general acceptance.

The Court added that Rule 702 is a flexible one. Courts should focus on methodology, not conclusions. The Court further cited Rule 403, which states that relevant evidence may be excluded if its probative value is outweighed by unfair prejudice.

Those representing the manufacturer were concerned that the abandonment of "general acceptance" would result in a free-for-all in which befuddled juries would be confounded by absurd pseudo-scientific assertions. Those representing the children worried that such a screening role for the judge would allow for the exclusion of too much evidence, creating a stifling and repressive atmosphere inimical to the search for truth.

Justice Blackmun anticipated that a balance would be struck by the "gate keeping role" of the judge. He argued, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[7] In addition, he pointed out that the courts remain free to direct a judgment or grant summary judgment in weak cases. Justice Blackmun concluded, "These conventional devices rather than wholesale exclusion under an uncompromising 'general acceptance' test are the appropriate safeguards where the basis of scientific testimony meets the standards of rule 702."[8]

The Aftermath

Which view, plaintiffs' or defendants', was most prophetic? Those representing the children turned out to be prescient. The lawyers for the injured children won the battle but lost the war.

In the first 50 years after *Frye* was decided, it was cited in only 96 cases, according to Michael J. Saks.[9] In the six years after *Daubert*, federal courts published 1,065 opinions on expert admissibility, 871 of which involved civil cases, according to D. Michael Risinger.[10] Risinger points out that civil defendants won nearly 70% of the time.

Some believe this trend favoring defendants will become even more pronounced. They note that corporate-funded reform groups are on the attack about what they claim to be junk science. The Defense Research Institute is urging defense lawyers to file *Daubert* motions whenever possible.

There are at least 50 different hurdles that various courts have directed experts to surmount.

The factors on the checklist in *Daubert* have been increasing. By one count, there are at least 50 different hurdles that various courts have directed experts to surmount, this according to Ned Miltenberg, speaking at the ATLA Annual Convention in 2000. Not happy about this trend, he titled his paper "Out of the *Frye*ing Pan and Into the Fire."

The *Joiner* Juggernaut

The benevolent gate keeping of *Daubert* turned into what one commentator called, less kindly, "Checkpoint Charley." Opponents of *Daubert* have argued that gate keeping is a euphemism for industry safekeeping. No matter what view is espoused, four years after *Daubert*, a stricter interpretation of judicial gate keeping followed.

In *General Electric Co. v. Joiner*,[11] the Supreme Court addressed the *Daubert* issue once again. The main holding is bland enough. Much delegation of authority to the lower courts is given. The District Court will only be reversed for admitting or excluding expert opinion when it abuses its discretion.

In *Joiner*, an electrician suffering from lung cancer sued the manufacturers of PCBs and other products. Defendants removed the case to federal court. The District Court excluded the testimony of the electrician's experts and granted defendant's motion for summary judgment. The Eleventh Circuit Court of Appeals reversed, holding that such a wholesale exclusion was

contrary to the liberal policies of admissibility that had long been the guiding principle of the federal courts. The Circuit Court said there is a preference for admissibility under the Federal Rules of Evidence. There should be a more stringent standard of review, particularly when evidence is excluded, said the court, adding it is wiser to leave to the jury the correctness of competing expert opinions.

The Supreme Court differed. It held that while the austere *Frye* standard of general acceptance is not carried over, a trial judge is not disabled from screening such evidence. It was not an abuse of discretion to exclude plaintiff's evidence.

How reliable was plaintiff's evidence? Plaintiff had identified relevant animal studies showing a link to cancer and directed the court's attention to four epidemiological studies on which the experts had relied. In short, there was a production of considerable evidence that some judges might find relevant and reliable.

> Are judges deciding questions of fact? Are they invading the province of the jury?

One such jurist was Justice Stevens, who concurred with the holding about using the abuse of discretion standard but dissented on the question of whether abuse had taken place. He felt it was not something the Supreme Court could decide without a closer review of the record. Justice Stevens pointed out that plaintiff's experts relied on the studies of at least 13 different researchers who referred to several reports of the World Health Organization that addressed the question of whether PCBs cause cancer. This was hardly junk science.

In any event, Justice Stevens, in a footnote, stated this was not the kind of junk science that should be excluded as unreliable. As an example of junk science, he cited the case of a phrenologist who would prove a defendant's future dangerousness based on the contours of that defendant's skull. That was hardly this case. Stevens asked quite pointedly: When qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible? He emphasized again that *Daubert* forbids trial judges from assessing the strength of an expert's conclusions. That is a matter for the jury. In a footnote, he again cites Justice Blackmun: "vigorous cross-examination, presenting contrary evidence, and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence."[12] Thus, it is *Joiner* that truly endorses the revolution that *Daubert* most likely never intended to initiate.

The *Kumho* Coup

In *Kumho Tire Co., Ltd. v. Carmichael*,[13] plaintiff sued the manufacturer of a tire for injuries brought about when the right rear tire failed. The District Court granted the defendant summary judgment. The Eleventh Circuit reversed. The Supreme Court reversed and held that *Daubert*'s gate keeping obligation requires an inquiry not only into scientific testimony but into all expert testimony, including "technical" testimony.

This case, unexceptional on its face and in its main ruling, is of greater import when one looks closely at the facts. That close look suggests a few questions. Are judges deciding questions of fact? Are they invading the province of the jury? Has there been a coup to diminish the role of jurors and advocates in favor of a more powerful judiciary? Are there special interests that would favor that transfer of power?

In *Kumho*, plaintiff's expert testimony seemed shaky. Justice Breyer carefully analyzed the facts in great detail before sustaining the exclusion of that expert's testimony. Plaintiff's expert had a master's degree in mechanical engineering, worked for 10 years at Michelin America, and had testified many times as a tire-failure consultant. But his testimony was weak.

Justice Breyer noted that plaintiff's expert testified that the tire was bald, should have been taken out of service, had its punctures repaired inadequately, and showed evidence of over-deflection. Justice Breyer noted that plaintiff's expert concluded that the depth of the tire tread was 3/32 inch, while the opposing expert's measurements indicated the depth ranged from 5/32 to 4/32 inch. Justice Breyer dug deeply into the minutiae of the many facts before sustaining the conclusion that the jury should not hear the testimony.

In the pre-*Daubert* era, this expert testimony most likely would have been admissible. There would have been a cross-examiner to attack these shaky opinions. There would have been a jury to resolve the dispute. There would have been a judge to evaluate the result.

This apparent invasion of the factual province of the jury has continued apace. It seems to have reached a level of acceptance perhaps only because it is denominated as a necessary *Daubert*-type analysis as to the reliability of expert opinions.

The Codification

The *Daubert* Revolution resulted in its being codified in Rule 702 as of December 1, 2000. The Rule applies to all expert opinion. To be admitted, the testimony must be: (1) based upon sufficient facts; (2) the product of reliable

methods; and (3) the methods must have been reliably applied to the facts.

Note the word "reliable" is used twice. It remains the key. It takes us back to *Daubert*. Needless to say, reliability is often in the eyes of the beholder. And the beholder in the first instance is the judge. The issue of reliability has thus been largely shifted from jury to judge.

The Expanding Judicial Role

In 1999, in *In re TMI Litigation*,[14] the Third Circuit excluded 11 of plaintiffs' 12 experts. The court wrote a scholarly opinion of more than 50 pages, with an in-depth analysis of multiple scientific disciplines. It determined that the testimony of a dose-exposure expert was unreliable because the expert violated an elementary principle of credible dose reconstruction in estimating dose exposure. This seems to be the kind of factual analysis traditionally done by a jury. If it were truly junk science, would it have taken 55 pages to reach that conclusion? In truth, the courts seem to be excluding more than junk science.

In *In re Hanford Nuclear Reservation Litigation*,[15] a case arising out of the Eastern District of Washington in 1995, the court excluded all but one of plaintiff's 13 causation and dose-exposure experts. This case involved 3,000 plaintiffs in a consolidated litigation, who claimed personal injuries as a result of exposure to radioactive emissions from the nuclear reservation in the state of Washington. It took the court 762 pages to render its summary judgment opinion, finding the methodology on which the experts relied unsound. To be blunt, has the *Daubert* analysis, on occasion, gotten a little silly in its depth and length?

This deep involvement in factual issues not only constitutes an incursion into what was formerly decided by jurors, but also threatens the very efficiency of our courts. Days are spent on hearings. How many hours are spent in writing opinions of 20 pages or more? Jurors, of necessity, decide quickly. Judges may spend months on a decision.

Those who argue that *Daubert* has reached levels of absurdity have found a recent case that, they submit, removes all doubt. It deals with . . .

Fingerprinting

Nothing quite prepared the legal community for the startling decision in *United States v. Llera Plaza*.[16] A highly regarded federal jurist held, "[T]he parties will not be permitted to present testimony expressing an opinion of an expert witness that a particular latent print matches, or does not match, the rolled print of a particular person."[17] In short, fingerprint identification of a particular person would not be allowed, despite decades of general acceptance of fingerprint identification.

In a decision of some 25 pages, the court exhaustively analyzed fingerprint evidence. It described in detail many technical areas. It discussed the ACE-V process, an acronym standing for analysis, comparison, evaluation and verification. It went into ridgeology, the study of ridges. It dealt with Galton points, which are characteristics of the fingerprint ridges.

Nothing quite prepared the legal community for the startling decision in *United States v. Llera Plaza*.

The court, as judicial gatekeeper, shut out the fingerprint evidence because it did not meet the requirements of *Daubert*. The court concluded that the ACE-V does not meet *Daubert*'s testing and peer review criteria. Its rate of error is in limbo and ultimately it is a subjective test. The court, therefore, concluded the parties would only be able to present expert fingerprint testimony describing how the prints were obtained, placing the prints before the jury and pointing out observed similarities, but would not be permitted to testify on whether the print is that of a particular person, despite about a century of general acceptance of fingerprint testimony by experts.

Following a highly public reaction to that decision of January 7th, the court held a hearing based on a motion to reconsider. It was conducted on February 26 and 27, 2002. On March 13, 2002, in another extremely conscientious and lengthy decision of over 20 pages, the court reversed itself.[18]

The court again went into great factual detail. There was even an historical note, describing Francis Galton, a multi-talented English scientist who was a cousin of Darwin. The opinion goes on to discuss other great historical names in the fingerprinting field.

The court, on reconsideration, concluded that the fingerprint community's general acceptance of ACE-V should not be discounted. The judge also concluded there was no evidence that the error rate was unacceptably high. The court further said that the subjectivity involved in the process is not such as to render the evidence excludable.

As to general acceptance, the court pointed out that the first English appellate endorsement of fingerprint identification came in 1906. The first American court to consider the admissibility of such evidence was in Illinois in 1911, where it was accepted and a murder conviction affirmed.

The court cited Justice Felix Frankfurter: that wisdom too often never comes and so one ought not to reject it merely because it comes late. In a remarkable expression of great modesty, the judge added, "On further reflection, I disagree with myself."[19] The court then denied the motion to preclude the government from introducing the fingerprint evidence which would allow the identification of a particular person. The scholarly soundness and humility of the decision are exemplary and admirable. However, there is a deeper question: Was all that effort necessary? What lessons can we learn?

Lessons for Bench and Bar

For the Bar

Much depends on which side of the issue a lawyer stands. Those representing corporate defendants accused of manufacturing dangerous products will, of course, try to go to federal court and make as many *Daubert* motions as they can. This is an enormous new weapon in the defendant's arsenal. It is, as they say, "outcome determinative." In short, one can win the case as a defendant with a successful *Daubert* motion. It must be remembered, however, that *Daubert* is a weapon that further empowers the powerful.

For those representing the injured consumers, it is a much more difficult world. They will not want to be in federal court. They will try to create non-diversity whenever they can. They will be better off staying in state courts that still apply the supposedly stricter *Frye* rule that, ironically, has proven to be more permissive. Such a state is New York. In *People v. Wernick*,[20] Judge Bellacosa, speaking for the state's highest court, makes clear that the Court has often endorsed and continues to apply the well-recognized rule of *Frye*. This was even more recently set forth in *People v. Johnston*,[21] which indicates that the court continues to apply the "general acceptance test of *Frye*."

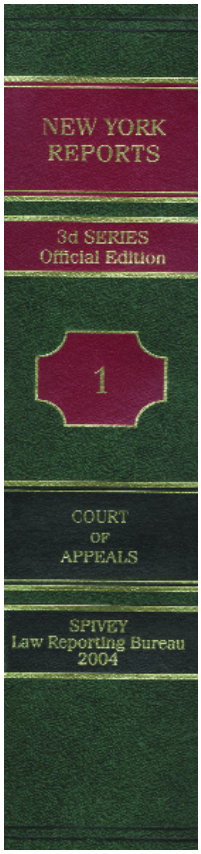
For the Bench

Intending no presumption and with respect, there is a lesson for our judiciary. Those imbued with the traditional attitude of the Federal Rules of Evidence will favor the more liberal introduction of evidence. They will let jurors decide the issue after vigorous advocacy on both sides. They will take to heart Justice Blackmun's admonition that vigorous cross-examination under the overview of the court and a basic trust in the jury are the way to go.

The ultimate issue is: Do we, or do we not, trust our juries to resolve these factual issues? It would seem that *Daubert* has had consequences never intended by Justice Blackmun. It was never intended to have judges with overloaded calendars expending untold effort holding hearings and writing lengthy decisions on the details of expert evidence. Certainly, all agree that junk science should be excluded. The judges have always been the gatekeepers. They should continue that role.

However, it was never intended for judges to supplant jurors. It was never intended for judges to write decisions of 20 or 50 or 100 pages to hold that it is clear that this opinion evidence is unreliable as a matter of law. In my view, and it is, after all, only my view, correction is urgently needed to achieve the balance that Justice Blackmun envisioned. ■

1. 509 U.S. 579 (1993).
2. 293 F. 1013 (D.C. Cir. 1923).
3. *Id.* at 1014.
4. 509 U.S. at 588 (citation omitted).
5. *Id.* at 589.
6. *Id.* at 593.
7. *Id.* at 596.
8. *Id.*
9. 49 Hastings L.J. 1069, 1076 (1998).
10. 64 Alb. L. Rev. 99 (2000).
11. 522 U.S. 136 (1997).
12. *Id.* at 155.
13. 526 U.S. 137 (1999).
14. 193 F.3d 613 (3d Cir. 1999).
15. No. CY-91-3015-AAM, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998).
16. 179 F. Supp. 2d 492 (E.D. Pa. 2002).
17. *Id.* at 518.
18. *U.S. v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).
19. *Id.* at 570.
20. 89 N.Y.2d 111, 651 N.Y.S.2d 549 (1996).
21. 273 A.D.2d 514, 709 N.Y.S.2d 230 (3d Dep't 2000).



Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan, and an adjunct professor at New York Law School. He graduated from the Ottawa, Tulane, and New York University Law Schools. Judge Lebovits thanks court attorney Justin J. Campoli and New York Law School student Ryan O. Miller for their assistance.

The Third Series

A Review

By Gerald Lebovits

While the Boston Red Sox were preparing to crush the New York Yankees on the way to Boston's first World Series win in 86 years, a group of lawyers in Albany were preparing for what, to New York lawyers, will surely be a more fortunate and significant series: The Third Series.

The year 2004 marked the Bicentennial of official New York law reporting. The Official Reports have evolved over the past 200 years: from 1804, when the first Official Reports were published, to 1847, when the First Series of the current Official Reports was published, to 2004, when New York State's Law Reporting Bureau (LRB) began to compile the Third Series of Official Law Reports. The Third Series is the most comprehensive revision of New York's Official Reports since the First Series was published.

From Earliest Times

Reporting cases is older than the common law,[1] with a history of twists and turns.[2] While Moses may be considered the first reporter,[3] Sir Edward Coke created the modern case reporter.[4]

Compiling and organizing New York's case law before 1804 consisted of practitioners and judges relying on their memory of case law.[5] James Kent, best known as Chancellor of New York's Court of Chancery but who also served as Chief Justice of New York's Supreme Court of Judicature, began the push for judicial reporting. He encouraged judges to transcribe their decisions and to rely on written decisions. Before 1804, judges rarely wrote opinions. American and British judges delivered their judgments orally.[6]

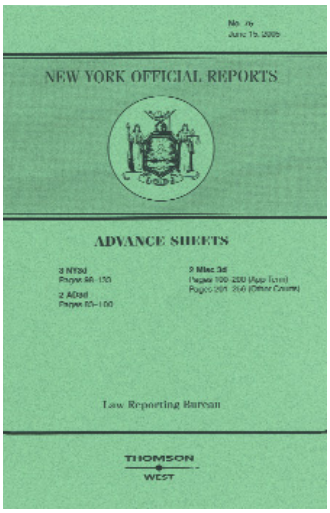
Starting in 1804, the Legislature empowered the Court for the Trial of Impeachments and the Correction of Errors, the state's highest court, and the Supreme Court of Judicature to compile and publish nominative reports of decisions. Nominative reports were collections of decisions a reporter would collect, edit, and publish in volumes named after himself. George Caines published a nominative report entitled Caines' Reports from 1803 to 1805, while serving as New York's first reporter of decisions. William Johnson, who succeeded Caines, published a nominative report entitled Johnson's Reports, which were noted for their thoroughness and accuracy and set a high standard for official reporting in New York.[7] Some reports still name the reporter on the bound volume's spine, and New York is an example. But nominative reports no longer exist.

In 1846, the Legislature abolished the Court for the Trial of Impeachments and the Correction of Errors and created the Court of Appeals.[8] That same year, the Legislature also authorized the publication of officially reported judicial opinions in the New York Reports supervised by a reporter of decisions known as the State Reporter, appointed by the Executive Branch.[9]

Since 1804, the reporter of decisions has overseen the organization and publication of the state's judicial work product. Twenty-five men have served as State Reporter.[10] Many went on to other achievements. Some became influential judges, including Hiram Denio (1845–48) (Chief Judge, Court of Appeals), George F. Comstock (1847–51) (Chief Judge, Court of Appeals), Samuel Hand (1869–71) (Judge, Court of Appeals, and

father of Judge Learned Hand), and Edward J. Dimock (1943–45) (U.S. District Court, S.D.N.Y.). Other State Reporters held important government positions, including Francis Kernan (1854–56) (U.S. Senator for New York) and Henry R. Seldon (1851–54) (Lieutenant Governor of New York). Still other State Reporters, like J. Newton Fiero (1909–31) (New York State Bar Association president), held leadership positions in the bar.

The Official Reports First Series served as New York's Official Reports from 1847 to 1955 and consisted of 833 volumes. During those 108 years, the courts and law reporting experienced important innovations. In 1894, the Fourth State Constitution created the Appellate Division and the Appellate Term. In response to these new courts, the Legislature introduced the Appellate Division Reports and the Miscellaneous Reports to publish the new courts' decisions. The Miscellaneous Reports were also intended to include selected opinions of non-appellate courts. In 1894, the Legislature authorized the State Reporter to begin compiling and distributing advance sheets to tell lawyers about decisions before a full, bound Official Reports volume was published.



The Advance Sheets.

In 1925, a New York constitutional amendment allowed the Legislature to create the LRB. Yet, for 13 more years, the responsibility to publish the Official Reports continued to be divided among the offices of the State Reporter, the State Supreme Court Reporter, and the Miscellaneous Reporter. In 1938 the Legislature finally established the LRB,[11] headed by a State Reporter appointed by the Court of Appeals.[12] The LRB was and continues to be charged with compiling, editing, and organizing for publication all decisions of the Court of Appeals and the Appellate Division and selected opinions from other courts of record.[13]

The New York Official Law Reports Third Series is the most comprehensive revision of New York's Official Reports since the First Series was first published in 1847.

The Second Series survived for almost 50 years, from 1956 to 2003, and consists of 605 volumes. The Second Series was published when legal research transformed from storing opinions on microfiche, to transferring them to CD-ROM technology, and finally to creating searchable Internet databases. But the Second Series could not fully integrate the new methods of legal research that practitioners now use every day. The Court of Appeals therefore approved in April 2003 the publication of a Third Series to address advances in technology and changes in the law. The LRB started publishing the Third Series in January 2004.

In the federal system, the only official reporter is the United States (U.S.) Reports.[14] The Thomson West Publishing Company (West) publishes the Supreme Court (S. Ct.) Reports and collects lower-court opinions in unofficial reporters like the Federal Supplement 2d and the Federal Reporter 3d, respectively for District Court and Court of Appeals cases.[15] In the state system, 28 states and the territory of Puerto Rico have official reporters of judicial opinions.[16] Rather than favor a particular unofficial reporter over another unofficial reporter, eight states have adopted a "vendor neutral" or "medium neutral" citation format for cases in the public domain.[17] Mississippi's public-domain format, adopted for cases decided after July 1, 1997, is cited like this, according to the Bluebook: Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (Miss. 1998).[18]

Operation of the Law Reporting Bureau

New York has long had an interest in officially reporting, publishing, and distributing its courts' opinions, as the Court of Appeals has noted.[19] The LRB's function is to make this happen.

Since the Legislature authorized the LRB in 1925 and funded it in 1938, the LRB has served as the liaison between New York's judiciary and the public for New York case law.[20] Currently, the LRB operates under the direction and control of a State Reporter and is supervised by the Court of Appeals, which has the power to appoint and remove the State Reporter.[21] After the Court of Appeals or the Appellate Division issues an opinion, it is submitted to the LRB. Before the opinion is published in the Official Reports, the LRB's editors perform a process that law review editors call cite-and-substance checking. They verify every citation to assure support for the cited proposition. They also assure that every quotation is accurate, that grammar and style are proper and clear, and that the citations conform to the Official Edition New York Law Reports Style Manual (Tanbook), which governs the format of opinions published in the Official Reports.[22]

The LRB's editors also check Court of Appeals and Appellate Division opinions for factual errors and for dis-

crepancies between the opinion and the record by comparing the appellate record and briefs with the court's opinion. They further verify the parties' names and designations as defendant, plaintiff, respondent, petitioner, appellant, or respondent (New York's appellee) and put the case titles in the proper form. The LRB corrects over 16,000 substantive mistakes and countless grammar and style mistakes every year.[23] If the LRB catches an error, it will notify the court or judge, which has the final say on whether to accept the suggestions.

Judiciary Law § 433 requires the LRB to prepare and publish headnotes, tables, and indexes of every cause determined in the Court of Appeals and the Appellate Division. The name of the judge or justice who presided at the hearing or trial in the court of original jurisdiction must also be included in the Court of Appeals and Appellate Division opinions.[24] In addition to the opinion, the reports must contain as much of the facts, arguments of counsel, decision, or any other matter the State Reporter deems necessary.[25]

The LRB is also responsible for compiling, editing, and contracting the Official Reports for publication. The LRB assures publication of the Official Reports CD-ROM version, the official version of New York opinions published online, and the Official Reports microfiche version.[26]

The LRB splits the printed Official Reports into three separate volumes that represent the three levels of New York State's judiciary. The volumes are designated New York Reports Third Series (N.Y.3d) for the Court of Appeals, Appellate Division Reports Third Series (A.D.3d) for the Appellate Division, and the Miscellaneous Reports Third Series (Misc. 3d) for the Appellate Term and the trial courts.[27]

Currently, the LRB staff includes State Reporter Gary D. Spivey, Deputy State Reporter Charles A. Ashe, Assistant State Reporter William J. Hooks, Chief Legal Editor Michael S. Moran, and 31 others. They edit and publish a mountain of judicial opinions every year.[28]

New York State Reporter Gary D. Spivey.

Why a Third Series?

The LRB instituted the Third Series to modernize the Official Reports. The LRB's goal was to integrate the print version of the Third Series with the electronic databases, new research methods, and changes to the law.[29] For the Third Series, the LRB enhanced the Second Series' format and arrangement of the additional research tables that the LRB provides to practitioners to make research easier and to improve the Official Reports' utility.

Print and electronic materials have been integrated by including research references to online materials in the print materials. This integration is important to maintaining the relevance of the Official Reports to this generation of lawyers, who use electronic-research mediums in addition to the traditional print-research mediums.

Significant Changes

The modernization of the Third Series began with changes in the look of the volumes and the content of the advance sheets. The general appearance of the Third Series' bound volumes has been updated by changing the binding from a grey-green to a glossy, speckled green; State Reporter Spivey's name remains on the spine. Advance sheets now have greater detail, including abstracts of other courts' opinions selected for online publication. Abstracts are created in Third Series Miscellaneous Reports for Appellate Term and trial-level opinions selected for online publication only.

In 1804, George Caines, the first official reporter, included a Digest Index in the Official Reports to enable researchers to find decisions by topic. That Digest Index system is still used today. The LRB modernized the Official Reports by updating the language of the Digest Index for the Third Series. Modernization was necessary because lawyers no longer use some of the archaic terms found in the Digest Index of the Second Series. For example, the LRB dropped the topic of "Master/Servant," the principle that employers are sometimes responsible for their employees' acts. The concept embodied by "Master/Servant" is now found within "Employment Relationships."

Another research tool in the Official Reports Third Series is the Total Client Service Library (TCSL) References. The LRB includes the TCSL References after the headnotes and before the appearances of counsel. The TCSL refers the researcher to encyclopedias, case reporters, statutes, finding aids, and practice guides. These resources are organized by topic to allow comprehensive research. The LRB has expanded the TCSL References for the Third Series to include more secondary sources like treatises, especially New York-centered sources like David D. Siegel's *New York Practice*.

The Third Series also ensures that practitioners will learn about mistakes found in the printed volumes. In the Second Series, the LRB issued corrections, sometimes by issuing an entirely new, corrected volume. The LRB's new method of issuing corrections after an opinion is published in the bound volume is more efficient. The Third Series has an "errata table," an innovation that allows users to discover mistakes found in an earlier volume of the Official Reports. The table contains corrections that

Pursuing justice.

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- Improve the law and the legal process
- Educate the public
- Ensure legal resources for all
- Advocate on behalf of the profession

"Our work for and with the profession continues to be multifaceted. It is our duty to ensure that our justice system can effectively meet today's complexities and to speak against measures that would erode the legal process and the independent judgment of attorneys and judges."

– Kenneth G. Standard, President
New York State Bar Association

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apply to bound versions of the previous volume's opinions. The opinions in the Official Reports Internet database (NY-ORCS in Westlaw or through the State Reporter's Web site[30]) are also corrected and available to users immediately after correction. With the inclusion of the errata table, the LRB provides print users with a service comparable to that enjoyed by professionals who research on the Internet.

Another one of the LRB's significant changes to the format of the print-published opinions in the Third Series is the addition of sample queries that researchers can plug into a Westlaw search to bring up the topic in Westlaw's electronic database. The LRB's addition of sample queries, entitled "Find Similar Cases on Westlaw," allows researchers to find New York case law on related topics. Look up *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003). The LRB has supplied lawyers with the query "shareholder /4 derivative & 626 & 'collateral estoppel'" and the Westlaw database in which to conduct a search: NY-ORCS. The sample queries are printed after the annotation reference section and before the points of counsel in the New York Reports and before the appearances of counsel in Appellate Division and Miscellaneous Reports.

Changes Specific to N.Y.3d

The New York (N.Y.) volume of the Third Series contains the officially reported opinions of the Court of Appeals, New York State's highest court. One notable change from the N.Y.2d is the LRB's inclusion in N.Y.3d of a table of cases overruled, disapproved of, or otherwise limited by the cases in that volume. The new criminal leave tables provide "opinion below" information citations to cases reported below. The Second Series included only title, disposition, and judge. The Third Series also prints the official citation in the criminal tables.

The LRB has introduced an interim volume published roughly every six months to reduce the number of advance sheets that users must collect before publication of the bound volume. The interim volume is soft-bound and contains all the cases reported until that point. Subscribers can discard the interim volumes after the bound volume is distributed.

Changes Specific to A.D.3d

The Appellate Division (A.D.) volume of the Third Series contains the officially reported opinions of the four departments of the Appellate Division, New York's intermediate appellate court. The LRB now publishes headnotes for Appellate Division memorandum decisions, defined as brief, conclusory decisions that follow established principles.[31] In both the First and Second Series, the headnotes for memorandum opinions appeared only in the Digest Index. In the Third Series, the headnotes appear at the beginning of each memorandum opinion.

The LRB continues to apply to the Third Series opinions a three-pronged approach to including headnotes for Appellate Division memorandum opinions. All other opinions are fully headnoted. If the Appellate Division's memorandum opinion contains enough material, it will be given a full headnote. If its memorandum opinion has some relevant material but not enough to support a full headnote, the opinion is summarized and classified according to its topic. And no headnote will be included and the memorandum opinion will not be classified if the opinion is based on a specialized set of facts.

Changes Specific to Misc. 3d

The Miscellaneous volume of the Third Series contains selected officially reported opinions of different lower courts of record. Misc. 3d includes selected opinions of the Appellate Terms — appellate courts that exist only in the first and second departments and hear appeals from the District Courts, City Courts, Town Courts, Village Courts, and the New York City Civil and Criminal Courts.

Misc. 3d also includes selected opinions from all of New York State's other lower courts: Supreme Court, Court of Claims, Family Court, Surrogate's Court, New York City Criminal Court, New York City Civil Court, County Court, District Court, and 61 City Courts, 932 Town Justice Courts, and 552 Village Courts.[32] Although the LRB publishes all the opinions of the Court of Appeals and the Appellate Division, the LRB is not required to publish all submitted Appellate Term and trial-court opinions.[33] The LRB publishes in the Miscellaneous Reports only about 26% of judicial opinions submitted each year.[34]

Reported cases in Misc. 3d are now arranged differently from the way they were in the earlier two series. The LRB has included the Appellate Term opinions in the front half of the volume and trial-court cases in the back half of the volume instead of mixing them together. Also included in each half of Misc. 3d are the abstracts of opinions selected for online publication. The abstracts provide the case name, authoring judge or justice name, decision date, classifications to the Official Reports Digest-Index

The Third Series includes sample queries that researchers can plug into a Westlaw search.

headings, and slip-opinion citation. A slip opinion is an opinion that exists before it is published in a bound reporter.

Each opinion published in the electronic database is assigned a slip-opinion number and given page numbers to allow users to cite the specific pinpoint (jump cite) page.

Submission of Opinions

Under Judiciary Law § 432, every judge or justice of a court of record must promptly deliver to the State Reporter a copy of every written opinion rendered, although no one complies with that rule. Judges submit to the LRB only those opinions they hope to publish. Under Judiciary Law § 431, the LRB is required to publish all opinions and memoranda that the Court of Appeals and the Appellate Division transmit to the LRB. Unlike some jurisdictions, New York has no court rule or statute that prohibits citing unpublished opinions.[35]

The LRB is authorized by Judiciary Law § 431 to publish select Appellate Term and trial-court opinions in the Miscellaneous Reports.[36] The LRB takes into account numerous factors to determine whether to publish a lower-court opinion. Factors include precedential significance, novelty, public importance, practical significance, subject matter diversity, geographical diversity, author diversity, and literary quality.[37] Opinions of interest only to the litigants or that contain primarily factual or discretionary matters or dicta are ineligible for publication.[38] Judiciary Law § 431 limits publication of an Appellate Term or trial-court opinion to one that is "worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest."

The Committee on Opinions was created in 1963 to hear appeals from the State Reporter's refusal to include opinions submitted for publication in the Miscellaneous volume of the Official Reports. The Committee is made up of a rotating panel of Appellate Division justices. Judges who believe that their opinions have been overlooked may appeal to the Committee. Since the Committee began, judges have appealed approximately 100 times the State Reporter's decision not to publish an opinion. No judge has prevailed.[39]

In 2003, the LRB published 148 Court of Appeals decisions in N.Y.2d and 301 Appellate Division decisions in A.D.2d. The LRB also accepted 584 trial court and Appellate Term decisions for publication in the Miscellaneous Reports. The LRB withheld 1687 opinions from Miscellaneous publication, for an acceptance rate of 26%. This rate has remained constant for several years. Of those opinions withheld from publication in the Miscellaneous Reports, 1261 were accepted for online publication,[40] including all Appellate Term opinions not published in the Miscellaneous Reports. Trial-court opinions not accepted for publication in the Misc. 3d or for online-only publication may not be published, except in the *New York Law Journal*.[41]

People send about 2400 opinions to the LRB for publication in the Miscellaneous Reports every year. Attorneys may submit lower-court opinions for publication. The LRB sometimes solicits from the authoring judge an interesting opinion it finds in the *New York Law Journal* or elsewhere. Judges themselves submit most of the lower-court opinions the LRB selects for publication.[42] Judges may themselves publish their decisions on the Web; some judges even maintain their own non-court-approved Web sites. But the decisions must contain the following two admonitions: (1) "This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without the approval of the State Reporter or the Committee on Opinions (22 N.Y.C.R.R. 7300.1)" and (2) "This opinion is uncorrected and subject to revision in the Official Reports."

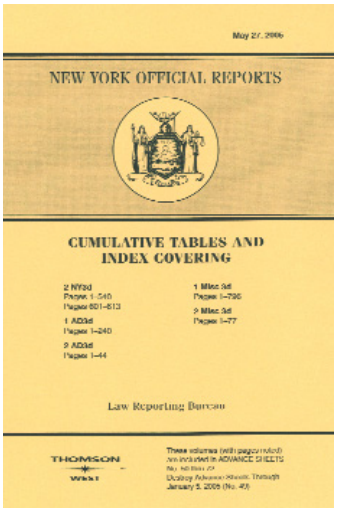
Since the Committee on Opinions began in 1963, judges have appealed approximately 100 times the Reporter's decision not to publish an opinion. No judge has prevailed.

Although judges are protected from liability for all acts done in the exercise of judicial functions, one state opinion has held that publishing opinions elsewhere than in the Official Reports is not required by law and is therefore not an act performed in a judicial capacity,[43] although some federal courts have taken a broader view of the immunity available to publishers of opinions.[44]

To request that an opinion be published, a practitioner may send a letter with a copy of the opinion to the Honorable Gary D. Spivey, State Reporter, One Commerce Plaza, 17th Floor, Suite 1750, Albany, New York 12210. To submit an opinion, judges and their staffs should attach the opinion in WordPerfect or Microsoft Word (but not Microsoft Word 2002) to an e-mail to <reporter@courts.state.ny.us>. Include the phrase "Opinions Submitted Electronically" in the "Subject" line. If someone other than the authoring judge — such as a judge's secretary or law clerk — is submitting the opinion, a carbon copy must be sent to the authoring judge.

Official vs. Unofficial

The LRB is responsible for content in the Official Reports, but the LRB does not publish the Official Reports. Judiciary Law § 434 requires that the Official Reports be printed and distributed under a competitively bid five-



The Cumulative Tables and Index pamphlet.

year publishing contract. West won the current five-year contract, covering 2001–2005. Interestingly, West competes against itself as the major unofficial publisher of decisions from the state and federal courts.

West's National Reporter System dates to the 1880s and covers state cases in seven regional reporters. These reporters are North Eastern (N.E.2d), North Western (N.W.2d), Atlantic (A.2d), Pacific (P.2d), South Eastern (S.E.2d), South Western (S.W.2d), and Southern (So. 2d). Also part of the National Reporter System is a separate sub-regional reporter for New York, West's New York Supplement (N.Y.S.2d). The New York Supplement began publication in 1888. Decisions from New York are too numerous for the regional reporter, so New York's lower-court cases are excluded from the North Eastern Reporter, which publishes the decisions of the highest appellate courts of Illinois, Indiana, Massachusetts, New York, and Ohio. New York Court of Appeals opinions appear in the Official Reports, the North Eastern Reports, and the New York Supplement.

Content and Cost

Numerous differences separate the Official Reports Third Series from the N.E.2d and the N.Y.S.2d, the unofficial reports. In the New York Reports (N.Y.3d), a section named "Points of Counsel" contains the attorneys' arguments. The section is separated into issues brought up by the attorneys along with cases on which the attorneys relied for their arguments. The N.E.2d and N.Y.S.2d contain the attorneys' names for the parties involved, but their arguments and the cases they cite are absent.

Another major difference between the Official Reports Third Series and the N.E.2d and N.Y.S.2d is their cost. A subscription to N.Y.3d, A.D.3d, and Misc. 3d costs less than a subscription to the unofficial reporter. The N.E.2d consists of 815 volumes and costs $11,307 for the entire set.[45] Individual volumes of the N.E.2d cost $150.75.[46] The N.Y.S.2d consists of 780 volumes and costs $5000.[47] Individual volumes of the N.Y.S.2d cost $97.50.[48] Subscription to the Third Series bound volumes is $19.67 a volume plus tax and $10.00 plus tax for interim volumes, effective January 1, 2005. The LRB compiles approximately 19 volumes (17 bound and 2 interim volumes) each year for publication. A subscription to the Official Reports for one year costs about $360 (17 bound volumes and 2 interim volumes at $10 each). Advance sheets are included at no additional charge. Practitioners may subscribe only to the advance sheets, for $98.56 a year, effective January 1, 2005.

The space that these reporters take up on the subscribers' bookshelves is a factor to consider. A subscriber to the Official Reports must have enough shelf space for the three separate bound series (N.Y.3d, A.D.3d, and Misc. 3d), published each year. The N.Y.S.2d and the N.E.2d are each in separate bound series. The N.E.2d is a good investment for those who practice in several (arbitrarily grouped) states in the Northeast, but for those whose practice is in New York alone, buying the N.E.2d does not make economic sense. A lawyer practicing in New York will find it more economical to purchase only the N.Y.S.2d, which contains decisions from the Court of Appeals, the Appellate Division, and other selected Appellate Term and trial courts.

The publication's value correlates to the extra material that reporters add to their publications to make it easier to research a given legal topic. Judicial opinions enjoy no federal copyright protection,[49] although copyright protection, when available, extends to the reporter's own writings, including headnotes, statements of fact, statements of arguments, syllabuses, case tables, and other materials the reporter includes to create a more accessible and useful research tool.[50]

Beware Corrections

The prime reason to use the Official Reporter is that the LRB has scrutinized and edited the decisions it publishes. If a lower-court opinion is edited for length in the Official Reports, the authoring judge decides what material is cut for publication. The unofficial reporters are not edited, or at least not as comprehensively as the Official Reports. When cited in an opinion or a lawyer's brief, therefore, the version of the opinion in the unofficial reporter might not have been corrected, depending upon whether the unofficial reporter has incorporated the corrections that the LRB makes available. The LRB gives unedited slip opinions selected for official publication to West, which then publishes the unofficial reports.[51] The unofficial reports might not contain the LRB's corrections approved by the courts and included in the Official Reports, although the LRB makes corrections available to vendors, and West and Lexis make every effort to incorporate the corrections. Moreover, although the unofficial reporters publish unedited slip opinions, courts amend, clarify, vacate, and depublish slip opinions, occasionally without the unofficial reporter's knowledge.[52]

Practitioners should, thus, always consult the Official Reports to verify a case citation. That advice applies to online research as well: lawyers should always read and cite the official version of New York case law. Although West is reliable, West sometimes makes mistakes of substance.[53] There is no reason not to rely on the Official

Reports. West makes citing the Official Reporter easy. Although the Official Reports do not "star" page the unofficial reports, West star pages the Official Reporter. Practitioners should at least use the star-pagination tool in the unofficial reporters to cite the Official Reporter correctly if they do not refer to the Official Reports directly.[54]

In the past, an advantage to the unofficial reporters was that they were published more quickly than the Official Reporter. West was faster because the Official Reporter was delayed by the official editing process. But subscribers to both the unofficial reports and the Official Reports are offered advance sheets to keep them up to date. For some time now, the Official Reports have been as current as the unofficial reports; Court of Appeals opinions now come out faster in the Official Reports than in the unofficial reports.

Tanbook Citation

A further advantage to using the Official Reporter is that the edited opinions from the state courts contain the official Tanbook citation. The LRB developed the Tanbook in 1956, when it inaugurated the Second Series. Called the Tanbook because its cover is tan with black print, it provides the rules for citing New York statutes, cases, rules, regulations, and secondary authority. The Official Reports provide practitioners with the correct New York State citation format. The 2002 Tanbook, prepared by the LRB board of editors headed by Senior Legal Editor Katherine D. LaBoda, replaced the 1998 edition. In 2004, soon after the Third Series appeared, the LRB issued a supplement to the 2002 Tanbook.[55]

A further advantage to using the Official Reporter is that the edited opinions from the state courts contain the official Tanbook citation.

Studying Tanbook citations in the edited Third Series opinions simplifies employing the correct citation format. The opinion will have the correct abbreviations, capitalization, quotations, word selection, and case-name style. West's unofficial reports use a modified version of the Bluebook. But the Bluebook violates several New York rules.[56]

Practitioners should cite according to the Tanbook when they write for a New York court. Attorneys must cite the Official Reports if the case was published in New York's Official Reports.[57] This advice makes practical sense. The Official Reports are the only reports that New York's judiciary receives under the LRB contract with West, and they are likely the only reports a judge will have in chambers to refer to when reviewing an attorney's papers.[58] Moreover, all judges are entitled to receive the Official Reports, but most are not given the unofficial reporters. The court must separately pay for subscriptions to unofficial reporters. Citing the unofficial reports means forcing judges and their law clerks to convert the citation to the Official Reports.

The Official Reports also make legal research easier than the unofficial reports. The LRB has integrated the print and the electronic Official Reports and developed a style of citation to tell readers where to find cases. All cases published in the Official Reports are assigned a slip-opinion number. The decisions can then be found on the LRB's Web site, <http://www.courts.state.ny.us/reporter/Decisions.htm>.

The Tanbook has a new rule for citing those opinions that are assigned a slip-opinion number but are included only as an abstract in the hard copy of the Miscellaneous Third. To illustrate, *City Realty Assocs. Ltd. v. Westreich* is cited (in Tanbook format) as 3 Misc. 3d 127(A), 2004 NY Slip Op 50344(U) (App Term, 1st Dept 2004, per curiam).[59] Including the "(U)" after the slip-opinion number denotes that the full opinion is not published in the hard copy of the Official Reports. Including the "(A)" signals readers that they will need Internet access to read the full version of the opinion. The LRB's Web site provides the public with easy access to a free source of New York case law.

Headnotes or Key Numbers

The LRB's headnotes in New York Official Reports have advantages over West's Key Number system. West's Key Numbers published in N.E.2d and N.Y.S.2d are specific and include every point of law, whether the point is part of the opinion's holding or dictum. The LRB's headnotes sort cases by a general category and then sort them again into a specific category. For example, in *Matter of Town of Southhampton v. New York State Public Employment Bd.*, 2 N.Y.3d 513 (2004), the headnote reads: "Civil Service — Public Employees' Fair Employment Act — Jurisdiction of Public Employment Relations Board." This headnote derives from the general issue of civil service and then specifically addresses the public employees' Fair Employment Act and whether the Public Employment Relations Board has jurisdiction over the charge. The category of the headnote is then related to the specific part of the opinion to which it refers.

West's Key Number system breaks the law down into major areas.[60] Each topic is divided into smaller and smaller concepts. The legal concepts are assigned unique numbers at each step in the process. Over 80,000 different, unique numbers correspond to a single point of law. West's attorney editors pick out all the points of law in an opinion and write a brief headnote and assign a series of

Key Numbers to the point. The point of law gets a Key Number.

The Official Reports' headnotes refer researchers to specific points in an opinion that stand for the point of law the headnote addresses. The headnotes also contain a topic heading that allows a researcher to look up those topic headings in New York's Official Reports Digest Index to find other case law with those same points of law. West's Key Number system refers researchers to the legal points made in the case and to the West's Digest Index. The researcher can then look up the Key Number in the Digest Index and find the headnotes of cases that have the same points of law. When researching online, Key Numbers make it particularly easy for a researcher to find cases from different jurisdictions that deal with similar issues because the Key Number system is used for all the West's reporters that cover every state and federal court.

Important differences exist between the content of the headnotes and which topics are headnoted in the official and unofficial reports. In the Official Reports, *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808 (Sup. Ct. Bronx County 2004), has two headnotes. The proposition that New York State Supreme Court parts are not bound by Appellate Term precedent is included in the first headnote. The central holding of *29 Holding* — that a residential landlord has a duty to mitigate — is in the second headnote along with the basic reasoning for the holding. In the unofficial report, *29 Holding* (775 N.Y.S.2d 807) has five headnotes, the last two of which cover the same propositions as the Official Reports headnotes. The *29 Holding* court noted in passing a point of law that is pure dictum, yet it is given a Key Number and included as a headnote in the unofficial reports. A researcher looking for controlling or persuasive precedent on a point of law would waste time looking at *29 Holding* for that point of law. The case is not precedent on that point and would never be expressly overruled on that point. The Official headnotes, as opposed to the West headnote, list the points of law at issue but leave the dictum out.

The difference between the two headnotes reflects a difference in the editorial staff of the LRB and West. The Official Reports' stated goal is to provide the New York bar with a concise, accurate summary of the published opinion. West refers to its Key Number system as "the most comprehensive and widely used indexing system for finding caselaw materials."[61] Practitioners who want nationwide, comprehensive coverage might wish to invest in West's unofficial reporters. The benefits of investing in the Official Reports are greatest for those who are concerned with New York law alone.

Both the Third Series and the unofficial reporters include a summary of the facts and holding of the court, also known as a syllabus. The syllabus is not an official part of the decision, and may not be cited as legal authority.[62] The LRB editors write the Official Reports' summaries by adhering to the same goals of concision and precision they achieve when writing headnotes. West has its own version of summaries.

The Big Picture

The LRB's integration of the print and the electronic research mediums in the new Third Series is an important innovation. The Third Series is a not just a new binding or a way to start volumes from one onward. It is a new way of using the Official Reports as the source of New York law for a new era in the practice of law. After doing so well for so long, the Yankees did not advance to the World Series last season. But the LRB hit a home run with the Third Series. ■

1. *See* John Baker, The Common Law Tradition: Lawyers, Books, and the Law 133 (2000) (noting that during 600 years of law reporting, over one million sheep gave their skins so that opinions could be recorded).

2. For example, the colleagues of one Pennsylvania justice once refused to allow him to publish a dissent in the Pennsylvania official reports. The justice brought a mandamus action against his colleagues — and lost in his own court. *See Musmanno v. Eldredge*, 1 Pa. D. & C.2d 535 (Common Pleas), *aff'd per curiam*, 382 Pa. 167, 114 A.2d 511 (1955). For an account of a conflict between the Federal Justice Department and a publisher, see Stuart Taylor Jr., *U.S. Obtains Curb on Judge's Attack on Justice Dep't*, N.Y. Times, Jan. 22, 1984, at A1, which describes how the Justice Department obtained a temporary order restraining West Publishing from printing a controversial opinion in the Federal Supplement. The opinion was eventually published. *See United States v. Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) (Winner, J.), *appeal dismissed & mandamus denied sub nom. Blondin v. Winner*, 822 F.2d 969 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

3. *See* Frederick Pollock, *English Law Reporting*, 19 L.Q. Rev. 541 (1903).

4. *See* Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold's* Anastasoff *Opinion Is Saving America's Courts from Themselves*, [2002] Ark. L. Notes 85, 90.

5. *"But how are their decisions to be known?": Celebrating 200 Years of New York State Official Law Reporting* 13 (2004) (hereinafter "Celebrating"), *available at* <http://www.courts.state.ny.us/reporter/history/page_10.htm> (last visited on Feb. 4, 2005). For excellent histories of how judicial opinions have been reported and published, see Morris L. Cohen & Sharon Hamby O'Connor, A Guide to the Early Reports of the Supreme Court of the United States (1995); William Domnarski, In the Opinion of the Court 5-29 (1996); Gerald T. Dunne, *Early Court Reporters*, [1976] Sup. Ct. Hist. Soc'y Y.B. 61; John H. Moore, *One Hundred Fifty Years of Official Law Reporting and the Courts of New York*, 6 Syracuse L. Rev. 273 (1955); Erwin C. Surrency, A History of American Law Publishing 37 (1990).

6. John Caher, *The Exacting Work of Putting the Law Between Hard Covers*, N.Y. L.J., July 29, 2004, at 1, col. 4 (recounting Chancellor Kent's complaining that "[w]hen I came to the Bench there were no reports or State precedents").

7. *See* Celebrating, *supra* note 5, at 12.

8. *See* Andy Ashe, *200 Years of Law Reporting in New York*, 12 The Catchline: Bulletin of Ass'n of Reporters of Judicial Decisions (Feb. 2004) *at* <http://arjd.washlaw.edu/catchline_feb_2004.htm> (last visited Feb. 4, 2005). The Association of Reporters of Judicial Decisions (ARJD) is dedicated to improving the accuracy and efficiency of reported judicial opinions. *See* Association of Reporters of Judicial Decisions, Articles of Ass'n and By-Laws, Art. II, § 1. The ARJD consists of those responsible for preparing opinions for official publication by editing and writing headnotes, summaries, and syllabuses. Among the ARJD's stellar efforts: Proceedings of the Second International Symposium on Official Law Reporting: July 30, 2004 (Thomson West) distributed in early 2005. The Symposium materials include speeches by New York's Chief Judge Judith S. Kaye (keynote address on the importance of law reporting and Chancellor Kent's contributions), California Reporter of Decisions Edward W. Jessen (on official law reporting in America), U.S. Supreme Court Reporter of Decisions Frank D. Wagner (on the official U.S.

Reports), and New York State Reporter Gary D. Spivey ("200 Years of Official Law Reporting in New York").

9. *In re Williams Press, Inc. v. Flavin*, 35 N.Y.2d. 499, 503, 323 N.E.2d 693, 694–95, 364 N.Y.S.2d 154, 157 (1974). For other decisions that discuss the history and operations of New York law reporting, see *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943); *Little v. Banks*, 85 N.Y. 258 (1881); *In re Lenz & Riecker, Inc. v. Fitzpatrick*, 129 Misc. 2d 1068, 500 N.Y.S.2d 929 (Sup. Ct. Albany County 1986); *In re Lawyers Co-op. Publ'g Co. v. Flavin*, 69 Misc. 2d 493, 331 N.Y.S.2d 159 (Sup. Ct. Albany County 1971), *aff'd*, 39 A.D.2d 616, 322 N.Y.S.2d 616 (3d Dep't), *lv. denied*, 30 N.Y.2d 488, 287 N.E.2d 398, 335 N.Y.S.2d 1027 (1972); *People v. Carr*, 5 Silvernail 302, 23 N.Y.S. 112 (Sup. Ct. Gen. Term 3d Dep't 1884); *Little v. Banks*, 67 Hun. 505, 51 N.Y. Sup. Ct. 462, 22 N.Y.S. 512 (Sup. Ct. Gen. Term 3d Dep't 1893).

10. Celebrating, *supra* note 5, at 23.

11. Law of 1938, Ch. 494, § 1.

12. Judiciary Law § 430.

13. *About the Official Reports at* <http://www.courts.state.ny.us/reporter/About.htm> (last visited Feb. 4, 2005).

14. William A. Hilyerd, *Using the Law Library: A Guide for Educators — Part II: Deciphering Citations & Other Ways of Locating Court Opinions*, 33 J.L. & Educ. 365, 369 (2004).

15. *See id*.

16. *See id*. at 369 n.16. The 28 are Arizona, Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin.

17. *See* The Bluebook: A Uniform System of Citation, tbl. T.1 (17th ed. 2000); K.K. DuVivier, The Scrivener: Modern Legal Writing, *Parallel Citations—Past and Present*, 30 Colo. Law. 25 (Jan. 2001). The eight are Louisiana, Maine, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin.

18. *See* Bluebook *supra* note 17, at 211 tbl. T.1.

19. *See Williams Press*, 35 N.Y.2d at 503, 323 N.E.2d at 695, 364 N.Y.S.2d at 156.

20. *See generally* Caher, *supra* note 6, at 1, col. 4.

21. Judiciary Law § 430. Judge Victoria A. Graffeo is the current liaison to the LRB.

22. *See* Gerald Lebovits, *New Edition of "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8, 9 (Mar./Apr. 2002).

23. *Editing of the Official Reports at* <http://www.courts.state.ny.us/reporter/Edit.htm> (last visited Feb. 4, 2005).

24. *See* Judiciary Law § 433.

25. *See id*.

26. *See About the Official Reports at* <http://www.courts.state.ny.us/reporter/About.htm> (last visited Feb. 4, 2005).

27. Judiciary Law § 433-a.

28. *See* Celebrating, *supra* note 5, at 2.

29. *See id*. at 52.

30. *Research the Official Reports at* <http://www.courts.state.ny.us/reporter/Decisions.htm> (last visited Feb. 4, 2005).

31. Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness — Part I*, 75 N.Y. St. B.J. 64, 64 (June 2004).

32. Frederick A. Muller, Dissenting Opinion *in The American Association of Law Libraries Task Force on Citation Formats Final Report*, 87 Law Libr. J. 624, 627 (1996).

33. Judiciary Law § 431.

34. *See Selection of Opinions for Publication at* <http://www.courts.state.ny.us/reporter/Selection.htm#Criteria> (last visited Feb. 4, 2005). New York is selective of opinions for publication. *See generally* Caher, *supra* note 6, at 1, col. 4 (reporting that LRB publishes in print about 25% of opinions submitted for publication and publishes online about 50% of opinions submitted for publication); Comment, *Discretionary Reporting of Trial Court Decisions: A Dialogue*, 114 U. Pa. L. Rev. 249 (1965).

35. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251, 258 (2001).

36. *See* William S. Holdsworth, *The Case-Law System: Historical Factors Which Controlled Its Development*, in The Life of the Law 44–45 (Honnold ed. 1964) (reciting belief that selectively publishing decisions provides a clearly defined view of the law).

37. *See Selection of Opinions for Publication at* <http://www.courts.state.ny.us/reporter/Selection.htm#Criteria> (last visited Feb. 4, 2005).

38. *See generally* Antonio I. Brandveen, *Opinion Writing for Publication: Hearing and Trial Judges* 1–4 (O.C.A. monograph for 1999 Judicial Seminar); James M. Flavin, *Decisions and Opinions for Publication*, 12 Syracuse L. Rev. 137 (1960); Gary Spencer, *Behind the Books*: *Reporter Selects, Cuts Official Opinions*, N.Y. L.J., Feb. 28, 1991, at 1, col. 3.

39. *See* Caher, *supra* note 6, at 1, col. 4.

40. *See 2003 Annual Report of the State Reporter at* <http://www.courts.state.ny.us/reporter/annual2003.htm> (last visited Feb. 4, 2005).

41. *See* 22 N.Y.C.R.R. 7300.1.

42. *See 2003 Annual Report of the State Reporter at* <http://www.courts.state.ny.us/reporter/annual2003.htm> (last visited Feb. 4, 2005).

43. *See Murray*, 290 N.Y. at 57, 48 N.E.2d at 259.

44. *E.g.*, *Beary v. West Publ'g Co.*, 763 F.2d 66, 68–69 (2d Cir. 1985) (disavowing *Murray*, 290 N.Y. at 59, 48 N.E.2d at 260, while holding unofficial reporters immune).

45. *Thomson West Publishing — Product information for the North Eastern Reports at* <http://west.thomson.com/product/22011703/product.asp> (last visited Feb. 4, 2005).

46. *Thomson West Publishing — Individual North Eastern Volumes at* <http://west.thomson.com/store/volume.asp?product_id=22011703> (last visited Feb. 4, 2005).

47. *Thomson West Publishing — Thomson West Product information for the New York Supplement Reports at* <http://west.thomson.com/product/22011509/product.asp> (last visited Feb. 4, 2005).

48. *Thomson West Publishing — Individual New York Supplement Volumes at* <http://west.thomson.com/store/volume.asp?product_id=22011509> (last visited Feb. 4, 2005).

49. *Wheaton v. Peters*, 33 U.S. 591, 668 (1834) (holding that individual reporter's publisher may not claim copyright in judicial opinions).

50. *See Callaghan v. Myers*, 128 U.S. 617, 647 (1888) (holding that copyright could be obtained covering portions of compilation resulting from intellectual labor).

51. *See* Muller, *supra* note 32, at 625 (noting that Axel-Lute honesty principle requires citation to source writer actually uses) (citing Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982)).

52. *See id*. at 625–26 (noting that final edited text of Official Reports might include headnotes, summaries, syllabuses, and other editorial enhancements that authoring court approved).

53. *See* James W. Paulsen, *An Uninformed System of Citation*, Harv. L. Rev. 1780, 1786 (1992) (noting West errors).

54. Star paging, often using asterisks, refers readers to specific pages in other reporters in which the opinion is published. Michelle D. Orton, *House Bill 1822: New Anti-Westopoly Rule Proposed in Congress*, 7 DePaul-LCA J. Art. & Ent. L. & Pol'y, 308, 313 (1997). Star paging is not copyrightable. *Matthew Bender & Co. Inc. v. West Publ'g Co.*, 158 F.3d 693, 699 (2d Cir. 1998).

55. *See* <http://www.courts.state.ny.us/reporter/New_Styman.htm>. To download on pdf. the 2002 Tanbook and its 2004 supplement, go to <http://www.courts.state.ny.us/reporter/styman_menu.htm>.

56. *See* Lebovits, *supra* note 22, at 11–12 (noting that Bluebook advice contradicts New York law and practice).

57. *See* CPLR 5529(e) (requiring that "New York decisions . . . be cited from the official reports, if any"); Rules of Ct. of App., 22 N.Y.C.R.R. 500.1(a), 500.5(d)(3), 510.1(a); Rules of App. Div., 1st Dep't, 22 N.Y.C.R.R. 600.10(a)(11); Rules of App. Div., 4th Dep't, 22 N.Y.C.R.R. 1000.4(f)(7).

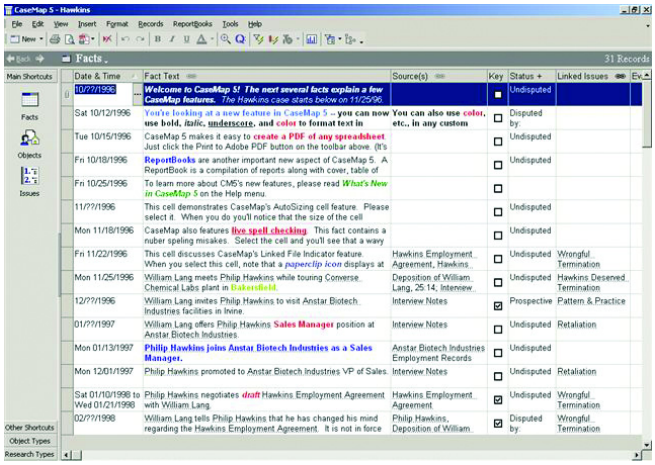
58. *See* Judiciary Law § 434(6); DuVivier, *supra* note 17, at 25 (noting that one value of Official Reports is that judges have them in chambers).

59. *See 2004 Supplement to 2002 New York Reports Style Manual* § 2.2(a)(2)(b).

60. *See West's Key Number System: The Key to Finding Good Law at* <http://lawschool.westlaw.com/KNumbers/default.asp?mainpage=16&subpage=4> (last visited Feb. 4, 2005).

61. *Id*.

62. *See generally* Gerald Lebovits, The Legal Writer, *Write the Cites Right — Part I*, 76 N.Y. St. B.J. 64, 64 (Oct. 2004).



Greg Krehel <gkrehel@casesoft.com> is the CEO of DecisionQuest's CaseSoft division. Mr. Krehel has over 15 years of trial consulting experience in addition to his background in software development.

Case Chronologies Create Litigation Efficiencies

By Greg Krehel

A law practice's profitability often hinges on the success of its practice management strategies. Such strategies can cover anything from office operations to substantive practice techniques. Some cover a number of these areas.

For the litigation practice, fact chronologies can be tremendous tools for creating greater efficiencies. They help ensure that the attorney is well prepared, and, more important, that fellow attorneys, paralegals, and other support staff will have the case knowledge they need, without duplicating each other's work. Yet, busy litigators often overlook the substantial advantages of creating case fact chronologies. And the majority of chronologies fail to live up to their full potential.

Chronologies are thinking tools. The very act of setting discrete facts down on paper or in your computer clarifies thinking and better reveals the story of the case. Chronologies help ensure complete discovery. Which facts require which forms of evidence that will be admissible in court? Not only do good chronologies make it easy for everyone on the litigation team to share case knowledge, they are useful in preparing for depositions, when developing motions for summary judgment and pretrial motions, in settlement conferences, and during trial.Even so, many litigators who do manage to create a full case chronology often end up with unsatisfactory results. Often, their chronologies are no more than lists of case documents that are sorted by date. While a document index is useful in locating items of evidence, it hardly matches a well-prepared chronology of case facts. Still other trial teams focus on facts, not documents, and create chronologies with perhaps just two or three columns: date, fact, and, sometimes, the source. These layouts are a start, but they fail to capture critical information about the facts, information that can make the chronology far more valuable.

The following set of chronology "best practices" should result in better and more effective case chronologies.

Don't Wait

You will likely obtain crucial knowledge about the problem that led the individual or corporation to seek counsel from your first conversation with the prospective client. Begin creating the case chronology immediately. No matter how early in the case, and no matter how small it may seem, as soon as your client has given you an overview of the dispute, you have probably heard more facts than you can easily memorize and manipulate in your head. Why even try? Memorization is a job for your software.

Your chronology can be put to good use early in the case. Take copies of the initial chronology to your second client meeting, and use it to clear up any misunderstandings. Do the facts listed accurately reflect the client's understanding of the case? Can your client supply missing dates? Can your client indicate which documents and

potential documents might be sources of proof? Use the chronology also to focus your client on potentially serious omissions. Is your client aware of any particularly favorable or unfavorable facts that do not appear in the chronology?

Define "Fact" Broadly

Some chronologies omit facts that require sources of evidence that are yet to be developed. Others exclude facts that are in dispute. Both omissions are a mistake. If you don't enter a fact into your chronology because it's disputed or because you have yet to develop an admissible source of proof, you lack the resources to properly analyze and strategize, and consider alternative theories of liability or defense. The chronology becomes nothing more than a list.

Complete Facts

When you enter a fact into your chronology, begin by emptying your head of all knowledge about that fact. Your chronology should be a memory replacement, not a memory jogger. If you don't get the complete fact into the chronology, you derail the communication efficiencies chronologies offer to the rest of the litigation team. If a critical part of the meaning of the fact is still hidden in your head, others on the trial team won't know about it when they read the chronology.

Every time you enter a fact into your chronology, pause and read it before you continue. Put yourself in the shoes of someone who doesn't know the case, such as a new member of the trial team who may be reading the chronology for the first time. Does your entry in the chronology represent your total knowledge regarding the fact? If not, rewrite it. While you're at it, ask yourself, "so what?" Does your fact entry make the implications of that fact clear? If not, edit the fact again. If after careful consideration you have no good response to "so what?", decide whether the fact belongs in the chronology in the first place.

Indicate Disputed Items

It makes good sense to create a column that indicates whether a given fact is undisputed or disputed, and if so, by which party. Consider titling your column "Disputed Status" and using these values: "Disputed by Opposition," "Disputed by Client," "Undisputed," "Undetermined." Once the facts have been marked as disputed or undisputed, your chronology becomes a tremendous aid in the preparation of motions for summary judgment and pretrial motions. For example, instead of creating a separate list of the facts to which your client is willing to stipulate, you can simply filter out everything but the undisputed items. If you've begun preparing your chronology early, you can use this information to organize your examination of adverse witnesses.

Show Issue Relations

Most cases involve multiple issues. Assessing the strength and weakness of your case is really an exercise in assessing your strength or weakness on each issue. The chronology provides an important aid in making this determination. Add another column to your chronology and develop a list of case issues. Include any topic that might influence the thinking of the trier of fact. Name the issue or issues to which each fact is related. You can capture issue relationships as you first enter the facts. Another alternative is to forgo entering this information initially and work through the chronology at a later point, focusing on analysis of issues.

Establishing relationships between facts and issues is a logical task to parse among members of the trial team and create better efficiencies. Junior members of the team can cull facts from documents and depositions. Senior members can make links between facts and issues and develop global strategies. Creating the links between facts and issues makes it easy to print chronologies of just those facts that relate to a particular issue, which is valuable in analyzing your case and developing legal theories.

Issue-Driven Approach

As you develop your chronology, consider taking a "top-down" or "issue-driven" approach to your case. As case preparation begins, and every so often thereafter, conduct a brainstorming session in which you think about your facts on an issue-by-issue basis. Prepare by printing for each issue a mini-chronology of the facts that bear on it. Begin the brainstorming session by reviewing the chronology of facts related to the first issue in your issue list. Then set the list of facts aside, and consider other facts of which you're aware that are related to this issue. Enter these additional items into your chronology. Next, think also about the facts you *wish* you had for this issue. If you sense that such a fact may be developed through further investigation, enter it in the chronology and note its "wishful" status. List any potential sources of proof that come to mind. This exercise will help point you in the right direction.

Put yourself in the shoes of someone who doesn't know the case, such as a new member of the trial team who may be reading the chronology for the first time.

Put Your Chronology to Work

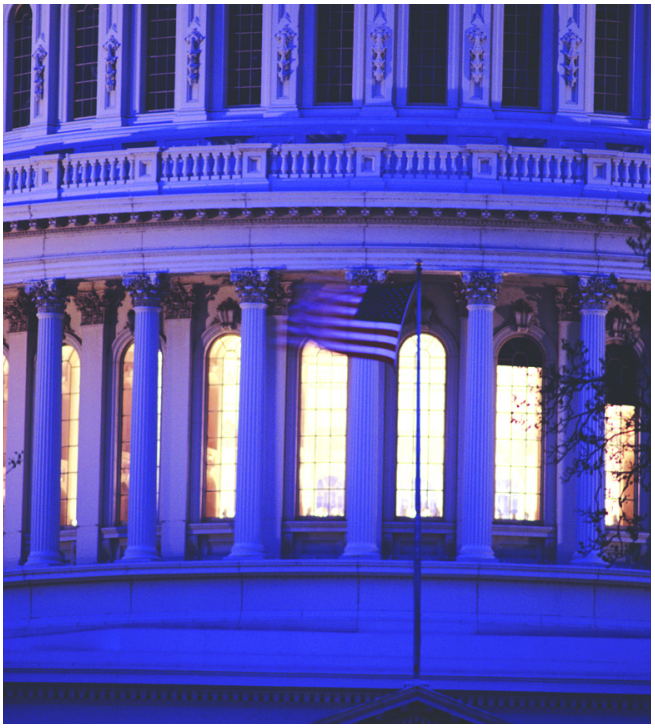
Your chronology should be more than a thinking tool. It should be a practical aid in communicating about your case with your colleagues, your client, your adversary, and the trier of fact.

Use your chronology to communicate with your client. Send your client the chronology on a regular basis. If you are using database software that stamps each fact with the date it is entered into the chronology, ensure that the software marks with an icon each fact that was entered since the time you last sent your client the chronology. The report will give your client the complete story of the case, but it will also be easy for the client to focus on what is new.

Use your chronology to help present a powerful case in court. Chronologies are great tools for educating the jury during an opening statement and for illustrating your arguments during closing.

Chronologies can also be used to expedite attorney training in case analysis. Assign young attorneys the task of developing a chronology for new cases. Critique the language used to describe each fact, their determination of whether the fact is disputed or undisputed, their evaluation of the fact, and their analysis of the issues to which the fact relates.

A case chronology can prove to be a tremendous aid in organizing and exploring case knowledge and in presenting your case in court. Moreover, case chronologies provide strong and durable links among members of your litigation team that promote practice efficiencies and eliminate needless duplication of effort. ■



If It's Out There

Researching Legislative Intent in New York

By William H. Manz

Researching the legislative intent of New York State statutes can be a frustrating experience. As one commentator observed, "anyone accustomed to researching legislative intent on the Federal level will be in for a massive shock when attempting the same thing with New York State documents."[1] Those investigating federal legislative history generally have easy access to multiple bill versions, related bills, hearings, reports, committee prints, and the text of debates as published in the *Congressional Record*. Although New York legal research guides typically describe an extensive list of potential sources of legislative history,[2] the courts usually have available only the contents of governor's bill jackets.[3] As Chief Judge Judith Kaye once noted, "the tonnage is entirely on the federal side."[4]

Getting Started

The search for legislative history will begin, in most cases, with ascertaining the year and chapter number of a statute by consulting *McKinney's Consolidated Laws* and *Consolidated Law Service* (*CLS*), which then enables the researcher to locate the governor's bill jacket.[5] Governor's bill jackets are packets of materials gathered by the governor's counsel's office when a bill has passed the Senate and Assembly and is awaiting gubernatorial action. Typically, a bill jacket may contain the governor's approval memorandum, sponsor's memorandum, state agency memoranda prepared by their legal counsel, and letters from constituents. It should be noted that the contents of bill jackets vary widely. Some contain several memoranda and numerous letters, while others may only include a printed copy of the bill and a few related documents, and will prove worthless to the researcher.

Unfortunately, many of the bill jacket memoranda are quite brief – often only a few lines – offering little more than a summary of the bill's provisions. However unimpressive they may appear to a researcher who is accustomed to the more extensive federal materials, the memos are the legislative history documents most cited by the New York courts.[6] Although the courts cite all types of bill jacket memos, those that are potentially most useful in determining intent are prepared by the sponsor because they are written before the bill is passed; they are also the type of memoranda most likely to be available because they are required by the Assembly and Senate rules.[7] The courts also often refer to the bill jackets based on the correspondence they contain. These letters, which are available only in the bill jackets and have been cited more frequently in recent years,[8] may be of value to the researcher because the letters tend to focus on the key issues presented by the bill.

The Alleged Paper Drive

Bill jackets exist for the year 1905 and then from 1921 onward. There is no clear account of what happened to the bill jackets created for the period from 1906 to 1920. The most frequently offered explanation for the gap is that they were destroyed by a fire, although it has also has been suggested that a flood or even a donation to a World War II paper drive may be to blame. Comprehensive bill

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).

Cases Citing Legislative History

A Westlaw search of the NY-CS database found that the following legislative history materials were cited by the New York courts in 2004. Cases citing such materials included 25 from the Court of Appeals, 30 from the Appellate Division, and 27 from other state courts.

Documents Listed by Source	
Bill Jackets	88
McKinney's Session Laws	14
Legislative Annual	8
Miscellaneous	26

Documents Listed by Type	
Memoranda	
Legislative	45
State Agency/Department	12
Governor's	13
Attorney General's	8
Miscellaneous	8
Reports	
Law Revision Commission	7
Budget Report on Bills	4
CPLR Advisory Committee	2
Temporary Commissions	2
Miscellaneous	7
Other	
Bill Jacket Letters	17
Bills	8
Debate Transcripts	1
Miscellaneous	2

jacket collections on microfilm and microfiche are held by the New York State Archives, the New York State Library, and the New York City Public Library's Science, Industry, and Business Library.[9] The complete microform collection is also held by the New York Legislative Service, which offers same-day delivery of requested bill jackets. This service is provided at a discount to members, while the cost to non-subscribers is $100 per chapter, plus a $35 daily access fee and copying charges of 60 cents per page. Subscribers receive a discount of 25% or more.[10]

The courts most often refer to the bill jackets for copies of memoranda, although there are three other widely held print sources. Overall, the most complete collection is provided by the *New York Legislative Annual*, published by the New York Legislative Service since 1946. In 1990, the *Annual*'s former practice of omitting memoranda for laws deemed to be unimportant was discontinued, making the collection even more comprehensive.

The second source is the collection of memoranda reprinted in chapter law order in the second volume of each annual edition of *McKinney's Session Laws*. The *McKinney's* collection was, until recently, more selective than the *Legislative Annual*, but since the 1990s it has been greatly expanded.[11] The coverage of the *Legislative Annual* and *McKinney's* largely overlap for recent years, but they should both be checked because selected memos may appear in one but not the other. A final print source for memos is the annual *CLS* edition of the session laws, but here coverage is restricted to governor's approval memoranda.

Electronic Sources

There are also options for those seeking electronic sources of memoranda and bill jackets. The brand new Westlaw NY-LH-BILLJACKET database currently contains the contents of bill jackets for the 219th Legislature through the 224th Legislature (1996–2001). Since 1996, governor's, legislative, and judicial memoranda have been available on Westlaw, in the NY-LEGIS and NY-LEGIS-OLD databases as part of the online version of *McKinney's Session Laws*, but their presence was not readily apparent to the typical researcher. Since late 2004, they have also been provided in separate databases (NY-LH and NY-LH-REP), where the back file starts with 1998. Legislative memoranda are also available through the Bill Drafting Commission's online subscription service, the Legislative Retrieval System, which has a 10-year back file. Legislative memos are also available at the Commission's public Web site <http://public.leginfo. state.ny.us/menuf.cgi> and the Assembly Web site <http://assembly.state.ny.us>, but both of these resources offer materials only from the current legislature.[12]

Although the typical legislative history research scenario will not require looking beyond the memoranda and bill jacket correspondence, there is a variety of sources that may occasionally be relevant to the history of selected statutes. One set of documents that might be somewhat misleading to the researcher is the legislative documents series that was published annually as a bound compilation until 1975.[13] In most cases, these materials were not generated by the Senate and Assembly as part of the legislative process, but were instead reports to the legislature from various state departments, agencies, committees, or commissions. Two types of these reports, however, are relevant to legislative history research. These are the reports of bodies charged with the revision and/or recodification of parts of the Consolidated Laws, and the annual reports of the Law Revision Commission.

Law Revision Commission Reports

Law Revision Commission reports may be relevant to researching legislative intent if the particular enactment was one proposed by the Commission. The annual reports of the Commission (1935–1994) included, until 1970, proposed bills, studies made for the Commission's deliberation, and a detailed analysis and justification for the Commission's recommendations. From 1970–1994, the reports consisted only of the recommendations and justi-

fication. No formal annual reports have been printed since 1994, although individual reports resumed in 2001.[14] In addition to the bound documents compilation, which is also available on microfilm, the annual reports are available in separate volumes. They were also reprinted in *McKinney's Session Laws* from 1951–1994, and are therefore available on Westlaw in the NY-LEGIS-OLD database.

Legislative documents consisting of reports of the bodies charged with revisions and recodifications can be quite extensive, although they may only be relevant to selected parts of the Consolidated Laws. For example, during the process of replacing the old Civil Practice Act with the CPLR, the Advisory Committee on Practice and Procedure issued four substantial annual preliminary reports before submitting to the legislature in 1961 the 800-page Final Report. Another example is the Joint Legislative Committee to Study the Revision of Corporation Laws, which published lengthy annual reports from 1957–1973. The annual reports of the Judicial Council and its successor, the Judicial Conference, which have been replaced by advisory committee reports, are also part of the legislative document series and a potentially relevant source in searching the history of laws relating to civil, criminal, and family law practice. All three types of reports are reprinted in *McKinney's Session Laws*.

A committee report on a bill of the type routinely prepared in Congress is, surprisingly, one type of document that is almost always unavailable for New York enactments. Although both the Assembly and Senate do publish reports, these are on general topics because their rules have not required reports on specific legislation. The Senate produced no reports on 152 major pieces of legislation between 1997 and 2001, while the Assembly produced only two on the 181 bills for which the researchers had complete data, according to the Brennan Center for Justice at New York University School of Law.[15] Similarly, the legislature holds hearings, but does so only rarely with regard to specific legislation. Hence, the Brennan Center reports that between 1997 and 2001 both the Senate and Assembly held only one hearing each on major bills.[16]

If a Debate Is Never Recorded . . .

Researchers hoping for access to transcripts of debates as found in the *Congressional Record* will also be disappointed. Unlike the *Congressional Record*, the New York State Senate and Assembly journals contain only summaries of the daily transactions, and are therefore of little use when compiling a legislative history. There are no debates on most bills even though debates have been officially recorded in the Senate since 1960, and in the Assembly since 1973. The Brennan Center study indicates that between 1997 and 2001 there was no "debate" in the usually recognized sense of the term on 95.5% of major Assembly bills and 95.1% of major Senate bills.[17] However, if a debate transcript exists it may be obtained for a fee from the Legislative Service or from the Senate Office of Microfilm and Records and the Assembly Office of Public Information.

There is a variety of sources that may be relevant to the history of selected statutes.

Another source to which the courts may occasionally refer is prior unenacted bills, because differences in language may provide clues to legislative intent. Copies of old bills are available on microfiche and microfilm from the State Library in Albany. Finally, official press releases[18] and the legislative recommendations or reports prepared by major bar associations may shed some light on legislative intent, although they are rarely cited.[19]

Fortunately, there are several methods to determine whether a given statute has a legislative history that consists of more than bill jacket memos and letters. The New York Legislative Service will add such items as commission reports, hearing transcripts, bar association memos, and newspaper articles, if available, in the bill jackets they provide. The Legislative Service will also include any relevant debate transcripts for a copying charge. The more recent volumes of the Service's *Legislative Annual* will, along with the reprinted memos, note the existence of additional material, particularly press releases and debate transcripts, and occasionally reports and public hearings. The *Annual* also may note the existence of prior unenacted bills, as does the *McKinney's Session Laws* collection of memoranda. If a statute was originally recommended by the Law Revision Commission, this will be noted in the annotations in *McKinney's Consolidated Laws* and/or *CLS*.[20] In addition, if the intent of a statute has already been considered by the courts, the most relevant materials on its legislative history may be found cited in the opinion and in the related briefs.[21] Finally, if a law is the subject of one of the *McKinney's* practice commentaries, the author may cite and discuss key documents.[22]

Intent from Long Ago

In some instances, the law for which some indication of legislative intent is being sought will turn out to be derived from a statute enacted in the 19th or early 20th century. It is often impossible to research the intent of early enactments because the comprehensive bill jacket collection begins in 1921, and there are no early counterparts to the *Legislative Annual* or the *McKinney's Session Laws* reprints. However, there are exceptions. If a law was derived from the Revised Statutes of 1827–1828 (known as the "Butler and Duer Revision"), the notes of the revisers may offer some information.[23]

For example, last summer, the New York Law Institute received an inquiry concerning the history of section 5 of the Domestic Relations Law, which bars incestuous marriages and derives from the Revised Statutes.[24] The revis-

ers' notes indicate that for this section they relied on an opinion by Chancellor Kent, in which he stated, "Marriages among such near relations, would not only lead to domestic licentiousness, but by blending in one object, duties and feelings incompatible with each other, would perplex and confound the duties, habits and affections proceeding from the family state, impair the perception and corrupt the purity of moral taste, and do violence to the moral sentiments of mankind."[25]

Historical annotated codes, which tend to accumulate dust and remain forgotten on many law library shelves may also provide clues to the basis for a statutory change or amendment. For example, *White and Goldmark on Non-Stock Corporations* explains that "[t]he legislative interest in enacting the provision authorizing the taking of property in trust for the improvement and embellishment of cemetery property [now found in section 7 of the Religious Corporations Law] was to abrogate the rule against perpetuities in the case of gifts to religious for cemetery purposes."[26] Similarly if a statute was originally a part of the old Code of Civil Procedure, the annotations in *New York Code of Civil Procedure as Amended in 1877* (Bliss), *The Code of Civil Procedure of the State of New York with Notes* (Throop 1882), or the reports of the Commissioners on Practice and Pleading (1848/1849) might contain some information.

Despite the existence of a variety of potential sources, the researcher must begin any search for the legislative intent of New York State statutes with realistic expectations. The available legislative history is often quite basic and phrased in general terms, and it is often impossible to determine the intent of many statutory provisions, particularly if they are a part of a lengthy enactment. However, one may at least rest assured that, if the sources described in this article have been investigated, the researcher has consulted the same documents utilized by the New York courts. ■

1. Robert Allan Carter, Legislative Intent in New York State 1 (1981).

2. *See, e.g.*, William H. Manz, Gibson's New York Legal Research Guide 98–106 (2004); New York State Library, New York State Legislative Intent, *at* <http://www.nysl.nysed.gov/legint.htm>; Albany Law School, New York State Legislative History Materials, *at* <http://www.als.edu/lib/editor.cfm?ID=245>. For a history of legislative intent in New York, see Robert Allan Carter, Legislative Intent in New York: Materials, Cases and Annotated Bibliography 5–9 (2d ed. 2001).

3. Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 Touro L. Rev. 595, 600 (1997). For bills that have been vetoed, there are veto jackets which contain a copy of the veto message. There are also "recall jackets" for bills that were "recalled" from the governor's office, a practice that was declared unconstitutional in *King v. Cuomo*, 81 N.Y.2d 247, 597 N.Y.S.2d 918 (1993). Both veto and recall jackets are available from the same sources as jackets for approved bills.

4. Kaye, *supra* note 3, at 600. The situation in many other states is far worse. Little or no material on legislative intent is reportedly available in Alabama, Arkansas, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming.

5. For a more detailed description of the steps in compiling a legislative history, see Manz, *supra* note 2, at 109–11.

6. See the accompanying chart, p. 46. In 2000, 78.2% of the legislative materials cited by the New York appellate courts in 2000 were memoranda. William H. Manz, *New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos*, N.Y. St. B.J., May 2002, at 14.

7. *See, e.g.*, Senate Rule VI, § 1 (2005–2006); Assembly Rule III, § 1(f) (2005–2006).

8. *See, e.g.*, *Excellus Health Plan, Inc. v. Serio*, 2 N.Y.3d 166, 172, 777 N.Y.S.2d 422 (2004) (citing letter from Superintendent of Insurance); *Carney v. Philipone*, 1 N.Y.3d 333, 341, 774 N.Y.S.2d 106 (2004) (citing letter from Onondaga County Department of Law); *Specialty Prods. & Insulation Co. v. St. Paul Fire & Marine Ins. Co.*, 99 N.Y.2d 459, 464–65, 758 N.Y.S.2d 255 (2003) (citing letter from Association of Casualty and Surety Cos.); *Gorsky v. Triou's Custom Homes, Inc.*, 194 Misc. 2d 736, 755 N.Y.S.2d 197 (Sup. Ct., Wayne Co. 2002) (citing letter from New York State Builders Association). Bill jacket letters were cited by the Court of Appeals only eight times between 1950 and 1979. Between 1980 and 1989, they were cited 26 times, and between 1990 and 1999, 60 times. William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 Buff. L. Rev. 1273, 1289 n.76 (2001).

9. New York Legislative Service, Bill/Veto/Recall Jackets, *at* <http://www.nysl.nysed.gov/billjack.htm>. Various other libraries also have bill jacket collections. *See* Carter, *supra* note 2, at 11–13.

10. Fees also are charged for jackets requested from the State Library, State Archives, and New York Public Library.

11. In 1980, legislative memoranda comprised 138 pages. In 1990, the number rose to 205, and by 2003 the total was 549.

12. Accordingly, the large number of sponsor's memoranda for 2003–2004, which were available in December 2004 are no longer posted.

13. The documents of the Senate and Assembly were published as separate annual sets until 1918. The combined legislative documents series was published from 1919 until 1975.

14. The reports are posted at the Commission's Web site *at* <http://www.lawrevision.state.ny.us>.

15. Brennan Center for Justice at N.Y.U. Law School, The New York State Legislative Process: An Evaluation and Blueprint for Reform 6 (2004).

16. *Id.*

17. *Id.* at 23.

18. *See, e.g.*, *People v. McRobbie*, 168 Misc. 2d 151, 156, 636 N.Y.S.2d 975 (Just. Ct., Monroe Co. 1995) (citing press release of Sen. Norman Levy); *see also Schulz v. State*, 84 N.Y.2d 231, 251, 616 N.Y.S.2d 343 (1994) (citing Joint Press Release of the Governor and Comptroller).

19. *See, e.g.*, *In re Frohlich*, 1 Misc. 3d 908A, 781 N.Y.S.2d 624 (Sur. Ct., Kings Co. 2004) (citing Report of the Committee on the Surrogate's Court, New York County Lawyers' Association, Report No. 280 (1948)).

20. There are also published indexes for legislative documents and reports. *See* Manz, *supra* note 2, at 106–07.

21. *N.Y.A.A.D., Inc. v. State*, 1 N.Y.3d 245, 771 N.Y.S.2d 54 (2003) (discussing Vehicle & Traffic Law § 398-d, citing Senate Memorandum in Support and mentioning statements from individuals involved in the passage of the legislation); *Rosner v. Metro. Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 729 N.Y.S.2d 658 (2001) (Ins. Law § 3425, citing sponsor's memorandum and governor's approval memorandum).

22. *See, e.g.*, Peter Peiser, McKinney's Practice Commentary DRL § 230, at 29 (1999) (citing Law Revision Commission memorandum); Vincent C. Alexander, McKinney's Practice Commentary, CPLR 105, at 59 (2003) (citing Office of Court Administration memorandum).

23. These notes are formally entitled *Report[s] From the Commissioners Appointed to Revise the Statute Laws of the State of New York*, and extracts were reprinted in an appendix to vol. 3 of Revised Statutes (2d ed.) (1836), and vol. 5 of *Edmonds' Statutes* (1862).

24. *See* The Revised Statutes of the State of New-York, Pt. II, Ch. VIII, tit. 1, § 3 (Packard & Van Bethuysen printers, 1829).

25. *Extracts from the Original Reports of the Revisers*, *reprinted in* 5 Statutes at Large of the State of New York 399 (John W. Edmonds ed., 1863) (citing *Wrightman v. Wrightman*, 4 Johns. Ch. Rep. 343, 350 (N.Y. Ch. 1820)).

26. Frank White & Godfrey Goldmark, White and Goldmark on Non-Stock Corporations 319 (1913).

Paying Off a Mortgage

A (Surprisingly) Convoluted Story

By Bruce J. Bergman

Perhaps because a mortgage is far more momentous and formal than a telephone bill or a grocery store obligation, its satisfaction can become complicated. Many other endeavors are surely more intricate and laden with nuance than the satisfaction of a mortgage, but paying off a mortgage is sufficiently problematic to raise a host of difficult, often unanticipated issues that occur for disparate reasons. So, uniting the concepts in one neat place should be of service.

Typically, the subject is addressed on one of two occasions. Property burdened by a mortgage is to be sold and so a payoff letter is requested from the mortgage holder. (The solicitation to satisfy might not be honored or, if favorably viewed, it may delineate categories of expense that are contentious.) Alternatively, the borrower is in default and a foreclosure action is either imminent or pending. Through sale of the premises, refinance, or rescue from some friend or family member, the mortgage is to be satisfied.

The amount that must be paid to achieve that satisfaction can be a thorny issue. In any event, satisfying the mortgage should not be confused with reinstating the mortgage (remitting past due sums to cure the default). That is a different subject with different rules.[1]

Can It Be Paid?

Can the mortgage be paid off at all? This sounds like a foolish question. If a borrower has the wherewithal to pay off a mortgage, namely, *all* the money is in hand, it might be assumed that a lender could not reject it. This is particularly so when contemplating the sacred right to redeem (discussed later).

But for those who recall the first time they were involved in negotiating a mortgage, either the other side insisted upon the right to prepay or, when representing the borrower, your senior partner reminded you to be sure to get that privilege for your client. And the reason

Bruce J. Bergman <b.bergman@bhpp.com> is a partner at Berkman, Henoch, Peterson & Peddy, P.C. in Garden City. He is the author of the three-volume treatise *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2005). A graduate of Cornell University, he received his law degree from Fordham University School of Law.

pursuit of that right was so important is the general rule in New York that indeed, a mortgage may *not* be prepaid unless the mortgage documents specifically so provide.[2] As a practical matter, this is understandable because prepayment can impose untoward economic burdens upon a mortgagee, such as loss of an expected rate of return, increased tax liability, and the costs attendant to reinvesting the principal, sometimes at a lower rate of return.[3]

Statute plays a role here too. If a loan is secured primarily by either an owner-occupied one-to-six family residence, or a co-op unit, the loan *can* be prepaid in whole or in part at any time.[4] Additionally, lenders covered by Banking Law Article IX or 12-D licensed lenders (typically home equity lenders who make junior loans on owner-occupied residences of one to four units) are barred from employing a mortgage provision that would not allow prepayment.[5]

Because there is considerably more nuance to this subject than is reviewed here, exploring all the issues can become necessary on a case-by-case basis. Whatever the breadth of the subject, it makes the point that the availability of prepayment can be a threshold question.[6]

The Prepayment Penalty

Although far more common in commercial rather than residential mortgages, a penalty can be imposed by an appropriate mortgage provision upon a borrower seeking to satisfy the obligation prior to its natural maturity date.[7] Whether the right to collect a prepayment penalty exists, however, will depend upon the applicability of a number of statutes and rules. For an owner-occupied one-to-six family residence, no prepayment penalty is available if payment is made on or after one year from the date the loan is made,[8] although if made prior to that time the penalty is permitted but only if a provision to that effect is in the loan agreement.[9] Then too, lenders licensed pursuant to Article IX or 12-D of the Banking Law are precluded from extracting a prepayment penalty.[10] And the further exceptions are extensive enough not to be economically discussed here.[11]

Where the prepayment is couched in terms of a yield maintenance provision (common in commercial mortgages), it is generally an enforceable liquidated damages clause under New York law.[12]

A prepayment penalty encounters yet another twist when it intersects with acceleration of the debt followed by initiation of a foreclosure action. Prepayment is deemed involuntary where default precipitates acceleration, so that collection of a prepayment penalty is barred.[13] But if the provision in the mortgage makes the sum payable notwithstanding an involuntary payment (or even in the event of acceleration and a foreclosure action), it will be enforced.[14]

The compelling point remains: a prepayment penalty could comprise a portion of a mortgage payoff, and searching for exceptions, if the payment demand is considered untoward, is a difficult exercise.

> Charging interest on maturity, even where the rate would otherwise be usurious, is not deemed to violate usury statutes.

How Much Is Due?

The amount due depends upon the particular case, but the crux of the determination lies in delineation of the categories of charge and expense that can be encompassed by the mortgage. Both principal and interest will usually be due, although upon natural maturity at the end of the mortgage term, only interest might be due. Other charges that may form part of the debt may be less overt. Included among those items are the following:

Legal Fees

Because the American rule is that each party to an action bears its own counsel fees,[15] the obligation to pay someone else's legal cost is seldom encountered. But contractual agreement (the mortgage) between the parties can alter the rule,[16] something commonplace in the realm of mortgages. In the event of a foreclosure, the mortgagee's reasonable legal expense, together with sundry costs, disbursements, and allowances are most often a component of the debt. Even absent a foreclosure, the lender may have incurred legal fees during the life of the mortgage – perhaps a title claim or the borrower's bankruptcy filing – and these could be added to the debt.[17]

Late Charges

Mortgages generally have a grace period for submission of periodic installments; 15 days is the most common. As is typical, a late charge may be imposed for tardy remittances. For a one-to-six family dwelling, Real Property Law (RPL) § 254-b provides 2% as the maximum late charge available. This limit does not apply, though, to loans insured by the federal housing commissioner, loans insured or guaranteed pursuant to the Federal Servicemen's Readjustment Act of 1944 or to federal savings associations.[18] Similarly, the cap would not affect commercial mortgages.

A 2% charge each month can mount where a residential mortgage has been regularly late over a period of years. The total due may become very significant on large, often commercial, mortgages, where the charge

could be 5% or 6%. Such sums are compensable in a mortgage foreclosure action[19] and therefore due upon a payoff.

Applicable Interest and Interest on Default

Although much of the time the note rate controls the quantum of interest accrual, such a calculation is likely incomplete where there may have been a default. Some time after a borrower may have defaulted, the lender will eventually accelerate the debt and declare the entire balance due. Upon that acceleration, if the mortgage is silent as to the rate of interest to apply, the judgment rate of 9% controls.[20] If the mortgage provides for a default rate to apply, and most well-drafted mortgages will, that rate will prevail.[21]

If the foreclosure action proceeds to entry of judgment of foreclosure and sale, then the mortgage merges into the judgment so that interest reverts back to the judgment rate,[22] except if the parties intended to avoid merger, in which case the contract or default rate can still control so long as the applicable mortgage provision is clear and unequivocal.[23]

The default rate can sometimes be quite high, for example, up to 24%. Mindful that the legal rate of interest is 16%,[24] anything above that might appear usurious. But it is not so. Charging interest on maturity, typically by acceleration, higher than the note rate is generally valid and enforceable[25] and even where the rate would otherwise be usurious it is not deemed to violate usury statutes.[26] Usury can exist only where there is a loan or forbearance and interest upon maturity fits neither category.

And yet there is further subtlety. Since a 2001 ruling of the Court of Appeals, the note rate of interest will accrue on both the principal and interest portion of all missed installments from the date each was due until acceleration is declared.[27]

Lender's Advances and Interest

Improved premises need to be insured, lest hazard damage to the structures diminish the value of the security. Whether the borrower was maintaining the insurance or the lender was paying through an escrow account, a lapse of insurance coverage is dangerous. Consequently, the mortgage will authorize the lender to advance sums necessary to keep insurance in force, a sum that will be added to the mortgage balance. Mortgages will also assess interest on such an advance, payable at the judgment rate of 9% if the mortgage is silent on the subject, or some higher default rate if the mortgage so provides.

Similar concepts govern advances for real estate taxes. Failure to pay such taxes will eventually result in divestment of title and extinguishment of the mortgage. Therefore, the lender will at some point advance sums to cure tax defaults to protect the lien of the mortgage. These amounts, together with interest (9% or some higher percentage depending upon provision in the mortgage) will be due if the mortgage is to be satisfied.

Like principles control sums due upon senior mortgages or other encumbrances. If the mortgage upon which payment is contemplated is in a second or more junior position, if at any time during the existence of that mortgage there had been a default on a paramount mortgage, the junior lender might be constrained to cure the default or satisfy the senior in full. After all, foreclosure of a senior mortgage extinguishes a junior mortgage. So, such amounts, with interest, as with insurance and taxes, will be due upon satisfaction.

Redemption and a Payoff Statement

If a mortgage cannot be prepaid, as discussed earlier, then there is no issue of redemption. But if prepayment is not barred, or if the balance of the mortgage has been accelerated, then the mortgagor has the right to save the pledged property, to pay the total sum due, to redeem, a right that is a rule of equity favored by the courts.[28] Indeed, a borrower's right of redemption cannot be waived or abandoned by any stipulation of the parties at any time, even if contained in the mortgage[29] or expressed in open court.[30] This absolute right to satisfy the mortgage continues until the moment the hammer falls at a foreclosure auction sale.[31]

In order to tender the proper satisfaction amount, the borrower needs a payoff statement from the lender. Where the mortgaged property is an owner-occupied one-to-six family residential structure or residential condominium unit, statute requires the payoff letter to be sent within 30 days of request.[32]

Happily, there will be many occasions when a borrower desiring to satisfy a mortgage contacts the lender and promptly receives an uncomplicated statement reciting principal and interest due. But as analyzed, it may not be that simple. There are numerous categories of calculations and fees (each with more detail than can be explored here) that can be part of the payoff formula. Even then, this excursion did not address other varieties of charges, such as fees for ownership transfers, modifications, releases of lien, bounced check charges, among more than a few others, or the problems of redemption on the eve of sale, or the ability to obtain an assignment of the mortgage instead of a satisfaction. It is hoped, though, that revealing some of the obscurities here will be helpful. ■

1. For a review of issues relating to reinstatement, see 1 *Bergman on New York Mortgage Foreclosures* § 4.06 (rev. 2005).

2. *See, inter alia*, *Russo Enters. v. Citibank, N.A.*, 266 A.D.2d 528, 699 N.Y.S.2d 437 (2d Dep't 1999); *Missouri, Kansas & Texas Ry. Co. v. Union Trust Co.*, 156 N.Y. 592, 51 N.E. 309 (1898); 1 *Bergman on New York Mortgage Foreclosures* § 1.16 (rev. 2005).

3. *See Arthur v. Burkich*, 131 A.D.2d 105, 520 N.Y.S.2d 638 (3d Dep't 1987).

4. General Obligations Law § 5-501(3)(b) (GOL).

5. 3 N.Y.C.R.R. § 80.9(e).

6. For further exploration of the subject, see 1 *Bergman on New York Mortgage Foreclosures*, § 1.16 (rev. 2005).

7. As to enforceability of the provision, see, *inter alia*, *Criimi Mae Servs. Ltd. P'ship v. Nassau Bay Assocs.*, 283 A.D.2d 215, 724 N.Y.S.2d 735 (1st Dep't 2001); *Poughkeepsie Galleria Co. v. Aetna Life Ins. Co.*, 178 Misc. 2d 646, 680 N.Y.S.2d 420 (Sup. Ct., Dutchess Co. 1998).

8. GOL § 5-501(3)(b).

9. *Id.*

10. 3 N.Y.C.R.R. § 80.9(e).

11. *See* 1 Bergman on New York Mortgage Foreclosures, § 1.16[2][a] (rev. 2005).

12. *In re Vanderveer Estates Holdings*, 283 B.R. 122 (2002) (citing *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134 (2d Cir. 1982); *Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896 (2d Cir. 1972)).

13. *Kilpatrick v. Germania Life Ins. Co.*, 183 N.Y. 163, 75 N.E. 1124 (1905).

14. *United Merchants & Mfrs.*, 674 F.2d 134; *Eyde v. Empire of Am. Fed. Sav. Bank*, 701 F. Supp. 126 (E.D. Mich. 1988).

15. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Baker v. Health Mgmt. Sys.*, 98 N.Y.2d 80, 745 N.Y.S.2d 741 (2002); *see also* 2 Bergman on New York Mortgage Foreclosures § 26.01 (rev. 2005).

16. *Baker*, 98 N.Y.2d 80; *Chapel v. Mitchell*, 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994).

17. Not surprisingly, the topic of legal fees pursuant to a mortgage is a much broader subject than reviewed here. Suggested guidance can be found at 2 *Bergman on New York Mortgage Foreclosures* Ch. 26 (rev. 2005).

18. RPL § 254-b(2).

19. *Centerbank v. D'Assaro*, 158 Misc. 2d 92, 600 N.Y.S.2d 1015 (Sup. Ct., Suffolk Co. 1993); *Barrow v. Rocksprings Mgmt. Co.*, 169 A.D.2d 585, 564 N.Y.S.2d 437 (1st Dep't 1991).

20. *See, inter alia*, *Metro. Sav. Bank v. Tuttle*, 290 N.Y. 497, 49 N.E.2d 983, *reh'g denied*, 291 N.Y. 634, 50 N.E.2d 1018 (1943); *Title Guar. & Trust Co. v. 2846 Briggs Ave., Inc.*, 283 N.Y. 512, 29 N.E.2d 66, *reh'g denied*, 284 N.Y. 685, 30 N.E.2d 725 (1940); *Ferris v. Hard*, 135 N.Y. 354, 32 N.E. 129 (1892); *Heimbinder v. Berkovitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dep't 1999); *see also* 1 Bergman on New York Mortgage Foreclosures § 1.11[1] (rev. 2005).

21. *See, inter alia*, *Heimbinder*, 263 A.D.2d 466 (citing *inter alia*, *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230 (2d Dep't 1992); *Marine Mgmt. v. Seco Mgmt.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991), *aff'd*, 80 N.Y.S.2d 886, 587 N.Y.S.2d 900 (1992); *Ward v. Walkley*, 143 A.D.2d 415, 532 N.Y.S.2d 426 (2d Dep't 1988)); *see also Citibank, N.A. v. Liebowitz*, 110 A.D.2d 615, 487 N.Y.S.2d 368 (2d Dep't 1985); *Levine v. State of New York*, 106 A.D.2d 709, 484 N.Y.S.2d 678 (3d Dep't 1984).

22. *Taylor v. Wing*, 84 N.Y. 471 (1881); *Banque Nationale de Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dep't 1998).

23. *Banque Nationale de Paris*, 248 A.D.2d 154; *Marine Mgmt.*, 176 A.D.2d 252.

24. GOL § 5-501(1); Banking Law § 14-a(1).

25. *See, inter alia*, *Bloom v. Trepaml Constr. Corp.*, 29 A.D.2d 951, 289 N.Y.S.2d 447 (2d Dep't), *aff'd*, 23 N.Y.2d 730, 296 N.Y.S.2d 372 (1968).

26. *Klapper v. Integrated Agric. Mgmt. Co., Inc.*, 149 A.D.2d 765, 539 N.Y.S.2d 812 (3d Dep't 1989).

27. *Spodek v. Park Prop. Dev. Assocs.*, 96 N.Y.2d 577, 733 N.Y.S.2d 674 (2001).

28. *Goodell v. Silver Creek Nat'l Bank*, 48 N.Y.S.2d 572 (Sup. Ct.), *aff'd*, 268 A.D. 1020, 53 N.Y.S.2d 529 (4th Dep't 1944).

29. *Peugh v. Davis*, 96 U.S. 332 (1877).

30. *Maher v. Alma Realty Co., Inc.*, 70 A.D.2d 931, 417 N.Y.S.2d 748 (2d Dep't 1979).

31. *Nutt v. Cuming*, 155 N.Y. 309, 49 N.E. 880 (1898). For an in-depth review of this subject, see 1 *Bergman on New York Mortgage Foreclosures* § 2.21[3] (rev. 2005).

32. RPL § 274-a(2). For a further discussion of the statute see 2 *Bergman on New York Mortgage Foreclosures* § 24.06[4] (rev. 2005).

"I love your summation, and the pyrotechnics were awesome."

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Some time ago, I believe you wrote a column in which you stated that the expression *all . . . are not* might be ambiguous. Would you explain that statement again?

Answer: I can't find the column to which the questioner refers, but he may have seen the discussion of that phrase in my book, *Legal Writing Style*, Foundation Press, fifth edition, 1992, at page 91.

The problem with *all . . . are not* is that while the person using it believes it expresses a negative, it does not. For example, "All cats are gray," expresses an unequivocal affirmative. But "All cats are not gray," does not express an unequivocal negative. It merely means that some cats are gray; as does the statement, "Not all cats are gray." The negative form of "All cats are gray" is "No cats are gray."

People get into trouble sometimes because of the ambiguity of *all . . . are not*. A notice on the student bulletin board recently announced, "All classes regularly scheduled for Monday will not be held." The implication is that *some* classes will be held. To be clear the notice should have said, "No Monday classes will be held."

As illustration of that point, a reader submitted a comment made by a politician who was attempting to state that Newark had no responsibility in society's ills. He wrote, "All of society's ills are not solely Newark's responsibility." Instead of denying that any of society's ills were solely Newark's responsibility, this comment admitted that *some* were – not at all what he intended.

Double (and sometimes triple) negatives also cause trouble. *The New York Times* reported another unintended comment when it quoted Mahmoud Abbas, then-front-runner in the Palestinian presidential race, as saying, "Ariel Sharon is an elected leader and we will negotiate with him. I **can't** say that Ariel Sharon is **not** a partner. But whether or **not** he is serious, we will find out." (Emphasis added.) From that overload of negatives, Abbas should have removed at least one, to say instead: "I can't say that Ariel Sharon is a partner."

What might take the prize for unintended obfuscation caused at least partly by negatives is a paragraph from a court holding:

> This rule [comparative negligence] should **not** be construed so as to entitle a person to recover for damage in a case where the proof shows that the exercise of due care could **not** have prevented the injury, or where the defendant's negligence was **not** a legal cause of the damage. Stated differently, there can be **no** apportionment of negligence where the negligence of the defendant is **not** directly a legal cause of the result complained of by the plaintiff. *Hoffman v. Jones*, Fla. 280, So.2d 43. (Emphasis added.)

Negatives are handy, however, when the speaker wants to hedge. Speaking of a governmental official under indictment, then-President Reagan asserted, "Mr. _____ is not a dishonest man." Or consider Alan Greenspan's comment about the Consumer Price Index: "I **can't** say with great confidence, but I can say that what data we have does **not** suggest that the April rise will **not** be repeated in the month of May." (Emphasis added.)

To soften a negative statement, the *not . . . un* construction is also useful. For example, an instructor might tell an aspiring student, "This is not bad writing." Or, to soften a blow: "This is not the worst situation you might have encountered."

The *not . . . un* negative is also convenient when you want to express something between praise and criticism. Consider the statement, "The plaintiff was not unhappy with the outcome." Was the plaintiff happy? No. Was he unhappy? Well, no. And how about the disclaimer, "I was not unaware of other possible arguments against my client?" It's hard to pin down just what the speaker meant in that statement. The same is true of the statement by a lawyer for the defendant physician (who had removed an incompetent man's kidney without permission): "The removal of the kidney was not without benefit to him."

Addendum:

The following account appeared some time ago in *Glimpse*, a newsletter of the International Society for General Semantics. It seems relevant here:

> In an appeal heard at the Assize Court in England, the Lord Justice was hearing a plea on behalf of a man charged with an act of bestiality with a duck. The defense called a Viennese psychiatrist whose evidence went something like this: "I have known the prisoner, My Lord, for a long time, and for many years he has been a patient of mine, but now he is responding to treatment and is showing a marked improvement."
>
> His Lordship asked: "By 'showing a marked improvement,' are you suggesting that he is about to graduate up through the animal and bird kingdom until he gets to little boys and girls?"
>
> "Oh no, my Lord," said the psychiatrist, "he'll always stick to ducks."

This anecdote confirms that there are other ways to get into trouble with language than by using negatives. ■

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).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a new associate in the litigation department of a law firm. A senior partner recently assigned a matter to me concerning someone I shall call Mrs. Privileged. Mrs. Privileged is the matriarch of the Privileged Family, which owns and develops much of the real estate in our county, including shopping centers, office buildings and residential complexes. For the past 10 years, the firm has handled all the commercial work for the Privileged Family, as well as personal matters for many of its members.

According to the senior partner, Mrs. Privileged claims that her gardener negligently over-fertilized her prize rose garden, rendering the roses unfit for the annual flower show in which she has participated for many years, and won medals for her displays. She claims $5,000 in damages and is furious with the gardener, so much so that she not only fired him, but also "spread the word" about his incompetence to her neighbors, many of whom also used him. Although I have never met Mrs. Privileged, the scuttlebutt around the office is that she is not very kind, to say the least, and is also penurious, despite her wealth.

As instructed, I prepared a complaint and commenced discovery. I just completed taking the deposition of the gardener, who is indigent, and was not represented by counsel. His testimony does not support our client's claim that he was negligent, and, even if it did and we obtained a judgment, his lack of assets would render it uncollectible. In addition, the gardener has been unable to find work, having been "blacklisted" by our client – who, I am convinced, is just being petty and spiteful. This is my first case without close supervision, and I want to make a good impression on an important client and the senior partner. As a matter of my own professional development, I am also anxious to take a case to trial. Nevertheless, I am conflicted, as I think that this case should not be continued. What should I do, particularly if the senior partner tells me to proceed notwithstanding my concerns?

Sincerely,

An Attorney With a Thorny Issue

Dear Attorney With a Thorny Issue:

It appears that you have more than one issue to deal with in this case; I hope this response will give you some direction.

At the outset, you should realize that the Code of Professional Responsibility itself can point you in the right direction. The preamble to the Code states, in part, as follows: "In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which the lawyer may encounter can be foreseen, but fundamental ethical principles are always available for guidance. . . . Each lawyer's own conscience must provide the touchstone against which to test the extent to which the lawyer's actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the profession and of the society which the lawyer serves that should provide to a lawyer the incentive for the highest degree of ethical conduct."

With this in mind, you can begin to analyze the problems you are facing. DR 7-102(A)(1) provides as follows: "In representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Further, a lawyer is prohibited from "knowingly advanc[ing] a claim or defense that is unwarranted under existing law" unless certain conditions, not relevant here, exist. DR 7-102(A)(2).

Based upon the discovery you conducted, you have reached the conclusion that your client's claim of negligence cannot be proven. You also sense that your client is being petty and spiteful, and that her actions may be motivated solely by an intention to harass or injure the defendant.

First, your judgment about the case must be communicated to your client. You know that Mrs. Privileged is a significant and longstanding client of the firm, and prudence therefore would dictate that you avoid characterizing her behavior. Instead, give her your professional opinion as to what you believe the outcome of the litigation will be. As explained by EC 7-3, a lawyer may serve as both advocate and adviser, and, in the latter capacity, the lawyer "furthers the interest of the client by giving a professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand."

If, after giving her your view of the case, Mrs. Privileged nevertheless insists on pursuing it against your advice, you may have a problem. A lawyer should not "knowingly assist the client . . . to take a frivolous legal position" (EC 7-5) or advance a claim that is "unwarranted" under the law.

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

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

DR 7-102(A)(2). Your only course of action may be withdrawal if you become convinced that Mrs. Privileged is pursuing her claim solely to punish her former gardener. DR 2-110(B)(1) requires mandatory withdrawal if "the lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person."

Of course, your supervising partner may have other thoughts about such a decision. Nevertheless, you must clearly articulate your concerns to him. The economic interests of the firm do not allow you to violate the Disciplinary Rules, no matter how much business is generated by this particular client. In fact, the partner has to be aware of his own obligations. DR 1-104 covers the responsibilities of a partner or supervisory lawyer with respect to subordinate lawyers. The law firm itself has an obligation to make reasonable efforts to ensure that all the lawyers in the firm conform to the Disciplinary Rules. DR 1-104(A). In addition, the individual lawyer with management responsibility in a firm, or who has direct supervisory responsibility over another lawyer, must make reasonable efforts to ensure that other lawyers conform to the Disciplinary Rules. DR 1-104(B).

It is to be hoped that the senior partner who assigned you this matter is concerned with your professional development. Supervision is particularly important for someone like you, who is a new associate with limited experience. *See* DR 1-104(C). If the partner, as your supervising attorney, is able to give you a reasonable resolution of "an arguable question of professional duty," then you would be protected if you acted accordingly. DR 1-104(F). Unfortunately, it appears that he will be hard pressed to come up with one given the circumstances you describe – and if he cannot, you will have to comply with the Disciplinary Rules even if your supervisor orders you to do otherwise. DR 1-104(E). In fact, absent such a resolution, DR 1-104(D)(1) places him in the position of violating the rules himself if he directs you to proceed.

It is hoped that these suggestions and guidelines will assist you. Remember that professionalism is something you should always strive for. While the economic interests of a firm may influence some decisions, they should never cloud ethical and professional judgment.

The Forum, by
Arthur N. Terranova, Esq.
Jamaica, NY

LETTERS TO THE FORUM:

We received the following letter in response to the Forum published in the January 2005 issue of the Journal.

I disagree with certain aspects of the response to "Conflicted's" problem. While courtesy to a fellow attorney is always appropriate, I think that Conflicted was also dilatory and gullible. When the opposing attorney failed to meet, and then to respond to discovery, Conflicted took weeks and weeks to contact the court. This was much too long a delay, especially in light of the client's previous experience. Conflicted also made a real mistake in taking the matter off the docket, as opposed to continuing it, before getting back a signed arbitration agreement. There was every reason to distrust the other attorney, yet Conflicted disarmed before achieving the desired result. Courtesy and concern for a fellow attorney's distress is fine, but it should not become an excuse for neglecting or devaluing the client's interests.

Keith Roberts, Esq.
Roberts Proprietaries, Inc.
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represent the estate of a 17-year-old boy. Sam was a passenger in a motor vehicle when the driver lost control at high speed, and struck a telephone pole. The accident happened in the middle of the day, and there was only one car involved. As is often the case, the driver survived but the passenger did not.

Although the case is arguably worth two to three times as much, the maximum insurance coverage available is $100,000. I contacted the claims person, who indicated that she was prepared to offer the full amount of the policy, but just wanted to see the autopsy report first to make sure that the boy had no underlying diseases which would affect his life expectancy. I told her I would send the report when I received it.

A few days later I got the autopsy report, and to my surprise (and dismay) the attached toxicology results indicated that Sam had a fair amount of alcohol in his system at the time of death. My sense from talking to the claims adjuster is that she, as I, had not considered drug or alcohol use on Sam's part. The problem I perceive is that once the carrier learns about the alcohol finding it may seize on it as an opportunity to delay resolution of the case, or to negotiate down from full policy coverage, even though Sam's intoxication did not cause the accident. The parents are devastated by their son's death. I would like to spare them having to be deposed and being questioned about their son's drinking.

My question is this: What should I send to the claims adjuster? I've asked three lawyers I respect for their advice, and have gotten three different opinions: (a) don't send anything, except an authorization allowing the carrier to get the autopsy report only; (b) send the entire report, with the toxicology results; or (c) send the report, without the toxicology results. A variation of (c) would be to alert the claims person that I was only sending part of the report.

Is one of those options more "professional" than the others?

Sincerely,
Unsure

EDITOR'S MAILBOX

To the Editor:

I read and enjoyed very much Eric Penzer's article in September on "When a Mortgage Commitment Is Issued But Later Revoked…."

But it reminded me of a thought I have had before as to whether the very concept of 10% down payment – and its forfeiture as liquidated damages – in one-family house sales is flawed.

There is no reason today, with the purchase numbers so amazing, that the measure of damages cannot, and should not, be limited to actual damages.

The median price of a home in New York in 2003 was about $300,000. A traditional down payment would be $30,000. Assuming a first time buyer (young couple) is thinking about one of those insured 85% mortgages, they would need cash of $45,000. But if some misfortune befell them after they signed a contract and after they received a mortgage commitment, as described by the cases cited by Mr. Penzer – loss of job, illness, just for example – resulting in the commitment being pulled by the bank before closing (remember, they require borrower to certify to no material adverse change in financial status at closing), if the kids were to forfeit their down payment, 2/3 of the cash needed to buy, they would probably be out of the home market for years trying to accumulate the $45,000 again.

However, if seller is not harmed, if in fact the price has gone up, is it a fair result? No. What would be fair is, carrying costs, that is, seller's mortgage, taxes and insurance, plus the actual difference in the price under the replacement contract of sale, but not to exceed an aggregate of 10%. Perhaps even 1% for the broker for its trouble.

Let's see how this might work for an imagined $300,000 sale price house. Assume it takes three months to find a new buyer, who needs three months to close. Six months of taxes, say $500 per month, plus $100 per month for insurance and assume seller has a $100,000 mortgage at 8% (the prices were most likely much less when seller acquired it) for six months, $4,000, for a total of $7,600. Let's throw in that 1% for the broker, $3,000 plus say $1,000 for legal fees. A total of $11,600.

Now, if the replacement contract is also $300,000 why should seller get more than $11,600? And if the new contract is more, if it's $325,000!, why should seller get anything?

A liquidated damages provision may require that the actual damages are difficult to determine, but that's not true in our situations. It's quite simple to determine them, no harder than any contract default cover; you resell and compare the price. So in our suggested method, we say: carrying costs plus the price differential and cap it all at 10%.

It could be done by having the escrow agent continue to hold the down payment until the new contract is signed. At that moment seller is right back where it began. The taxes, insurance and mortgage are easily documented, and the seller's attorney could be required to certify to the new contract's sale price. This would be submitted to buyer and escrow agent. If buyer has no objection, escrow agent disburses, loss to seller and balance back to buyer; or they can duke it out in court. Perhaps then plaintiff (whoever was unhappy with the numbers) pays legal fees if it loses.

This would only apply if buyer had an unforeseen misadventure. It would not be available if buyer just changed its mind and bought a different house, or any other kind of bad faith situation. (Although we believe that theoretically it makes no difference, seller should not have a windfall; a party is allowed to default so long as it makes the other party whole.)

Buyer would be required to submit to seller evidence of the unexpected event and seller could reject the evidence and litigate the point. But, we suggest that the number of unfortunate events is so small that this would not be a burden in general. It would be a hardship once in a while, for example a seller who needs the money in order to buy a different house. But based on the apparent rarity, and the innocence of buyer, it seems to us less unfair a result.

A variation could be, seller can grab 5% no questions asked, or can seek 10% but pays buyer's legal fees if seller loses. We cannot explain why this appeals to us but at least this cuts the pain of the innocent buyer in half. With these million-plus prices, losing $100,000 for a reason beyond your control just seems overly harsh. So perhaps it's time to revisit the 10% number in consumer one-family sales.

As a coda, Mr. Penzer notes that the latest standard contract provides that no matter what the cause, revocation of the commitment after its issuance is no grounds for purchaser to cancel. Obviously (to understate the obvious), purchaser is not buying without a mortgage. So why do these forms not take that into account somehow. For ages the standard was just the opposite, including the cooperative contract; if for any reason except purchaser's default the loan did not close the deal was off. Now they are all reversed, for no apparent reason. Even worse, they provide that a commitment conditioned on any requirement except appraisal is deemed unconditional for contingency clause purposes. We wonder why they put it, and we leave it, in.

Richard M. Frome
New York, NY

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New Law Student Members 1/1/05 - 2/14/05	**283**
Total Regular Members as of 2/14/05	**68,794**
Total Law Student Members as of 2/14/05	**4,261**
Total Membership as of 2/14/05	**73,055**

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Cite, citation, site. "Cite" is a transitive verb: "The court attorney's *citations* [not *cites*] are accurate." *Correct*: "He cited [omit *to*] a case." In legal writing, authorities are called "citations," not references. A "site" is a place, such as a battle site or a Web site.

Cohort. A "cohort" is not a colleague or a co-conspirator. A cohort is a group so large it cannot be counted and which is united in a common goal. *Correct*: "A cohort of law clerks pressed for a raise." In Roman times a "cohort" was a group of 500–600 soldiers.

Common, mutual. *Correct*: "We and our mutual friend share common interests."

Compare to, compare with, contrast. Use "compare to" when the things being compared are alike, when the phrase introduces a similarity. Use "compare with" when the things being compared are both alike and different. *Correct*: "The court compared the New York statute with the New Jersey statute." Do not use "compare with" if you make no comparison. "The Chief Judge hired five court attorneys this year compared with four last year." *Becomes*, for example: "The Chief Judge hired five court attorneys this year; last year she hired four." Use "contrast" when things are compared only for their differences. Your sixth-grade teacher's "compare and contrast" is a tautology. To compare something with something else is to note similarities and differences.

Compel, impel, induce. To "compel" is to force. To "impel" is to persuade. To "induce" is to impel gently.

Compendious. "Compendious" means "abridged," not "voluminous."

Compleat, complete. Both mean "perfectly skilled or equipped," but "compleat" is archaic.

Complement, compliment. To "complement" is to complete something. To "compliment" is to flatter. *Correct*: "Because the judge's necklace complemented her judicial robes, the court officer complimented the judge."

Comprise, consists of, includes. "Comprise" means "to contain," "to embrace," or "to consist of." "The elements comprise the statute" is incorrect because statutes comprise elements, not the other way around. *A tip*: Use "has" instead of "comprises": "The statute has elements." Note: "Includes" precedes a partial list and thus is not a synonym for "comprises." More to "include": A sentence that includes "include" may not also include "some." Thus, the following is incorrect: "Some of the briefs included one from an amicus."

Concerned about, concerned with. To be "concerned about" is to worry about it. To be "concerned with" is to have an interest in it. *Correct*: "Ms. X, the court attorney, was concerned about the intern's writing because Ms. X was concerned with writing a draft opinion."

Confute, deny, refute. To "confute" is to "refute" conclusively. To "deny" is to disavow. To "refute" is to destroy by argument. *Incorrect*: "He refuted the charge." Use "denied."

Congenial, genial. To be "congenial" is to be easy to get along with. To be "genial" is to be pleasant. *Correct*: "Her geniality made her congenial."

Connote, denote. Words "connote" what they suggest. They "denote" what they mean.

Consecutive, continuous, continual, successive. "Consecutive" and "continuous" mean "uninterrupted" or "unbroken." "Continual" and "successive" mean "intermittent" or "repeated at intervals."

Consist of, consist in. "Consist of" refers to materials. *Correct*: "A computer consists of a motherboard, a screen, and a keyboard." "Consist in" refers to abstract qualities or intangibles. *Correct*: "The character of a good law clerk consists in effort and integrity."

Consistently, constantly. Both suggest something ongoing. What occurs "consistently" occurs without contradiction. What occurs "constantly" occurs persistently.

Contemptible, contemptuous. To be "contemptible" is to deserve contempt. To be "contemptuous" is to feel or express contempt. *Correct*: "The court is contemptuous of contemptible attorneys." A contemnor has been contumacious and is guilty of contempt.

Continue, continually, continuously, resume. "Continue" suggests no interruption. "Resume" does. "Continually" means "again and again." "Continuously" means "without stopping."

Converse, reverse. The "converse" is the turning about: "The judge knows the defendant" is the converse of the defendant knowing the judge. The "reverse" is the opposite or the contrary. *Correct*: "Please list your citations in reverse chronological order: from newest to oldest."

Convince, persuade. To "convince" is to satisfy by argument. To "persuade" is to influence someone to believe that you are correct. An attorney may convince a client that he should settle but not persuade him to do so. *Correct*: "Opinion writers must persuade. It is not good enough for them to convince."

Correspond with, correspond to. Use "correspond with" to mean "writing to other people." Use "correspond to" to analogize.

Corespondent, co-respondent, correspondent. A "corespondent" is a euphemism that describes the third party in a divorce action. A "co-respondent" is a second litigant responding to an action or proceeding or, in some jurisdictions, an appeal. A "correspondent" writes letters or is a journalist in any medium.

Cost, price, value, worth. "Cost" is the amount the purchaser paid. "Price" is amount the seller asks for the article. "Value" is assessed by comparing the article with a fair standard. A buyer's need or desire for an article determines its "worth." *Correct*: "He knows the cost of everything and the value of nothing."

Council, counsel, consul. A "council" is an organization. "Counsel," a noun or a verb, is advice or someone who gives advice. A "consul" is an officer in the foreign service. *Correct*: "Counsel gave good counsel to the Council of Elders and the French consul."

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Credible, creditable, credulous, credence, incredible, incredulous. A "credible" person or thing is believable. "Creditable" means "worthy of belief or praise." A person who is "credulous" is someone too willing to believe. "Credence" means "mental belief" or "acceptance." "Incredulous" is the opposite of "credulous." A person or thing unworthy of belief is "incredible."

Criticize, criticism, critical. To "criticize" is to assess. "Criticism" and "critical" assessments can be positive or negative, but neither is given without explanation. A "critic" criticizes the good and the bad. A "critical" person finds fault everywhere.

Currently, presently. "Currently" is "now." "Presently" is "soon." Note: It is redundant to use the present tense "is," "am," or "are" with "currently." Excise accordingly: "[Currently] I am a law clerk." Soon after you learn this rule you will cut currently presently. *A tip*: Use "now" or "soon" rather than the pretentious "currently" or "presently."

Data, datum. "Data" is plural. "Datum" is singular. Avoid a construction that uses "datum," which is obsolete.

Deduction, induction. "Deduction" is reasoning from general principles to specific conclusions. Reasoning deductively is a civil-law hallmark. "Induction" is reasoning from one or more specific observations to a general principle. Reasoning inductively is a common-law hallmark.

Definite, definitive. "Definite" means "explicit." "Definitive" means "exhaustive" and "authoritative."

Delete, omit. To "delete" is to erase. To "omit" is to leave something out intentionally or to neglect accidentally.

Delusion, illusion. A "delusion" is a false belief. An "illusion" is a false perception.

Des'ert, desert', dessert. The issue here is pronunciation: Place the right emPHASIS on your syllABLES. *Correct*: "Her friend wanted to desert her while they were eating dessert in the desert. She got her just deserts."

Diagnosis, prognosis. A "diagnosis" analyzes a bodily condition. A "prognosis" is a projected course of a disease or condition.

Dialectal, dialectic, dialectical. "Dialectal" means "pertaining to a dialect of language." "Dialectic" is the art of reasoning correctly. "Dialectical" means "pertaining to dialectic."

Differ from, differ with. Correct: "The two court clerks differ from each other in temperament." *Correct*: "The two court clerks differ with each other about politics."

Different from, different than. The former is always correct, unless the sentence sounds tortured, but the latter may be used to compare differences: "Judge A's writing style is different from Judge B's, but Judge C's style is even more different than Judge A's and Judge B's." The phrase "should be no different from" is incorrect. *Correct*: "The rule should not be different from . . . ."

Dis-, un-. Words that have an "un-" prefix are weaker than words that have a "dis-" prefix. An "ununited group," for example, was never united. A "disunited" group was once united but is no longer. To be "uninvolved" is not to be involved. To be "disinvolved" is to have withdrawn from involvement. To be "unorganized" is to lack order. To be "disorganized" is to have been organized but now to be in disarray. To be "unqualified" is to lack qualifications. To be "disqualified" is to lose one's qualifications. To be "unsatisfied" is to be not entirely satisfied. To be "dissatisfied" is to be entirely unhappy.

Disassemble, dissemble. To "disassemble" is to take apart something that was once assembled. To "dissemble" is to conceal.

Disburse, disperse. To "disburse" is to pay out. To "disperse" is to separate and move apart in into different directions.

Disclose, divulge, expose, reveal. To "disclose" is to make private information public. To "divulge" is to pass a secret to a select group. To "expose" is to make public something reprehensible. To "reveal" is to unveil something beyond one's knowledge.

Discomfit, discomfort. To "discomfit" is to thwart. To "discomfort" is to make uncomfortable.

Discover, invent. To "discover" is to find something that exists but which was unknown. To "invent" is to bring something new into existence. *Correct*: "The pilgrims might not have discovered America, but they invented the Thanksgiving Dinner."

Discreet, discrete. To be "discreet" is to be circumspect. Something "discrete" is separate or disconnected.

Disinformation, misinformation. "Disinformation" is a deliberate falsehood. "Misinformation" is incorrect information.

Disinterested, uninterested. To be "disinterested" is to be neutral. To be "uninterested" is not to care. *Correct*: "We want our judges to be disinterested, not uninterested."

Dissimulate, simulate. To "dissimulate" is to conceal. To "simulate" is to feign or to create the effect of. The two words are not antonyms.

Distinct, distinctive. "Distinct" means "easily perceived." Something "distinctive" is different.

Divers, diverse. According to divers authorities, "divers views" are various views. "Diverse" views are opposing views. But "divers" is archaic.

Doubtless, no doubt, doubtlessly, indubitably, undoubtedly. Even doubting Thomases agree that "doubtless" and "no doubt" suggest "probably" and therefore are weak. "Doubtlessly" and "indubitably" are pretentious. Pick "undoubtedly" to express certainty. But recall that adverbs often weaken. Thus, "He lied" is stronger than "He undoubtedly lied."

Duplicate, replicate. A "replica" is a copy made by the original creator. A "duplicate" is an exact copy. ■

1. *Morgan v. Jones*, [1773] Lofft 160, 176.

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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cwallingford@nysba.org

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Database Administrator
gvincent@nysba.org

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pwos@nysba.org

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bbeauchamp@nysba.org

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pwood@nysba.org

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† *Delegate to American Bar Association House of Delegates*
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BY GERALD LEBOVITS

Problem Words and Pairs in Legal Writing—Part II

As Lord Chief Justice Mansfield wrote, "Most of the disputes in the world arise from words."[1] Therefore, utilize words good. Irregardless how others employ words, you are suppose to use them like a writer should. Be especially careful to use adverbs correct. Otherwise your writing will look horribly.

Bad, badly. Use "bad," an adjective, to modify a noun or pronoun ("He did a bad job") or to describe emotions. Use "badly," an adverb, to modify a verb, to answer the question "how" (he played badly"), or to describe physical sensations. *Correct*: "The court attorney felt bad because his judge felt badly after she fell off her chair."

Balance, remainder. A "balance" is not a remainder, except as a part of an account. The "remainder" is what is left over.

Bellwether. A wether is a male sheep that leads its flock and has a bell around its neck. The word is not spelled "bellweather."

Beneficent, benevolent. To be "beneficent" is to do good. To be "benevolent" is to offer supportive sentiments. Correct: "I would rather be ruled by a beneficent than a benevolent dictator."

Bi-, semi-. "Bi-" is an ambiguous prefix. Biweekly, for example, means every two weeks, but many believe, incorrectly, that it means twice a week. Twice a week, in fact, is "semiweekly." Semiperfect advice for those who need bifocals: Do not use "bi-" or "semi-"; both have the potential to confuse. Instead, write "twice a week," "once every two weeks," and so on.

Bisect, dissect. To "bisect" is to cut into two equal parts. To "dissect" is to cut into parts of any number or size but two equal parts.

Blatant, flagrant. Something or someone "blatant" is offensive or brazen. A "flagrant" act is a wrong act, done openly and knowingly.

Boat, ship, vessel. A "boat" is a small craft. A "ship," the more common word for "vessel," is a large craft suitable for travel on the high seas.

Bombastic. To be "bombastic" is to be pompous, not strident or violent.

Breach, breech. "Breach" as a noun, means a "violation" or a "gap." As a transitive verb, "breach" means "make a gap in." As an intransitive verb, "breach" means "to break through water." A "breech" is the back part of a gun or gun-barrel or a birth in which the baby's buttocks emerge first.

Bring, take. To "bring" is to carry toward. To "take" is to carry away. *Correct*: "She brings home the bacon but takes it to work."

Broke, broken. "Broken" is the participle of "broke." It is illiterate to write that something is "broke." A person who writes free handbooks on legal writing, however, becomes "broke" in the pecuniary sense.

Burglarize, burgle. Neither back-formation is acceptable in formal writing.

Can, could, may, might. "Can" and "could" mean "able." Do not use either word to express a possibility or permission. "May" means "permission" or "possibility." "May" will confuse when it can mean either "permission" or "possibility." If "may" might mean either "permission" or "possibility," use "might." Thus, "I may write the opinion" *can mean* "I am permitted to write the opinion" *or* "I will write the opinion if I get around to it." "Might" is the past and past perfect tense of "may"; implies a conditional ("Ms. X might run for Village Justice"); expresses a supposition when used in the subjunctive ("The court attorney is acting as if he might run for judicial office"); and is a strong synonym for "may" ("Judge X said that it may happen, but I am certain that it might").

Cannot, can not? — the former.

Capital, capitol. The seat of government is the "capital." "Capitol" is the building. Capital punishment awaits those who confuse "capital" with "capitol."

Carat, caret, karat. A "carat" is a unit of weight for precious metals and stones. Editors use a "caret" ("^") to note that something should be inserted. A "karat" is a measure of the fineness of gold.

Catch-22, dilemma, Hobson's choice. A "Catch-22" is an impossibility. *Correct*: "John could not get a job without experience, and he could not get experience without a job." A "dilemma" is a choice between two bad bargains — also known as a "Sophie's Choice" or being "between a rock and a hard place." To be in a dilemma does not mean "to be in a bind, plight, predicament or quandary." A "Hobson's choice" is no choice at all. A Hobson's choice means "take it or leave it." In the clichés "between a rock and a hard place" and "between Scylla and Charybdis," neither offers any comfort, but the latter offers a safe though difficult exit.

Character, reputation. "Character" defines what you are. "Reputation" is what others think of you.

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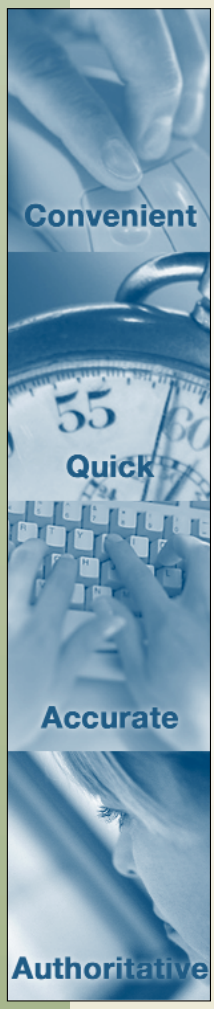

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