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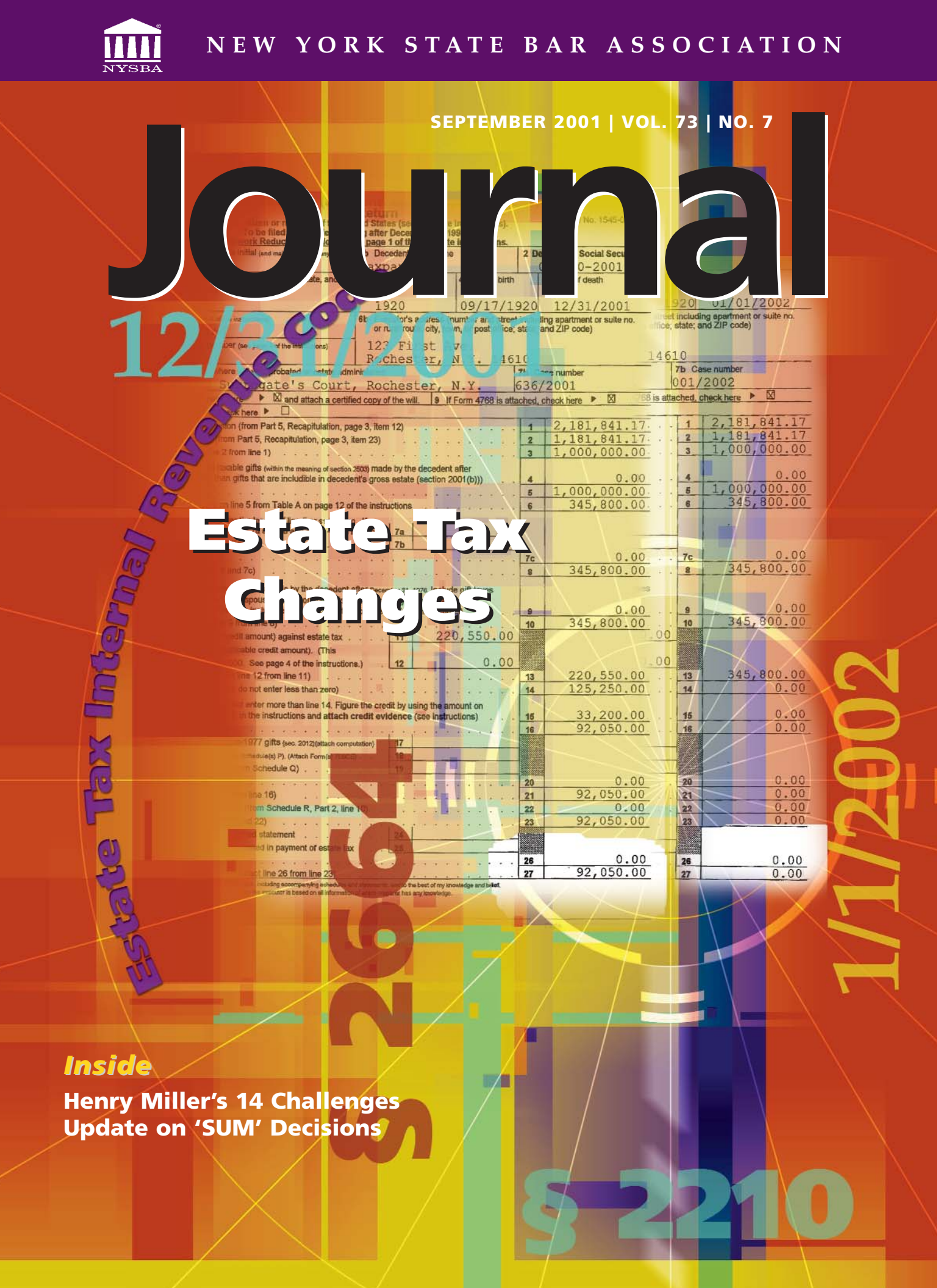
Journal



Estate Tax Changes

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Contents

Editor's Note – This edition of the *Journal* departs from our normal practice of presenting articles of moderate length to provide an in-depth look at three areas of particular interest.

In the first article, Henry G. Miller, a former president of the NYSBA and a well-known trial attorney, recounts his experience defending—and ultimately helping to win a favorable civil verdict for—a man whose case seemed hopeless. It is an engrossing account that transcends its length.

It is followed by the eighth in an annual series of articles by Jonathan A. Dachs that have summarized a year's worth of developments affecting a wide variety of cases involving motor vehicles without adequate insurance coverage.

Finally, Sanford J. Schlesinger and Dana L. Mark provide a careful review of the changes that are being made in estate and gift taxes, with a particular focus on how the new rules will affect New York estates. Their article is followed by a set of tables designed to provide readers with specific examples, year by year, of the actual tax amounts that will be due from estates of various sizes, based on the levels at which the current tax percentages change.

Departments

On The Cover

This month's cover montage reflects changes being made in estate taxes as the result of legislation that President Bush signed in June. The new law adds two sections, 2210 and 2664, to the Internal Revenue Code. The pseudo tax returns shown demonstrate the difference in estate taxes for the $1 million net estate of a New York resident who dies on December 31, 2001, vs. the taxes due on a $1 million estate for those who die in 2002.

Cover design by Lori Herzing.

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President's Message

STEVEN C. KRANE

"Endgame"

It is a beautiful Saturday afternoon in Chicago. I am seated in my room at the Hyatt Regency Hotel, the headquarters for the American Bar Association's 2001 Annual Meeting. I have just received a phone call from the chairman of the ABA Standing Committee on Ethics and Professional Responsibility, reporting that he has left the meeting of the Committee on Rules and Calendar having just withdrawn Report No. 113 from the agenda for Monday's House of Delegates meeting. He asks me to confirm that the New York State Bar Association will not file what would have been Report No. 10D, and—after silently noting my thankfulness that the NYSBA lacks the convoluted procedures of the ABA—I so confirm.

So ends the latest skirmish in the battle over multidisciplinary practice, our old friend known fondly by its acronym "MDP." And so begins the end-game phase in a controversy that has demanded the attention of the legal profession for the past several years. The issue of implementing the July 2000 ABA House of Delegates resolution rejecting multidisciplinary partnerships will be presented to the ABA House at the Midyear Meeting in Philadelphia in February 2002. It will likely be considered in the context of a New York State Bar Association proposal, patterned on disciplinary rules newly adopted in New York State that draw a clear and unmistakable line between permitted cooperation between lawyers and nonlawyers and prohibited partnerships and enmeshing alliances.

A flurry of activity during June and July led to this moment. It was a remarkable period, which saw the NYSBA working closely with the Office of Court Administration and ultimately the Administrative Board of the Courts toward the adoption of MDP-related rules that implemented the letter and spirit of the MacCrate Report, the NYSBA House of Delegates Resolution of June 2000, and the proposed amendments to the Code of Professional Responsibility adopted by the NYSBA in November 2000.

The heart of the amendments consists of two new disciplinary rules, which will go into effect on November 1, 2001. DR 1-106 will govern the provision of nonlegal services by lawyers or law firms, either directly or through companies that they own or control. The thrust of the rule is to require clarity with respect to the nature of the services being provided. As EC 1-9 explains,

> Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship.

That being said, lawyers will be able to provide all sorts of nonlegal services to clients, either personally, through employees or through subsidiaries of their firms, and will be able to advertise the fact that such services, along with legal services, are available.

DR 1-107 will set limits on the existing capability of lawyers to form relationships with nonlawyers to provide legal and nonlegal services to clients on a systematic and continuing basis, provided that the nonlawyers do not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. As discussed in EC 1-13, the nonlawyer

> may not play a role in, for example, the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, determining the manner in which lawyers are hired or trained, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of pro bono publico and other public-interest legal work, financial and budgetary decisions relating to the legal practice, or determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

The existence of the contractual relationship must be disclosed to any client to whom a referral is made, a "Statement of Client's Rights in Cooperative Business Arrangements" must be delivered, and the client must give informed *written* consent. Furthermore, lawyers will not be permitted to enter into such contractual relationships unless the nonlegal profession satisfies certain minimum educational and ethical criteria. Lawyers will

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still have to exercise their professional judgment when making referrals to nonlawyers, and vice versa, and will have to be certain in accepting referrals that they have no conflicts of interest or other impediments that would preclude them from taking on the matter.

The remaining proponents of MDP continue to urge that clients would be better served by having the opportunity to engage in "one-stop shopping." These new rules will allow lawyers to provide clients with whatever benefits can be provided through integrated legal and nonlegal services in "one stop," without allowing the nonlawyers to have any financial interest in the legal practice or control over the manner in which the legal practice is run. The financial relationship is irrelevant to clients in most cases anyway. After all, when a client visits a lawyer on an elder law issue, and the lawyer walks the client down the hall to a social worker who helps the client with various issues, and then to another office where a financial planner works, does the client care whether these professionals are sharing fees?

Over the past several weeks, we engaged in an ongoing dialogue with the courts over the final text of the rules. Because of its two-tiered structure, the Code of Professional Responsibility is inherently a cooperative project between bench and bar. The four presiding justices of the Appellate Division have the statutory power to enact rules governing the discipline of lawyers, now codified in 22 NYCRR Part 1200, and commonly referred to as Disciplinary Rules or "DRs." As a practical matter, however, the presiding justices do not act without consulting the justices of their respective Departments, a process that begins with the work of the Interdepartmental Committee on the Code of Professional Responsibility, a group deftly chaired for the past several years by Presiding Justice Joseph Sullivan. It is this statewide committee that first receives and reviews changes to the Code proposed by the NYSBA House of Delegates or others. Often, the NYSBA is called in to help at one stage or another of this process, to consult on the proposed rules, to suggest language that would accommodate the views of various justices. In addition, the overlay of explanatory and sometimes aspirational provisions, known as Ethical Considerations (or "ECs"), is not adopted by the courts, but by the New York State Bar Association House of Delegates.

It has been my good fortune to be a part of this process over the past several years, first as chair of the NYSBA Special Committee to Review the Code of Professional Responsibility and its successor, the Committee on Standards of Attorney Conduct, and now as your president. Through cooperation and hard work, we were able to see the emergence of the new MDP-related rules in sufficient time to forestall potentially adverse action by the ABA.

The reaction of our fellow states to the new rules was overwhelmingly positive. We received praise for our courage in being "jurisdiction alpha," for the rules themselves, and for continuing to lead the battle against the takeover of the profession. "High-fives" were frequent, as were promises of assistance and support from many state bars over the next few months. Our effort will focus on generating nationwide support for a series of amendments to the Model Rules of Professional Conduct that is based on our newly announced New York rules. Success in convincing the ABA to adopt those rules will go a long way toward setting a national policy that carries forward the policy underlying the MacCrate Report and restricts MDPs to those controlled entirely by lawyers.

Implementation of our association's policy that multidisciplinary practice be limited to situations in which lawyers retain complete control over the practice of law could not be achieved without the hard work of many, but also, more importantly, the continuity that our association institutionally provides. I am the fourth association president to grapple with this issue. Jim Moore appointed a committee that looked at the MDP question for the first time and identified various issues and problems with the concept. Tom Rice appointed the MacCrate Committee and became a national figure and leader of the debate in New York, through the ABA, and even internationally. Paul Hassett led the association through the adoption of anti-MDP resolutions by the Houses of Delegates of the NYSBA and the ABA in the summer of 2000. Now, it has been my privilege to see the adoption of ethical rules for New York lawyers that were derived from and prompted by our association's efforts. And it will be my task and honor to take those rules to the rest of the nation and present them to the ABA House of Delegates in February 2002. And if, on June 1, 2002, more work remains to be done to achieve a nationwide endgame on MDP, it will be my pleasure to pass the baton to Lorraine Power Tharp, who will carry forward the policy of the NYSBA.

A Real Case

Learning to Love: The Trial Lawyer's 14 Challenges

BY HENRY G. MILLER

Love is blind, but a trial lawyer must see all. In painting your client's portrait, you must anticipate the warts. If you don't, your opponent will. You ignore the hostile gaze of a juror at your peril. Same for the judge. And what about co-counsel? You've known Tyrone (the Tiresome) for years. You never liked him. He never liked you. Now you have to work together. Worst of all, you don't like your case. The facts are tawdry. The file is thick. No one wants to try the case. In truth, you hate the case. You hate the judge. You hate the jury. You hate your client. You hate the lawyers with whom you have to work.

What do you do? Resign? Run away with Gaugin to Tahiti? Flee to a nunnery or a monastery? Fake a heart attack? Beg a colleague to replace you? Settle at any price? Cry and hope for an early quietus? No. You dig deep and take refuge in an old secret: Love the challenge as you love yourself. And this is a wise secret because it permits us to face every obstacle, no matter how challenging.

Let's take a real case and use it as a summary of all our approaches to the trial of a case. A case that may have been the longest civil case ever tried before a New York jury.

A Real Case

Forty-eight children claim sex abuse. By one man. Their school bus driver. Hicksville, Long Island, 1987 to 1989. As to 16 of the children, the driver pled guilty. This was after having been convicted by a jury of sexually abusing Boy Scouts following an accusation from the son of a family friend. Then came civil lawsuits. The search for money.

The Chronology Robert Izzo joined Harran Transportation Company, Inc., in September 1986. As a school bus driver in Hicksville, he was popular and well-liked by the children.

But less than three years later, on May 21, 1989, Izzo was arrested for molesting a young man, a charge which eventually included the Boy Scouts. Then in June, the Nassau County Police began an investigation regarding schoolchildren.

Izzo, a Hicksville resident, had been released from custody following his arrest. However, on July 21, 1989, he was rearrested for allegedly sexually abusing schoolchildren. He has been in jail ever since.

Grand jury testimony was taken in the summer and early fall as to the young man and Boy Scouts. In October, a grand jury heard about the schoolchildren. Izzo was indicted. Two criminal trials were anticipated. One for the young man and the Boy Scouts; another for the schoolchildren.

The school case was to go first. Nineteen months had been spent focusing on that trial. But at the last moment the court switched the order and the Boy Scout case went first. That was in February 1991. Why a switch? Some of the schoolchildren had recanted. Only 20 days to prepare for the trial. After a full trial, Izzo was convicted in the Boy Scout case by a Nassau County jury. Both Izzo and his estranged wife, the mother of his two sons, testified.

Following that conviction, Izzo pled guilty on April 2, 1991, to abusing 16 of the schoolchildren, obviating a need for the second trial.

The first cluster of civil cases on behalf of the schoolchildren came on for trial in September of 1995 in the Supreme Court of Nassau County.

The plea of guilty put the plaintiffs in a powerful position.

The Plea The plea of guilty in the schoolchildren case followed the Boy Scout conviction by less than two months in 1991. The assistant district attorney, Maureen Reardon, offered Mr. Izzo a plea of guilty to 38 counts

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including rape, sodomy and sexual abuse in the first degree. She made the offer after Izzo had been convicted by a jury of sexually abusing the Boy Scouts. The district attorney's offer was contingent upon Izzo waiving his right to appeal in all cases. His sentences would run concurrently. He would serve no extra time. The offer was accepted. Izzo was not merely asked whether he pled guilty. He was asked specifically what he did. He explained. "My penis entered her vagina." That is, a five-year-old's vagina. He read from notes prepared, he believes, by the prosecutor.

After Izzo pled guilty, the parents had a party. It was very festive. Music, dancing and drink. The prosecutor, Maureen Reardon, as well as Charles Brennan, the lawyer representing the children in the civil cases, and some of the detectives were there. They had a lot to celebrate. A plea of guilty would probably be admissible in the civil case where not only Izzo would be sued, but where his employer, the Harran Transportation Company, and the school district of Hicksville, deep pockets, would also be sued.

Why did he take a plea? After his arrest in May of 1989 for molesting an older boy, an intense police investigation followed. The Nassau County Police Department augmented its sex abuse unit so that at one time at least 10 detectives were on the case. The police, although there were no complaints from the young children or their parents, began to interview them at great length. They obtained incriminating statements from the little children written by the police themselves. The parents were not present when the police interviewed the children. The children could neither read nor write. They were only five or six years old. They printed their names on the bottom of these statements, countersigned by their parents. Some of the statements were graphic. "I saw Bob kiss the boys on the lips. He would also touch the boys' penises with his penis." "He made me sit on his lap when his pants were down. He pulled down my pants and my underpants and he rubbed his penis against my butt and my front private spot. He put his penis where I make pee pee." This from a kindergarten girl. These statements were taken in the summer of 1989.

Robert Izzo drove these children during the school year starting in September 1988. At lunch time, he took the half-day morning class from school to home and the half-day afternoon class from home to school. The last time he drove was in early May 1989. He had gone to Florida for a short visit. Upon his return, he was arrested.

In October, Maureen Reardon swore the children to testify before a grand jury. Swearing six-year-old children is highly unusual. But there was no other corroboration, and legally she needed sworn testimony. Some children would not testify despite having given statements to the police. Others gave watered-down versions of what the police had written in the statements. The grand jury indicted Izzo.

On the recommendation of the police, the children were sent to North Shore Hospital for extensive psychological therapy, lasting for months, in some cases up to a year. The therapists at North Shore, for the most part, assumed the children were abused. When the children would deny or forget the abuse, the therapists claimed that the children were in denial.

The Client How could anyone represent Bob Izzo, a convicted pedophile, in the civil cases? Our first challenge:

1. Learning to Love Your Client No Matter How Unlovable.

Enter Pat Crowe, of Agoglia, Fassberg, Holland & Crowe, assisted by Jocelyn Krystal. They undertook the defense of Izzo. There was a temptation to treat Izzo politely and competently but give no passion, no zeal, a cold defense. They resisted that gutless approach. Instead, they got to know their client.

Bob Izzo was an excellent candidate when Harran Transportation Company hired him. He had been in the Navy eight years, serving in Vietnam. He was married and had two sons. He grew up in Hicksville, graduated from its high school and still lived there in the family home owned by his father. To be a school bus driver, the law requires an investigation of one's background. He was fingerprinted. He had no record. Absolutely clean. Clear in drug testing. A very good driving record. On paper, a first-rate candidate.

He was a very popular driver, often requested by the parents. The children liked him. He ran a tight ship. He was quick to complain in writing if some of the kids, particularly the older ones, were unruly. There were two letters of commendation in his file. The dispatchers thought he was the kind of driver on whom they could depend. He would sometimes go to lunch with Dotty Watts, one of the dispatchers. She liked him. In fact, Dotty, who later became a crucial witness, testified that she used him as a photographer, one of his great interests, for her daughter's wedding.

A bond developed between lawyers and client. Some said Crowe's opening was the best they ever heard. Krystal's concern for Izzo was noticeable, bringing him help he couldn't get in jail like lunch and a clean shirt. It was contagious. It was noticed that the court officers, not usually hospitable to pedophiles, had a good relationship with Izzo.

However, there were some problems. It was claimed that Izzo once asked a teenage counselor for a date during a school summer program. But she may have looked as old as 20. However, this was never reported to the

bus company. A school clerk admitted that a mother once complained Izzo had touched the sleeve of her child's dress saying she looked pretty. It made her child uncomfortable. However, that mother was never called to testify.

More seriously, a letter from a clerk at St. Ignatius, a school in Hicksville, alleged that some children complained about Izzo. They thought he was weird. He raffled off candy. There was a dirty picture from a magazine on the floor. During the trial, the author of the letter testified that the only reason she put the complaint in writing was because the bus company requested it. She admitted she was asked to make the letter strong so that there would be a basis to change his route. She had no fear for the children's safety. The children had not come into her office to complain about Izzo; it was something that evolved during a conversation. She never wanted the man fired and there were no sexual overtones to the incident. Another judge on an earlier application called the letter sinister only in hindsight.

Being a trial lawyer who comes to a file late in litigation has its drawbacks. . . . People may become trial lawyers because they like to talk, but they'd better like reading.

Izzo wrote a response. The children had been unruly and their complaint was an act of retaliation. Indeed he had filed a written complaint about one of the children from St. Ignatius before the children complained of him.

The Harran safety director investigated the complaint. He immediately searched the bus, found nothing wrong, questioned Izzo, put a report in the file and changed Izzo's route.

The bus company and the school district argued there was nothing in any of these complaints to suggest that Izzo was a child molester.

Three sets of lawyers in general agreement but with variations in their approach. And that's a challenge.

2. Learning to Love Co-Counsel, Even When You Want to Kill Each Other.

I, along with my partner, Bob Frisenda, and Lynn Rosenthal of the firm of Clark, Gagliardi & Miller, P.C., undertook the defense of the bus company. Almost all my trials are for plaintiffs, but this case was for old friends at the Greater New York Mutual Insurance Co. which had limited coverage for the bus company. The defense of Izzo went to Crowe and the Agoglia firm.

Stanley Orzechowski, along with Michelle Mittleman of the firm of Kroll & Tract, undertook the defense of the Hicksville School District. Stanley had been with the case from the beginning. My firm came in late, just for the trial.

There were built-in tensions. Crowe took the position that Izzo was railroaded into a plea. We, on behalf of the Deep Pockets, had other defenses. Also, there were differences between the bus company and the school district. And all three sets of attorneys had their own way of doing things, their own individual trial lawyer personalities. But we all had to hang together or assuredly we would all "you know what" separately.

Strategy

We, the Deep Pockets, began with the approach that we would gloss over the issue of whether Izzo did or did not do it. We had a strong defense. The bus company did nothing wrong. The abuse, if it did occur, was outside the scope of employment. The plaintiffs would have to prove the bus company and the school district knew or should have known that Izzo had a proclivity to hurt children. But we had a powerful answer to that. Who in their right mind would keep a bus driver if it was even suspected he had the slightest tendency to hurt children? We were not dealing with a person of rare skill such as a great athlete or performer. We were talking about a bus driver whose skills were easily replaceable.

A debate over strategy raged: "Don't go near the issue of whether Izzo did or did not do it. He pled guilty. Who would plead guilty unless he did it? Even if he didn't do everything, he must have done something."

My colleagues, Bob Frisenda, who supervised our preparation, and Lynn Rosenthal, both former assistant district attorneys from the Bronx, tried the case with me and they concurred. Beware of the "did he or did he not" issue. We didn't need it. We had a solid defense. "If the children's parents and teacher didn't know, how could we know?"

A Troubled File Being a trial lawyer who comes to a file late in a litigation has its drawbacks. There's much to learn. You have to read and then read and then read a little more. People may become trial lawyers because they like to talk, but they'd better like reading.

In this case, dozens of depositions and hearings had to be digested. Pleadings and motions perused. Precedents had to be analyzed. The investigation had to be revisited. Police statements had to be studied. It was work.

And running under the entire case was a sewer of foul accusations. Major sexual invasions of children of

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tender years. Children at their most adorably innocent moment. Life is short. Who wants to be saddled with this kind of a case? And that brings me to the third challenge:

3. Learning to Love the Case That Even Good People Despise.

Despite all the tawdriness of the claims, there was an undeniable fascination at work. True or not, these claims drew back the curtain on a human being in a most private moment. There was the voyeuristic thrill one sometimes gets in the theater. We were privy to dark secrets. We were reminded: When it comes to sex, never be surprised.

Yes, it was a hard case to learn, but we were buttressed by Dame Hawthorne's wise dictum: That which is hardest to do is sweetest to have done.

Young lawyers should learn that lesson. The case in the office that no one wants to try is the case to covet. "I'll try it" should be their instinctive and unqualified response. Embrace it. Run to it. Make that case the love of your life. The rewards will be many.

And so it was with this case. It became a mesmerizing adventure.

Strange Facts Facts inconsistent with the plea of guilty came to our attention.

There was no physical evidence to corroborate the claims. The children had been taken to Long Island Jewish Hospital. There was no residual evidence of abuse in the vaginal or anal area of any child. The claims of abuse were not of light fondling. The claims included the big three of sex abuse: vaginal, anal and oral rape. Even if one were dealing with the most cautious pedophile who sought to leave no evidence of his vicious intrusions into five-year-old children, wouldn't there have been at least one lustful uncontrolled lunge that would have left an indelible mark? Wouldn't it be virtually impossible not to physically harm such a small delicate child?

None of these 14 kindergarten children had been in therapy for the last five years. If a child had been truly traumatized in such an ugly fashion, wouldn't some of them have needed some kind of continuing treatment?

These events supposedly took place in broad daylight during the lunch hour. In Hicksville, homes and buildings are close together. It is not a rural area where buses can hide. Yet, not one witness to any of these atrocious acts was ever found, despite an intense investigation following enormous publicity.

Maybe we should question whether the abuse took place.

The Judge But the trial was ready to begin. Time to decide on the Battle Plan. Time for the final strategy. Time to choose. Time to open. Much depended on the judge. How strict would he be on the admissibility of evidence? How tight would the ship be run? It would be a long trial. Jurors almost always go with the judge, the most powerful personage in the courtroom. And it's always a challenge.

4. Learning to Love the Judge.

In this case, it was easy. People will accuse me of flattery. I don't care. Fair is fair and truth is truth. We had a splendid assignment.

The trial judge, Hon. Edward W. McCarty, III, permitted a relaxed atmosphere. He didn't insist we stand each time he entered the courtroom. But when counsel became too contentious, he stopped it fast. The mood was one of congenial discipline. A colonel in the Army Reserves, he had served in Haiti and would probably have been in Bosnia except for this trial. A former prosecutor himself, he understood the criminal process.

His instinct was to let in as much evidence as he legally could, often over our objections. He wanted the jury to really know this case. In retrospect, a wise decision.

A trial that could have been ugly rarely became ugly. A superb judicial performance.

The Jury We went through almost 800 jurors who would be willing to sit for a "three-month" trial to find 10, six jurors and four alternates. Little did we know that it would take more than 11 months of a full-time, continuous trial. The jury was sound. We were in Mineola, Long Island. A cross-section of Nassau County. Who were they?

Juror One. The foreman, a large and friendly man.

Juror Two. Quick to smile, she always responded well to my poor quips during our long trial. Not a parent but a strong family person.

Juror Three. Very understanding, a mother, a solid juror all the way.

Juror Four. Con Ed, a father who rarely betrayed his feelings. Strong. He always listened attentively. From the first, I wanted him on the jury.

Juror Five. Very warm, quick to seize nuance. She smiled a lot. We liked each other. You can tell. Our only black juror, a parent.

Juror Six. An attractive, well-dressed woman, wore something different almost every day. Her attentiveness, particularly during summations, to all four counsel, was extraordinary. It riveted you to her. Her face showing a high degree of intelligence. Divorced. No children.

By the time of the verdict, there was only one alternate left and she did not vote.

The Trial

What to do in the opening? What to do? You can bluff through jury selection, but not an opening.

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We equivocated. In our opening, we told the jury we were here to defend the Harran Transportation Company. Even if Izzo did abuse the children, the bus company did no wrong. This was also the position taken by the Hicksville School District.

The defense that Izzo didn't do it was carried by his counsel, Pat Crowe, who made a riveting opening. He promised to prove that Izzo's plea of guilty was a lie. And he would explain why Izzo pled guilty when in fact he was not guilty.

The testimony began. The children would testify as to these horrific events. The jurors would be sympathetic. Maybe no questions should be asked of the children by the defense counsel.

Harran was the first-named defendant. That meant I was first to cross-examine. I could say "no questions" when the children testified. But something wouldn't let me do that. I now firmly believed the abuse had not occurred. It would have been dishonest to just sit there. Therefore, I had to:

5. Learning to Love the Cross-Examination You Dread.

Yes, even when little children are the witnesses.

I confronted the children with their inconsistencies. Gently, of course. The children had spoken on many occasions. They had given statements to the police as well as to therapists and even to the defense psychiatrist. They testified in pre-trial proceedings. There were many contradictions and virtual impossibilities. Understandably, much was to be forgiven. They were only five years old when they rode with Izzo, six at the grand jury, eight or nine when deposed, 12 at the time of trial. Even adults don't remember perfectly. However, no child ever told the same story twice. And many testified in a mechanical fashion. They had no picture in their brain. They seemed to have no visual memory. This ran counter to the experience of those who have suffered from genuine traumatic experience. They can't get it out of their minds. Three of the 14 children couldn't remember anything at all even after reading their so-called statements of abuse to the police. There was something that did not ring true.

As a result of witnesses not being able to remember being abused by Izzo, two of the cases were severed in the middle of the trial. This gave them a chance at a later trial to prove repressed memory. The defense objected, arguing those two cases should have been dismissed.

The Motivation So, a doubt was building. Perhaps the children were not abused. But why would the parents embrace the claim with such zeal? Just for money? Maybe, but not likely. They were believers. Even before Izzo pled guilty, they were believers. What motivated them? We thought we knew. But first we had to meet the challenge of:

6. Learning to Love the Unlikely When It Comes to Human Beings.

The parents were in the grip of mass hysteria. It has happened before. Hysteria is a human ailment. It is something that has always been with us. Salem was not something that happened in the ancient world. It was only 300 years ago. Young women were burned as witches. People cheered. In World War II, we interned loyal Americans of Japanese descent. In the 1930s, people believed the Martians had landed, surprising even Orson Wells. Hysteria is a part of the human tradition.

One mother cried "hysterically" when she first learned that Izzo had been arrested for abusing an older boy. This was before any claim was made that her daughter had been touched. This we learned from the diary of a mother who made 70 phone calls in two hours after hearing of the arrest. There were parent meetings in which the emotions ran so high that Miss Carly, the kindergarten teacher, a lovely young woman who exhibited the greatest affection for her students, "her babies," was reduced to tears by the hysteria.

The parents admitted that no child had come forward during the kindergarten year to describe abuse. Not one. Some of the parents were originally incredulous when the police arrived. One mother said, "If you think my child has been abused, you need therapy. I am the mother and I'd have been the first to know." Indeed, wouldn't she have been?

The children said they did not speak out about the abuse because Bob threatened to kill their Mommies and Daddies if they did. But the children never got off the bus appearing fearful. The children were fond of Bob. Many parents had given Bob gifts. One invited him to lunch. Another shared a beer. There was no atmosphere of fear. It was hysteria that changed them.

But what set the accusation in motion? If he didn't do it, where did the damning evidence come from?

The Police But to criticize the police, let alone attack them, in Nassau County might be suicidal. The police are respected in that affluent county. They are seen, rightly, as protectors, not oppressors. The Nassau County Police enjoy deservedly a reputation for decency and competence. But that doesn't mean they are infallible. It doesn't mean they are immune to hysteria. And claims of sex abuse against children tend to bring about a suspension of critical faculties in all too many people. Thus, we had to meet the challenge of:

7. Learning to Love the Unpopular, or 50 Million Frenchmen Can Be Wrong.

The police in Nassau were popular. But they appeared wrong to us. Therefore, damn the unpopular, full speed ahead.

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The Nassau County Police first arrested Izzo for abusing an older boy. They believed that Izzo was a pedophile. They became judge and jury.

The police came to the houses of the children not at the request of any parent, but of their own volition. They were relentless. They did not take "no" for an answer. They visited some homes two to five times. They interviewed some children two to five hours. The parents were not present during the interviews. Usually two detectives interviewed a child. Sometimes they stayed after midnight even though it was summertime and the six-year-old children would have been home during the day.

All the psychological experts, even those called by the plaintiffs, agreed that little children are immensely suggestible, particularly when questioned by adult authority figures such as the police. The police eventually got statements of abuse. Conveniently, not one interview was videotaped. The statements had much in them that was inherently ludicrous. "Bob put his penis into the backside of seven boys at a red light." "We had a garbage pail on the bus in which we all had to pee." "Bob put his penis in my butt in the schoolyard during lunch." The teacher said, "That's cool." There was never any corroboration of these fantastic claims.

As the children and the parents began to meet more in groups, the stories began to grow and borrow from each other. Tales of perpetrators besides "Mr. Bob" began to sprout. Tales of "Fat Billy" and "Bald Mike." One child even claimed that months later at the 1989 Christmas assembly she saw a man named Johnny who was part of the group that had abused her. Izzo had been in jail for a half year at that time. Another child told of a black man who raped her on the bus. Many children talked of an abandoned house that was vacant and boarded up where there were homeless people and bums. There were black men with black suits with knives and white men with white suits. There were Chinese men. Women sometimes. Amazingly, none of these perpetrators was ever found. Not one. That didn't seem to bother the police or distract the district attorney's office, which pushed on with the case against Izzo. Our abuse expert testified that a claim of multiple perpetrators is one of the hallmarks of a false claim of sex abuse.

No one was ever found to corroborate even one location where abuse allegedly took place. Some children claimed that they were taken to an upper floor in a bank building to a computer room at lunchtime with people all over the place. Yet no one in the bank ever saw them. There was a claim of a "junkyard" that no one could even find.

The most common situs complained of was Sears, a shopping center with a large parking lot. At lunch, Sears is very busy. We asked the children, "Didn't someone see you at Sears?" One child said he saw an adult once outside the bus moving his lips saying, "Oh my God." That person was never found. Some kids said Izzo put curtains on the windows so no one could see in. Curtains were never found.

Late in the trial, Izzo's attorney, Pat Crowe, called the security director for Sears. He described the surveillance cameras in the Sears parking lot, none of which ever detected any abuse. The police as well as Sears security patrolled the area. No one ever saw a busload of children being abused.

When Bob went to Florida at the end of April 1989, he was replaced by a man we'll call Sam. (Not his real name.) The children didn't like Sam as much as they liked Bob. When pressed by police for tales of sex abuse, the children told stories of abuse by Sam. They gave statements. It was then learned by the police that Sam was a former police officer. The police quickly got recantations from the children about Sam abusing them. The police only took statements about Bob abusing the kids.

Pursuing the case against Bob, but not against Sam. Was this police manipulation? Were the police soft on former police officer Sam and vigorous only against Bob? If the claims against Sam were ludicrous, were not the claims against Bob ludicrous? Particularly when child after child kept saying how much they liked Bob?

Many of the children had nightmares. They wanted the door locked so that their parents would be safe. Maybe Bob did threaten them. The most damaging revelation comes here. Parent after parent admitted that the nightmares began after the police interviews. The terror began after the police, not before.

One mother described her son as being a "beast" after the police interview. These children endured traumatic episodes. Those episodes were the police interviews.

Conveniently, the police took no videotapes or audiotapes of any interviews. There were few police notes of the interviews. What did the police say to these impressionable six-year-olds during these interviews to get those statements? Did they suggest answers? Did they ask leading questions? Why would a child want to lock the doors to protect mommy and daddy? Why did they start to have nightmares? Were they told that if this bad man wasn't put away, he could hurt mommy and daddy? Our imaginations soar. What harm would there have been in videotaping these interviews? We would then know for sure what happened behind the closed doors without the comforting presence of the parents.

But it was not enough to discredit the police tactics. We had to produce a coherent explanation. How could

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so many people be wrong about Izzo? We needed medical testimony. We needed insight into the human mind. We had to face the formidable challenge of:

8. Learning to Love a Psychiatrist Even if He Talks Like Sigmund Freud.

And this may be the hardest love of all. They have strange ideas. You talk about your mother. They talk about Oedipus. You talk about children. They talk about that little bit of pedophile in all of us. You see tunnels and towers. They see female and male anatomy. Somebody once said, "Who would ever be a psychiatrist unless they were a little troubled themselves?"

But the human mind is a dark and largely undiscovered labyrinth. These psychiatrists are trying to relieve the suffering of those formerly considered incurable. Respect must be paid for that effort.

We reached out to one of the most eminent. This was no case to have anyone of less than top stature. We retained one of the foremost child psychiatrists and forensic debunkers of false sex abuse claims in the country. Richard Gardner, M.D., had superb credentials. He was associated with Columbia Presbyterian, one of the foremost medical centers.

Gardner argued that America was in the grip of hysteria over sex abuse. One of his books is *Salem Revisited*. Once we burned witches. Now we put people in jail on fantastic evidence: The McMartins in California; Kelly Michaels in New Jersey; the Amiraults in Massachusetts. A minister in Washington. A pastor in the Bronx. Gardner was passionate. None of these children were abused.

He gave us the phrase:

Retrospective Reinterpretation The parents noticed nothing unusual during the school year. After the police, they blamed everything on sex abuse. "Now it is clear to me." "It all fell together." A child who was a bed wetter was now a worse bed wetter because of abuse. A child who had nightmares because she once suffered a bee sting attack was now having those very same nightmares because she was abused. Children pretending to lick like a cat did so because they were abused.

Gardner called it "Retrospective Reinterpretation." What seemed normal at the time was later seen as pathological.

The Main Witness Experts are wonderful but the jury wants to see the main witness. They want to see the man who pled guilty to sexually abusing kindergarten children. You can't finesse it. You can't alibi a failure to call him. He has been sitting there. They have been studying him. They want to hear him. Why did you plead guilty if you didn't do it?

What a challenge:

9. Learning to Love the Witness for Whom There Is No Hope.

Izzo was serving a sentence of 20 to 60 years. Throughout the trial, he entered the courtroom in handcuffs and was unshackled before the jury entered. Two guards sat behind him. Those who plead guilty in a criminal trial can always at a subsequent civil trial explain why they pled guilty.

Plaintiffs threatened to call Izzo as a witness but didn't. Somehow Izzo as he sat there didn't come across as a monster. He seemed an unthreatening man who sat quietly through months of testimony. But we worried that he would make a poor witness. Some felt that Izzo could so poison the atmosphere by his testimony that the school district and the bus company would not get a fair trial. Yet Izzo's lawyers, and it was their decision, felt they had no choice but to put him on. The jury would feel cheated if he didn't testify. He had to go on.

Pat Crowe was enormously busy preparing for the questioning of the assistant district attorney and the chief detective whom he was going to call as part of his case. He wanted to show that Izzo was not treated fairly by the police and the district attorney's office. He felt he needed help, so he called upon the senior partner of his firm, Emmet Agoglia, a trial lawyer of immense ability, to conduct the examination of Izzo.

It was a wise choice. Somehow, Agoglia was able to rouse Izzo from the defeatism that had gripped him during his years in jail.

Plaintiffs brought in the highly regarded criminal lawyer, Steve Scarring, an expert on sex abuse cases, to cross-examine Izzo. Many felt Izzo, a convicted abuser, would be destroyed.

Extraordinarily, it didn't come out that way. No fault of Scarring. He performed with his usual commanding competence. What was unexpected was that Robert Izzo was full of fire and credibility. He made a startlingly good witness. He proclaimed that he never abused the bus children. He also claimed that he was wrongfully convicted of abusing the Boy Scouts.

He explained why he pled guilty. He had lost all confidence in the justice system after his conviction on the Boy Scout charge. His father would have had to mortgage his house and lose his only possession to come up with $150,000 to pay for the defense of his second trial dealing with the kindergarten children. It had cost his family $100,000 for the first trial and wiped out their savings. If he pled guilty, he was promised a sweetheart deal. He would not get one day extra punishment for pleading guilty to abusing the kindergarten children over and above what his sentence would be for his conviction in the Boy Scout case. He already faced 55 to 167 years on the conviction. When the guilty verdict was read in the Boy Scout case, all he heard was his mother

crying. He still hears her cries. (Izzo's lawyer says Izzo is convinced that his conviction killed his mother. His mother died less than two years after his conviction.) Izzo did not want to subject his mother, his wife, his two sons and father to a further ordeal when there was nothing to gain. He already lost his life, his family, his job, his freedom and his father's savings. He would not subject them to further harm. That's why he pled guilty.

He was persuasive when none thought it was possible. Incredibly, his testimony was even touching. My co-counsel, Lynn Rosenthal, who used to prosecute sex offenders, confessed to being moved. So was I. So were others.

And there was a bit of evidence that substantiated Izzo's claim that his plea was fake. A report from the Department of Mental Health. A psychiatrist interviewed Izzo after he pled guilty. Izzo stated how hard it was to plead guilty to crimes he did not commit.

Izzo's criminal attorney was prepared to try the kindergarten case first. But at the last minute, the Criminal Court ordered the Boy Scout case to go first. The defense only had a couple of weeks to prepare. The switch seemed likely to aid the prosecution. Regardless of whether he was guilty, it seemed to us that Izzo had not been treated too fairly by the criminal justice system.

But Izzo's strong showing raised a question about the district attorney's office. Did the prosecution rush to judgment?

Can everybody be wrong? We criticized the police. Should we now also criticize the district attorney's office, a respected institution in the County of Nassau? Would that be too bold? Another challenge:

10. Learning to Love Boldness, or Faint Hearts Fair Cases Never Win.

That's right. Timid trial lawyers never win a damn thing. Go for it. We did.

The assistant district attorney, Maureen Reardon, took the stand toward the end of the civil trial only when called as a witness by the defense.

She was a first cousin once removed of Dennis Dillon, the elected district attorney of Nassau County. She received the assignment to prosecute this very newsworthy case although she had only been admitted three years. Following Izzo's plea of guilty, she joined the law firm that had represented Izzo. She testified that meetings about joining the firm only took place after Izzo's sentencing. Later, she rejoined the district attorney's office. She was married to an uncle of one of the kindergarten children who was suing. Thus, she was an aunt by marriage to one of the plaintiffs. However, she met her husband-to-be after the Izzo criminal case was over.

We made more of the relationship of Charles Brennan, plaintiffs' trial lawyer, and District Attorney Dennis Dillon. On October 4, 1989, Mr. Brennan wrote a letter to Maureen Reardon saying he wanted to work

closely with her. A letter dated the next day appointed Mr. Brennan treasurer of the Dennis Dillon Re-Election Committee. We said there was nothing wrong in this, and there wasn't, but perhaps it explained the relationship. The degree of cooperation given by the district attorney's office to plaintiffs' counsel was highly unusual. Maureen Reardon signed an affidavit, which Brennan prepared and notarized, to delay the children's pre-trial testimony in the civil case. We had the impression that Brennan and Reardon wanted a result in the criminal case before the children testified in the civil case. This testimony, if forgetful and inconsistent, would have weakened the prosecution.

Reardon further admitted that Izzo's criminal counsel claimed that one of the children recanted her claim of sex abuse. (Reardon did not videotape any of her interviews with the children.) Another child told her mother and father it never happened. "We made it all up to get Mr. Bob in trouble." When the child's father wouldn't believe her denial, the child became so upset she wanted her mother to divorce her father. Was the criminal case falling apart before the plea of guilty?

And some of the pleas of guilty seemed ridiculous on their face. Izzo pled to having committed seven rapes at four locations on January 20, 1989, despite the fact he attended a birthday party for the kindergarten teacher in the classroom on that very day. All their abuse took place on a 24-minute bus run and the bus was not late. In addition, some of the abuse to which he pled guilty took place on a Sunday when neither the children nor the driver were present. Another plea involved a child who was vacationing in Florida at the time of the abuse. Who could believe such a plea?

The district attorney's office is required under the *Brady* Rule to give the defense counsel in a criminal case all exculpatory material that tends to prove the defendant not guilty. But the district attorney's office never told Izzo's lawyer that many children were claiming that Sam, the replacement bus driver, also abused them. Top lawyers in the district attorney's office debated the issue and decided against disclosure. Also, Izzo's criminal defense lawyer was never informed that many of the kids originally denied abuse.

We argued that the whole purpose of the Brennan-Reardon effort was to get a plea of guilty. The plea would then probably be admissible in the civil case.

Then an amazing piece of luck fell to the defense. The parents kept diaries. One of the fathers wrote "Charlie planning plea." This was our very theory. Charles Brennan, the plaintiff's attorney, was working with the district attorney's office to get a plea. And they got it. For Izzo, the plea was a wise decision. He did not want to submit his family to the expense and ordeal of a further trial because he had absolutely nothing to gain since he would get no additional prison time. Everybody wins and nobody loses, except maybe the deep pockets in the civil case.

How were the jurors reacting to all this? After all, they were the ones who would decide the case.

And that takes us to the oldest challenge and hardest love of all:

11. Learning to Love the Juror Who Hates You.

We were trying to tell the truth. But truth comes at a price. All the talk of sexually invading little children took its toll. We felt (of course, trial lawyers are paranoid by definition) that one juror didn't like defense counsel. Lawyers are constantly fooled by smiles and frowns. But these facial grimaces seemed hostile. How to deal with it?

We couldn't remove the juror for cause. We had to live with that juror. We could not let it affect our performance. We had other jurors to worry about. I for one tried to think of all the reasons why we once loved and selected that juror.

Years ago, my office had an important client that everybody hated. A disagreeable fellow. He never praised. He only found fault. He rarely smiled. We hit on a device. We decided to love him. When he called we would say, "Oh, it's you. How good to hear from you." He was overwhelmed. In all his sour life, no one ever spoke to him with affection. Once we even got him to smile.

So we tried to play the same mind trick. We decided to love that juror. We soldiered on. Did it work? Probably not. Who knows? It was one of the alternates who never voted. It might have been our best juror. We'll never know.

The Summations

The supreme challenge:

12. Learning to Love the Truth.

What is advocacy but putting the truth in the light most favorable to your client? Accept the truth we must. We're not short story writers free to invent our own facts. Temptations abound, but character remains the first attribute of an advocate.

In our case, however, the truth was hard to sell; it was unlikely. But truth has an inherent consistency that the most clever fabricator can never design. We told the truth.

We sum up in reverse order. Crowe goes first. Next, Orzechowski for the school district. Then me. Then Brennan.

Crowe was a lawyer with no where to go but up. He represented Izzo, a man convicted of sex abuse. A lawyer's opportunity of a lifetime. He could afford to take chances. And chances he took.

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Crowe castigated the police for their late-night interviewing of five- and six-year-olds. He blasted the district attorney's office for swearing six-year-old children to indict his client at the grand jury. He questioned all concerned for the last-minute switching of the order of the criminal trials so that Izzo was minimally prepared to try the Boy Scout case. He lambasted the prosecutor for not turning over exculpatory material. He even used the "c" word, calling the prosecutors "corrupt."

Stan Orzechowski, defending the school district, had a problem. He had a lot of knowledge and a lot of knowledge is a dangerous thing for a trial lawyer. It can overwhelm you. He and Brennan had been there from the beginning. They knew more than anyone else about the case.

Orzechowski prepared a time chart. It highlighted when the major events took place. The school district had been, in his view, unfairly frustrated when it tried to get information early in the case. He used his chart to review the entire history. He proved there was little chance to abuse some children. One child was on the bus only three minutes. Orzechowski proved that his time to question the children was postponed until the district attorney's office got that guilty plea. The children's terrors began after the police, not before. A false scenario was created by the investigation itself. A brilliant performance.

I was last for the defense. A rare opportunity. I could be brief. Always an advantage. The others took two or more days. I could do it in a half day. I did not have to review all the evidence. The others had done that. I could seize the headlines and hopefully weave them into a persuasive argument.

I argued that the case was a classic conflict. The evidence favored the defendants but the passions favored the plaintiffs. We had everything against us except the truth. Jurors can vote for whom they want and find reasons later. Who wouldn't have sympathy for the children? Regardless of whether they were sexually abused, they certainly had been traumatized by repeated police and prosecutorial interviews. Physical examinations into their tiny private parts. Attendance at depositions. Therapy. All added stress and revived matters the children wanted to forget.

In fact, in this case there was a question never asked. Was it worth it to the children to subject them to this lawsuit? Mr. Izzo was already in jail and posed no further threat. The lawsuit was only for money. But the defense never asked this delicate question. It might be seen as critical of the parents who in many ways were themselves victims of hysteria.

I went on. Beware of the prejudice. When it comes to sex abuse against children, people tend to rush to judgment. Even my client. When Harran learned that Izzo had been arrested on charges of abusing an older boy, he was immediately suspended without a hearing. Izzo and his father protested and argued for the presumption of innocence. They wanted reinstatement. Our vice president said, "Over my dead body. I have daughters." It was a tough decision to suspend for the owner of the bus company, a thoroughly decent man, who had very good relations with his workers. He supported his vice president. It allowed me to argue that Harran put the well-being of children over everything, even over a concern for the rights of an employee.

When evidence favors but passions oppose, only one argument will do. Appeal to the integrity of the jurors. That wasn't hard. These jurors already demonstrated an extraordinary dedication. They had shown good humor during their long service. They all wore black shirts on Halloween, red on Valentine's Day, green on St. Patrick's and somewhere around the tenth month, a shirt which asked: "Is it three months yet?"

The appeal to them was simple. Follow the evidence no matter where it takes you. You took an oath to do the right thing whether it's popular or not. You didn't give up 11 months of your life to deliver a verdict that violates your conscience. Just follow the evidence. That's the moral thing to do.

Where did the evidence point? No child had been in therapy for five years. No physical evidence of abuse. No witness ever found. Not from the bank, the junkyard, the abandoned house, Sears or any other location. The bus had a two-way radio. The bus was never late. How likely was it that the bus in broad daylight was the site of repeated sexual invasions? No other perpetrator was ever found. No teacher or monitor had the slightest suspicion. No child ever gave the same story twice. No pediatrician who saw these children during the school year ever suspected there was abuse. I saved for later the decisive fact that no parent ever suspected.

The evidence was so strong I feared a change of theory in plaintiff's summation. Old adage: Whoever defines the issue wins the case. I worried plaintiffs would try to argue that Izzo was a pedophile who gradually won the children's confidence and gently fondled them when no one was looking. A more plausible claim than rape early on.

But there was a problem with that approach. That was never the claim. Gentle fondling gradually arrived at was never asserted. Izzo pled guilty to having committed sex abuse during the first month of the school year. Police statements described anal, oral and vaginal sex. And gentle equivocal fondling doesn't produce the kind of major damage claimed here, that is, lives destroyed by hideous invasions. This claim was always much more than gentle fondling.

No matter what plaintiffs' counsel argued, however, some juror still might say—where there's smoke there's fire. We agreed. We said the fire was the police. It was their zeal. They had become judge and jury. They had become believers. And it is wrong, plainly speaking, for those in the sex abuse industry, be it the police, the prosecutors or the therapists to get carried away by fantastic claims that can unjustly destroy innocent lives.

Yes, there was police misconduct. Anything that didn't implicate Izzo was disregarded. One child said "The boy (who accused Bob) is a liar. Bob is a nice man." That was ignored. Two sisters told their mother they had been abused by Sam, the replacement bus driver. The mother told the police. She testified that the police made her feel guilty for starting a rumor about Sam. The police didn't want to hear about abuse from any one but Bob. One detective who persisted in crediting stories of abuse by Sam was challenged by other detectives.

When evidence favors but passions oppose, only one argument will do. Appeal to the integrity of the jurors.

The Unanswerable I saved until last two arguments that I called unanswerable. To my grave I will go believing them unanswerable.

• ***No Opportunity*** The lead detective admitted that there were only five or six minutes for these abuses to have taken place. Every parent admitted there was no pattern of lateness. Izzo was a punctual driver arriving usually at the same time.

How did the bus go to Sears or the bank or a junkyard or an abandoned house and never be late? Can you imagine a bus load of five-year-olds coming off a bus, removing clothing, having sex, putting clothing back on, reboarding the bus and never be late? Common sense says there was no opportunity.

• ***No Outcry*** No child gave a hint for the entire school year. No parent ever suspected anything amiss. Think about it. A five-year-old child has been raped and told that "your Mommy and Daddy will be killed if you tell anyone." Imagine that child getting off the bus. A mother would merely have to say, "What kind of day did you have?" No five-year-old child has the neurological apparatus to conceal it. The child's face would give it away.

There is not a caring parent in the world who wouldn't have gotten it out of the child in two or three minutes. It wouldn't have taken two or three months, two or three weeks, two or three days or even two or three hours. And that is if it happened only to one child once. But in this case there were claims of multiple abuse of each child. How can it be suggested a parent wouldn't pick it up the second or the third time? But we're not talking about one child. Sixteen children on that bus were supposedly abused.

After the verdict, we heard that parents on the jury argued strongly against the claim. They understood intimately the workings of a five-year-old child's mind. There is no way a child could keep that secret from a parent if it happened once, let alone many times, let alone to 16 children. This was and is unanswerable.

The Plaintiffs' Lawyer All during the trial I sat behind Charles Brennan. We got along well. I even met his wife during the trial, a lovely person and a great support to him. His co-counsel at trial was Dominic Sichenzia. They both were knowledgeable and capable. They both gave total dedication to the case. Perhaps, I as one who is usually a plaintiff's lawyer, identified with them more than one might expect. I know the feeling when on paper a case looks unbeatable but in reality is frail. Years of hard work have gone into the case. Much money has been expended for necessary and proper disbursements. All rides on the verdict. One of the cruelest challenges:

13. Learning to Love the Cross You Never Wanted to Carry.

You have no choice. Face your problems and remember that's why they're called trials. That's what Charles Brennan did.

His summation lasted three days. He waged a valiant fight. He had lived with the case for seven years. He put his heart and soul into it. A great trial lawyer once said, "If I believe in my case, I can get a jury to believe." Charlie was most certainly a believer. It was a good summation. Some in the courtroom were persuaded by it.

Brennan argued there probably wasn't true penetration. He opined that a pedophile would just rest his private part on that of a child. Frankly, there was no evidence to support that claim. He argued it can take a long time for a youngster to go public with a story of sex abuse. He said he had answered the unanswerable. I looked into the jury's eyes. I did not believe they were persuaded. Plaintiff's attorney asked for $4 million for each child. Thus, he didn't retreat from his claim that there were serious acts of sexual depravity. By asking for a lot of money, he took a risk. It's easier for a jury to give smaller amounts of money. But such was his confidence in his case. He was a believer and these children couldn't have had a more dedicated advocate.

The Charge The judge's charge was remarkably short. It was clear. The jury deliberated conscientiously. They wanted the charge read back and it was. The jury was out for more than a week. The suspense built.

The Verdict

"We have a verdict." The end of an 11-month trial.

The jurors enter. No smiles. Nothing to foretell their verdict. The foreman clutched 12 thick verdict sheets. One for each of the kindergarten children who claimed sex abuse by their bus driver, Robert Izzo. The first question was pivotal. The "did he or did he not do it" question. The judge seemed as tense as the lawyers. He cautioned against any outburst.

The clerk intoned the usual words:

"Have you reached a verdict?"

"We have."

The bulky verdict sheets were gathered. Silently, the judge perused them. His face was grave: "Take the verdict."

The first question on the sheet:

"Considering all the evidence, did Robert Izzo sexually abuse Ken Alexander?"[1]

"No."

"Is that unanimous?"

"No."

Murmurs in the courtroom.

Before the verdict, the families of the children were supremely confident. Parents had been overheard: "Get your pencil out because each of us will get different money."

Izzo had pled guilty to abusing all but two of these children in the criminal case five years earlier. How could a jury in a civil case say he didn't do it?

Perhaps the first "no" was limited only to that child. Surely the answer would be "yes" to the others.

"Considering all the evidence, did Robert Izzo sexually abuse Mary McDonough?"

Considering all the evidence meant including the plea of guilty.

Once again, "No."

And so it went child after every child. All 12 of them. Sitting at the defense table, I only had eyes for Charlie Brennan. I repeat, we had become friendly. I identified with him. I usually represent people who sue. I saw Charlie's head ever so slightly snap back. The defense lawyers did not smile, did not gloat.

The judge, "Poll the jury."

All said yes to the question of whether that was their verdict, but number two who said "no." The verdict was five to one. That makes a verdict in a civil case in New York. The 5/6 rule.

One of the children, now 12 years old, left with a sob during the taking of the verdict. Later, the parents hugged each other and their attorney in bewilderment and consolation— even in defeat they had not forgotten the enormity of his effort.

Rarely has a verdict in New York surprised so many within the legal profession.

And that brings us to the final and ultimate challenge confronting every trial lawyer:

14. Learning to Accept Defeat.

There is no loving of defeat, only accepting it. The sweet uses of adversity taste very tart indeed. Every trial lawyer knows defeat. If you have truly given it your very best, there is no shame in it. There is only shame in inadequate effort or cowardly refusal to ever take a verdict.

Charles and Dominic behaved well and with grace. Disappointed, yes, but no unseemly reaction.

The Aftermath

Following the verdict, the six jurors met with the judge. It was reported that the five in the majority were comfortable with their verdict. They felt they had done right. They did not do what was popular. They knew that they had to live with that verdict in the years to come. While I am not exactly unbiased, I believe they absolutely did right. I believed it all along. I believe it now.

The Other Cases Thirty-four other cases remained. Following this startling verdict, they were settled for little more than the cost of the defense. Once again, none of those children ever made an outcry during the period of alleged abuse. The two severed cases have been dismissed.

Motions to set aside the verdict have been denied. Judgment for the defense has been entered and has not been appealed.

The verdict remains a stark rebuke to all those who contributed to the hysteria.

At the present time, Robert Izzo is making further legal efforts to obtain his freedom.

The Lessons for Society What can we learn?

Undoubtedly, sex abuse of children exists, particularly within the family. There, unfortunately, opportunity and temptation sometimes meet. But we are witnessing an epidemic of false sex claims. People have been falsely imprisoned. Based all too often on the fantastic claims of young children. Somehow a myth has arisen that young children don't lie. Of course they lie, innocently, but they lie, "I didn't spill the juice, Mommy." Parents lie, too. "Santa Claus brought the gifts." And children are immensely suggestible.

The police and other investigators must take care. No leading questions. Be neutral. Don't try to get an answer. Videotape the children during the interviews so that jurors and jurists can see that the children were not subjected to suggestive techniques.

Prosecutors, police and therapists must bring the same healthy degree of skepticism that they do to any other claim. Prosecutors must accept their legal responsibility to make exculpatory material available to the de-

fense. Is it a custody dispute? Beware. A parent may be using the claim of abuse for advantage. Is there a lawsuit? Look out, always look out when money is involved. Are the children trying to spite one of the parents? Look out. Even in this case, two of the children admitted they made up a false sex claim against their mother's boyfriend. They had learned quickly what an awesome weapon is a charge of child molestation.

Let us never hesitate to see sex abuse when it's reasonably proven. But let us also never hesitate to subject every claim of abuse to critical scrutiny.

The police, no matter how sincere they are in the belief that they are dealing with a pedophile, must not become judge and jury. They must not prejudge and then do anything and everything to justify the prejudgment.

The Lesson for Trial Lawyers Learning to love the inevitable challenges is the *sine qua non* of advocacy. By now it must be obvious that trial lawyers are in the business of boldly embracing the truth, no matter how unlikely and unpopular. We must dig deep into the minds of our clients to say for them what they cannot say for themselves. We must respect the court so that a civilized forum for the resolution of disputes not only exists but thrives. We need a philosophy that places our work in perspective. The world will continue despite our most humiliating defeat. In short, we need to be humble and wise.

Our life is hard but our reward unique. In a world where many people are burdened with a life of predictable conformity, ours is an exhilarating opportunity. We are permitted to have our say. Our challenges are many but without them there would be no joy.

Our burden as a trial lawyer is heavy but happy are those who bear it well.

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1. Names of the children are fictitious.

Journal Editorial Board Welcomes Two New Members

Judge John B. Nesbitt of Lyons and Philip H. Dixon of Albany have been named to the *NYSBA Journal* board of editors.

"We chose Judge Nesbitt and Philip Dixon based on their considerable experience writing and editing in the legal field for many years. They were chosen from a pool of nearly 40 applicants," said NYSBA Immediate Past-President Paul Michael Hassett, of Buffalo, who chaired the search committee.

Dixon earned his undergraduate and law degrees from Cornell University. His primary practice areas include environmental, real property and municipal law. He previously served as a law clerk to Judge Lawrence H. Cooke, chief judge of the Court of Appeals. He has contributed chapters to both the NYSBA's treatise on environmental law and to West Publication's volume on the same subject. Before attending law school, he covered New York state government for five years as a reporter with United Press International.

As a member of the NYSBA, Dixon co-chairs the Environmental Law Section's Committee on Legislation and co-chaired its Water Quality Committee for 14 years.

Nesbitt received his undergraduate degree from St. Lawrence University and earned his law degree from Syracuse University College of Law. He was a partner in Nesbitt & Williams LLP and was an assistant Wayne County District Attorney. He has served as president of the Wayne County Bar Association. He is the author of numerous articles, such as "Climbing Justices: Holmes & Hughes in the Alps," published in XIV *Supreme Court Historical Society Quarterly*. Since 1988, he has written an article on local government law for the *Syracuse Law Review*'s annual Survey of New York Law issue.

As a member of the NYSBA, Nesbitt served on the executive committee of the Real Property Law Section and also served on its Committee on Real Estate Financing. He is also a member of the Municipal, Judicial, and Trusts and Estates Law Sections.

Members of the *Journal*'s board of editors are limited to three consecutive three-year terms. Nesbitt and Dixon will fill the vacancies left by Paul S. Hoffman of Croton-on-Hudson, and Albert M. Rosenblatt, associate judge of the Court of Appeals, both of whom reached their term limits this year. Another member, Eugene E. Peckham of Binghamton, was reappointed. Howard Angione of Queens, was reappointed for his second three-year term as editor-in-chief of the *Journal*.

In addition, Philip C. Weis of Oceanside has been named associate editor of the *Journal* to assist the editor-in-chief. He is the law secretary to Hon. Robert Roberto of Supreme Court Nassau County. A graduate of the State University of New York, he holds a master's degree from Brown University and received his J.D. from Brown University.

Actions by Courts and Legislature In 2000 Addressed Issues Affecting Uninsured and Underinsured Drivers

BY JONATHAN A. DACHS

A review of the most significant cases and legislative developments in 2000 that affected coverage for uninsured motorists (UM), underinsured motorists (UIM) and supplementary uninsured motorists (SUM) follows, the eighth in a series of articles published on these pages.[1]

GENERAL ISSUES

"Resident"

The definition of an "insured" under the SUM endorsement includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse.[2] Whether a particular relative was a resident of the insured's household was a frequently litigated issue again in 2000.

In *New York Central Mutual Fire Ins. Co. v. Bonilla*,[3] the court noted that "[e]stablishing whether a person is a resident of a household for insurance purposes generally requires a showing of 'something more than temporary or physical presence and requires at least some degree of permanence and intention to remain." The claimant admitted that within a two-year period, he lived at three different addresses, including the premises of the insured. Under those circumstances, the court held that it was not error to grant a petition to stay arbitration on the ground that the claimant was not a resident of the insured's household.

In *Hartford Ins. Co. of the Midwest v. Casella*,[4] the evidence established that the claimant owned a two-family house and resided in the ground floor apartment. She rented the upstairs apartment to her niece (her brother's daughter), with whom her brother and his wife resided for part of each year, when they were in New York. The apartments shared a common heating system, but they had separate electric meters. The occupants shared the household expenses and ate meals together in the first floor apartment. The house had one exterior door to the street, with access to the upstairs apartment provided by an interior stairway. Although each apartment had a separate entrance area, there were no locked doors restricting access to any part of the house. The claimant's contention that she was a resident of her brother's household and, therefore, entitled to SUM coverage under his automobile insurance policy, was rejected by the court, which focused upon the fact that the brother did not consider the claimant to be a member of his household and, therefore, "would not have reasonably anticipated that she would be afforded coverage under his policy of automobile insurance."

In *Fiore v. Excelsior Insurance*,[5] the evidence established that approximately two months prior to the accident, the claimants sold their home in Florida and moved to New York. They accepted an offer to stay in their relatives' three-bedroom home in New York until they could secure employment and a new home. They slept in a bed in their relatives' dining room, where they kept their clothing in boxes. Their belongings were stored in the attic and basement and at other relatives' homes. At the time of the accident, they had secured part-time employment and had contacted a real-estate agent in their search for a new home. Although they used their relatives' home address for certain purposes, they had a post-office box where they received their mail. The court held, as a matter of law, that their stay at their relatives' home was "only temporary" and that they never intended to make that home their permanent residence. Moreover, "the fact that they resided with plaintiffs for a prolonged period of time after [the acci-

JONATHAN A. DACHS, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola, is the author of "Uninsured and Underinsured Motorist Protection" 4 *New York Insurance Law*, Chapter 51 (Matthew Bender & Co., Inc.), and of a chapter on UM/UIM and SUM (pre- and post-Regulation 35-D), in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). He is also a frequent lecturer on insurance law and appellate practice. He is a graduate of Columbia University and received his J.D. from New York University.

dent] is not determinative." Thus, the exclusion in the relatives' homeowners policy for residents of their household was held to be inapplicable.

In *Nationwide Ins. Co. v. Smaller*,[6] the court held that although the claimant stored some of her belongings at her then-estranged husband's home, had a key and would visit occasionally to obtain clothing, she was not a resident of his household. The evidence established that she had been living separate and apart from her husband at the time of the accident and her residence address was not the marital address.

In *Harris v. American Protection Ins. Co.*,[7] the court held that the claimant had a single residence, which was not with his father, thus precluding his recovery of underinsured motorist benefits under his father's policy. Although he had previously resided with his father, a sentence of probation had required that he leave that residence, which was in Vermont, and reside with his mother and attend school in New York. At the time of the accident, he resided with his mother in New York, while his father resided in Maryland.

Derivative Claims

One of the categories of an "insured person" in the UM and SUM endorsements is that of the "derivative insured." This category includes persons who are entitled to recover consequential damages in an action against an uninsured or underinsured motorist as a result of bodily injuries to a person who is covered as an insured under the policy. These individuals are usually spouses, parents or guardians.

In *Travelers Ins. Co. v. Lianides*,[8] the First Department stated in 1998 that "because the uninjured respondent, the injured respondent's wife and guardian, was not involved in the accident," she was "not entitled to benefits under the uninsured motorist endorsement." Two cases decided in 2000[9] refused to follow *Lianides* for the reasons set forth in a *New York Law Journal* article,[10] in which I analyzed *Lianides* and concluded that it was wrongly decided in view of the clear language of the endorsements that expressly authorized derivative claims.

"Use or Operation"

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle.

In *Progressive Cas. Ins. Co. v. Yodice*,[11] the plaintiff alleged that a ride known as the Whip, which was secured to the rear of a vehicle, was negligently operated, causing injuries to a number of people at a party. The owner of the truck and ride was insured by Progressive under a commercial auto policy that covered only the truck. In upholding Progressive's denial of coverage, the court noted that

> not every accident involving an automobile concerns the use or operation of that vehicle. The accident must be connected with the use of the automobile *qua* automobile. The use of the automobile as an automobile must be the proximate cause of the injury [citations omitted]. The inherent nature of an automobile is to serve as a means of transportation to and from a certain location [citation omitted]. The accident in question did not arise out of the use or operation of the truck as a truck, *i.e.*, as a means of transportation; it arose out of the operation of a business operating a ride, which happened to be permanently secured to the back of a stationary vehicle.

In *Dupra v. Benoit*,[12] the plaintiff's four-year-old son was injured when he was pinned between the bumpers of a pickup truck and a Nissan Sentra that was being manually pushed toward the truck. The Sentra was unregistered, uninsured and temporarily inoperable. The court rejected the defendant's contention that the Sentra was not in use or operation at the time of the accident and held that questions of fact existed as to whether the accident arose out of the maintenance or use of the vehicle. The court also held that the Sentra, which was equipped with and propelled by an engine, was a "motor vehicle" even though it was temporarily disabled or inoperable at the time of the accident.

Duty to Provide Timely Notice

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the new mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." Failure to satisfy the notice requirement vitiates the policy, and the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions. The interpretation of the phrase "as soon as practicable" was a hot topic once again in 2000.

In a trio of cases, the courts reiterated the well-established rule that where the policy requires the claimant/insured to give notice of claim to the SUM insurer "as soon as practicable," this requires that notice be given "within a reasonable time under all the circumstances." Where there is a substantial delay in giving such notice, the claimant/insured is obligated to demonstrate that he or she "acted with 'due diligence' in ascertaining the insurance status of the vehicle involved in the collision."[13]

Following the 1999 Court of Appeals decision in *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*,[14] which held that in the context of an underinsured motorist claim, the phrase "as soon as practicable" means "with reasonable promptness after the insured knew or should have

known that the tortfeasor was underinsured," several courts in 2000 addressed the issue of timely notice.

In *Interboro Indemnity Ins. Co. v. Sarno*,[15] the court reiterated that the proper standard for timely written notice of an underinsured motorist claim is "as soon as possible" from the date that the claimant knew or should have known that the tortfeasor was underinsured, and that the claimant is obligated to demonstrate that he or she acted with due diligence in ascertaining the insurance status of the vehicles involved in the accident.[16] Finding that there was no evidence that the claimant made any effort, other than tendering a complaint to one of the tortfeasors' insurers, to acquire information regarding insurance coverage, the court held that the claimant did not sustain her burden of demonstrating due diligence or a reasonable excuse for her delay in ascertaining the tortfeasors' insurance coverage, and that notice was not given as soon as practicable.

The court reminded that when the notice provision of a policy specifies that notice be in writing, other forms of notice will not suffice.

In *Ciaramella v. State Farm Ins. Co.*,[17] the court held that a 12-year delay, including a delay of eight months after retention of an attorney, was unreasonable as a matter of law. In *Unwin v. New York Central Mutual Fire Ins. Co.*,[18] the court held that the insured, who underwent spinal fusion, failed to submit any evidence from which it could be determined that he was not reasonably aware of the severity of his condition for the period of a 23-month delay, and, therefore held the delayed notice to be untimely.

In *State Farm Mut. Auto. Ins. Co. v. Hernandez*,[19] the court held that a delay of more than two years, including a delay of nine months after claimant became aware of the true extent of her injuries, was unreasonable as a matter of law. In *American Home Assurance Co. v. State Farm Mut. Auto. Ins. Co.*,[20] the court held that a delay of seven months was unreasonable as a matter of law.

On the other hand, in *Nationwide Insurance Enterprise v. Leavy*,[21] where it was established that the extent of the claimant's injuries was not known until six months after the accident and the owner of the other car was not located until ten months after the accident despite due diligence, the court held that there was a reasonable excuse for the failure to provide notice of an underinsurance claim until nine months after the accident. In *New York Central Mut. Fire Ins. Co. v. Benson*,[22] where the claimant's medical condition was diagnosed at the time of the accident as muscle spasms of the back, that diagnosis continued for almost a year, until her doctor advised that she might not be able to return to work, at which time it became apparent that the injury was more significant than originally determined, and the claimant's attorney promptly contacted the tortfeasor's insurer, negotiated a settlement for the bodily injury limits of that policy and immediately notified the SUM carrier that claimant was making a claim for SUM benefits, the court concluded that the claimant gave notice "with reasonable promptness after [she] knew or should have known that the tortfeasor was underinsured."

In *Ciaramella v. State Farm Ins. Co.*, *supra*, the court noted that "the fact that defendant had potential knowledge of plaintiff's SUM claim because it was plaintiff's no-fault carrier does not alter the fact that plaintiff failed to provide timely written notice. . . . Defendant's actual notice of the accident does not vitiate the requirement that [plaintiff] provide timely notice of [his] claim."[23] In *Country-Wide Ins. Co. v. Park*,[24] the court noted that "[t]he fact that the petitioner insurer may have received some notice of the accident through [the claimant's] no-fault claim does not vitiate the breach of the policy requirement [for timely notice of an SUM claim]."

In *GA Insurance Co. of New York v. Simmes*,[25] the court noted that N.Y. Insurance Law § 3420(a)(4) (hereinafter "Ins. L.") creates "an independent right in the injured party to give notice of the accident * * * [and,] where the injured person proceeds diligently in ascertaining coverage and in giving notice, he is not vicariously charged with any delay by the assured." Moreover, the notice required of an injured party to an insurer is measured less rigidly than the notice required of an insured. And, in *American Home Assurance Co. v. State Farm Mut. Auto. Ins. Co.*, *supra*, the court observed that "[p]ursuant to Insurance Law § 3420(a)(3), written notice by or on behalf of the injured party shall be deemed notice to the carrier." Such notice must also be given "as soon as reasonably possible."[26]

In *Hazen v. Otsego Mut. Fire Ins. Co.*,[27] the injured party effectively "saved the day" by giving the liability insurer notice of the accident where the insured had failed to. Even though the notice by the injured party was itself untimely, because the insurer's disclaimer was premised upon the insured's failure to give notice of the accident and made no reference to the injured party's late notice, the court held that the disclaimer was invalid as against the injured party, who was then entitled to summary judgment in her direct action against the insurer to recover on the judgment she obtained by default against the insured.[28]

In *Transportation Ins. Co. v. Pecoraro*,[29] the court reminded that when the notice provision of a policy specifies that notice be in writing, other forms of notice will not suffice.

Finally, the notice letter to the insurer should be specific and definite. In *American Cas. Ins. Co. v. Silverman*,[30] the claimant's attorney informed the insurer, in writing, two months after the accident, of his intent to pursue an underinsured motorist claim by stating that "[i]n the event that the vehicle owned by [the tortfeasor] is uninsured or underinsured, our clients will be making a claim under the applicable provisions of the uninsured or underinsured motorist endorsements of the above stated policy." The Supreme Court, Suffolk County (Doyle, J.) held:

> This letter is clearly insufficient to notify [the insurer] of [the claimant's] intention to make an underinsured motorist claim. It gives [the insurer] no more information that [sic] it had before it received the letter. It is reasonable to assume that every policyholder with underinsured motorist coverage might make such a claim if the offending vehicle is underinsured. Here, the language of [the claimant's] letter did not notify Petitioner that a claim was going to be made.

The court then went on to hold that the first actual notice of an intention to make claim, given more than 18 months after the accident, was untimely. The Second Department affirmed.

Notice of Legal Action

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition precedent to coverage, that the insured or his/her legal representative "immediately" forward to the insurer a copy of the summons and complaint and/or other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In *Nationwide Mut. Ins. Co. v. Charles*,[31] the court held that the claimant's delay of nine months in forwarding the summons and complaint to the SUM insurer violated the Notice of Legal Action condition of the policy and vitiated the coverage thereunder. Similarly, in *Nationwide Ins. Co. v. Shedlick*,[32] the court held that a 22-year delay in forwarding the summons and complaint to the SUM insurer justified a permanent stay of arbitration.

It should be noted, however, that in *Hess v. Nationwide Mut. Ins. Co.*,[33] the court reminded that the breach of the Notice of Legal Action provision requires a timely notice of disclaimer. If the insurer's disclaimer is untimely, it will be precluded from relying upon the claimant's failure to provide Notice of Legal Action to deny a claim.

Discovery

The UM and SUM endorsements also contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *Interboro Mut. Indem. Ins. Co. v. Pardon*,[34] the court, continuing a recent trend, held that the petitioner had waived the right to discovery from the claimant because it had "ample time prior to the commencement of the proceeding 'within which to seek discovery of the respondent insured as provided for in the insurance policy, and unjustifiably failed to utilize that opportunity' to obtain the discovery now sought."

On the other hand, the Second Department held in *Allstate Ins. Co. v. Baez*,[35] and *Peerless Ins. Co. v. McDonough*,[36] that the supreme courts in those particular cases providently exercised their discretion in temporarily staying arbitration and ordering medical authorizations, discovery of medical records and reports, depositions and physical examinations in aid of arbitration.

Petitions to Stay Arbitration

Venue Effective August 16, 2000, as a result of a statutory amendment, the venue rules of N.Y. Civil Practice Law & Rules 7502 (hereinafter "CPLR") have been substantially changed. That statute now provides:

> (i) The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county *where the party seeking arbitration resides or is doing business*, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending. (ii) If there is no county in which the proceeding may be brought under paragraph (i) of this subdivision, the proceeding may be brought in any county [emphasis added].[37]

Timeliness Exceptions CPLR 7503(c) provides that an application to stay arbitration "must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." It is well-established that the failure to make a timely application to stay arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding. One exception to the 20-day rule is that where the application to stay is based upon the ground that no agreement to arbitrate exists, it may be entertained even if made after the 20-day period had expired.[38]

In *Liberty Mutual Ins. Co. v. Saravia*,[39] the court noted that the 20-day limitation period of CPLR 7503(c) does not apply where the policy language expresses a lack of coverage. In *State Farm Mut. Auto. Ins. Co. v. Torcivia*,[40] the court stated,

> A party will not be compelled to arbitrate, and thus surrender the right to litigate a dispute in court, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. . . . In addition, an agreement to arbitrate must be "express, direct and unequivocal as to the issues or disputes to be submitted to arbitration."

In *Travelers Prop. Cas. Corp. v. Klepper*,[41] the court held that the claim that the other vehicle was identified and was, therefore, not a hit-and-run vehicle relates to whether certain conditions of the policy have been complied with and not whether the parties agreed to arbitrate—thus, that issue did not fall within the *Matarasso* exception and the 20-day rule applied.[42]

In *Martin v. J. C. Penney Co., Inc.*,[43] the court held that the closing of the County Clerk's office due to a snow emergency on the last day of the limitations period for a slip and fall action extended the period for filing the summons and complaint to the next day when the office was open for the transaction of business.

Mere occasional associations between an arbitrator and those appearing before him generally will not warrant disqualification on the ground of the appearance of bias or partiality.

Filing and Service In past years, I have advised that when the time to file a Petition to Stay Arbitration is close to expiring, it is not advisable to use an Order to Show Cause instead of a Notice of Petition. This is because it has been held that the filing of an *unsigned* Order to Show Cause is a nullity and does not effectively commence a special proceeding; the requisite filing does not actually take place until the Order to Show Cause is signed by the judge and then filed, which may be several days after the Order to Show Cause was first presented and filed.[44]

In *Thorsen v. Nassau County Civil Service Commission*,[45] the Order to Show Cause had already been signed and service of process had already been made before the petitioner filed the papers. Moreover, at the time of filing, the proposed Order, rather than the signed Order, was included by mistake. This was held to be improper and insufficient to commence the special proceeding. Moreover, even if the Order included had been the signed copy, the proceeding would still have failed because the service was made before the filing, an error in sequence which is fatal since the rule is that "the papers served must conform in all important respects to the papers filed."[46]

Burden of Proof An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[47]

In *GEICO v. Sosnov*,[48] the court reiterated the well-known rule that "[t]he party seeking to stay arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue that would justify the stay."

In *Eagle Ins. Co. v. Pusey*,[49] the court held that a letter from the alleged insurer of the tortfeasor's vehicle failed to establish *prima facie* that the offending vehicle was insured on the date of the accident and, therefore, failed to satisfy the UM carrier's burden of proof in the proceeding to stay arbitration. In *Allstate Ins. Co. v. Holloway*,[50] the court held that the petitioner failed to meet its initial burden of showing that the offending vehicle was, in fact, insured on the date of the accident where the only evidence submitted was a letter from the alleged insurer of the offending vehicle disclaiming coverage.

On the other hand, in *State Farm Mut. Auto Ins. Co. v. Youngblood*,[51] the court held that a letter from the DMV indicating that the driving privileges of the owner and operator of the offending vehicle had been revoked because the vehicle was uninsured on the date of the accident was sufficient to establish that the offending vehicle was uninsured and to overcome the *prima facie* showing of coverage made by the presentation of a police report and DMV record indicating coverage. In *Commercial Union Insurance Co. v. Kim*,[52] the court held that the testimony of an underwriter for Eagle Insurance Co., who admitted that the expansion record, or DP 37 form, listed the insurance code number for Eagle, and the form itself, indicating that Eagle insured the vehicle several months prior to the accident, supported the granting of Commercial Union's Petition to Stay Arbitration.[53]

Where the documents submitted by the parties raise issues of fact as to whether the offending vehicle was uninsured, and/or whether the alleged insurer of the offending vehicle properly disclaimed coverage, a hearing should be held at which the alleged insurer and its insured should be joined as additional respondents.[54]

In *Eagle Ins. Co. v. Lucero*,[55] the court held that the issue of whether an insurance policy was validly canceled prior to the accident could not be properly litigated without the joinder of the other insurance company. Where such an issue arises, a hearing must be

held, preceded by an order joining the alleged insurer of the offending vehicle as well as the owner and driver of that vehicle as additional parties.

Appeals In *Interboro Mut. Indem. Ins. Co. v. Johnson*,[56] the court reiterated the rule that by participating in the arbitration proceeding instead of moving to temporarily stay it, a party waives its right to seek a permanent stay of arbitration. A party must at least seek a stay of the arbitration pending the appeal, in order not to be deemed to have waived the right to appeal.[57]

Arbitration Awards

Issues for the Arbitrator In *Nationwide Ins. Co. v. McDonnell*,[58] the court held, "It is well settled that a court, and not an arbitrator, must resolve the issue of whether there was an actual contact with a hit-and-run vehicle." Thus, where the insurer initially brought an untimely Petition to Stay Arbitration on the ground of no physical contact, which petition was dismissed, and the arbitrator subsequently determined that it could raise a "liability defense" based upon the issue of contact between the vehicles even though that issue had been waived as a "contractual coverage defense," the court held that the arbitrator exceeded his powers and it vacated the award in favor of the insurer.

In *Liberty Mut. Ins. Co. v. Tetteh*,[59] the court held, "The courts have no authority to grant a stay of arbitration on the ground that the damages sought under a policy are excessive."[60] Rather, the issues of the extent of the insurer's liability and the availability of offsets are matters expressly within the language of the arbitration clause of the relevant Supplemental Uninsured Motorist endorsements, and thus must be determined at arbitration.

Scope of Review In *Curley v. State Farm Ins. Co.*,[61] the court held that an arbitrator's award will not be set aside even though the arbitrator misconstrues or disregards the proof or misapplies substantive rules of law, unless it violates strong public policy or is totally irrational. In *State Insurance Fund v. Country-Wide Ins. Co.*,[62] the court held that "it was arbitrary and capricious of the arbitrator not to follow clear precedent."

In *Chernuchin v. Liberty Mutual Ins. Co.*,[63] the court noted that "mere occasional associations between an arbitrator and those appearing before him generally will not warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality." There, the nature of the contact involved—an appearance by the arbitrator on the same CLE lecture panel with counsel for the claimant—was held insufficient to support a finding that there was an appearance of bias or partiality. Moreover, and in any event, there was no showing of prejudice as a result of any alleged appearance of bias or partiality.

In *Rothman v. Re/Max of New York, Inc.*,[64] the court noted that a party "who knows of a relationship between his adversary and the arbitrator and nevertheless assents to the choice of that arbitrator waives his right to later object [citations omitted]."

In *Santana v. Country-Wide Insurance Co.*,[65] the court noted that Rule 10 of the AAA's arbitration rules requires that decisions concerning disqualifications of arbitrators for partiality are to be made by the AAA, and that its decisions are to be deemed conclusive.

Collateral Estoppel In *State Farm Ins. Co. v. Smith*,[66] the court noted:

> Although it is well-settled that the doctrine of collateral estoppel applies to arbitration awards . . . , it is also true that "resolution of disputes by arbitration is grounded in agreement of the parties" . . . Thus, the parties are free to limit the scope and effect of an arbitration agreement by formulating their own "contractual restrictions on carry-over estoppel effect" . . . Here, the parties to the prior arbitration exercised that right by consenting to a provision which limited the collateral estoppel effect of the determination to the appellant's damages claim . . . . Accordingly, the prior arbitration decision does not preclude the appellant from pursuing her claim . . . for underinsured motorist benefits.

In *Davey v. DeMenna*,[67] the court held that the fact that an insured had taken the position that the identity of a hit-and-run driver allegedly responsible for her injuries was unknown when she asserted a claim for uninsured motorist benefits did not preclude her from pursuing a later action against the individual who was subsequently identified as the owner or driver of that vehicle, because her position with respect to the uninsured motorist claim, which accurately reflected the circumstances at the time of the claim, was not inconsistent with, much less preclusive of, her later claim.

Post-Award Proceedings In *In re Solkav Solartechnik, Ges m.b.H. v. Besicorp Group, Inc.*,[68] the Court of Appeals held that because a special proceeding to compel or stay arbitration is no longer pending after a judgment is entered directing arbitration and the arbitration is thereafter held, all subsequent applications, such as applications to confirm or vacate an arbitration award, must be brought in a new proceeding, under a new index number. Following that decision, legislation was introduced which, in effect, would have overruled *Solkav* and provide that all applications relating to an arbitration must be presented in the same case even if final judgment has been entered on a prior application. That legislation, Senate Bill No. 3071-A and Assembly Bill No. 5937-A, passed both Houses. However, in 1999, Governor Pataki refused to sign it into law.

Effective August 16, 2000, however, CPLR 7502(a) was amended to effectively overrule *Solkav*, *supra*, by

adding a new subdivision (iii), which provides that "Notwithstanding the entry of a judgment, all subsequent applications shall be made by motion in the special proceeding or action in which the first application was made."[69] Thus, a party will no longer have to commence a new proceeding to obtain additional judicial relief with respect to the same arbitration. "The requirement that subsequent applications be made in a 'pending' proceeding has been eliminated, and the statute now expressly provides that a motion will suffice even after entry of judgment. Indeed, the commencement of a new proceeding would be improper."[70]

UNINSURED MOTORIST ISSUES

Insurer's Notice of Denial or Disclaimer

Insurance Law § 3420(d) requires liability insurers to be "given written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

In *U.S. Fidelity and Guaranty Co. v. New York Susquehanna & Western Railway Corp.*,[71] the court noted that Ins. L. § 3420(d), by its terms, applies only to accidents "occurring within this state." In *American Ref-Fuel Co. of Hempstead v. Employers Ins. Co. of Wausau*,[72] the court noted that, in addition, that statute applies only to coverage in a policy delivered or issued for delivery in this state. And, in *Legion Ins. Co. v. Singh*,[73] the court noted that the statute was not applicable to claims that were not based upon "death or bodily injury."

In *2540 Assoc. Inc. v. Assicurazioni Generali, S.P.A.*,[74] the court reiterated the well-established principle that a proper notice of denial or disclaimer must apprise, with a high degree of specificity, of the ground or grounds upon which it is predicated.[75] The court added that "reasonable investigation is preferable to piecemeal disclaimers" and noted that "the moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim, not the date on which it receives the insured's notice of claim."

In *American Cas. Ins. Co. v. Silverman*, *supra*, the court treated the Petition to Stay Arbitration as a written notice of disclaimer.

In *Allstate Ins. Co. v. Arpaia*,[76] the court held that the insurer waived its right to invoke an exclusion in its SUM policy by delaying more than five months in issuing its disclaimer notice. In *American Ref-Fuel Co. v. Excelsior Ins. Co. of Wausau*, *supra*, the court held that a delay of more than four months rendered a disclaimer untimely as a matter of law. In *Wasserheit v. New York Central Mutual Fire Ins. Co.*,[77] the court held that the insurer's unexplained delay of four (4) months in disclaiming on the basis of late notice—a ground that should have been immediately readily apparent—was unreasonable as a matter of law. And, in *2540 Associates, Inc. v. Assicurazioni Generali, S.P.A.*, *supra*, the court held that a two-month delay in disclaiming coverage was unreasonable as a matter of law.[78]

On the other hand, in *Nationwide Mut. Ins. Co. v. Graham*,[79] the court held that a delay of two weeks was not unreasonable for a disclaimer based upon the breach of a cooperation clause of the policy. In *Sphere Drake Ins. Co. v. Block 7206 Corporation*, *supra*, the court held that a delay of 45 days was reasonable as a matter of law under the facts and circumstances of that case. In *Kramer v. GEICO*,[80] the court held that a delay of less than one month was reasonable as a matter of law. In *Dryden Mut. Ins. Co. v. Greaser*,[81] the court held that the insurer disclaimed as soon as reasonably possible when it did so within 27 days after receiving untimely notice. And, in *State Farm Mut. Auto. Ins. Co. v. Daniels*,[82] the court held that a delay of approximately three weeks following the completion of the insurer's investigation was reasonable.

In *Hess v. Nationwide Mut. Ins. Co.*, *supra*, the court refused to adopt a bright-line rule that any delay of 30 days or less in issuing a disclaimer is reasonable as a matter of law. In *Osterreicher v. Home Mutual Insurance Company of Binghamton, New York*,[83] the court held that the reasonableness of a 52-day delay was a factual issue for trial.

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Ins. L. § 3420(d), a distinction must be made between (a) policies that contain no provisions extending coverage to the subject loss, and (b) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Ins. L. § 3420(d) may be dispensed with.[84]

In *Brociner v. Mann*,[85] the court held that a motor vehicle covered by a policy of insurance that is disclaimed cannot itself qualify as an uninsured motor vehicle under the uninsured motorist coverage of that policy.[86]

Cancellation of Coverage

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

In *American Home Assurance Co. v. Chin*,[87] the court held that an automobile liability insurance policy, which was not a "covered policy" within the meaning of Ins. L. § 3425 (because it had not been issued to a "natural person" for "non-business" purposes) and which the insurer ineffectively attempted to cancel, remained in effect even after its natural expiration date.

The *Chin* court also reiterated the well-established rule that cancellation is ineffective unless in strict compliance with the requirements of Vehicle and Traffic Law § 313(1)(a) (hereinafter "Veh. & Traf. L.") and the Commissioner's Regulations, and that a notice that incorrectly states the amount of the per-day civil penalty for failing to have insurance in effect (which is now $8.00) is an invalid and ineffective notice of cancellation.

In *Insurance Co. of North America v. Kaplun*,[88] the court reiterated the well-established rule that under New York law, there is no right to cancel a policy of automobile insurance retroactively ("*ab initio*") as against an innocent third party, even for fraud or misrepresentation in the procurement of the policy.

In *Eagle Ins. Co. v. Singletary*,[89] the court was asked to determine the validity of a retroactive cancellation of a policy of automobile insurance issued in Virginia on the basis that the policy was procured by a material misrepresentation. The retroactive cancellation was permitted under Virginia law, but prohibited under New York law. Resolving the conflict of law question in favor of applying Virginia law, the court found that the retroactive cancellation was valid.[90]

The moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim.

In *State Farm Ins. Co. v. Lofstad*,[91] the court held that the fact that the notice of cancellation filed with the DMV contained the wrong vehicle identification number, did not invalidate the cancellation because the insured was responsible for the error by supplying the insurer with the wrong number on the application for insurance. "An innocent misleading of another party may estop one from claiming the benefits of his or her deception."

In *Rosenberg v. Colonial Penn Ins. Co.*,[92] the court rejected the contention that a notice of cancellation was untimely filed with the DMV because of an uncorrected "edit error" within the meaning of N.Y. Comp. Codes R. & Regs. tit. 15, § 34.2(b).

In *Travelers Property Casualty Corp. v. Eagle Ins. Co.*,[93] the court held that a cancellation of an auto insurance policy on a livery cab that was governed by the provisions of Veh. & Traf. L. § 370 (vehicles used to transport persons for hire) was rendered ineffectual when the insurer sent to the insured an additional notice of cancellation under the separate statute governing cancellation of auto policies for which a certificate of insurance has been issued, *i.e.*, Veh. & Traf. L. § 313, because the sending of the additional notice "could have caused the insured confusion as to its duties under the financial security provisions of [the] Vehicle and Traffic Law."

Stolen Vehicles

In *General Accident Ins. Co. v. Bonefont*,[94] the court stated, "Pursuant to Vehicle and Traffic Law 388 there is a 'very strong' presumption that a vehicle is operated with the consent of the owner." The court further added that the fact that the vehicle owner's testimony was not contradicted "does not, by itself, overcome the presumption that the vehicle was being operated with permission."

In *American Transit Ins. Co. v. Baez*,[95] the court held that there was no demonstration that the owner left her vehicle "unattended" within the meaning of Veh. Traf. L. § 1210(a) (the "key in the ignition" statute), where the evidence established that the owner left the vehicle with her husband, who, at the time was seated in the right front passenger seat, but momentarily stepped away from the vehicle to prepay the pump attendant for refueling, at which time the vehicle was stolen.

In *Surace v. Kersten*,[96] the court noted that Veh. & Traf. L. § 1210(a) applies "upon public highways, private roads open to motor vehicle traffic and any other parking lot." Veh. & Traf. L. § 1100(a). "Parking lot" is defined in Veh. & Traf. L. § 129-b as an area

> of private property near or contiguous to and provided in connection with premises having one or more stores or business establishments, and used by the public as a means of access to and egress from such stores and business establishments and for the parking of motor vehicles of customers and patrons of such stores and business establishments.

Where, as in *Surace*, the parking area at issue was private property, limited to private use, the statute is inapplicable.

In *Eagle Ins. Co. v. Nowaz*,[97] the insured brought a personal injury action against the owner of the offending vehicle. The owner claimed in defense of that action that the vehicle had been stolen prior to the accident and was being operated without his permission. The matter

was set down for a hearing on whether the vehicle was stolen, but that issue had not yet been determined. The insured then served a Demand for Arbitration of an uninsured motorist claim. In moving to stay arbitration, the uninsured motorist insurer requested that a hearing be held to determine whether the vehicle at issue had been stolen at the time of the accident. In light of the pendency of the personal injury action and hearing to determine that issue, the court properly exercised its discretion to stay the arbitration without prejudice to the service of a new Demand in the event the Supreme Court determined that the vehicle was stolen in the context of the personal injury action.[98]

Hit-and-Run

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

In *Allstate Ins. Co. v. Basdeo*,[99] the court held that the requisite physical contact was involved, albeit *indirect* contact with the claimant's vehicle, where the accident involved multiple vehicles and originated from a collision with an unidentified vehicle.[100]

UNDERINSURED MOTORIST ISSUES

Trigger for Underinsured Coverage

Under Regulation 35-D, it is the coverage of only a single vehicle, and not the total number of vehicles involved in the accident, that must be exhausted as a condition precedent to an underinsured motorist claim. In *Allstate Ins. Co. v. Charno*,[101] the claimant was involved in a multi-vehicle accident that involved an underinsured vehicle. The limits of bodily injury liability coverage for the underinsured vehicle were exhausted by settlement. The Appellate Division held that under those circumstances, the claimant was entitled to pursue his underinsured motorist claim, noting that the Supreme Court erred in taking into account the payments received from the insurer for a second, adequately insured, tortfeasor involved in the accident.

Consent to Settle

In *Friedman v. Allstate Ins. Co.*,[102] the court held that the insureds were precluded from asserting a claim for benefits under the underinsured motorist provisions of their policy because they failed to obtain the written consent of the insurer before settling the underlying negligence action with the tortfeasor and issuing a general release to the tortfeasor that failed to preserve the UM insurer's subrogation rights.

In *Transportation Ins. Co. v. Pecoraro*,[103] the court rejected the claimant's contention that its letter advising the SUM insurer of an intention to make an SUM claim was sufficient to prompt the insurer to respond within 30 days and give consent to settle, noting that the letter did not apprise the insurer of the pendency and settlement of the action.

Reduction in Coverage Clause

In *Butler v. New York Central Mutual Fire Ins. Co.*,[104] the driver of one car was injured and her passenger was killed in an accident with an uninsured motorist. The injured driver settled her claim for $25,000, the policy limit of the tortfeasor's vehicle, and the wrongful death claim of the passenger was settled for $30,000. The SUM carrier sought to stay arbitration of the injured driver's SUM claim under its $50,000 (single limit) policy by arguing that the total of $55,000 paid by the tortfeasor effectively wiped out its $50,000 SUM coverage. The SUM carrier's argument that the settlement sums of *both* insureds were to be applied as offsets to its SUM limit was rejected by the court, which held that the SUM limit applicable to the injured driver's SUM claim was to be offset only by the $25,000 payment she received, leaving $25,000 available in SUM benefits. As stated by the court,

> whether the reference to insured in paragraph 6(b) refers to each independent insured, as plaintiff contends, or a cumulative grouping of all who qualify as insureds, as advanced by defendant, is not clear and creates an ambiguity which must be construed against the insurer and in favor of the insured.

In *Transportation Ins. Co. v. Mueller*,[105] the court held that the fact that the offset or reduction in coverage provision was not contained in the declarations page of the policy did not warrant the conclusion that the offset provision was unenforceable. [NOTE: It appears that this might be a pre-Regulation 35-D case!]

Actions Against MVAIC—Statute of Limitations

If a "qualified person" is injured or killed as the result of an accident with a "hit-and-run" vehicle, the claimant may, upon notice to the MVAIC, apply to the court for leave to commence an action against the MVAIC directly. The statute of limitations on such an action is tolled during the pendency of the application pursuant to Ins. L. § 5218 because during that period, plaintiff has no right to sue.[106] In *Vasquez v. MVAIC*,[107] the court held that the toll lasts until the order granting leave to sue is entered and, therefore, goes into effect.

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1. *See* Jonathan A. Dachs, *Summing Up 1999 "SUM" Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*, 72 N.Y. St. B.J. 18 (July/Aug. 2000); *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, 71 N.Y. St. B.J. 8 (May/June 1999); *Legislative and Case Law Developments in UM/UIM/SUM Law - 1997*, 70 N.Y. St. B.J. 46 (Sept./Oct. 1998); *Develop-*

ments in Uninsured and Underinsured Motorist Coverage, 69 N.Y. St. B.J. 18 (Sept./Oct. 1997); *The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995*, 68 N.Y. St. B.J. 42 (July/Aug. 1996); *Uninsured and Underinsured Motorist Cases in 1994*, 67 N.Y. St. B.J. 24 (November 1995); *Uninsured and Underinsured . . . But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage*, 66 N.Y. St. B.J. 13 (Sept./Oct. 1994).

2. *See Interboro Mut. Indem. Ins. Co. v. Johanessen*, 273 A.D.2d 237, 709 N.Y.S.2d 445 (2d Dep't 2000).
3. 269 A.D.2d 599, 704 N.Y.S.2d 819 (2d Dep't 2000).
4. 278 A.D.2d 417, 717 N.Y.S.2d 645 (2d Dep't 2000).
5. 276 A.D.2d 895, 714 N.Y.S.2d 149 (3d Dep't 2000).
6. 271 A.D.2d 537, 706 N.Y.S.2d 140 (2d Dep't 2000).
7. 277 A.D.2d 772, 716 N.Y.S.2d 758 (3d Dep't 2000).
8. 246 A.D.2d 490, 668 N.Y.S.2d 200 (1st Dep't 1998).
9. *Berger and Byrne v. Allstate Ins. Co.*, SUM 255, N.Y. No-Fault/SUM Reporter, Vol. 25, No. 1 (March 2000) (Arbitrator Thomas Bogan); *Travelers Prop. Cas. Corp. v. Sniadach*, N.O.R., Index No. 109636/00 (Sup. Ct., N.Y. Co.) (Justice Bruce Allen); *see also* N. Dachs and J. Dachs, *Health Provider Assignments/Derivative Claims*, N.Y.L.J., Nov. 14, 2000, p. 3, col. 1.
10. *UM and SUM Coverage for Derivative Claims*, N.Y.L.J., Mar. 9, 1999, p. 3, col. 1.
11. 180 Misc. 2d 863, 694 N.Y.S.2d 287 (Sup. Ct., Richmond Co. 1999), *aff'd*, 276 A.D.2d 540, 714 N.Y.S.2d 715 (2d Dep't 2000).
12. 270 A.D.2d 856, 705 N.Y.S.2d 781 (4th Dep't 2000).
13. *American Cas. Ins. Co. v. Silverman*, 271 A.D.2d 528, 705 N.Y.S.2d 676 (2d Dep't 2000); *State Farm Mut. Auto. Ins. Co. v. Tremaine*, 270 A.D.2d 962, 705 N.Y.S.2d 477 (4th Dep't 2000); *Unwin v. New York Central Mutual Fire Ins. Co.*, 268 A.D.2d 669, 700 N.Y.S.2d 580 (3d Dep't 2000).
14. 93 N.Y.2d 487, 693 N.Y.S.2d 81 (1999).
15. 277 A.D.2d 454, 716 N.Y.S.2d 707 (2d Dep't 2000).
16. *See Witterschein v. State Farm Ins. Co.*, 278 A.D.2d 317, 718 N.Y.S.2d 192 (2d Dep't 2000); *Hartford Ins. Co. v. Brody*, 278 A.D.2d 830, 718 N.Y.S.2d 782 (4th Dep't 2000); *Nationwide Mut. Ins. Co. v. Wexler*, 276 A.D.2d 490, 713 N.Y.S.2d 878 (2d Dep't 2000); *State Farm Mut. Auto. Ins. Co. v. Hernandez*, 275 A.D.2d 989, 713 N.Y.S.2d 618 (4th Dep't 2000).
17. 273 A.D.2d 831, 709 N.Y.S.2d 296 (4th Dep't 2000).
18. 268 A.D.2d 669, 700 N.Y.S.2d 580 (3d Dep't 2000).
19. 275 A.D.2d 989, 713 N.Y.S.2d 618 (4th Dep't 2000).
20. 277 A.D.2d 409, 717 N.Y.S.2d 224 (2d Dep't 2000).
21. 268 A.D.2d 661, 700 N.Y.S.2d 582 (3d Dep't 2000).
22. 277 A.D.2d 920, 716 N.Y.S.2d 259 (4th Dep't 2000).
23. Citing *In re Nationwide Mut. Ins. Co. [Steber]*, 272 A.D.2d 940, 712 N.Y.S.2d 712 (4th Dep't 2000).
24. 277 A.D.2d 175, 717 N.Y.S.2d 132 (1st Dep't 2000).
25. 270 A.D.2d 664, 704 N.Y.S.2d 700 (3d Dep't 2000).
26. *See* Ins. L. § 3420(a)(4).
27. N.Y.L.J., July 31, 2000, p. 35, col. 3 (Sup. Ct., Richmond Co.).
28. Ins. L. § 3420(a)(2), (b).
29. 270 A.D.2d 851, 705 N.Y.S.2d 155 (4th Dep't 2000).
30. 271 A.D.2d 528, 705 N.Y.S.2d 676 (2d Dep't 2000).
31. 275 A.D.2d 324, 712 N.Y.S.2d 578 (2d Dep't 2000).
32. 274 A.D.2d 519, 711 N.Y.S.2d 181 (2d Dep't 2000).
33. 273 A.D.2d 689, 709 N.Y.S.2d 701 (3d Dep't 2000).
34. 270 A.D.2d 266, 704 N.Y.S.2d 834 (2d Dep't 2000).
35. 269 A.D.2d 392, 702 N.Y.S.2d 878 (2d Dep't 2000).
36. 269 A.D.2d 398, 702 N.Y.S.2d 880 (2d Dep't 2000).
37. For a discussion of the new venue rule and its implications to practitioners, see N. Dachs, and J. Dachs, *The New Venue Rule*, N.Y.L.J., Jan. 9, 2001, p. 3, col. 1.
38. *See Matarasso v. Continental Casualty Co.*, 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982).
39. 271 A.D.2d 534, 705 N.Y.S.2d 685 (2d Dep't 2000).
40. 277 A.D.2d 321, 715 N.Y.S.2d 75 (2d Dep't 2000).
41. 275 A.D.2d 234, 712 N.Y.S.2d 517 (1st Dep't 2000).
42. *See Allstate Ins. Co. v. Rosado*, 271 A.D.2d 527, 705 N.Y.S.2d 899 (2d Dep't 2000) (whether or not the injuries occurred as a result of an intentional act relates to whether certain conditions of coverage have been satisfied and not whether the parties have agreed to arbitration—application to stay arbitration must be brought within 20 days); *Allstate Ins. Co. v . Taylor*, 271 A.D.2d 443, 706 N.Y.S.2d 135 (2d Dep't 2000) (claim of no physical contact relates to whether certain conditions of the contract have been complied with and not whether the parties have agreed to arbitrate—20-day period applies); *Merchants Mut. Ins. Co. v. Anemone*, 271 A.D.2d 690, 707 N.Y.S.2d 865 (2d Dep't 2000) (to same effect).
43. 275 A.D.2d 910, 713 N.Y.S.2d 402 (4th Dep't 2000).
44. *See Fry v. Village of Tarrytown*, 226 A.D.2d 461, 641 N.Y.S.2d 54 (2d Dep't 1996), *rev'd on other grounds*, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997); N. Dachs and J. Dachs, *Petitions to Stay Arbitration: Special Proceedings*, N.Y.L.J., July 8, 1997 p. 3, col. 1.
45. N.Y.L.J., Sep. 25, 2000, p. 33, col. 5 (Sup. Ct., Nassau Co.).
46. *See In re Gershel v. Porr*, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82 (1996).
47. *See Eagle Ins. Co. v. McPherson*, 271 A.D.2d 689, 707 N.Y.S.2d 864 (2d Dep't 2000).
48. 275 A.D.2d 322, 712 N.Y.S.2d 54 (2d Dep't 2000).
49. 271 A.D.2d 445, 706 N.Y.S.2d 123 (2d Dep't 2000).
50. 272 A.D.2d 539, 708 N.Y.S.2d 899 (2d Dep't 2000).
51. 270 A.D.2d 493, 705 N.Y.S.2d 619 (2d Dep't 2000).
52. 268 A.D.2d 296, 700 N.Y.S.2d 816 (1st Dep't 2000), *lv. to appeal denied*, 94 N.Y.2d 762, 708 N.Y.S.2d 51 (2000).
53. *See also Country Wide Ins. Co. v. Allstate Ins. Co.*, 278 A.D.2d 270, 718 N.Y.S.2d 185 (2d Dep't 2000).
54. *See New York Central Mutual Fire Ins. Co. v. Paillant*, 269 A.D.2d 451, 702 N.Y.S.2d 883 (2d Dep't 2000).
55. 276 A.D.2d 695, 716 N.Y.S.2d 317 (2d Dep't 2000).
56. 273 A.D.2d 238, 709 N.Y.S.2d 833 (2d Dep't 2000).
57. *See Commerce & Industry Ins. Co. v. Nester*, 90 N.Y.2d 255, 660 N.Y.S.2d 366 (1997).
58. 272 A.D.2d 547, 708 N.Y.S.2d 146 (2d Dep't 2000).
59. 277 A.D.2d 239, 716 N.Y.S.2d 399 (2d Dep't 2000).
60. Citing *In re Allstate Ins. Co. v. Olsen*, 222 A.D.2d 579, 634 N.Y.S.2d 773 (2d Dep't 1995); *In re General Accident Ins. Co. v. Brown*, 263 A.D.2d 542, 693 N.Y.S.2d 223 (2d Dep't 1999); *In re Commerce and Industry Ins. Co. v. Weber*, 240 A.D.2d 742, 660 N.Y.S.2d 1001 (2d Dep't 1997); and *In re GEICO v. Abbensett*, 240 A.D.2d 518, 659 N.Y.S.2d 73 (2d Dep't 1997)—all upholding stays of arbitration on the

issue of excessiveness of damages only where no additional recovery would be possible, thus rendering arbitration academic.

61. 269 A.D.2d 240, 702 N.Y.S.2d 305 (1st Dep't 2000).
62. 276 A.D.2d 432, 715 N.Y.S.2d 15 (1st Dep't 2000).
63. 268 A.D.2d 521, 701 N.Y.S.2d 672 (2d Dep't 2000).
64. 183 Misc. 2d 402, 703 N.Y.S.2d 666 (Sup. Ct., Suffolk Co. 1999), *rev'd on other grounds*, 274 A.D.2d 520, 711 N.Y.S.2d 477 (2d Dep't 2000).
65. 177 Misc. 2d 1, 675 N.Y.S.2d 817 (N.Y.C. Civ. Ct. 1998), *aff'd*, 184 A.D.2d 294, 714 N.Y.S.2d 854 (2d Dep't 2000).
66. 277 A.D.2d 390, 717 N.Y.S.2d 210 (2d Dep't 2000).
67. 269 A.D.2d 191, 702 N.Y.S.2d 300 (2d Dep't 2000).
68. 91 N.Y.2d 482, 672 N.Y.S.2d 838 (1998).
69. *See* Laws of 2000, Chapter 226, effective August 16, 2000, N.Y. Real Property Tax Law § 533.
70. *See* Vincent C. Alexander, *Special Proceedings Relating to Arbitration: New Developments*, N.Y.L.J., Sep. 20, 2000, p. 3, col. 1.
71. 275 A.D.2d 977, 713 N.Y.S.2d 624 (4th Dep't 2000).
72. 265 A.D.2d 49, 705 N.Y.S.2d 67 (2d Dep't 2000).
73. 272 A.D.2d 809, 708 N.Y.S.2d 183 (3d Dep't 2000).
74. 271 A.D.2d 282, 707 N.Y.S.2d 59 (1st Dep't 2000).
75. *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979).
76. 276 A.D.2d 628, 714 N.Y.S.2d 326 (2d Dep't 2000).
77. 271 A.D.2d 439, 705 N.Y.S.2d 638 (2d Dep't 2000).
78. *See Transportation Ins. Cos. v. Sellitto*, 267 A.D.2d 462, 700 N.Y.S.2d 492 (2d Dep't 2000) (7-year delay); *GEICO v. Kolodny*, 269 A.D.2d 564, 703 N.Y.S.2d 513 (2d Dep't 2000) (over one-year delay); *Hanover Ins. Co. v. Van Hoesen*, N.Y.L.J., Nov. 21, 2000, at 30, col. 1 (Sup. Ct., Nassau Co.) (approximately four (4) months); *Pennsylvania Lumbermens Mutual Ins. Co. v. Borden House Condominiums*, N.Y.L.J., July 27, 2000, p. 24, col. 3 (Sup. Ct., N.Y. Co.) (more than two (2) months).
79. 275 A.D.2d 1012, 713 N.Y.S.2d 602 (4th Dep't 2000).
80. 269 A.D.2d 567, 703 N.Y.S.2d 514 (2d Dep't 2000).
81. 269 A.D.2d 792, 702 N.Y.S.2d 479 (4th Dep't 2000).
82. 269 A.D.2d 859, 703 N.Y.S.2d 796 (4th Dep't 2000).
83. 272 A.D.2d 926, 707 N.Y.S.2d 742 (4th Dep't 2000).
84. *See In re Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 712 N.Y.S.2d 433 (2000); *Markevics v. Liberty Mutual Ins. Co.*, 278 A.D.2d 285, 717 N.Y.S.2d 305 (2d Dep't 2000); *Metropolitan Prop. & Cas. Ins. Co. v. Pulido*, 271 A.D.2d 57, 710 N.Y.S.2d 375 (2d Dep't 2000); *Sphere Drake Ins. Co. v. Block 7206 Corporation*, 265 A.D.2d 78, 705 N.Y.S.2d 623 (2d Dep't 2000); *American Ref-Fuel Co. of Hempstead v. Employers Ins. Co. of Wausau*, 265 A.D.2d 49, 705 N.Y.S.2d 67 (2d Dep't 2000). *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 268 A.D.2d 524, 701 N.Y.S.2d 654 (2d Dep't 2000) (no obligation to timely disclaim where not yet established that offending vehicle was uninsured on date of accident); *Liberty Mutual Ins. Co. v. Saravia*, 271 A.D.2d 534, 705 N.Y.S.2d 685 (2d Dep't 2000) (no duty to timely disclaim where policy language expresses a lack of coverage).
85. 184 Misc. 2d 789, 711 N.Y.S.2d 691 (Sup. Ct., Kings Co. 2000).
86. *But see Knickerbocker Ins. Co. v. Faison*, 22 N.Y.2d 554, 293 N.Y.S.2d 538 (1968).
87. 269 A.D.2d 24, 708 N.Y.S.2d 453 (2d Dep't 2000).
88. 274 A.D.2d 293, 713 N.Y.S.2d 214 (2d Dep't 2000).
89. 279 A.D.2d 56, 717 N.Y.S.2d 351 (2d Dep't 2000).
90. *See Nationwide Ins. Co. v. Guareno*, 278 A.D.2d 419, 717 N.Y.S.2d 653 (2d Dep't 2000).
91. 278 A.D.2d 224, 717 N.Y.S.2d 287 (2d Dep't 2000).
92. 274 A.D.2d 518, 712 N.Y.S.2d 384 (2d Dep't 2000).
93. 273 A.D.2d 65, 708 N.Y.S.2d 406 (1st Dep't 2000).
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97. 276 A.D.2d 628, 714 N.Y.S.2d 313 (2d Dep't 2000).
98. *See Liberty Mutual Ins. Co. v. Saravia*, 271 A.D.2d 534, 705 N.Y.S.2d 685 (2d Dep't 2000).
99. 273 A.D.2d 466, 710 N.Y.S.2d 111 (2d Dep't 2000).
100. *See Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 574 N.Y.S.2d 927 (1991).
101. 276 A.D.2d 552, 714 N.Y.S.2d 309 (2d Dep't 2000).
102. 268 A.D.2d 558, 703 N.Y.S.2d 198 (2d Dep't 2000).
103. 270 A.D.2d 851, 705 N.Y.S.2d 155 (4th Dep't 2000).
104. 274 A.D.2d 924, 711 N.Y.S.2d 607 (3d Dep't 2000).
105. 268 A.D.2d 542, 701 N.Y.S.2d 655 (2d Dep't 2000).
106. *See Trepel v. MVAIC*, 267 A.D.2d 228, 699 N.Y.S.2d 469 (2d Dep't 1999); *Betances v. MVAIC*, 210 A.D.2d 475, 620 N.Y.S.2d 835 (2d Dep't 1994).
107. 272 A.D.2d 275, 708 N.Y.S.2d 99 (1st Dep't 2000).

Changes in Estate and Gift Taxes Will Increase Exemption Amounts And Lower Federal Rates

BY SANFORD J. SCHLESINGER AND DANA L. MARK

The tax legislation that President Bush signed on June 7[1] provides for gradual reductions in estate and generation-skipping transfer taxes beginning in 2002 and continuing through 2009, the elimination of these taxes in 2010 and their restoration in 2011, unless subsequent changes are made.

If the so-called "sunset" provision actually does take effect in 2011, tax rates will return to what they would have been under the law that preceded the new one. Because the older law called for a series of changes that would have been completed by the year 2006, the estate tax structure in 2011 would thus reflect the rates and the $1 million exemption amount that would otherwise have taken effect in 2006.

For the estates of those who die after December 31, 2001, the applicable exclusion amount not subject to taxation, now $675,000, increases to $1 million for 2002 and 2003. It moves up to $1.5 million in 2004 and 2005, reaches $2 million for 2006 through 2008, and increases to $3.5 million in 2009. A one-year repeal of federal estate taxes takes effect in 2010.

The top estate tax rate, now 55%, decreases to 50% in 2002 and then gradually drops to 45%. The new law also eliminates the 5% surcharge that has resulted in an effective tax rate of 60% on estates of more than $10,000,000 through $17,184,000 to offset the benefits of the lower rates applicable to smaller estates.

Although the total of state and federal estate taxes due on New York estates will be lower in 2002 than it has been this year, for many estates the total will rise in 2003 and 2004 because of the way the new law reduces the size of the credits that may be taken for the payment of state taxes. When the credits are eliminated in 2005 and replaced by a system that allows only the deduction of state taxes actually paid, the total state and federal estate taxes paid by New York estates of more than $139,853,335 will then rise above the totals that would have applied if the current rules had remained in effect. In 2006, when the federal exemption amount rises to $2 million, and continuing until the federal tax is repealed in 2010, the total of estate and federal taxes paid by New York estates will be lower than under the current rules, but the decline will not be dramatic for large estates. (See the charts on pages 53-54.)

Ultimately, the gift tax is to be retained with reduced rates and an exemption amount somewhat higher than the current level.

Beginning in 2010, limits will be placed on the amounts that qualify for a stepped-up basis in computing capital gains. Up to $1.3 million in property will be eligible for a step-up in basis, and for property passing to a surviving spouse an additional $3 million will qualify for a stepped-up basis.

Rate Reductions

For estates of decedents dying and gifts made after December 31, 2001, the highest estate and gift tax rate drops from 55% to 50%, reaching this level when the taxable estate totals $2.5 million. The highest rate then declines by an additional percentage point in each of the following years, until it stabilizes at 45% in 2007.

The most dramatic effect of the rate decreases applies to estates of more than $10,000,000 through $17,184,000. Effective for estates of those who die after December 31,

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Legislative Structure of the Changes

The changes affecting estate taxes are contained in Title V of the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "Act"). The key provisions affecting estate, gift and generation-skipping transfer taxes are contained in two new sections, 2210 and 2664, that are being added the Internal Revenue Code.[1]

Title IX of the Act contains the "sunset" provision. It provides that the changes made by Title V will not apply to estates of decedents dying, gifts made or generation-skipping transfers made after December 31, 2010.

Without further legislative action, therefore, the law that was in effect on June 7, 2001, would apply on January 1, 2011. Under that law, the applicable exclusion amount would have increased to $1 million in 2006, and thus $1 million would become the 2011 exclusion amount and the current rates above 45% would be restored.

Effect on Gift Taxes The Act retains the gift tax. Before 1977, the gift tax rates were lower than the estate tax rates, making transfers during life more attractive than accumulating wealth and transferring the property at death. The Tax Reform Act of 1976 unified the estate tax and the gift tax. In one respect, it can be said that the Act's "deunification" of the transfer tax system favors the accumulation of wealth until death. On the other hand, it appears that the intention of the Act in retaining the gift tax is to deter income-shifting that might otherwise be possible.

From a transfer tax view, the retention of the gift tax may have little impact beyond impeding lifetime transfers. Nevertheless, as the price to be paid for income shifting, the gift tax plays a more formidable role. *Query:* Should there be a gift tax where the transfer is to a taxpayer in the same income tax bracket?

Family-owned Businesses For decedents dying after December 31, 2003, the deduction for qualified family-owned business interests is repealed.

Qualified Domestic Trusts Until January 1, 2021, the Act leaves in effect the tax under IRC § 2056A(b)(1)(A) on distributions from a qualified domestic trust ("QDOT") to a non-citizen surviving spouse, but repeals the estate tax on a QDOT on the surviving spouse's death, effective for decedents dying after December 31, 2009. Thus if a decedent dies prior to January 1, 2010, establishes a QDOT for his or her spouse and the surviving spouse dies after December 31, 2009, a QDOT tax could be payable on the surviving spouse's death even though there is no estate tax in existence.

1. All references are to the Internal Revenue Code of 1986, as amended through June 7, 2001.

2001, the 5% surcharge that has applied to these estates has been eliminated. Estates in this range will be taxed only at the new top rate, initially 50%.

The rate on generation-skipping transfers remains at the highest estate and gift tax rate.

For gifts made after December 31, 2001, the applicable exclusion amount is limited to $1 million, with no further scheduled increases. For gifts made after December 31, 2009, the top gift tax rate will be equivalent to the top individual income tax rate.

The amount exempt from the generation-skipping transfer tax remains at its 2001 level, $1.06 million, adjusted annually for inflation, through December 31, 2003. Effective for generation-skipping transfers after December 31, 2003, the amount exempt from the generation-skipping transfer tax is the applicable exclusion amount.

No Change in $10,000 Exclusion Although a proposal to increase the annual gift tax exclusion from the current $10,000 figure was included in the proposals that preceded the new law, it is noteworthy that the final version did not increase this amount.

The $10,000 exclusion remains in effect, together with the existing provision that an adjustment for increases in the cost of living since 1997 will be calculated each year and the actual exclusion will be increased whenever the cumulative increases total $1,000.[2]

Similarly, despite some changes that had been discussed, the Act does not provide for a surviving spouse to claim the unused unified credit of a predeceased spouse.

State Death Taxes

A credit for state death taxes, available under IRC § 2011, remains available through December 31, 2004; but its size is being reduced by 25 percentage points in each of the following three years, as follows:

Year of Death	Percentage of credit that can be deducted from the federal tax that would otherwise be due:
2002	75%
2003	50%
2004	25%
2005	0%, but the amount of state taxes actually paid becomes a deduction that reduces the size of the taxable estate.

As of July 1, 2001, the amount collected by 37 states and the District of Columbia was a "sop" tax equal to the credit allowed on the federal estate tax return for state death taxes. A majority of these states will automatically conform to changes in the federal estate tax, and thus the economic effect of the reduction in the state death credit will immediately reduce state revenue de-

rived from taxes based on the credit. These states may have to consider enacting estate, inheritance and/or succession taxes to make up for the revenue loss due to the elimination of the credit.

In states such as New York, where the state statute does not automatically follow changes made in the federal estate tax, the impact on revenue will be smaller.

New York Rates Unless New York State specifically enacts legislation to make adjustments reflecting the impact of the federal changes, the estates of New York decedents will be required to pay taxes higher than the credit allowed on the federal return for state death taxes.

This occurs because of the language in New York Tax Law § 951(a), which states that for the purposes of Article 26 (the estate tax provisions) "any reference to the internal revenue code means the United States Internal Revenue Code of 1986, with all amendments enacted on or before July twenty-second, nineteen hundred ninety-eight."

Under the Internal Revenue Code prior to the new law, the potential credit for state estate taxes in a $2 million estate has been $99,600. This year, the full amount of the credit is payable to New York and is subtracted from the $560,250 that is the "tentative tax" due after the subtraction of the unified credit amount, making the actual tax payment to the federal government $460,650 and holding the combined state-federal total due to $560,250. Next year, the full $99,600 will still be due to New York State, but only $74,700 will be subtracted from the $435,000 "tentative tax" figure that emerges after the subtraction of the applicable unified credit amount, making the actual tax payment to the federal government $360,300 and yielding a combined state-federal total due of $459,900. (See pages 46-54 for tables showing the total taxes due for the years 2001 through 2010.)

Effectively this change in the actual credit allowed by the federal government results in the re-introduction of a state estate tax akin to the structure that was repealed effective February 1, 2000. Until then, New York residents had to pay more than the credit for state taxes that was allowed on the federal return. This imposition of a state tax beyond the allowed credit may have served as a motive for some New Yorkers to leave the state and establish domicile in states such as Florida that collect only a "sop" tax equal to the credit.

Nevertheless, the total tax bill for New York estates of $1 million or less will drop to zero in 2002. This occurs because N. Y. Tax Law effectively provides for the state to forgo estate taxes whenever the federal government would not collect estate taxes, provided that the federal exemption equivalent does not exceed $1 million.[3] As a result, the era of no taxes for New York estates of $1 million or less will arrive in 2002, not 2006 as had been expected.

When the federal exemption equivalent reaches $1.5 million in 2004, however, New York will continue to collect taxes on estates worth more than $1 million, even though there will be no federal estate tax until an estate exceeds the $1.5 million mark. Similarly, New York will continue to collect taxes on estates of more than $1 mil-

Higher Total Tax Due for Some New York Estates

The chart below illustrates how the total state and federal estate taxes due on some New York Estates will actually increase in the years 2003, 2004 and 2005 when compared with the total amount that would have been due under the rules that are to be superceded in 2002.

In 2003 and 2004, the increase is due to the reductions in the size of the credit allowed on the federal return for state estate taxes.

When the credit is eliminated in 2005 and replaced by a deduction against the estate for taxes actually paid, the total state and federal estate taxes paid by some New York estates will also exceed the amount that would have been paid if the old estate tax rules had remained in force.

Beginning in 2006, when the federal exemption amount reaches $2 million, the total state and federal estate taxes paid by all New York estates will be lower than would have been true under the old rules, although the effect of the way state estate taxes are treated will offset much of the reduction in the federal tax due.

In the charts below, the figures in boldface identify the size of an estate that first becomes subject to state and federal estate taxes equal to the total tax that would have been due under the old rules. The final three columns show the total state and federal amounts payable by estates of the sizes indicated under the old and new rules.

2003	Estate Size	**$29,090,000.30**	$40,000,000	$140,000,000	$150,000,000
	Old Tax	$15,769,700.17	$21,770,200	$ 76,770,200	$ 82,270,200
	New Tax	$15,769,700.17	$21,988,400	$ 78,988,400	$ 84,688,400

2004	Estate Size	**$9,722,727.30**	$40,000,000	$140,000,000	$150,000,000
	Old Tax	$4,701,000.02	$21,712,700	$ 76,712,700	$ 82,212,700
	New Tax	$4,701,000.02	$22,865,100	$ 82,865,100	$ 88,865,100

2005	Estate Size	**$139,853,334.74**	$40,000,000	$140,000,000	$150,000,000
	Old Tax	$ 76,593,034.11	$21,673,700	$ 76,673,700	$ 82,173,700
	New Tax	$ 76,593,034.11	$21,194,404	$ 76,674,404	$ 82,222,404

lion when the federal exemption rises to $2 million in 2006, $3.5 million in 2009, and even when the federal estate tax repeal takes place in 2010.

Transfers in Trust

Effective for gifts made after December 31, 2009, IRC § 2511 is amended by the addition of a section "(c)," which provides that a transfer in trust is to be treated as a taxable gift unless the trust is treated as a grantor trust wholly owned by the donor or the donor's spouse.

This provision has already caused much confusion. It apparently is not intended to eliminate *Crummey*[4] powers, nor is it intended to alter existing law by preventing what would otherwise be a completed gift from being subject to the gift tax merely because the transfer is to a grantor trust.

Consistent with the underlying rationale of the new law to deter income shifting, IRC § 2511(c) was added to address the situation where a transfer is made to a trust that is not a grantor trust but is still an "incomplete" transfer because the grantor retains some element of control. At present, such a gift may not immediately be subject to taxation but the government collects a transfer tax from the grantor's estate at death. For transfers after 2009, however, such a transfer will be treated as "completed," for gift tax purposes, thereby assuring that it will immediately be subject to tax. Presumably, if the trust is a grantor trust but ceases to be one at any time before the grantor's death, the gift would be treated as "complete" at that time and then be subject to gift tax.

End of Some Step-Ups in Basis

Effective for decedents dying after December 31, 2009, the new law adds a new section, IRC § 1022. It eliminates the step-up in basis at death that would have occurred under IRC § 1014 for assets that had increased in value and would otherwise have been subject to cap-

Law Modifies Allocation Rules for GSTs

The new law modifies the allocation rules applicable to the generation-skipping transfer tax ("GST"), amending IRC §§ 2632 and 2642, and is generally effective for transfers subject to estate or gift tax beginning January 1, 2001.

Under the new law, the generation-skipping transfer tax exemption is automatically allocated to "indirect skips," which is a new term. An indirect skip is a transfer of property (other than a direct skip) that is subject to the gift tax, made to a "GST Trust."

During lifetime, any unused portion of an individual's generation-skipping transfer tax exemption is allocated to the property transferred to the extent necessary to produce the lowest possible inclusion ratio. A transferor can elect—on a timely filed gift tax return for the calendar year in which the transfer was made or deemed to have been made—not to have the automatic allocation rules apply.

A GST Trust is defined as a trust that could have a generation-skipping transfer, unless any of the following applies:

- The trust instrument provides that more than 25% of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons before they attain the age of 46, or that this amount must be distributed on or before a date specified in the instrument before non-skip persons attain the age of 46, or that such a distribution is to take place upon the occurrence of an event in accord with the regulations prescribed by the Treasury secretary.
- The trust instrument provides that more than 25% of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons and are living on the date of death of another person identified in the instrument who is more than 10 years older than such individual.
- The trust instrument provides that if one or more individuals who are non-skip persons die on or before a date or event described in either of the two previous circumstances, more than 25% of the trust corpus either must be distributed to the estate or estates of one or more of such individuals or be subject to a general power of appointment exercisable by one or more of such individuals.
- The trust is a trust any portion of which would be included in the gross estate of a non-skip person (except the transferor) if such person died immediately after the transfer.
- The trust is a charitable lead annuity trust, a charitable remainder annuity trust or a charitable remainder unitrust.
- The trust is a trust with respect to which a deduction was allowed under IRC § 2522 for the amount of an interest in the form of the right to receive annual payments of a fixed percentage of the net fair market value of the trust property and is required to pay principal to a non-skip person if such person is alive when the payments for which the deduction was allowed terminate.

Retroactive Allocation The GST tax exemption can be allocated retroactively if there is an unnatural order of death. A transferor can allocate generation-skipping transfer exemption to a trust where the beneficiary (1) is a non-skip person, (2) is a lineal descendant of the transferor's grandparent or of a grandparent of the trans-

ital gains taxes when sold. Beginning in 2010, property "acquired from a decedent" will therefore inherit the cost basis the decedent had in the asset once its value exceeds certain threshold levels. Up to $1.3 million in property can have a stepped-up basis to the value at the decedent's date of death; an additional $3 million in property that passes to a surviving spouse qualifies for a stepped-up basis. The $1.3 million is increased by any unused built-in losses and loss carryovers that the decedent, but for his or her death, could otherwise have claimed. Any asset that does not qualify for the stepped-up basis will be subject to capital gains tax when actually sold.

In no event can the amount to which the basis is stepped up exceed the fair market value of the property at date of death. Thus, for property that is not allowed a step-up in basis, there will be no difference in the income tax consequences to the recipient between property received by gift and property received as an inheritance—*i.e.*, it will be the lesser of the decedent's adjusted basis or the fair market value of the property at the date of the decedent's death.

Nonresident aliens will be allowed to increase the basis of property by up to $60,000. The $1.3 million, $3 million and $60,000 amounts are to be adjusted for inflation after December 31, 2010. *Query:* If the interest in a passive activity receives no basis step-up, will unused passive activity losses no longer be available?

The allocation is to be made by the fiduciary. The fiduciary undoubtedly will look to the will or trust for direction in this regard. More particularly, the draftsperson may want to ensure that wills contain provisions absolving the fiduciary from liability with respect to the way that assets with disparate income-tax bases are allocated to certain beneficiaries.

Types of Property Affected For purposes of IRC § 1022, the following property is considered to have been acquired from the decedent:

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feror's spouse, (3) is a generation below the generation of the transferor and (4) dies before the transferor.

The applicable fraction and inclusion ratio would be determined on the value of the property on the date that the property was transferred to the trust. This section applies to deaths of non-skip persons after December 31, 2000.

Severing of a Trust A trust can be severed into two or more trusts in a "qualified severance." A qualified severance is defined as the division of single trust and creation of two or more trusts if (1) the single trust was divided on a fractional basis and (2) the terms of the new trust provide for the same succession of interests of beneficiaries that was provided in the original trust.

If a trust has an inclusion ratio of greater than zero and less than one, a severance is qualified only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before severance. The trust receiving such fractional share will have an inclusion ratio of zero and the other trust will have an inclusion ratio of one.

A trustee may elect to sever a trust in a qualified severance at any time. (Prior to this provision, with respect to a trust included in the transferor's gross estate under the transferor's will, the Treasury Regulations would have required that a court order be obtained to sever a trust where no provision was made in the governing instrument or under local law requiring or permitting a severance.) This section applies to severances made on or after January 1, 2001.

Modification of Valuation Rules The value of property for purposes of determining the inclusion ratio shall be its finally determined gift tax value or estate tax value depending on the circumstances of the transfer. In the case of a generation-skipping transfer tax exemption allocation deemed to be made at the conclusion of an estate tax inclusion period, the value for purposes of determining the inclusion ratio shall be its value at that time.

Late Elections The Treasury secretary is authorized to grant an extension of time to file an election to allocate generation-skipping transfer tax exemption where the transferor has inadvertently failed to allocate GST exemption on a timely filed gift tax return. If relief is granted, the gift tax or estate tax value of the transfer to the trust would be used to determine the exemption allocation.

The secretary is directed to consider all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer. This section applies to requests pending on, or filed after, December 31, 2000.

Substantial Compliance Substantial compliance with the statutory and regulatory requirements for allocating GST tax exemption will suffice to establish that GST exemption was allocated. An allocation of GST exemption under IRC § 2632 that demonstrates an intent to have the lowest possible inclusion ratio with respect to a transfer or a trust shall be deemed to be an allocation of so much of the transferor's unused GST exemption as produces the lowest possible inclusion ratio.

All relevant circumstances are considered in determining whether there has been substantial compliance, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Treasury secretary deems relevant.

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• Property acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent.
• Property transferred by the decedent during his lifetime to a "qualified revocable trust" (as defined in IRC § 645(b)(1)).
• Property transferred by the decedent during his lifetime to any other trust with respect to which the decedent reserved the right to make any change in the enjoyment thereof through the exercise of a power to alter, amend or terminate the trust.
• Any other property passing from the decedent by reason of the decedent's death to the extent such property passed without consideration.

Property must not only have been acquired from a decedent to be eligible for the increase in basis; it also must also have been "owned" by the decedent at death under the following conditions:
• With respect to property held jointly with the surviving spouse, the decedent is treated as owning one-half of the property.
• As to property held jointly with anyone other than the decedent's spouse, the decedent is considered as having owned his or her proportionate share of the property for which the decedent furnished the consideration.
• If the decedent held property jointly with anyone other than the surviving spouse and if the property was acquired by gift, bequest, devise or inheritance and their interests are not otherwise specified or fixed by law, the decedent is treated as the owner to the extent of the value of a fractional part, to be determined by dividing the value of the property by the number of joint tenants.
• The decedent is treated as the owner of property transferred by the decedent during life to a qualified revocable trust.
• Property over which the decedent holds a power of appointment is *not* treated as owned by the decedent. Thus, property held in a marital deduction trust over which the decedent possesses a general power of appointment will not be eligible for any basis adjustment.
• With respect to community property, the decedent is treated as owning the surviving spouse's one-half share of the property if at least one-half of the entire community interest is treated as owned by, and acquired from, the decedent.

Only "qualified spousal property" may receive the additional $3 million step-up in basis. Qualified spousal property is defined in the Act as "outright transfer property" and qualified terminable interest property ("Q-TIP"). Outright transfer property is defined as any interest in property acquired from the decedent by the decedent's surviving spouse.

Liabilities in excess of basis are disregarded in determining whether gain is recognized on the acquisition of property from a decedent and in determining the adjusted basis of such property, except with respect to the transfer of such property to a tax-exempt entity.

Property *ineligible* for the basis increase includes: (1) property acquired by the decedent by gift (other than from his or her spouse) within three years prior to decedent's death, (2) property that constitutes a right to receive income in respect of a decedent, (3) stock of a domestic international sales corporation or former domestic international sales corporation, (4) stock or securities of a foreign personal holding company, (5) stock of a foreign investment company and (6) stock of a passive foreign investment company (except for which a decedent shareholder had made a qualified electing fund election).

The income tax basis of an asset obviously plays a significant tax planning role; and it may be all that much more relevant as it affects assets that may produce current income tax benefits such as partnership interests, interests in S corporations, sole proprietorships and the like—*i.e.*, the recipient of such an asset may not have sufficient basis against which to take deductions.

Reporting Requirements

The new law imposes certain reporting requirements for lifetime gifts and transfers at death.

Effective for estates of decedents dying after December 31, 2009, the executor of a decedent's estate (or the trustee of a revocable trust) will be required to report to the Internal Revenue Service transfers at death of noncash assets in excess of $1.3 million (as adjusted for inflation after December 31, 2010), and transfers of appreciated property acquired from a decedent, that was acquired by the decedent within three years of death and was required to be reported on a gift tax return. The return is required to be filed with the decedent's final income tax return, or on such later date specified in regulations, and is to contain the following information:

(1) the name and taxpayer identification number of the recipient of the property,
(2) an accurate description of the property,
(3) the adjusted basis of the property in the hands of the decedent and the fair market value at the time of death,
(4) the decedent's holding period for the property,
(5) sufficient information to determine whether any gain on the sale of the property would be treated as ordinary income,
(6) the amount of the basis increase to the property under new IRC § 1022 and
(7) such other information as the Treasury secretary may prescribe by regulations.

Each recipient of property named in such a return must be furnished with the foregoing information, in-

cluding the name, address and telephone number of the person making the return, within 30 days after the filing of the return.

If the executor is unable to make a complete return for any property, the executor is to include in the return a description of such property and the name of every person holding an interest in it.

A donor who is required to file a gift tax return is to furnish to each person named in the return, not later than 30 days after the gift tax return is filed, a written statement showing the name, address and telephone number of the person required to make the return (generally the donor) and the information specified in the return with respect to the property received by such person.

Penalties The failure to report the transfer of property at the decedent's death, as described above, could result in a penalty of $10,000. The failure to file written statements to property recipients with respect to property received by the decedent within three years of death could result in a $500 penalty.

There also would be a penalty of $50 for each failure to report such information to a beneficiary.

Property Transfers in Satisfaction of a Pecuniary Bequest

Gain on the transfer of property in satisfaction of a pecuniary bequest is recognized only to the extent that the fair market value of the property at the time of the transfer exceeds the fair market value of the property on the date of the decedent's death, *not* the carryover basis of the property.

The recipient's basis in the transferred property is the basis of the property immediately prior to the transfer, increased by the amount of gain recognized on the transfer.

Gain on Sale of Principal Residence The Act extends the exclusion of any gain from the sale of the decedent's principal residence under IRC § 121 to the decedent's estate, to the beneficiaries or to a trust that was, immediately before the decedent's death, a qualified revocable trust, taking into account the decedent's use and ownership.

To qualify for the exclusion under IRC § 121, the residence must have been owned and used by the decedent as his or her principal residence for two or more years during the five-year period ending on the date of the sale. If the heir occupies the residence as his or her principal residence after acquiring it from the decedent, the period during which the decedent occupied the residence may be aggregated with that of the heir to determine whether the residence was occupied for the requisite two years.

Conservation Easements

Under existing law, a donor who retained a development right in a conservation easement that qualified for an estate tax exclusion could later extinguish that right by executing an agreement. If the agreement to extinguish the development right was not entered into within the earlier of (1) two years after the date of the decedent's death, or (2) the date of the sale of the land subject to the easement, those with an interest in the land would be personally liable for any additional tax. This provision would be retained after repeal of the estate tax.

The Act eliminates the requirement that the qualifying real property be located within 25 miles of a metropolitan area, national park or wilderness area, or within 10 miles of an urban national forest. A qualified conservation easement can be located anywhere in the United

Estate and Gift Tax Rates by Year

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
$1,000,000 - $1,250,000	41%	41%	41%	41%	41%	41%	41%	41%	41%	*	41%
$1,250,001 - $1,500,000	43%	43%	43%	43%	43%	43%	43%	43%	43%	*	43%
$1,500,001 - $2,000,000	45%	45%	45%	45%	45%	45%	45%	45%	45%	*	45%
$2,000,001 - $2,500,000	49%	49%	49%	48%	47%	46%	45%	45%	45%	*	55%
$2,500,001 - $3,000,000	53%	50%	49%	48%	47%	46%	45%	45%	45%	*	53%
$3,000,001 - $10,000,000	55%	50%	49%	48%	47%	46%	45%	45%	45%	*	55%
$10,000,001 - $17,184,000	60%[1]	50%	49%	48%	47%	46%	45%	45%	45%	*	60%
$17,184,001 and higher	55%	50%	49%	48%	47%	46%	45%	45%	45%	*	55%

* Although the current law provides for no federal estate tax rate in 2010, gifts will continue to be taxed. The rate will be the top individual income tax rate.

1. Reflects the applicable 55% highest rate plus the 5% surcharge to offset the advantages of lower rates for smaller estates.

States or its possessions. The Act also clarifies that the date for determining easement compliance is the date on which the contribution was made. These provisions are effective for estates of decedents dying after December 31, 2000.

Installment Payments

Effective for estate of decedents dying after December 31, 2001, the definition of a closely held business for purposes of installment payment of estate tax under IRC § 6166 is modified. The number of partners in a partnership and shareholders in a corporation that is considered to be a closely held business is increased from 15 to 45. An estate of a decedent with an interest in a qualifying lending and financial business will be eligible for installment payment of estate taxes.

An estate with an interest in a qualifying lending and financial business that claims installment payment of estate tax must make such payments over five years rather than the 10-year installment period available to other closely held business interests. The law also clarifies that only the stock of holding companies, not that of operating subsidiaries, must be non-readily tradable in order to qualify for installment payment of the estate tax. An estate with a qualifying property interest, held through holding companies, that claims installment payment of estate tax must make all installment payments over five years.

New Planning Strategies

In an era without an estate tax, how might the client's dispositive scheme be altered, if at all?

The immediate focus is likely to be on provisions benefiting the surviving spouse. In estates where the primary assets are the home and qualified retirement plan assets (noting that income taxes will still play a large role with respect to retirement plan assets), presumably the surviving spouse will be the decedent's primary beneficiary for personal and financial reasons, not tax reasons. A significantly large estate where the assets are more than sufficient to benefit all the heirs may produce a different result in planning.

In light of repeal, the reduction of the estate and gift tax rates, and the increase in the estate, gift and generation-skipping transfer tax exemption, planning strategies may depend in large part on the age and/or health of the client. The focus for an older client unlikely to survive to repeal would be the reduction of the value of his or her estate for estate tax purposes, including the implementation of various techniques under current estate planning practice to transfer property at little or no gift tax cost. While the younger client in good health may seek to minimize the gift tax, he or she may more readily choose to postpone transfers.

An older client who may not have otherwise provided for his or her surviving spouse might consider establishing a trust for the surviving spouse's benefit in order to defer the estate tax, in the situation where one spouse is likely to die prior to repeal and the surviving spouse may survive until after repeal, if in fact repeal ever really occurs. Family dynamics may, of course, play a key role where, for example, the surviving spouse may be unrelated to the ultimate takers and just as young as they are.

It would be advantageous to immediately use the increase in the unified credit equivalent, which now will also have an effect on the amount that can be transferred free from the generation-skipping tax. Consideration does need to be given, however, to any state gift tax that may be imposed (as of now only Connecticut, Louisiana, North Carolina, Tennessee and Puerto Rico have a gift tax).

Document Drafting Insofar as drafting testamentary documents, closer scrutiny needs to be applied to the provision disposing of the unified credit exemption equivalent, as well as the GST exempt amount.

Many of these provisions are drafted as a formula equal to the maximum amount that can pass free of federal estate tax. Under current practice, this amount does not pass outright to the surviving spouse and may even be directed away from the spouse. As the unified credit equivalent increases, the resultant effect on many testamentary schemes may be to substantially reduce what the spouse receives, even to the point of inadvertently disinheriting the spouse or giving rise to the spouse's right of election under state law.

In regard to the GST exemption, estate plans may include a pre-residuary bequest of the amount exempt from the GST, generally qualifying for the marital deduction in the form of a Q-TIP. With the increase in the exemption climbing to $3.5 million by 2009, a couple with total assets in the $10 million range may have disposed of $7 million of their combined estates in a manner inconsistent with their overall planning—*e.g.*, the intention may have been to pass the lion's share of the estate outright to the surviving spouse.

In connection with lifetime transfers, certain planning techniques that are currently being used will still prove to be effective, such as:

- Chapter 14 of the IRC remains in place, thus sanctioning the grantor retained annuity trust ("GRAT") and, as a result of the decision in *Walton v. Commissioner*,[5] the zeroed-out GRAT is a viable device.
- The sale to the intentionally defective grantor trust works to effect a freeze of the value of the transferred assets with the only gift being the initial contribution to fund the trust.

• A family limited partnership can work to take advantage of appropriate discounting.

The GRAT, the sale to the grantor trust and the use of the family partnership, as well as the charitable lead trust, are typical leveraging devices to take maximum advantage of the gift tax exemption. Because the gift tax continues, these vehicles still remain useful.

To avoid making gifts beyond the unified credit equivalent, long-term loans, with interest at the applicable federal rate, may be appropriate. Once there is no longer an estate tax, the loans can easily be forgiven at death without any transfer tax consequences.

Once there is repeal, a testator/grantor might establish a dynasty spray trust for the benefit of the spouse and issue. This would provide a vehicle that would, in perpetuity, be exempt from the gift tax and any estate tax that might subsequently be enacted.

A testamentary charitable remainder trust established after repeal would eliminate the impact of the carryover basis, because a charitable remainder trust would not have income recognition on the potential gain. The value of the non-charitable interest passing to family members would not be relevant because there would be no estate tax, and the need to obtain an estate tax charitable deduction would no longer exist. IRC § 644 requires that, to qualify as a charitable remainder trust, the value of the charitable remainder interest must be at least 10% of the fair market value of the property placed in the trust, and the payout rate to the non-charitable beneficiary cannot exceed 50%. These restrictions would limit the possibility of creating a charitable remainder trust that would last for several generations.

Insurance Life insurance will still play a role in estate planning after full estate tax repeal. Clients may still wish to insure against the potential capital gains tax as a result of carryover basis.

In preparing life insurance trusts, it seems wise to revisit the provisions allowing distribution of the policy during the grantor's life. Such a provision should not be so broad that it would constitute a reversion, but should be broad enough to allow the trustee to distribute out the policy as the trustee determines, taking into account eliminating any liability on the trustee for so doing.

Decreasing term life insurance may be in order, decreasing as estate tax repeal draws closer. The danger, however, is that the estate tax will not vanish as scheduled and it may then be more costly or impossible to obtain replacement insurance if needed to pay the tax.

Conclusion

Whether repeal will actually come to pass remains to be seen. In the interim, however, practitioners need to be cognizant of the changes and the potential impact on estate plans currently being crafted. We have several more Congresses and possibly one or two future presidential administrations that could turn on and/or off various provisions of the Act during this long transition period.

Insofar as advice to clients, from a purely a tax-planning point of view, postponing death may be advisable. However, waiting until after repeal may not be the best strategy for those with estates under $3.5 million. These individuals can avoid the estate tax and step up the basis of their assets, whereas death after repeal may mean the imposition of a capital gains tax on appreciated assets when sold.

If clients intend to avoid the estate tax altogether and wait to die until after repeal, death must occur between January 1 and December 31, 2010; otherwise, it will have been much ado about nothing when, if all goes as scheduled, we'll be right back where we started from.

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1. The Economic Growth and Tax Relief Reconciliation Act of 2001 (hereinafter the "Act"), Pub. L. 107-16, 115 Stat. 38.
2. IRC § 2503(b)(2).
3. N.Y. Tax Law § 971(a) says that the executor of a New York estate must file a New York return if required to file a return with respect to the federal estate tax (determined as if the limitation contained in Tax Law § 951(a) "were applicable in determining whether such executor is required to file such federal return"). Tax Law § 951(a), in turn, links the unified credit allowable to the credit provided in IRC § 2010 with the proviso that the credit shall not exceed the amount allowable as if the federal unified credit did not exceed the tax due under IRC § 2001 on a federal taxable estate of $1 million.
4. *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968).
5. 115 T.C. 589, Dec. 54,165 (2000).

Federal Exemption Amounts by Year

Calendar Year	Estate Tax Exemption	GST Tax Exemption	Gift Tax Exemption
2002	$1 million	$1.06 million[1]	$1 million
2003	$1 million	$1.06 million[1]	$1 million
2004	$1.5 million	$1.5 million	$1 million
2005	$1.5 million	$1.5 million	$1 million
2006	$2 million	$2 million	$1 million
2007	$2 million	$2 million	$1 million
2008	$2 million	$2 million	$1 million
2009	$3.5 million	$3.5 million	$1 million
2010	(tax repealed)	(tax repealed)	$1 million
2011 and thereafter	$1 million	$1.06 million[2]	$1 million

1. As adjusted for inflation.
2. As adjusted for inflation from 2001

Net Taxable Estate: $1,000,000

This table and those that follow illustrate by year what the estate taxes would have been under the "old" tax rules that applied before the legislation approved in June, and the taxes that will apply under the "new" rules if no further changes are made in the federal and state estate tax laws.

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $1,000,001 Through $1,250,000
2001	Now	$675,000	$125,250	$33,200	$33,200	$92,050	$125,250	41% [1]
2002	Old	$700,000	$116,000	$33,200	$33,200	$82,800	$116,000	41% [1]
	New	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [2]
2003	Old	$700,000	$116,000	$33,200	$33,200	$82,800	$116,000	41% [1]
	New	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [2]
2004	Old	$850,000	$58,500	$33,200	$33,200	$25,300	$58,500	41% [1]
	New	$1,500,000	$ 0	$ 0	$ 0	$ 0	$ 0	0
2005	Old	$950,000	$19,500	$19,500	$19,500	$ 0*	$19,500	41% [1]
	New	$1,500,000	$ 0	$ 0	$ 0	$ 0	$ 0	0

* The formula that IRC § 2011 provides for calculating the state tax credit results in no federal tax at this level.

2006	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	$2,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	0
2007	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	$2,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	0
2008	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	$2,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	0
2009	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	$3,500,000	$ 0	$ 0	$ 0	$ 0	$ 0	0
2010	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	Repeal	$ 0	$ 0	$ 0	$ 0	$ 0	0
2011	Old	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]
	New	$1,000,000	$ 0	$ 0	$ 0	$ 0	$ 0	41% [1]

1. The allocation of this additional amount between the federal and state governments is subject to IRC § 2011, which governs how the credit for state taxes is computed. The state tax credit begins as 8/10ths of 1% of the amount by which the "adjusted taxable estate" (defined for purposes of IRC § 2011 as "the taxable estate reduced by $60,000") exceeds $40,000 and gradually increases in 18 additional steps until it reaches $1,082,800 plus 16% of the excess over $10,040,000.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount.

The computation of the state tax credit amount, and thus any amount due to New York State, will continue to be governed by IRC § 2011.

Net Taxable Estate: $1,250,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $1,250,001 Through $1,500,000
2001	Now	$675,000	$227,750	$48,400	$48,400	$48,400	$227,750	43% [1]
2002	Old	$700,000	$218,500	$48,400	$48,400	$170,100	$218,500	43% [1]
	New	$1,000,000	$102,500	$48,400	$48,400	$66,200*	$114,600	43% [2]

* Only $36,300 (75% of the $48,400 state tax credit) can be subtracted from the $102,500 tentative federal tax figure.

2003	Old	$700,000	$218,500	$48,400	$48,400	$170,100	$218,500	43% [1]
	New	$1,000,000	$102,500	$48,400	$48,400	$78,300*	$126,700	43% [2]

* Only $24,200 (50% of the $48,400 state tax credit) can be subtracted from the $102,500 tentative federal tax figure.

2004	Old	$850,000	$161,000	$48,400	$48,400	$112,600	$48,400	43% [1]
	New	$1,500,000	$ 0	$48,400	$48,400	$ 0	$48,400	0
2005	Old	$950,000	$122,000	$48,400	$48,400	$73,600	$122,000	43% [1]
	New	$1,500,000	$ 0	$48,400	$48,400	$ 0	$48,400	0
2006	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	$2,000,000	$ 0	$48,400	$48,400	$ 0	$48,400	0
2007	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	$2,000,000	$ 0	$48,400	$48,400	$ 0	$48,400	0
2008	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	$2,000,000	$ 0	$48,400	$48,400	$ 0	$48,4000	0
2009	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	$3,500,000	$ 0	$48,400	$48,400	$ 0	$48,400	0
2010	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	Repeal	$ 0	$48,400	$48,400	$ 0	$48,400	0
2011	Old	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]
	New	$1,000,000	$102,500	$48,400	$48,400	$54,100	$102,500	43% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount.

The computation of the state tax credit amount, and thus any amount due to New York State, will continue to be governed by IRC § 2011.

Net Taxable Estate: $1,500,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $1,500,001 Through $2,000,000
2001	Now	$675,000	$335,250	$64,400	$64,400	$270,850	$335,250	45% [1]
2002	Old	$700,000	$326,000	$64,400	$64,400	$261,600	$326,000	45% [1]
	New	$1,000,000	$210,000	$64,400	$64,400	$161,700*	$226,100	45% [2]

* Only $48,300 (75% of the $64,400 state tax credit) can be subtracted from the $210,000 tentative federal tax figure.

2003	Old	$700,000	$326,000	$64,400	$64,400	$261,600	$326,000	45% [1]
	New	$1,000,000	$210,000	$64,400	$64,400	$177,800*	$242,200	45% [2]

* Only $32,200 (50% of the $64,400 state tax credit) can be subtracted from the $210,000 tentative federal tax figure.

2004	Old	$850,000	$268,500	$64,400	$64,400	$204,100	$268,500	45% [1]
	New	$1,500,000	$ 0	$64,400	$64,400	$ 0	$64,400	45% [2]
2005	Old	$950,000	$229,500	$64,400	$64.400	$165,100	$229,500	45% [1]
	New	$1,500,000	$ 0	$64,400	$64,400	$ 0	$64,400	45% [2]
2006	Old	$1,000,000	$210,000	$64,400	$64.400	$145,000	$210,000	45% [1]
	New	$2,000,000	$ 0	$64,400	$64.400	$ 0	$64,400	0 [2]
2007	Old	$1,000,000	$210,000	$64,400	$64.400	$145,000	$210,000	45% [1]
	New	$2,000,000	$ 0	$64,400	$64.400	$ 0	$64,400	0 [2]
2008	Old	$1,000,000	$210,000	$64,400	$64.400	$145,000	$210,000	45% [1]
	New	$2,000,000	$ 0	$64,400	$64.400	$ 0	$64,400	0 [2]
2009	Old	$1,000,000	$210,000	$64,400	$64.400	$145,000	$210,000	45% [1]
	New	$3,500,000	$ 0	$64,400	$64.400	$ 0	$64,400	0 [2]
2010	Old	$1,000,000	$210,000	$64,400	$64.400	$145,000	$210,000	45% [1]
	New	Repeal	$ 0	$64,400	$64.400	$ 0	$64,400	0 [2]
2011	Old	$1,000,000	$210,000	$64.400	$64,400	$145,100	$210,000	45% [1]
	New	$1,000,000	$210,000	$64,400	$64,400	$145,100	$210,000	45% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005, the additional federal tax will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

In 2006 and beyond, the only additional tax due will be the amount payable to New York State based on the computations established by IRC § 2011.

Net Taxable Estate: $2,000,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $2,000,001 Through $2,500,000
2001	Now	$675,000	$560,250	$99,600	$99,600	$460,650	$560,250	49% [1]
2002	Old	$700,000	$551,000	$99,600	$99,600	$451,400	$551,000	49% [1]
	New	$1,000,000	$435,000	$99,600	$99,600	$360,300*	$459,900	49% [2]

* Only $74,700 (75% of the $99,600 state tax credit) can be subtracted from the $435,000 tentative federal tax figure.

2003	Old	$700,000	$551,000	$99,600	$99,600	$451,400	$551,000	49% [1]
	New	$1,000,000	$435,000	$99,600	$99,600	$385,200*	$484,800	49% [2]

* Only $49,800 (50% of the $99,600 state tax credit) can be subtracted from the $435,000 tentative federal tax figure.

2004	Old	$850,000	$493,500	$99,600	$99,600	$393,900	$493,500	49% [1]
	New	$1,500,000	$225,000	$99,600	$99,600	$150,300*	$299,700	48% [2]

* Only $24,900 (25% of the $99,600 state tax credit) can be subtracted from the $225,000 tentative federal tax figure.

2005	Old	$950,000	$454,500	$99,600	$99,600	$354,900	$454,500	49% [1]
	New	$1,500,000	$225,000	$99,600	$99,600	$180,180*	$279,780	47% [2]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $99,600 deduction reduces a $2,000,000 estate to $1,900,400. The 45% tax on the $400,400 excess over $1,500,000 = $180,180.

2006	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$445,000	49% [1]
	New	$2,000,000	$ 0	$99,600	$99,600	$ 0	$99,600	46% [2]
2007	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$445,000	49% [1]
	New	$2,000,000	$ 0	$99,600	$99,600	$ 0	$99,600	45% [2]
2008	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$445,000	49% [1]
	New	$2,000,000	$ 0	$99,600	$99,600	$ 0	$99,600	45% [2]
2009	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$445,000	49% [1]
	New	$3,500,000	$ 0	$99,600	$99,600	$ 0	$99,600	45% [2]
2010	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$445,000	49% [1]
	New	Repeal	$ 0	$99,600	$99,600	$ 0	$99,600	0 [2]
2011	Old	$1,000,000	$435,000	$99,600	$99,600	$335,400	$435,000	49% [1]
	New	$1,000,000	$435,000	$99,600	$99,600	$335,500	$435,000	49% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005 through 2008, the federal tax amount will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

In 2009 and 2010, the only additional tax due will be the amount payable to New York State based on the computations established by IRC § 2011.

Net Taxable Estate: $2,500,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax In 1998 Statute	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable To Amounts From $2,500,001 Through $3,000,000
2001	Now	$675,000	$805,250	$138,800	$138,800	$666,450	$805,250	53% [1]
2002	Old	$700,000	$796,000	$138,800	$138,800	$657,200	$796,000	53% [1]
	New	$1,000,000	$680,000	$138,800	$138,800	$575,900*	$714,700	50% [2]

* Only $104,100 (75% of the $138,800 state tax credit) can be subtracted from the $680,000 tentative federal tax figure.

2003	Old	$700,000	$796,000	$138,800	$138,800	$657,200	$796,000	53% [1]
	New	$1,000,000	$680,000	$138,800	$138,800	$610,600*	$749,400	49% [2]

* Only $69,400 (50% of the $138,800 state tax credit) can be subtracted from the $680,000 tentative federal tax figure.

2004	Old	$850,000	$738,500	$138,800	$138,800	$599,700	$738,500	53% [1]
	New	$1,500,000	$465,000	$138,800	$138,800	$430,300*	$569,100	48% [2]

* Only $34,700 (2% of the $138,800 state tax credit) can be subtracted from the $435,000 tentative federal tax figure.

2005	Old	$950,000	$699,500	$138,800	$138,800	$560,700	$699,500	53% [1]
	New	$1,500,000	$460,000	$138,800	$138,800	$404,764*	$524,764	47% [2]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $138,800 deduction reduces a $2,500,000 estate to $2,361,200. The 47% tax on the $361,200 excess over $2,000,000 = $169,764, which is added to the $235,000 due from an estate of $2,000,000.

2006	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	$2,000,000	$230,000	$138,800	$138,800	$166,152*	$304,952	46% [2]

* The $138,800 deduction for state taxes is subtracted from the $2,500,000 estate, leaving a balance of $2,361,200. The 46% tax on the balance over $2,000,000 = $166,152.

2007	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	$2,000,000	$225,000	$138,800	$138,800	$166,540*	$301,340	45% [2]

* The $138,800 deduction for state taxes is subtracted from the $2,500,000 estate, leaving a balance of $2,361,200. The 45% tax on the balance over $2,000,000 = $162,540.

2008	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	$2,000,000	$225,000	$138,800	$138,800	$166,540*	$301,340	45% [2]

* Same calculation as in 2007.

2009	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	$3,500,000	$ 0	$138,800	$138,800	$ 0	$138,800	0 [2]
2010	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	Repeal	$ 0	$138,800	$138,800	$ 0	$138,800	0 [2]
2011	Old	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]
	New	$1,000,000	$680,000	$138,800	$138,800	$541,200	$680,000	53% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005 through 2008, the federal tax amount will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

In 2009 and 2010, the only additional tax due will be the amount payable to New York State based on IRC § 2011.

Net Taxable Estate: $3,000,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $3,000,001 Through $3,500,000
2001	Now	$675,000	$1,070,250	$182,000	$182,000	$888,250	$1,070,250	55% [1]
2002	Old	$700,000	$1,061,000	$182,000	$182,000	$879,000	$1,061,000	55% [1]
	New	$1,000,000	$930,000	$182,000	$182,000	$793,500*	$975,500	50% [1]

* Only $136,500 (75% of the $182,000 state tax credit) can be subtracted from the $930,000 tentative federal tax figure.

2003	Old	$700,000	$1,061,000	$182,000	$182,000	$879,000	$1,061,000	55% [1]
	New	$1,000,000	$925,000	$182,000	$182,000	$834,000*	$1,016,000	49% [1]

* Only $91,000 (50% of the $182,000 state tax credit) can be subtracted from the $925,000 tentative federal tax figure.

2004	Old	$850,000	$1,003,500	$182,000	$182,000	$821,500	$1,003,500	55% [1]
	New	$1,500,000	$705,000	$182,200	$182,000	$659,500*	$841,500	48% [1]

* Only $45,500 (25% of the $182,000 state tax credit) can be subtracted from the $705,000 tentative federal tax figure.

2005	Old	$950,000	$964,500	$182,000	$182,000	$782,500	$964,500	55% [1]
	New	$1,500,000	$695,000	$182,000	$182,000	$609,460*	$791,460	47% [1]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $182,000 deduction for taxes actually payable to New York State reduces a $3,000,000 estate to $2,818,000. The 47% tax on the $318,000 excess over $2,500,000 = $149,460, which is added to the $460,000 due on $2,500,000, yielding the total of $609,460.

2006	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	$2,000,000	$460,000	$182,000	$182,000	$376,280*	$558,280	46% [1]

* The $182,000 deduction for state taxes actually payable to New York State reduces the $3,000,000 estate to $2,818,000. The 46% tax on $818,000 = $376,280.

2007	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	$2,000,000	$450,000	$182,000	$182,000	$368,100*	$550,100	45% [1]

* The $182,000 deduction for state taxes actually payable to New York State reduces the $3,000,000 estate to $2,818,000. The 45% tax on $818,000 = $368,100.

2008	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	$2,000,000	$450,000	$182,000	$182,000	$368,100*	$550,100	45% [1]

* Same calculation as in 2007.

2009	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	$3,500,000	$ 0	$182,000	$182,000	$ 0	$182,100	0
2010	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	Repeal	$ 0	$182,000	$182,000	$ 0	$182,100	0
2011	Old	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]
	New	$1,000,000	$945,000	$182,000	$182,000	$763,000	$945,000	55% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005 through 2008, the federal tax amount will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

In 2009 and 2010, the only additional tax due will be the amount payable to New York State based on IRC § 2011.

Net Taxable Estate: $3,500,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Percentage Applicable To Amounts From $3,500,001 Through $10,000,000
2001	Now	$675,000	$1,345,250	$229,200	$229,200	$1,116,050	$1,345,000	55% [1]
2002	Old	$700,000	$1,336,000	$229,200	$229,200	$1,106,800	$1,336,000	55% [1]
	New	$1,000,000	$1,180,000	$229,200	$229,200	$1,008,100*	$1,237,300	50% [2]

* Only $171,900 (75% of the $229,200 state tax credit) can be subtracted from the $1,180,000 tentative federal tax figure.

2003	Old	$700,000	$1,336,000	$229,200	$229,200	$1,106,800	$1,336,000	55% [1]
	New	$1,000,000	$1,170,000	$229,200	$229,200	$1,055,400*	$1,284,600	49% [2]

* Only $114,600 (50% of the $229,200 state tax credit) can be subtracted from the $1,170,000 tentative federal tax figure.

2004	Old	$850,000	$1,278,500	$229,200	$229,200	$1,049,300	$1,278,500	55% [1]
	New	$1,500,000	$945,000	$229,200	$229,200	$887,700*	$1,116,900	48% [2]

* Only $57,300 (25% of the $229,200 state tax credit) can be subtracted from the $1,180,000 tentative federal tax figure.

2005	Old	$950,000	$1,239,500	$229,200	$229,200	$1,010,300	$1,239,500	55% [1]
	New	$1,500,000	$930,000	$229,200	$229,200	$822,276*	$1,051,476	47% [2]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $229,200 deduction reduces a $3,500,000 estate to $3,270,800. The 47% tax on the $270,800 excess over $3,000,000 = $127,276, which is added to the $695,000 due on $3,000,000, yielding the total of $822,276.

2006	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	$2,000,000	$690,000	$229,200	$229,200	$584,568*	$813,768	46% [2]

* The $229,200 deduction for state taxes reduces the $3,500,000 estate to $3,270,800. The 46% tax on the $278,800 excess over $3,000,000 is $124,568, which is added to the $460,000 due on $3,000,000, for the total of $584,568.

2007	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	$2,000,000	$675,000	$229,200	$229,200	$571,860*	$801,060	45% [2]

* The $229,200 deduction for state taxes reduces the $3,500,000 estate to $3,270,800. The 45% tax on the $270,800 excess over $3,000,000 is $121,860, which is added to the $450,000 due on $3,000,000, for the total of $571,860.

2008	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	$2,000,000	$675,000	$229,200	$229,200	$571,860*	$801,060	45% [2]

* Same calculation as in 2007.

2009	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	$3,500,000	$ 0	$229,200	$229,200	$ 0	$229,200	45% [2]
2010	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	Repeal	$ 0	$229,200	$229,200	$ 0	$229,200	0 [2]
2011	Old	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]
	New	$1,000,000	$1,220,000	$229,200	$229,200	$990,800	$1,220,000	55% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005 through 2009, the federal tax amount will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

Net Taxable Estate: $10,000,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $10,000,001 Through $17,184,000
2001	Now	$675,000	$4,920,250	$1,067,600	$1,067,600	$3,852,650	$4,920,250	60% [1]
2002	Old	$700,000	$4,911,000	$1,067,600	$1,067,600	$3,843,400	$4,911,000	60% [1]
	New	$1,000,000	$4,430,000	$1,067,600	$1,067,600	$3,629,300*	$4,696,900	50% [2]

* Only $800,700 (75% of the $1,067,600 state tax credit) can be subtracted from the $4,430,000 tentative federal tax figure.

2003	Old	$700,000	$4,911,000	$1,067,600	$1,067,600	$3,843,400	$4,911,000	60% [1]
	New	$1,000,000	$4,355,000	$1,067,600	$1,067,600	$3,821,200*	$4,888,800	49% [2]

* Only $533,800 (50% of the $1,067,600 state tax credit) can be subtracted from the $4,255,000 tentative federal tax figure.

2004	Old	$850,000	$4,853,500	$1,067,600	$1,067,600	$3,785,900	$4,853,500	60% [1]
	New	$1,500,000	$4,065,000	$1,067,600	$1,067,600	$3,798,100*	$4,865,700	48% [2]

* Only $266,900 (25% of the $1,067,600 state tax credit) can be subtracted from the $4,065,000 tentative federal tax figure.

2005	Old	$950,000	$4,814,500	$1,067,600	$1,067,600	$3,746,900	$4,814,500	60% [1]
	New	$1,500,000	$3,985,000	$1,067,600	$1,067,600	$3,483,228*	$4,550,828	47% [2]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $1,067,600 deduction reduces the $10,000,000 estate to $8,932,400. The 47% tax on the $5,432,4000 excess over $3,500,000 = $2,553,228, which is added to the $930,000 due on $3,500,000, yielding the total of $3,483,228.

2006	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,600	$3,727,400	$4,795,000	60% [1]
	New	$2,000,000	$3,685,000	$1,067,600	$1,067,600	$3,188,904*	$4,256,504	46% [2]

* The $1,067,600 deduction for state taxes actually payable to New York State reduces the $10,000,000 estate to $8,932,400. The 46% tax on the $5,432,400 excess over $3,500,000 = $2,498,904, which is added to the $690,000 due on $3,500,000, yielding the total of $3,188,904.

2007	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,600	$3,727,400	$4,795,000	60% [1]
	New	$2,000,000	$3,600,000	$1,067,600	$1,067,600	$3,119,580*	$4,187,180	45% [2]

* The $1,067,600 deduction for state taxes actually payable to New York State reduces the $10,000,000 estate to $8,932,400. The 45% tax on the $5,432,400 excess over $3,500,000 = $2,444,580, which is added to the $675,000 due on $3,500,000, yielding the total of $3,119,580.

2008	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,600	$3,727,400	$4,795,000	60% [1]
	New	$2,000,000	$3,600,000	$1,067,600	$1,067,600	$3,119,580*	$4,187,180	45% [2]

* Same calculation as in 2007.

2009	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,600	$3,727,400	$4,795,000	60% [1]
	New	$3,500,000	$2,925,000	$1,067,600	$1,067,600	$2,444,580*	$3,512,180	45% [2]

* The $1,067,600 deduction for state taxes actually payable to New York State reduces the $10,000,000 estate to $8,932,400. The 45% tax on the $5,432,400 excess over $3,500,000 = $2,444,580.

2010	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,600	$3,727,400	$4,795,000	60% [1]
	New	Repeal	$ 0	$1,067,600	$1,067,600	$ 0	$1,067,600	0 [2]
2011	Old	$1,000,000	$4,795,000	$1,067,600	$1,067,000	$3,727,400	$4,795,000	60% [1]
	New	$1,000,000	$4,795,000	$1,067,600	$1,067,000	$3,727,400	$4,795,000	60% [1]

1. See note 1 on the chart for estates of $1 million.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount.

In 2005 through 2009, the federal tax amount will be computed by applying this percentage to the additional estate value minus the effect of the deduction for state taxes actually paid.

In 2010, the only additional tax due will be the amount payable to New York State based on IRC § 2011.

Net Taxable Estate: $17,184,000

		Unified Credit Exemption Equivalent	Tentative Tax After Unified Credit	Credit for State Tax Allowed by IRC § 2011	Amount Due to NY State	Amount Due to Federal Gov't	Total Taxes Due	Tax Percentage Applicable to Amounts From $17,184,001 Upward
2001	Now	$675,000	$9,230,650	$2,216,240	$2,216,240	$7,014,410	$9,230,650	55% [1]
2002	Old	$700,000	$9,221,400	$2,216,240	$2,216,240	$7,005,160	$9,221,400	55% [1]
	New	$1,000,000	$8,022,000	$2,216,240	$2,216,240	$6,359,820*	$8,576,060	50% [2]

* Only $1,662,180 (75% of the $2,216,240 state tax credit) can be subtracted from the $8,022,000 tentative federal tax figure.

2003	Old	$700,000	$9,221,400	$2,216,240	$2,216,240	$7,005,160	$9,221,400	55% [1]
	New	$1,000,000	$7,875,160	$2,216,240	$2,216,240	$6,767,040*	$8,983,280	49% [2]

* Only $1,108,120 (50% of the $2,216,240 state tax credit) can be subtracted from the $7,875,160 tentative federal tax figure.

2004	Old	$850,000	$9,163,900	$2,216,240	$2,216,240	$6,947,660	$9,163,900	55% [1]
	New	$1,500,000	$7,513,320	$2,216,240	$2,216,240	$6,959,260*	$9,175,500	48% [2]

* Only $554,060 (25% of the $2,216,240 state tax credit) can be subtracted from the $7,513,320 tentative federal tax figure.

2005	Old	$950,000	$9,124,900	$2,216,240	$2,216,240	$6,908,660	$9,124,900	55% [1]
	New	$1,500,000	$7,361,480	$2,216,240	$2,216,240	$6,319,847*	$8,536,087	47% [2]

* Credit for state tax is eliminated and replaced by a deduction for state taxes actually paid. The $2,216,240 deduction reduces the $17,184,000 estate to $14,967,760. The 47% tax on the $4,967,760 excess over $10,000,000 = $2,334,847, which is added to the $3,985,000 due on $10,000,000, yielding the total of $6,319,847.

2006	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	$2,000,000	$6,989,640	$2,216,240	$2,216,240	$5,970,170*	$8,186,410	46% [2]

* The $2,216,240 deduction for state taxes actually payable to New York State reduces the $17,184,000 estate to $14,967,760. The 46% tax on the $4,967,760 excess over $10,000,000 = $2,285,170, which is added to the $3,685,000 due on $10,000,000, yielding the total of $5,970,170.

2007	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	$2,000,000	$6,832,800	$2,216,240	$2,216,240	$5,835,492*	$8,051,732	45% [2]

* The $2,216,240 deduction for state taxes actually payable to New York State reduces the $17,184,000 estate to $14,967,760. The 45% tax on the $4,967,760 excess over $10,000,000 = $2,235,492, which is added to the $3,600,000 due on $10,000,000, yielding the total of $5,835,492.

2008	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	$2,000,000	$6,832,800	$2,216,240	$2,216,240	$5,835,492*	$8,051,732	45% [2]

* Same calculation as in 2007.

2009	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	$3,500,000	$6,157,800	$2,216,240	$2,216,240	$5,160,492*	$7,376,732	45% [2]

* The $2,216,240 deduction for state taxes actually payable to New York State reduces the $17,184,000 estate to $14,967,760. The 45% tax on the $4,967,760 excess over $10,000,000 = $2,235,492, which is added to the $2,925,000 due on $10,000,000, yielding the total of $5,160,492.

2010	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	Repeal	$ 0	$2,216,240	$2,216,240	$ 0	$2,216,240	45% [2]
2011	Old	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]
	New	$1,000,000	$9,105,400	$2,216,240	$2,216,240	$6,889,160	$9,105,400	55% [1]

1. See note 1 on the chart for estates of $1 million. At this level, the state consistently receives 16% of every additional estate dollar and the federal government receives 39%.

2. In 2002, the additional federal tax will be the figure computed using this percentage minus 75% of the state tax credit amount; in 2003, the additional federal tax will be the resulting figure minus 50% of the state tax credit amount; in 2004, the additional federal tax will be the resulting figure minus 25% of the state tax credit amount. In 2005 through 2009, the federal tax will be computed by applying this percentage to the additional estate value minus the deduction for state taxes actually paid.

In 2010, the only additional tax due will be the amount payable to New York State based on IRC § 2011.

Editor's Mailbox

President's Message

The ludicrous vignette that occupied the President's Message in the July/August issue apparently was employed as an artifice to persuade the reader that public exposure of lawyer discipline proceedings at an intermediate stage would somehow cure our problems of public image and greatly enhance the public perception of the Bar.

We are asked to believe somehow that attorney discipline in New York State is a subject of discussion and deep concern among ordinary people, not in this state, but around the firesides of rural North Dakota. Presumably on snowbound winter days, they talk of little else.

In more than 52 years of practice in this state, much of it spent in bar-related activities, I have never heard a single layperson raise that subject in conversation. Peoples' complaints about lawyers are mostly related to frivolous lawsuits, grossly inflated damages, and the defense of "obviously guilty criminals," as they are viewed by some.

Of course, as a former association officer, I am well aware that there are sometimes complaints about lawyers, some substantial and serious, most groundless or trivial. We are not a profession of perfect people, but every single complaint – groundless, trivial or not – receives a response and an explanation of action taken or not taken, and why. Most complainants are satisfied with the process, though not always with the result.

Contrary to the thrust of the President's Message, the agitation to remove the traditional cloak of confidentiality from attorney disciplinary proceedings does not come from the public. Instead, it emanates almost entirely from two sources.

One is the press, most of whose members think lawyers are overpaid while they themselves are underpaid, and who believe that they should have access to any meeting or proceeding, be it political, professional, business or personal, and that everything now confidential should be exposed, except, of course, their own sources.

The other promoters of change are a few "blue-ribbon committees" that issue foreordained reports little related to any practical personal experience of the subject matter. The McKay Report and the Craco Report may be widely discussed and admired in the farmhouses of North Dakota, but interestingly, not yet among the public of this most liberal state in the nation.

Indeed, "the public" has been represented for many years by prominent lay members on the grievance committees of every judicial district in this state, serving three-year terms and rotating in and out just as lawyer members do. If these nonlawyer members have expressed dissatisfaction with the confidentiality rule, it has certainly not been publicly reported nor cited by the advocates of "open" proceedings.

The President's Message suggests that public confidence in the lawyer disciplinary system would somehow be dramatically elevated if only the proceedings were publicized at an intermediate stage. But what could do more to inspire public confidence than the very statistics quoted in the same message, showing public discipline imposed in 98 percent of the cases decided in 2000, and dismissals in only 3 of 239? That suitably publicized statistic persuasively demonstrates that the disciplinary system is vigorous and effective, and shows clearly why there is no public agitation for change.

Were public trials to be required in disciplinary cases, witnesses might be reluctant to testify, especially in cases involving sexual contact, taxes, and bankruptcy, to name only a few examples. And the conviction rate might be considerably lower than it is now.

Fortunate indeed, were the three exonerated lawyers that the confidentiality rule prevented the embarrassment and humiliation that would have attended the publication of the charges against them, charges that were ultimately found to be groundless.

In my own practice, I have represented more than a few respondents charged with misconduct, including, at different times, a lawyer accused of dozens of instances of conflict of interest and self-dealing, and another alleged to have forged judicial signatures on a court order. After two week-long hearings before a referee, and argument in the Appellate Division in each case, all charges were dismissed. But despite the results, if those accusations and hearings had been widely reported in the press, as they surely would have been under an "open-hearing" rule, both of those unblemished careers would certainly have been destroyed.

Since the disciplinary statistics clearly demonstrate to the public that the guilty are being processed and punished, why must we also punish the innocent by exposing them to damaging publicity that cannot be undone by an ultimate dismissal?

Far better it would be if the organized bar would devote more effort to publicizing the enormous good that so very many lawyers do in the community, both institutionally and personally, and less to the demeaning self-flagellation exemplified in the President's Message.

Philip H. Magner, Jr.
Buffalo, N.Y.

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If you must use Latin and French, do not make errata. It is *de rigor* (really *de rigueur*) that you use foreign words correctly. *Exempli gratia*, misspelling Latin words is not *de minimus* (really *de minimis*). *Inter alia*, using foreign words may lead to redundancies, such as ordering chile con carne with meat while you cruise along the Rio Grande River. *Quod vide* "*vis-à-vis*," which means *compared with*, not *about*.

Legal writers are also entreated to forgo archaic words and expressions. It behooves you to eschew them. Store them in a file cabinet marked "Nice to Know" and forget them. A nonlawyer will never use archaic words. Methinks lawyers should quash them too.

Never use these old-English legalisms: *aforementioned*, *aforesaid*, *by these presents*, *foregoing*, *forthwith*, *hereinafter*, *henceforth*, *herein*, *hereinabove*, *hereinbefore*, *hitherto*, *herewith*, *inasmuch*, *one* (before a person's name), *per* (or, worse, *as per*), *said* (instead of *the* or *this*), *same* (as a pronoun), *such* (instead of *the*, *this*, or *that*), *therein*, *thereto*, *thereat*, *thenceforth*, *thereof*, *thereby*, *hereunto*, *thereafter*, *therefor* (which is different from *therefore* and means *for that*, as in "I need a receipt therefor"), *therefrom*, *to wit*, *whatsoever*, *whensoever*, *whosoever*, *whilst*, *whereas*, *wherein*, *whereby*, *wherewith*, and all verbs ending in *eth*.

Deem and consider this: You may have wanted to eschew up and spit out your aforesaid first-year legal-writing course. But please acknowledge and confess that what you learned therein in your first hour will, *inter alia*, put you on *terra firma* to improve your practice, to wit, your career. More this writer sayeth not.

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1. Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loyola L.A. L. Rev. 301 (1987).
2. Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 N.Y. St. B.J. 12, 12 (Nov. 1997).
3. Hollis T. Hurd, Writing for Lawyers 34 (1982).
4. *See, e.g.*, Rudolf Flesch, How to Write Plain English: A Book for Lawyers and Consumers (1979); Richard C. Wydick, Plain English for Lawyers (2d ed. 1985).
5. George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 209 (1967).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 210.
10. *Id.*
11. *Id.*

GERALD LEBOVITS, a principal court attorney in Supreme Court, Criminal Term, New York County, is also an adjunct professor of law and the Moot Court faculty advisor at New York Law School. He is the author of numerous articles and *Advanced Judicial Opinion Writing*, a handbook for New York State's trial and appellate law clerks and court attorneys. This column is adapted from that handbook. His e-mail address is Gerald.Lebovits@law.com.

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On *Terra Firma* With English

By Gerald Lebovits

Remember the first hour of your first-year legal-writing course in law school? You learned that legalese is a pejorative term and that good legal writers prefer English to romance languages. Then you spent the rest of law school reading cases that contradicted that good advice.

Those who distrust their writing teacher's advice not to use legalese should read Benson and Kessler's authoritative 1987 study.[1] It turns out that nonlawyers, practicing lawyers, law professors, and judges believe that those who compose legalese are lousy lawyers – the more the legalese, the lousier the lawyer. Benson & Kessler also proved the reverse. Everyone believes that the less the lawyer uses legalese, the better the lawyer is.

Legalese – lawyers' jargon – is turgid, annoying, adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis. From Judge Rosenblatt: "There is still a lot of 'legalese' in current usage, but the best writers have come to regard it as pretentious or bad writing."[2] Legalese can be eliminated: "When legalese threatens to strangle your thought process, pretend you're saying it to a friend. Then write it down. Then clean it up."[3]

Think of it this way, among other things. If you go on a date and your date asks you what you do for a living, would you answer, "I am, *inter alia*, a J.D."? If you would, plan to spend the next Saturday night in a law library – by yourself – studying texts on plain English for lawyers.[4] If you somehow secure a second date, the only tokens of affection your date will expect from you will be an English-Latin/Latin-English dictionary and plenty of caffeinated coffee to help your date stay awake during your effervescent conversation. Instead of an affectionate "hello," your date will expect you to say "To All To Whom These Presents May Come, Greetings."

Justice Smith of the Arkansas Supreme Court said this in his classic lecture on opinion writing: "I absolutely and unconditionally guarantee that the use of legalisms in your opinions will destroy whatever freshness and spontaneity you might otherwise attain."[5] Legal writing should be planned and formal, not conversational. Writing cannot emulate conversation. When people speak they use inflection, modulation, and body language. Nor should writers write as they speak, unless memorializing such pretties as *umm*, *ah*, *I mean*, and *you know* appeal to you. But Justice Smith explained that legal writers should not write words they "would not use in conversation."[6]

About *said*, as in *aforesaid*, Justice Smith asked whether one would say, "I can do with another piece of that pie, dear. Said pie is the best you've ever made."[7] About *same*, he asked whether one would say, "I've mislaid my car keys. Have you seen same?"[8] About the illiterate *such*, he asked whether one would say, "Sharon Kay stubbed her toe this afternoon, but such toe is all right now."[9] About *hereinafter called*, he asked whether one would say, "You'll get a kick out of what happened today to my secretary, hereinafter called Cuddles."[10] About *inter alia*, he asked, "Why not say, 'Among other things?' But, more important, in most instances *inter alia* is wholly unnecessary in that it supplies information needed only by fools . . . . So you not only insult your reader's intelligence but go out of your way to do it in Latin yet!"[11]

Many who enjoy legalisms also enjoy Latin. They might better enjoy being understood. As the line from high school goes, "Latin is a dead language, as dead as it can be. First it killed the Romans, and now it's killing me." Unless, a fortiori, you have an acute case of terminal pedantry, Latinate only when the word or expression is deeply ingrained in legal usage (*mens rea*, *supra*) and when you have no English quid pro quo.

Using Anglo-Saxon (English) words, not foreign, fancy, or Old English words, is not jingoistic. It is, mirabile dictu, common sense. Seldom is the foreign word le mot juste. A foreign word, rather, is usually an enfant terrible, a veritable bête noire. Foreign words and phrases are rarely apropos.

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A *sine qua non* of good legal writing: Do not use Latin and Norman French terms instead of (*in lieu of*?) well-known English equivalents. Example: "I met the Chief Judge in person," *not* "I met the Chief Judge *in personam*."

The legal writer may use *stare decisis* for *precedent*; *sua sponte* for *on its own motion* or *of its own accord*; *amicus curiae* for *friend of the court*; *res gestae* for *things done*; or *pro bono* for *free legal work for the public good*. The lay reader will not fully understand the English terms anyway. You and your alter ego will not be *personae non grata* if your *modus operandi* is to use bona fide foreign terms of art that have long been incorporated into the lingua franca of legal English and have no commonly known and well-understood English equivalent.

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