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NEW YORK STATE BAR ASSOCIATION

Journal

Youth Courts

The Power of Positive Peer Pressure

A special issue on youth courts

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NEW YORK STATE BAR ASSOCIATION
Journal

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The Power of Positive Peer Pressure

BY JUDITH S. KAYE

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STEPHEN P. YOUNGER

New York Youth Courts: Harnessing the Power of Positive Peer Pressure

It is an honor for me to contribute to this *Journal* issue, which is devoted to youth courts. The continued success and expansion of New York's youth courts is an issue that, in my view, is critical not just to the State Bar but to our state as a whole. It is so important that, last June, I created a Special Committee on Youth Courts to review best practices for developing effective youth courts around the state. Spearheaded by Chief Judge Emeritus Judith S. Kaye and Patricia L. R. Rodriguez, the special committee will also examine the role that the legal profession can play in promoting and financing youth courts and will help identify locations where new youth courts can be established.

I created this special committee because we owe it to our young people to do all we can to provide a nurturing atmosphere where they can become active participants in our society. We know that sometimes peer pressure can have a negative effect on our children and can lead to behaviors that, if not addressed early and corrected properly, can result in more severe problems down the road. If peer pressure can lead young people into delinquency, then peer pressure can be a part of the solution in keeping them out of delinquency.

More than 100 youth courts are currently operating in New York. Participating teens are trained to serve as jurors, judges and attorneys; they hear real-life cases of their peers involving minor offenses such as truancy, school fighting, vandalism, and shoplifting. Sanctions from these courts typically include community service, writing essays or letters of apology, and counseling. The courts are overseen by volunteer judges, attorneys, educators, and law enforcement officials and use positive peer pressure to ensure that young people who commit these minor offenses give back to the community and avoid further involvement in the justice system.

Youth courts offer a number of benefits to our legal system and to the public at large. First, they provide an important early intervention for teens who have committed low-level offenses. Moreover, youth courts educate young people about and instill respect for the rule of law and encourage a greater sense of civic engagement. By providing an alternative to incarceration, youth courts also lessen the burdens placed on probation and correctional services by reducing the rates of recidivism among teens and by relieving state and local courts of significant docket burdens.

By any measure, youth courts have proved to be a tremendous success in addressing adolescent delinquency issues. For example, national statistics show that kids who go through the youth court process are less likely to get into trouble with the criminal justice system again than those who are processed through the conventional courts. On the local level, a youth court has been in operation in the Town of Bethlehem in Albany County for more than 15 years. During this time, the Bethlehem Youth Court has handled approximately 35 to 40 cases per year involving youths between the ages of 10 and 19. In recent years, that court has seen a 100% successful completion rate for participants, including thousands of hours of community service performed at many local not-for-profit organizations.

In the nearby Town of Colonie, a youth court has been in operation since 1995. Of the more than 1,000 cases that have been adjudicated since its inception, 99% of young offenders have completed their sanctions. In total, more than 43,000 hours of community service have been performed, benefiting a myriad of local organizations, including food shelters, local clean-up projects, and various fundraisers to raise awareness of diseases such as cancer and AIDS.

But perhaps more important, our State's youth courts have had a powerful impact on the lives of young people across the state.

The success of these youth courts has been an integral part in the campaign to establish a youth court in New York's capital city of Albany. This October, the State Bar Association hosted an informational forum sponsored by the special committee at the State Bar Center, which brought together

STEPHEN P. YOUNGER can be reached at syounger@nysba.org.

several leaders of the legal, law enforcement and education communities in the Capital Region. The outstanding turnout at this forum gives us hope that we will someday in the near future have another youth court success story in our state.

Youth courts can transform lives. In the words of one participant who experienced the process, "youth court has made me more responsible and made me think about college, my future, and doing more things for the community on my own." Raising children to become thoughtful, active participants in our society is vital to the future of our country. Youth courts provide an important outlet to assist parents, teachers, and members of the legal community in achieving this goal, and they give profound opportunities for service to all the young people who participate in these innovative programs.

The State Bar is proud to support youth courts and their mission of providing a juvenile justice alternative that is operated for and by young people. I am confident that our Special Committee on Youth Courts will have great success in furthering the mission of these innovative courts and spreading the word about both their efficiency and efficacy. ■

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† Real Problems, Real Answers (video replay)
February 10 Jamestown

CPLR Update
February 11 Albany (1:00 pm – 5:00 pm)
February 12 Syracuse (9:00 am – 12:00 pm)
February 16 New York City (6:00 pm – 9:00 pm)
February 28 Long Island (6:00 pm – 9:00 pm)
March 18 Buffalo (1:00 pm – 5:00 pm)

Basics of Intellectual Property
March 3 New York City
March 10 Albany

Legal Malpractice
(9:00 am – 1:00 pm)
March 4 New York City; Syracuse
March 11 Albany; Long Island; Rochester
March 18 Westchester

Bridging the Gap 1
(two-day program)
March 8–9 New York City (live session)
Albany (video conference from NYC)

† 7th Annual International Estate Planning Institute
(two-day program)
March 24–25 New York City

LPM Marketing Program
(12:00 pm – 5:00 pm)
March 25 New York City

Hot Topics in Elder Law and Special Needs Planning
March 28 New York City
March 29 Rochester
March 30 Albany; Westchester
April 1 Long Island

† Hot Topics in Real Property Law (video replay)
(9:00 am – 4:35 pm)
March 31 Jamestown

Ethics and Civility
(9:00 am – 1:00 pm)
April 15 Long Island; Rochester
April 29 Albany; Buffalo; New York City

15th Annual New York State and City Tax Institute
April 27 New York City

Ethics for Business and Transactional Lawyers
(9:00 am – 1:00 pm)
May 2 Long Island
June 1 New York City
June 7 Albany

Commercial Litigators – Bridge the Gap
(two-day program)
May 5–6 New York City

Health Care Decision Making and New Legislation
May 6 Albany
May 13 New York City
May 20 Buffalo

Securities Law Primer: What You Need to Know
May 11 New York City

Starting Your Own Practice
May 20 New York City (live session)
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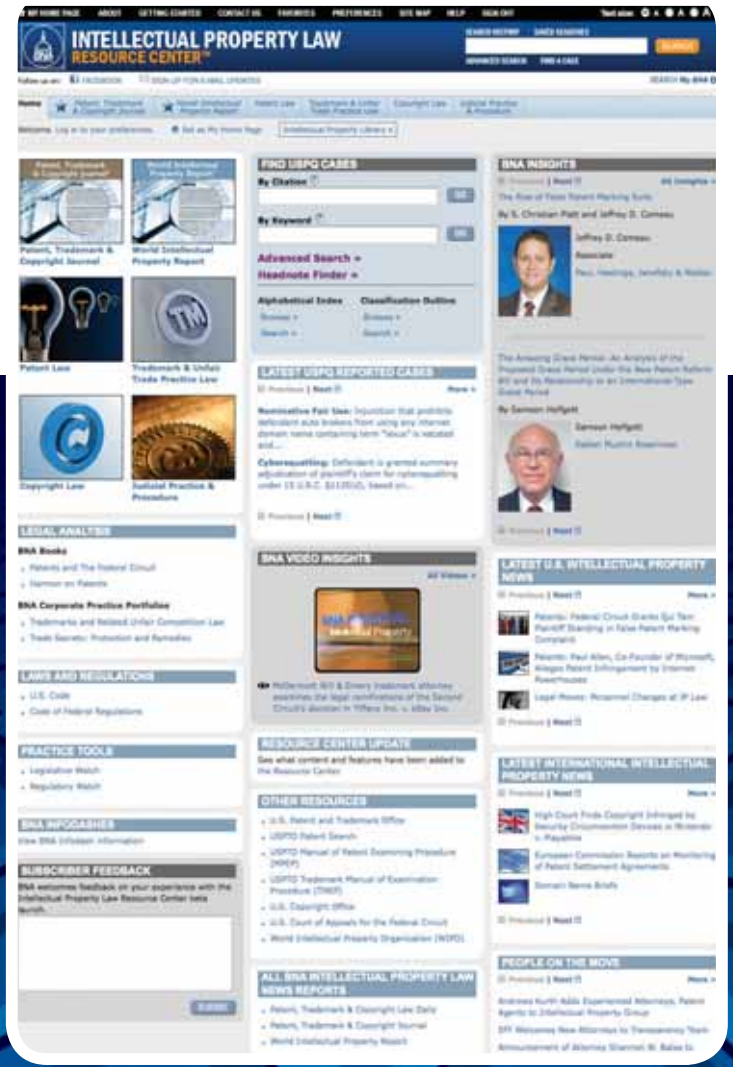

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Judge Kaye at Staten Island Youth Court's first graduation ceremony, December 2008.

Judith S. Kaye, formerly Chief Judge of the State of New York, is now Of Counsel to Skadden, Arps, Slate, Meagher & Flom. She is the Issue Editor for this special edition of the *Journal*. She expresses her profound thanks to her Skadden colleague Shari Graham for her extraordinary assistance in, and commitment to, putting together this special edition, start to finish.

Youth Courts – An Introduction to the January 2011 *Journal*

By Judith S. Kaye

Why Youth Courts?

For me the story begins – of all places – in Anchorage, Alaska, at the Summer 2008 meeting of the Conference of Chief Justices and Conference of State Court Administrators. The meeting opened with a warm welcome from then-Anchorage Mayor, today Alaska's Senator, Mark Begich. But instead of the Official Greeter's usual palaver about our host city and state, Mayor Begich spoke glowingly of Anchorage's youth court, a stunningly successful "second chance" Alaska offers teenagers in trouble.

Chief Administrative Judge Ann Pfau and I exchanged excited glances, and at the session's conclusion, instead of going to the next scheduled program, we headed across the street and knocked on the door of the Anchorage Youth Court. We were not disappointed.

What we ultimately saw (after signing a confidentiality agreement) was an actual youth court proceeding, conducted in a courtroom, involving a 16-year-old who had taken a car. (We arrived only after the factual presentation and did not learn the details.) His plea of guilty was his ticket entry into youth court. The courtroom was orderly and well staffed by his contemporaries, plus his parents and a lawyer were there to assure due process. This was, after all, a criminal charge referred by the District Attorney. After hearing the evidence, the three robed teenage judges retired to confer privately and then announced the recommended punishment – restitution, community service, letters of apology and behavioral modification classes. The offender conferred with the lawyer and accepted the sentence in full.

The message the young judges then solemnly delivered to him – eye to eye – included the following: They began by pointing out their common ground – what he had done diminished all teenagers in the eyes of the public. They then explained youth court to him, pointing out that he would be welcome to return there in any role but one. He could be the judge, prosecuting or defending lawyer, community advocate or court attendant. But he could never again be in youth court as the offender.

This was his one chance, his opportunity to turn his life around. If he did not fulfill his sentence, or if he committed another crime, he would be punished with a conviction that would follow him all the rest of his life – when he applied to school, or for a job, or for housing, anything. The choice was entirely his. Powerful. No wonder their success rate is high.

When Judge Pfau and I returned to New York my first call was to Dan Donovan, Staten Island District Attorney, then President of the District Attorneys Association. And after I sputtered out the story, still emotional from having personally witnessed the proceedings, his first words were, "Great. Let's do it in Staten Island." And so we began. I'm proud of our Staten Island Youth Court, now in its second year.

My Anchorage story plainly shows several of the immediate benefits offered by youth courts. The "kids" administering the court were magnificent. Their participation in youth court afforded them a first-class education in civics and in public service, too often lacking among their peers. The offender and his family got important lessons too. Only contemporaries could have delivered the message so meaningfully, both through the questions they asked and the sentence they imposed. It really hit home. The courts, and the schools, are beneficiaries too. Court dockets are crowded enough. Kids definitely need to be punished for offensive conduct – even "typical" adolescent misbehavior like school scuffles, vandalism, petty thefts, graffiti and writing on desks should be redressed. But does conduct like that need to be criminalized? When possible, kids should be kept in their schools and with their families, not arrested, prosecuted and sent to faraway out-of-home facilities. Do we really need to keep feeding the "School to Prison Pipeline"? We know all too well the grim statistics that follow school dropouts. Can't we do better for kids, for ourselves, and for the future of our nation?

In the days, months and years since that fateful visit to Anchorage – where they are so rightly proud of their youth court initiative – I have learned a lot about youth courts. Most surprising, I learned that the idea is decades old, and that it continues to function fabulously in several places around the state and country. And wouldn't you know – the Anchorage Youth Court actually had its origins right here in New York State, with a young Alaskan who was attending Cornell Law School! Even more surprising to me, however, is that the idea has lost its zip, its contagion – and not unrelatedly, federal financial support and other resources. Which brings us to this special *Journal* issue.

Why Not Youth Courts Now?

This is the moment, this is the time, to reformulate and reenergize the idea of youth courts. It is a moment unique in my own decades as a lawyer and judge when public interest centers on the outrageous, intolerable failures of our juvenile justice system. The media are ablaze with the atrocities of New York's juvenile placement facilities; the United States Department of Justice even threatened to sue New York if something isn't done here. I have never seen greater political will, leadership or commitment to improving our juvenile justice system.

And think for a moment: Should it really be our incarceration statistics that distinguish us as a nation, that we lock up more young people, and destroy more young families, than any other nation in the world? Today, more than two million children have an incarcerated parent, 50% more than a decade ago. Two out of three incarcerated mothers were the sole custodial parent before incarceration, and two out of five incarcerated fathers were living with their children prior to prison. *The New York Times* has called this the "incarceration generation."[1] This is America?

And boy, do we have statistics! Take my word for it: the relationship between being a school drop out and being incarcerated has been established beyond all question. Yes, we need the research, but we need more than research. We need to focus our efforts on keeping kids in schools and out of courts. When we talk about juvenile justice today, education is becoming at least as important a subject as punishment. It's about time.

So why *not* youth courts now? Why not take a full-fledged, enthusiastic stab at interrupting the School to Prison Pipeline with youth courts in schools, in courts, and in police and probation departments? Why not second chances for deserving offenders to avoid the lifetime scar of arrest and conviction? Why not healthy programs in civic education and public service for youth court members? This is not a tired old idea gone sour. It's a tried-and-true idea that simply needs new juice, new support, new commitment.

And isn't this the perfect kick-off? Our great State Bar President Steve Younger certainly thought so when he constituted a Special Committee on Youth Courts, co-chaired by Patricia Rodriguez and me, with a stellar membership. Aren't we – members of the esteemed New York State Bar Association, readers of this great *Journal*, lawyers, judges, academics, students, policymakers, concerned citizens – aren't we the perfect people to carry this idea to fruition? There is a role for each of us in accomplishing this, I promise.

In the ensuing pages we have selected the very best people to tell the story of what has been done and what needs to be done. Now only one task remains. ■

1. Erik Eckholm, *In Prisoners' Wake, a Tide of Troubled Kids* (Jul. 5, 2009), *available at* http://www.nytimes.com/2009/07/05/us/05prison.html?_r=1&ref=erik_eckholm.

Allegany County Youth Court Prosecuting Attorney Tad Johnson addresses the Jury on a case involving Criminal Trespass 2nd Degree as Judge Brad Palmer and Bailiff Joel Common look on.

Youth Courts: A Chance to Build Hope

By Shay Bilchik

As parents and as members of society we want our children's lives to be filled with love, opportunity and hope. We want them to love and be loved in a healthy way; to have opportunities, particularly for skill-building and meaningful work; and to have hope that things can get better, that today isn't the best that life can be. This is what we want in our own lives, and it is what we strive to help our most disadvantaged youth have in their lives. This desire is no less intense for youth involved with the juvenile justice system.

Rabbi Harold Kushner, in his book *Living a Life That Matters*, said, "We don't have to do great things, headline grabbing deeds, to matter to the world. Everyone who puts in an honest day's work, everyone who goes out of his or her way to help a neighbor, everyone who makes a child laugh, changes the world for the better."[1] In the same book, he quotes Dr. Dean Ornish, "Our survival depends on the healing power of love, intimacy and relationships." Our caseworkers in juvenile justice and other human services may not provide these things directly, but they can and often do provide the connections to them – and, ultimately, to hope. In juvenile justice, these connections include both treatment and positive, pro-social influences.

Shay Bilchik is the founder and Director of the Center for Juvenile Justice Reform at Georgetown University Public Policy Institute. From 2000 to 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America (CWLA). Prior to his tenure at CWLA, he headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice from 1994 to 2000. From 1977 to 1993, Mr. Bilchik was an Assistant State Attorney in Miami, Florida, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney.

A Robust Toolkit

Creating these connections requires the creative use of a variety of tools. As Abraham Maslow said, "[i]f the only tool you have is a hammer, you tend to see every problem as a nail."[2] Our challenge, therefore, is to develop a rich, robust toolkit in order to be successful with the youth with whom we come in contact. The tools we need are ones that relate to the various domains of youths' lives – family, school, peer and community – as well their individual development and needs. As described elsewhere in this *Journal*, one can see how youth courts can help us anchor our work in these domains. This article elaborates on the application of youth courts to these domains and how their use fits within current trends in juvenile justice policy and practice.

Youth courts are an essential tool – providing both **accountability** and the **opportunity** for exposure to pro-social peers and the protective impact they provide.

History

An analysis of the history of juvenile justice policy and practice in this country reveals an ebb and flow in how we have treated juveniles. The juvenile justice system has moved back and forth between responses that have been more punitive in nature and ones that have been more balanced in providing accountability and developmental opportunities, including the greater or lesser use of institutional care and community-based services. There is an increasing body of knowledge on effective practices, and the research speaks to the need to look, in each domain, at the risk factors that are present in the life of a youth, those that are contributing to negative or delinquent behavior along with those protective factors that are serving, or could serve, as buffers against that behavior.

Influence of Peers

An example of this relationship between risk and protective factors that is relevant to youth courts and delinquent youth can be found in the peer group domain. Association with an anti-social or delinquent peer group can greatly increase the probability that the youth will also engage in delinquent behavior.[3] This risk factor can be offset by protective factors within this domain (such as association with pro-social peers) or other domains (such as a teacher or positive youth development activity in school or a youth leader at a Boys and Girls Club). These factors can make the difference in the balance between risk and protection in a youth's life, which is then associated with either a pro-social or delinquent lifestyle. The youth court is an essential tool in this dynamic by providing both accountability and the opportunity for exposure to pro-social peers and the protective impact they provide.

Disconnection From Family

This need for pro-social connections has become evident in our work at the Center for Juvenile Justice Reform at Georgetown University's Public Policy Institute, where we focus on youth who are involved in both the child welfare and juvenile justice systems. These youth tend to present even higher levels of risk, translating directly into a greater need for the protective factors that help to offset the risk present in their lives. Abuse and neglect make up a significant risk factor associated with later delinquent behavior.[4] While this higher probability of delinquent behavior may be directly and immediately related to the family domain, it is also true that in removing many of these youth from their homes and their abusive or neglectful caretakers in order to protect them from further harm, we also disconnect them from positive family members (siblings, grandparents and other kin), as well as pro-social individuals within their schools and communities.

This is exacerbated by the fact that the average length of stay in foster care is more than two years,[5] often with numerous changes in placement. While this time is often spent with foster families that can provide protective factors, the lack of stability in placement is troubling. Too, these youth are often placed in group-care settings,

An analysis of the history of juvenile justice policy and practice in this country reveals an **ebb and flow in how we have treated juveniles**.

which can lead to contact with youth who present high levels of mental health disorders and substance abuse problems, introducing an additional risk factor into their lives and highlighting the need to provide every possible opportunity for pro-social activity and a connection to pro-social peers while youth are in foster care. This need was supported in recent research that found that one of the covariates associated with youth placed in foster care engaging in delinquent behavior and entering the juve-

nile justice system is a lack of social bonding opportunities while in care.[6] We need to provide as many pro-social opportunities as possible while these youth are in care, as well as once they come in contact with the juvenile justice system.

The response has included the greater or lesser **use of institutional care** and **community-based services**, an evolution informed by an increasing body of knowledge on effective practices.

Positive Development

Youth courts should be one of the tools we use in this regard; they provide an opportunity for civic engagement and positive youth development, while also providing the accountability we require as part of our response to delinquent behavior. Used as either a diversionary or dispositional option, youth courts bring the youth together with youth involved in pro-social behavior. Perhaps most important, this exposure is not limited to an individual event but is linked to the more in-depth developmental opportunity youth courts provide, which distinguishes youth courts from many other options available within the juvenile justice toolkit.

This is not to say that the impact of the initial youth court experience is not positive in and of itself. Indeed, facing one's "peers" and experiencing the youth court process is a rehabilitative experience as well as an exercise in accountability. What increases its impact, however, is that the experience is enhanced through the ongoing involvement it provides for the many youth who remain involved with the work of the youth court. This is youth development activity that provides the ongoing protection from further delinquent behavior.

We need to provide as many **pro-social opportunities** as possible while these youth are in care, as well as once they come in contact with the juvenile justice system.

As Jeffrey Butts, a leading researcher in the area of youth development has suggested, it is this sort of activity that helps to enhance the resilience of our youth. The notion underlying Butts's work in this area is that all young people can develop positively when connected to the right opportunities, the right support and the right relationships. In order to maximize a youth development opportunity we must provide two stages of potential growth: (1) the learning and doing phase and (2) the attaching and belonging phase.

The learning and doing phase involves developing new skills and competencies and using the new skills; taking on new responsibilities; and developing self-efficacy and personal confidence.[7] In many ways, this mirrors how the initial youth court experience prepares the youth to move from "offender" status to "member" status. The attaching and belonging phase reflects the youth becoming an active member of this pro-social group, developing the sense of belonging, valuing service to others and being part of a larger community. This describes a transition from negative behavior and association with an anti-social peer group, to one connected to opportunity and hope for the future.

This is perhaps the true promise of having youth courts in our juvenile justice toolkit – a tool that weaves together our need for a system response to delinquency that requires accountability, while at the same time creating a pro-social development experience. If used effectively, it is an experience that can better connect youth to the opportunities and hope we want them to have in their lives. ■

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On May 3, 2010, during the Harlem Community Justice Center's annual "Law Day Celebration," participants of the Harlem Youth Court recite an oath of confidentiality during a mock hearing.

Hon. William R. Shaw, Cornell '73 (JD & MPA), is a general practitioner in Ithaca, N.Y., and a part-time Town Justice in his hometown of Covert.

Something Old, Something New: A Personal Story of Youth Court Origins

By William R. Shaw

Like most good ideas, the youth court idea is borrowed, not new. It can be traced back to the late 19th century, when William "Daddy" George founded his George Junior Republic in Freeville, New York. Among its tenets was self-government by the young men who came there, including legislating and enforcing rules by the "citizens" of the Republic. The citizens also developed a court system that provided for prosecution of violations, youth representation of those charged, and a youth court with teen judges and juries to determine guilt or innocence and impose penalties.

Malcolm J. Freeborn, Jr., George's son-in-law, later began promoting the broader application of this youth court concept in the Tompkins County community, devoting countless hours to discussion with adult and youth leaders throughout the county. He made clear, however, that, while premised on youth initiative and leadership, the youth court would require adult endorsement.

After months of meetings, back in 1962 a core group of county-wide youth began drafting, publicizing and conducting presentations in five area high schools. Two county-wide referenda were held in the schools, with more than 4,000 youth voting overwhelmingly in favor of the concept of a county youth court and of a constitution for the Tompkins County Youth Court.[1] This novel idea was launched to handle delinquency cases referred from local city and town courts, county probation, even family court. The youth members would prosecute, defend, judge and sentence convicted teenagers. No other process of this kind was known to exist.[2]

Off and Running

Selected youth and community leaders were appointed by the local family court judge. Training was provided by volunteer members of the Tompkins County Bar Association and local District Attorney Richard B. Thaler. In October 1962, after a 10-week training course and passing a "bar exam," the first contingent of attorneys was sworn in by then-presiding County Judge Norman G. Stagg. Under the constitution, these 15 youth became the Tompkins County Youth Court Bar Association. I was a proud 14-year-old member of that group. We were 14 to

18 years old, from several area high schools, with various backgrounds and interests.[3]

We relied on those first attorney volunteers to train and guide us further to serve as judges, prosecutors and defense lawyers, clerks and bailiffs. We attended and witnessed local courts and met with local judges. Several mock trials were held to practice the skills we had been taught. Meanwhile, "Mal" Freeborn lobbied city and county officials for courtroom space, equipment and furniture for the youth court to conduct its training and its sessions, and we received access to and use of the historic Old County Courthouse in Ithaca. We were conceived as a community program, independent of school administrators and totally youth run.

In December 1962, Lansing Town Justice Fred Spry, convinced of our viability, sent us our first three cases. Defendants were arraigned, advised of their rights, provided with trained youth counsel, and prosecuted by peers. Based on the evidence, and testimony of witnesses and victims, the youth jury found the defendants guilty and imposed a sentence of community service. Thus, peer adjudication for teenagers was established in New York.

Youth Court Procedure

Each defendant referred to the youth court was provided with the same basic rights available in other courts, including assignment of a defense attorney, the opportunity to cross-examine witnesses, the opportunity to produce evidence or defense witnesses, and a right to an appeal. Defendants and their parents had to sign a consent form for their case to be transferred to the jurisdiction of the youth court. While that consent waived certain legal rights, the waiver could be withdrawn at any time. Virtually none did.

While adult attorneys or law students were available to provide advice, they did not make the decisions of guilt or innocence. The youth court judges decided the nature of the crime and meted out the degree of punishment. When I reached the age of 16, I was selected to serve as a youth court judge, then chief judge. We sat as a panel of three judges, with one presiding. The option of returning the case to the "referring agency"[4] was available to both the judges and defendants, although rarely used. The sentences were an array of community service alternatives, performed over time, up to a maximum of 50 hours.

Faculty from Cornell University (from what is now its School of Human Ecology) studied and reported on the impact on defendants, participants and the community as a whole.[5] For the most part, they observed invaluable opportunities and education for the members of the youth court but had mixed opinions on the impact on defendants. Recidivism for youth court defendants was exceedingly low (one known case in the first decade) but very hard to document. Youth defendant records are sealed both in family court and often in municipal courts. The concept of peer adjudication was also debated. Some felt that the socio-economic background of the youth court members did not match those of the defendants. Others felt it compared well with adult jury peers.

Spread of the Idea

The youth court relied on volunteers at its outset. Facilities and support by the County District Attorney were followed by offices and courtroom space made available in the Old County Courthouse and a modest operating budget from the Ithaca Youth Bureau. A part-time coor-

> Among the Republic's tenets was **self-government** by the young men who came there, including legislating and enforcement of rules by the **"citizens"** of the Republic.

> This **novel idea** was launched to **handle delinquent cases** referred from local city and town courts, county probation, even family court.

> The youth court members would **prosecute, defend, judge and sentence** convicted teenagers.

dinator position was created in 1967–68, which I filled, while a junior at Cornell University. Legal advisors were typically law students from Cornell, as well. (I performed that role in 1969–70.)

After early success and interest from youth in the nearby Village of Trumansburg, a "district court" was created for that school district. The constitution had provided for such an option. They created their own bar association and conducted their own district court, which conducted its own training, and convened its own cases. However, its cost and limited caseload led to its cessation in the early '70s.

No other process of this kind was known to exist.

During the late '60s and early '70s, caseload referrals tapered off, especially from the County Probation Department. As a result of concerns regarding the legal authority to refer cases, Tompkins County Assemblywoman Constance E. Cook worked on drafting Assembly Bill A-5992.[6] While the bill passed overwhelmingly in the Assembly, it never was voted out of the Senate Judiciary Committee. The prevailing view was that express authority for "youth conducted procedure" was unnecessary since there was already broad authority under the informal intake procedures operating statewide.

As a result of the novelty and publicity of the Tompkins County Youth Court, inquiries were received from other parts of New York and other states. I recall working with interested leaders in Western New York, Fort Leonard Wood, Missouri, and our neighboring states of Pennsylvania and Ohio. I attended a conference of the National Youth Councils of Civic Affairs in Dallas, Texas, in 1967, where the youth court concept found interest and support nationwide. Later inquiries came from other countries, including Germany and Sweden.

Each defendant referred to the youth court was provided with the same **basic rights** available in other courts.

Budget Stresses

The Tompkins County Youth Court found its bureaucratic home in the City of Ithaca's Youth Bureau, which provided space, staff, equipment and supplies through the early '80s. However, support by the County Probation Department was inconsistent. While the City Youth Bureau support was invaluable, that support also waned, as financial strain impacted the city's youth services budget.

During 1977–78, I served as chair of the newly created Tompkins County Youth Board and sought greater county support, but only very limited resources were available to support the county youth court. It continued under the auspices of the City Youth Bureau, but by 1984, the youth court was sharing space and competing for funds with an Ithaca neighborhood youth activities center (known as GIAC). When GIAC was compelled to reduce its budget, the county-wide youth court program was dropped. Without staff, space or resources, the Tompkins County Youth Court was discontinued.

The 1990s saw the emergence of youth courts in counties and states across the country. It is ironic that Tompkins County, which started the program 50 years ago, has not been able to re-launch its program. Meanwhile, in Anchorage, Alaska, young attorneys launched a youth court, inspired by a Cornell law student who learned of the idea during her three years in Tompkins County.

The Office of Juvenile Justice and Delinquency Prevention, within the U.S. Department of Justice, established the National Youth Court Center in 1999. That Center provides advice, services and sample documents nationwide. Sadly, a review of its documents and articles on the history of youth court did not reveal any reference to its genesis at George Junior Republic and Tompkins County, New York. Currently nearly 1,000 youth courts are operating in the United States. Perhaps Tompkins County, the home of youth court, will be the next. ■

1. The constitution adopted in 1962 is available from the author. It was resubmitted to the youth of the county after five years and again received an overwhelming vote of support in another county-wide referendum. It was later revised in 1971.

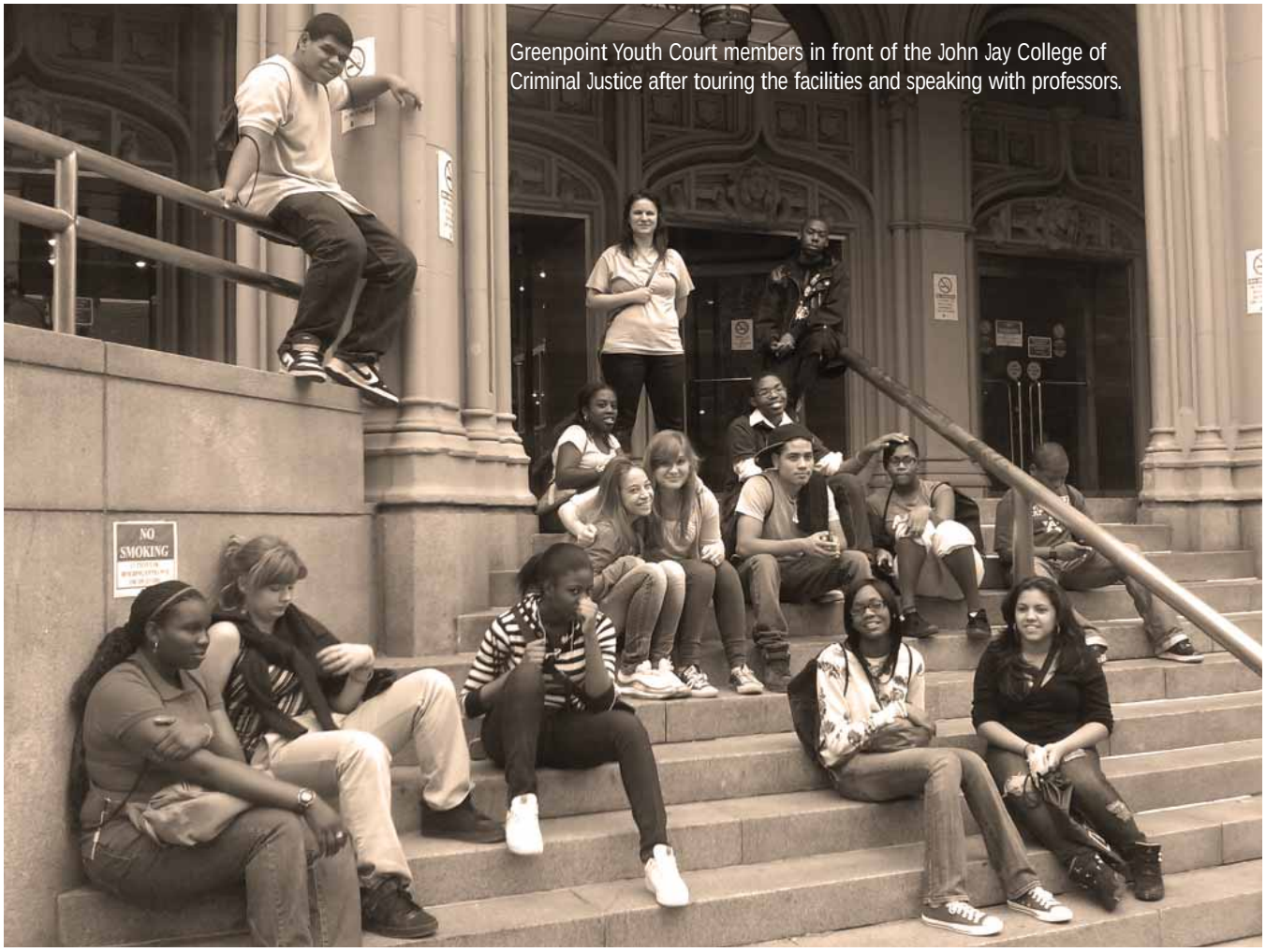
2. The concept of youth juries had existed in Hamburg, New York (where Town Justice Ron Tills presided) but they served an advisory role only.

3. During 1962, 44 enrolled in the Bar course, and 22 completed it. In subsequent years between 25 and 115 took the course and over 250 were sworn in during the first 10 years of operation. Most cases were for charges of petit larceny, vehicle and traffic violations, and criminal mischief.

4. Referrals came from town, village and city court, as well as the County Probation Department.

5. The Tompkins County Youth Court, 1964, by Prof. Edwin Devereux.

6. I served as her Legislative Intern during this time and contributed to the effort to enact this legislation.



Greenpoint Youth Court members in front of the John Jay College of Criminal Justice after touring the facilities and speaking with professors.

Teen Courts – Do They Work and Why?

By Jeffrey A. Butts and Jennifer Ortiz

Introduction

Teen courts (also known as youth courts or peer courts) are specialized diversion programs for young offenders that use court-like procedures in courtroom settings. The typical delinquent youth referred to teen court is probably 12 to 15 years old, in trouble for the first time, and charged with vandalism, stealing or other non-violent offense. Teen court offers a non-binding, informal alternative to the regular juvenile court process. In most cases, young offenders agree to participate in teen court as a way of avoiding formal prosecution and adjudication in juvenile court. If they agree to participate, but then refuse to comply with teen court sanctions, young offenders risk being returned to juvenile court to face their original charges.

When judged by the straightforward metric of proliferation, teen courts are clearly a success. The number of teen court programs in the United States grew quickly over the past two decades. Although fewer than 100 programs existed prior to 1990, recent surveys suggest that more than 1,200 programs are in operation today.[1]

Jeffrey A. Butts, Ph.D., is executive director of the Justice Research and Evaluation Center at John Jay College of Criminal Justice in New York City.

Jennifer Ortiz is a research assistant and Ph.D. student at the John Jay College of Criminal Justice.

Despite their popularity, there are many unanswered questions about the effectiveness of teen courts. The overall impression one gets from the evaluation literature is positive, but researchers have yet to identify exactly why teen courts work. Most important, studies have not yet investigated whether some teen court models are better than others.

What Does Research Tell Us?

The most recent, most comprehensive investigation of teen court effectiveness was conducted by the Urban Institute.[2] The project studied teen courts in four jurisdictions: Alaska, Arizona, Maryland and Missouri. More than 500 teen court cases from the four sites were compared with similar cases handled by the traditional juvenile justice system. In three of the four study sites, recidivism was lower among youth handled in teen court. In Alaska, for example, recidivism for teen court cases was 6%, compared with 23% of cases handled by the traditional juvenile justice system and matched with the teen court sample on variables such as age, sex, ethnicity and offense history. In Missouri, the recidivism rate was 9% in teen court and 27% in the traditional process. The difference among Arizona youth (9% vs. 15%) trended in the same direction, although the difference was not large enough to reach the level of statistical significance. In these three sites, teen courts were compared with the average juvenile justice response in cases involving matched cases of first-time offenders. The young offenders in the comparison group were not offered special services or sanctions. They received whatever was typical for first-time offenders in that jurisdiction, including warning letters, informal adjustments and outright dismissals.

Teen courts are believed to **reduce recidivism** by tapping the power of positive peer influence.

In the fourth site (Maryland), teen court was compared with a proactive, police diversion program in a neighboring county. The police program provided many of the same services and sanctions offered by teen courts. Young offenders were ordered to pay restitution, perform community service, and write letters of apology, just as they would in a teen court, but without a court hearing or any peer-to-peer justice. The entire process was managed by police officers and a police department social worker. Recidivism among the Maryland comparison group was slightly lower than it was among teen court cases (4% vs. 8%), although the size of the difference was not statistically significant. One could argue that the evaluation design in Maryland was a more rigorous test of teen court effectiveness, because it came closest to isolating the effects of peer-to-peer justice in a courtroom setting. The comparison group in Maryland, however, was a convenience sample, drawn from a neighboring county, and the cases were not matched on a case-by-case basis with the teen court sample, as was true in the other three sites. For these reasons, the Urban Institute described the Maryland findings as inconclusive.

Still, the Maryland results suggested that when most aspects of another kind of diversion program are similar to that of teen court – i.e., when teen court cases and comparison group cases receive similar sanctions and services – there may be little difference in recidivism. The evaluators inferred from these results that the real value of teen courts might be their ability to ensure the delivery of meaningful sanctions for first-time delinquent offenders, the type of youth usually ignored by the traditional juvenile justice process. In jurisdictions unable to provide meaningful interventions for these youth, teen court may offer an effective alternative.

Another interesting aspect of the Urban Institute study was the courtroom models used by each study site. The Alaska and Missouri sites used teen court models that relied heavily on youth themselves for courtroom management (even youth judges). The Arizona and Maryland programs used models in which adults were largely responsible for managing the court process and the courtroom dynamics (youth may question the defendant, but an adult judge determines sentencing). Thus, the sites with the strongest findings that favored teen court were those that used courtroom models in which youth themselves performed all the key roles. The study was not designed to test the effect of different courtroom models on recidivism, and the disparities in the

Adolescents crave peer acceptance and **peer approval**. The teen court process takes advantage of this naturally powerful incentive.

recidivism comparisons could be due to the nature of the comparison groups themselves more than the program effects, but the pattern at least suggested the need for further investigation.

What Does Theory Tell Us?

Teen courts are an appealing alternative to traditional juvenile court processing, but why? What is the theory behind the effectiveness of teen courts?

Juvenile justice interventions are often compatible with more than one theory of delinquency. In its 2002 evaluation of teen courts, the Urban Institute proposed several variants of theory that seemed to be consistent with teen courts as a method of reducing future recidivism.[3] Of all the theoretical perspectives identified by the Urban Institute – peer influence, procedural justice, deterrence, labeling and restorative justice – only the first, peer influence, seemed to be uniquely suited to teen courts. Teen courts are believed to reduce recidivism by tapping the power of positive peer influence. Adolescents crave peer acceptance and peer approval. The teen court process takes advantage of this naturally powerful incentive. Just as association with deviant or delinquent peers is commonly associated with the onset of delinquent behavior, pressure from pro-social peers may propel youth toward law-abiding behavior.

Just as association with deviant or delinquent peers is commonly associated with the onset of delinquent behavior, pressure from **pro-social peers may propel youth toward law-abiding behavior**.

The idea is not new. Researchers and practitioners have for decades used pro-social peer pressure in delinquency prevention programs, including Guided-Group Interaction, Positive Peer Culture and Peer Group Counseling. All of these programs are based upon a common principle: If peer-group influences lead to delinquency, peer-group influences might also be used to prevent delinquency. For more than 50 years, social scientists have found that delinquent acts are disproportionately committed by groups of juveniles rather than by lone offenders.[4] Numerous studies have found that youth with antisocial friends and associates are more likely to be delinquent themselves.

The theory of differential association posits that criminal behavior is learned through direct and repeated interactions with people who have attitudes or beliefs favorable to deviance.[5] Through social interaction, uninitiated youth are taught criminal techniques as well as definitions favorable to violating the law. The central tenet of differential association theory is that "a person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law."[6] Criminological theory suggests that reducing teenagers' antisocial interactions and increasing their exposure to the influences of non-delinquent, pro-social peers is a plausible approach to delinquency prevention. Every parent who worries about a child "hanging out with the wrong crowd" knows this as well.

Which Kind of Teen Court Is the Most Effective?

Not all teen courts are alike. They vary in how they handle cases and in the extent to which they assign responsibility to youth. Some include youth in prominent roles; others do not. Some involve youth judges; others permit only adults to serve as judge. Are these differences important? Do they affect the ability of teen courts to reduce recidivism? Do they shape the experiences of youth, either volunteers or defendants?

In more than half of all teen courts today, adults manage the courtroom process and decide all sentences. Young people are restricted to the lesser roles of attorney, clerk and bailiff. To some observers, this seems to contradict the very spirit of teen courts – the idea that youth will learn greater respect for the law when they are judged by their peers. To others, however, an adult presence may seem vital to maintaining order during teen court proceedings. Some practitioners worry that the impact of teen court may be diminished by the disorder and frivolity that may occur without adult supervision.

When viewed through the lens of the juvenile justice system, the particular courtroom model used in a teen court may not seem to be a critical issue. Juvenile justice professionals may express a preference for the adult judge model simply because it is thought to ensure a

greater degree of order and control – and because it takes less time to prepare youth for their roles. Certainly, it is easier to recruit and train youth volunteers for an adult-operated program. Young people are not expected to manage the courtroom process; they do not have to be as responsible, or as prepared. Many teen court program directors believe firmly in the superiority of the adult-run model, but is this simply a matter of convenience?

Social scientists have found that **delinquent acts are disproportionately committed by groups of juveniles** rather than by lone offenders.

During the Urban Institute's study of teen courts, investigators were told many times by advocates of the adult-run model that the presence of an adult on the bench is a critical ingredient of program effectiveness. This comment was often accompanied by descriptions of how chaotic courtrooms can be when an adult judge must leave the room even for a few moments. Adult supervision is necessary to restrain the natural tendencies of teenagers to "goof around." The underlying message in these comments is that young people cannot learn to be responsible.

Research suggests this is not true. The Anchorage program was run entirely by youth. The adult program director recruited the volunteers for the court, managed the office, scheduled the courtrooms, and monitored whether defendants completed their assignments and

Numerous studies have found that **youth with antisocial friends** and **associates** are more likely to be **delinquent** themselves.

sanctions. These tasks, however, were all out of the public eye. The public aspects of the program – those witnessed by young defendants and their parents – were managed entirely and exclusively by young people. Teens managed the courtroom process, presided over all hearings, deliberated on appropriate sanctions for each defendant, and announced their findings in open court.

The Urban Institute study showed that a youth-run teen court can run like clockwork. Courtroom procedures were orderly and timely. Participants behaved professionally. The entire process was conducted with great seriousness. The respect that both defendants and parents showed for the court was obvious to any observer. One of the principal conclusions of the Urban Institute study was that youth-run programs deserve closer attention from policymakers and practitioners.

Conclusion

There is sufficient research evidence to believe that teen courts have meaningful benefits for youth participants, their families and communities, yet many questions remain. One particularly vital question overlooked by researchers is whether communities are better served by teen courts that rely on youth rather than adults to manage the court process. As New York moves further ahead with its teen courts, hopefully this question will be resolved by rigorous evaluation research, which will additionally serve the larger interests of teen courts throughout the nation. ■

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Youth Court Alumni Reflect Upon Their Experiences

Aaron T. Frazier (Rochester Teen Court)

"Have you heard about teen court?"

This question changed my life. Like most sophomores in high school, I had only a rudimentary idea of what I wanted to do with my life, informed mostly by the depiction of the various professions I saw on television and in the movies. I particularly enjoyed legal shows and films. My parents noticed my interest and suggested I spend my spring break watching some real cases at the courthouse in my hometown, Rochester. That seemed reasonable enough, so I spent my April vacation in 2004 watching misdemeanor and felony trials. A bailiff soon inquired into my daily presence. I shared with him my interest in becoming an attorney, and he asked me the simple but life-changing question that began this essay. After learning of Rochester Teen Court from the bailiff, I immediately went to the program's office and signed up for attorney training. Weeks later, I was representing real clients before real judges in the alternative sentencing trials for juvenile offenders that comprise a Rochester Teen Court session.

My service to Rochester Teen Court began that wonderful spring in 2004 and continues to this very day. In the six years I have been volunteering for the program, I have had the opportunity to play many different roles, including that of prosecutor, defender, and judge. In each of those roles I have been fortunate enough to see progress in myself as a citizen and aspiring lawyer, and also in the young defendants in whom Rochester Teen Court seeks to cultivate the values of education, accountability and service. This positive peer pressure approach to curbing teen crime is powerful.

In a world as complex as ours, where empirical studies suggest more and more that preteen and teen misbehavior is less a reflection on the competence of parents or on the ill will of youth and more a reflection on the susceptibility of youth to social forces, positive peer pressure truly is the answer to saving our youth and in turn our communities. The genius of the positive peer pressure approach of Rochester Teen Court is that it beats the very social energy that corrupts so many of our youth at

The **genius of the positive peer pressure** approach of Rochester Teen Court is that **it beats the very social energy that corrupts** so many of our youth at its own game.

its own game. For so many urban youth, conformity with the unfortunately all-too-visible negative forces in their schools and neighborhoods is the best way to quench the thirst for acceptance that is characteristic of human nature. So many of them don't believe they can be successful and accepted "where they come from."

Rochester Teen Court presents troubled youth with an alternative force that by comparison makes the social forces urging them toward crime quite unappealing. Young defendants who come to Rochester Teen Court see that diligence and integrity are honored by other youths, and all that is necessary to gain the acceptance and respect of one's peers is an honest attempt at being a mature, responsible and productive member of society. It never ceases to amaze me how fair, forgiving, and encouraging the volunteer teens who serve as jurors are as they sentence the young defendants for their crimes.

Rochester Teen Court truly does change lives. It gives countless at-risk youths a second chance to live to their fullest potential and become assets to their community. It has given me the courage, insight, professional network and discipline necessary to become the first of my nuclear family not only to attend law school – at Cornell no less – but also to graduate from college – from Harvard no less. As an African-American male from humble beginnings, my journey through the Ivy League was an unlikely possibility, but the richness of my experiences with Rochester Teen Court and the encouragement of the program's staff made my journey not simply probable, but actual.

Aaron is a first-year law student at Cornell University. He graduated from Harvard College in 2010 with a degree in Philosophy.

Melissa Rifkin (Bethlehem Youth Court)

While my participation in youth court did not involve strict adherence to or even knowledge of courtroom procedure, it instilled in me an important lesson of advocacy, namely to learn and impart a client's story.

As a high school senior, I was assigned to defend a client who had pleaded guilty to breaking and entering a pizza shop. Upon reading his file, I did not see any viable defense argument. I assumed that at best he had acted hugely foolishly.

My assumption was wrong and my client proved to be far from the budding burglar that appeared on paper. I learned that he had worked at this establishment during the prior summer. He did not have a phone in his home and as an employee was allowed to place personal calls on the pizza shop's phone. On the day of his arrest, he wanted to call a relative. He found the pizza shop was closed, but the front door was unlocked and he did not think the owners would disapprove of his using the phone. As it turned out, the owners did object and pressed charges.

For so many urban youth, **conformity** with the unfortunately all-too-visible negative forces in their schools and neighborhoods **is the best way to quench the thirst for acceptance** that is characteristic of human nature.

Over ten years later, this case still reminds me that as a lawyer my job often is to **find and present an unexpected side of the story**.

The youth court jury, after hearing his version of the events, returned a sentence of 17 hours, far fewer than the 100 hours requested by the prosecutor.

Over ten years later, this case still reminds me that as a lawyer my job often is to find and present an unexpected side of the story. When I am tempted to draw a conclusion about a matter upon first glance, I tell myself that an undiscovered fact may alter its outcome.

Melissa is a 2003 graduate of Carleton College, and she received her law degree from American University in 2006. She currently works at the General Counsel's Office of the Fund for the Public Interest where she practices employment and tax-exempt law.

Sabrina Carter (Red Hook Youth Court)

I am from the Red Hook community and I know that Red Hook has come a long way from how bad it used to be in the '80s and '90s. Red Hook was notorious for drugs, violence and gangs. Once, when I was young, from my bedroom window I saw a man shot and killed in front of the store across the street from my house. But it wasn't until my elementary school principal, Patrick F. Daly, was gunned down while walking a sick child home early from school that the community was up in arms and ready for change.

Once, when I was young, from my bedroom window **I saw a man shot and killed**. . . . But it wasn't until my elementary school principal, Patrick F. Daly, was gunned down while walking a sick child home early from school that **the community was up in arms and ready for change**.

I strongly believe that the Red Hook Youth Court has had a strong impact on the community. This court gets the youth from the neighborhood involved in something positive, and gives them professional skills and a great experience to put on a college application. In addition, it gives youth who come through the youth court as respondents a second chance. Yes, you made a mistake but that doesn't make you a bad person. And if there is something the respondent needs that we can't help with directly, we can make referrals and try to keep the kid engaged in other positive ways. I served on the Red Hook Youth Court for two-and-a-half years and I enjoyed every minute of it.

After I graduated high school I joined the Red Hook Public Safety Corps program, and served as an AmeriCorps member for two years. Then I was hired by the Center for Court Innovation to help start the Staten Island Youth Court. During that time, I am proud to say I attended John Jay College for Criminal Justice and graduated with a Bachelors degree in Criminal Justice.

Now, here I am eight years later, and I am the Coordinator of the Red Hook Youth Court, ecstatic that I can serve my community directly with the youth I know so well. When someone who grew up in the Red Hook Community and is a former youth court member actually runs the program, it shows that hard work and dedication really do pay off. Youth court members look up to staff, so I try to set good examples for them. I tell them it is because I always stayed focused, used the Red Hook Community Justice Center as a networking tool, and worked my butt off. I definitely still want to study law, but I also would like to help the youth of this generation. It is very important that we make a positive impact on them, because not only are they our future, but they too will be setting examples for the next generation.

Sabrina is the Program Coordinator of the Red Hook Youth Court. She has also worked as a Program Associate for the Staten Island Youth Court and an AmeriCorps volunteer. Sabrina obtained a Bachelor's Degree in Criminal Justice from John Jay College for Criminal Justice in May 2009.

Javy Martinez (Colonie Youth Court)

The highest sentence of community service ever assigned to an offender through Colonie Youth Court is 302 hours. At age 13, I was that offender. Due to my actions on Halloween 2001 during the height of the national anthrax scare, I committed a Halloween prank with what I call "flower bombs" and was charged with two counts of criminal tampering and criminal nuisance.

Over the next 18 months, I attended my community service on Tuesday nights listening to a variety of educational classes and five hours every Saturday morning engaging in a variety of constructive community projects. I found community service both extremely educational and humbling. I learned there will always be consequences for one's negative actions. I learned life lessons, especially from a victim impact panel, which was one of the most emotional and moving presentations I have ever heard.

I have learned that **early intervention** is crucial in deterring future criminal acts.

During my pursuit of a master's degree, I earned an associate's degree with high honors in criminal justice and applied for the Colonie Youth Court program assistant position, which I have held for the past two years. I have learned that early intervention is crucial in deterring future criminal acts. So I share my story with every youth who comes through this program, in hopes that I can save a life the same way that this program, and Violet Colydas, Director of Colonie Youth Court, saved mine.

Javy is currently the Program Assistant at Colonie Youth Court and a senior at SUNY Albany, majoring in Criminal Justice. ■

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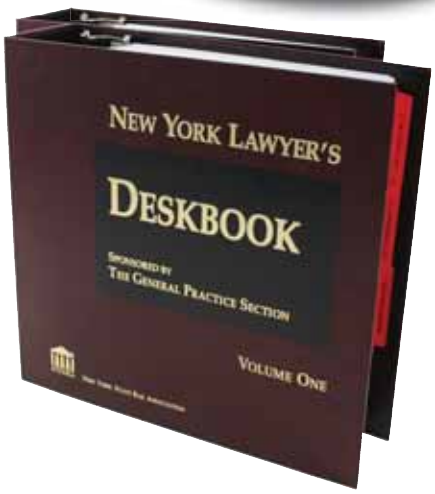

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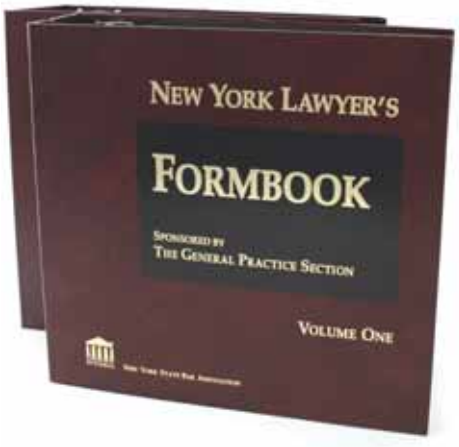

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Keeping Kids in School and Out of Court

A School-Justice Partnership

By Kathleen DeCataldo and Toni Lang

Kathleen DeCataldo, Esq., is the Executive Director of New York State's Permanent Judicial Commission on Justice for Children.

Toni Lang, Ph.D., is the Commission's Deputy Director.

Mayor Bloomberg with the inaugural class of Staten Island Youth Court members.

Today, too many school-aged children are spending critical time in court, on school suspensions or expulsions, or in juvenile justice facilities. This hinders their educational, social and personal development, which is so essential to their becoming self-reliant and productive adults. Our advancing technology increasingly relies on human capital – the knowledge, information, ideas, skills and health of individuals. Now, more than ever, education – *quality* education – is an essential key to opportunities.

Not only are schools across the country being called upon to re-think their education systems to help produce better outcomes for students – including higher test scores and increased graduation rates – but the justice system also is becoming involved to help promote these outcomes and reduce the flow of students entering the courts. The education and justice systems do not simply refer to schools and courts as they reflect the political, economic and social forces that help define the school environment and disciplinary policies and practices. The links between these systems have often had detrimental consequences for our children's educational trajectories. The current discourse is bringing these forces together to find and initiate alternative disciplinary policies and practices that will keep kids in school and out of court.

A symposium was convened last fall by former Chief Judge Judith Kaye, chair of the New York State Permanent Judicial Commission on Justice for Children,

in collaboration with the Commission, Skadden Arps and Advocates for Children, regarding innovative practices to ameliorate punitive school discipline policies. Judge Kaye envisioned a collaborative school-justice focus to improve outcomes for children by finding creative solutions to decrease the number of our youth dropping out of school and entering the revolving door of the criminal justice system. Representatives from the Mayor's Office, city agencies, the New York City Family Court, the Department of Education, the Police Department and advocates came together to hear presentations regarding positive behavioral interventions and supports, school-police arrest protocols and youth courts in schools.

This article continues that vital discussion, beginning with the now-established fact that the current punitive model is not working, and addresses the next step: How can a partnership among school administration, law enforcement, the court system and the community help to increase graduation rates while decreasing school suspensions, expulsions and arrests?

Zero Tolerance

School policies and disciplinary practices that discourage students from remaining in the classroom often lead to schools directly and indirectly "pushing" students out of school. "Pushout" policies and practices include zero tolerance and ineffective misbehavior prevention and intervention policies, as well as the lack of student-school engagement. Growing out of the now discarded drug interdiction policies of the late 1980s, zero-tolerance policies – meaning mandatory consequences applied to school rules violations without regard to individual circumstances – became widespread in schools with the passage of federal laws such as the Gun-Free Schools Act of 1994 (GFSA), itself a response to several of widely publicized, tragic school shootings.[1] The GFSA required one-year school expulsion for any student caught bringing a gun to school. Gun cases are now the smallest category of school discipline cases and students are being expelled, suspended and arrested for a variety of behaviors including minor student behaviors and rule infractions.[2]

Instituting a ban on hats, immediate suspension for any school disruption and increased use of law enforcement, in 1989 Yonkers, New York, became one of the first school districts in the country to adopt a zero-tolerance approach to students who caused school disruption.[3] With greater use of school resource and safety officers, criminal charges are more easily and more frequently brought against youth for things such as fighting, writing on desks and other actions that in an earlier day would have resulted in only a trip to the principal's office. The criminalization of school behaviors – also known as the School-to-Prison Pipeline – has in some cases flooded the juvenile and criminal courts with cases that originated in school incidents.

Not surprisingly, research shows that first arrests can have unintended negative consequences for school-age youth: a first arrest during high school almost doubles the odds of the youth dropping out of school. For youth who have a court appearance following the first arrest, the odds of dropping out are nearly quadrupled.[4]

Suspensions and Expulsions

Out-of-school suspensions and expulsions – the form of punishment longest relied on by schools – are almost equally as harmful as arrest in their longer-term effect on students. Suspension and expulsion are known to increase the propensity for school disconnectedness, academic problems, delinquency, criminal activity and substance abuse – the opposite of the desired effect. Out-of-school suspensions are linked to falling behind in school, failing a grade, dropping out of school, committing a crime and becoming incarcerated as an adult.[5] If students receive multiple suspensions the effects are exacerbated. Students who are suspended three or more times by the 10th grade are five times more likely to drop out than students who have never been suspended.[6] The long-term consequences of suspensions and expulsions indicate higher rates of future antisocial behaviors and involvement in the justice system.[7]

Having **long-term consequences**, suspensions and expulsions are actually **related to higher rates of future antisocial behaviors** and involvement in the justice system.

Out-of-school suspension can also make the community less safe, leaving youth unsupervised in the community. A recent statement by Fight Crime: Invest in Kids, a non-profit organization of 5,000 police chiefs, sheriffs, prosecutors and other law enforcement leaders, acknowledged the need to maintain school safety and remove truly dangerous students from the school environment but noted "suspension and expulsion often provide troubled kids exactly what they do not need: an extended, unsupervised hiatus from school that increases their risk of engaging in substance abuse and violent crime."[8]

Studies have shown that suspension is often used for less serious offenses. Although school-time fights and aggressive acts by students are the leading causes for suspension, the next ranking causes include abusive language, attendance issues such as cutting class, tardiness and truancy, followed by disobedience and disrespect and general classroom disruption.[9] Suspension has been used as a vehicle to push out students who are frequently disruptive or are bringing down test scores. Research has confirmed that academic skill can be a strong predictor of school exclusion.[10]

School-justice partnerships springing up across the country are demonstrating **benefits** that are not only child-related but also school- and community-related.

Perhaps more disturbing, studies have consistently demonstrated that children of color, in particular Black children, are referred for discipline more frequently and for less serious offenses, tend to be suspended for longer periods of time, and are more often subject to suspension and expulsion compared to their White peers.[11] Regardless of whether poverty and other demographic factors are considered in the analysis, racial and ethnic disproportionality in disciplinary practices has consistently been observed.[12]

School administrators, parents and communities struggle with the need to balance the safety of students and staff with the appropriate effective interventions to create a safe and productive learning environment. If the goal is to reduce bullying, violence and disruptive behavior in schools, it would appear that the strategies used most often today are at best ineffective and at worst exacerbate a student's disengagement with the school community, eventually leading to the student's dropping out. Clearly there must be a shift from over-reliance on out-of-school suspension, which has so many unwanted consequences. Researchers have concluded that what is needed is a "strong but caring discipline that works to inculcate good behavior, while resorting to out-of-school suspension only rarely."[13]

A School-Justice Approach

So how can a partnership among school administration, law enforcement, the court system and the community help to increase graduation rates while decreasing school suspensions, expulsions and arrests? As a community, we are charged with seeking the best outcomes for our children to enable them to become successful, productive adults. Together, we need to examine our school discipline policies and practices and develop strategies that lead to a school climate that fosters youth development and learning, increases student engagement and provides positive child-centered strategies for remediation of individual student misbehavior.

Our course of action can benefit from the national, state and community organizations that are now challenging the systemic problem of pushout. For example, the Dignity in Schools Campaign – a national and community-based campaign – brings together educators, students, parents, advocates and others to reframe the school discipline discourse around a framework of human rights that respects every child's right to an education and advocates for child-centered reform to keep children in school instead of school discipline that favors and relies on the punishment and pushout of children.

There are also school-based frameworks and practices that can help inform this discussion. For example, the school-wide Positive Behavioral Intervention and Supports (PBIS) is a decision-making framework which brings in the entire school culture. It is premised on using data collection to guide decisions and identify issues, continuous monitoring of student progress and achievement to evaluate outcomes, development of evidence-based academic and behavioral interventions and supports, and changing the school teaching and learning environment to address current, and to prevent future occurrence of, problem behavior. PBIS is grounded in a system that teaches and encourages pro-social skills and behaviors for both students and staff. When intervention for behavior issues is warranted, there is a three-tiered approach in which all children receive supports at the primary tier. When students do not respond, more intensive behavioral supports are provided at the intermediate tier, with the third tier of individualized intensive plans reserved for those students whose behavior warrants that approach. Throughout this school-wide system, the emphasis is to maximize academic engagement and achievement for all students.[14]

School-justice partnerships springing up across the country are demonstrating benefits that are not only child-related but also school- and community-related. For example, in Clayton County (Atlanta), Georgia, the school-justice community developed a model protocol to address student school-based offenses. The protocol provides that arrest is reserved for only the most serious offenses and an array of options for discipline for lower level offenses is provided. Following these changes, Clayton County graduation rates rose 21% while juvenile felony rates decreased 51%. By reducing school referrals to the juvenile justice system, there was a 38% decrease in the number of youth of color referred to the juvenile justice system.[15]

There is an alternative. The education and justice systems can work together outside of the courthouse to

Recent New York City School Suspension Findings*

Between the 2002/03 and 2007/08 school years, the number of suspensions in New York City schools more than doubled – jumping from 31,880 to 72,518, respectively.

More than one in five (22%) of the students suspended during the 2007/08 school year in New York City had a superintendent's suspension, which can last for up to one year. Principal's suspensions can last from one to five days.

Suspensions disproportionately affect Black students. During the 2006/07 school year in New York City, Black students accounted for 53% of the suspensions, but made up only 32% of the student population.

Suspensions disproportionately affect students receiving special education services. During the 2006/07 school year in New York City, students receiving special education services accounted for 28% of the suspensions, but only made up 9% of the student population.

* Source: NYC Department of Education response to Advocates for Children and DLA Piper December 2007 & January 2008 Freedom of Information Law (FOIL) Requests; NYC Department of Education. School Demographics and Accountability Snapshot SY2006–SY2009, http://print.nycenet.edu/accountability/default.htm.

hold youth accountable for their actions while promoting civic responsibility. Youth and student courts, like other efforts mentioned earlier, are based on restorative justice practices and can be ideal in the learning environment of schools. Student courts offer the opportunity to demonstrate to offenders the harm their behavior has caused while also giving young offenders the chance to explain their particular and, perhaps, extenuating circumstances that led to the infraction. Penalties and sanctions are designed so the offender can repair the harm caused by the offense or otherwise contribute to the school community through service opportunities. Sanctions often include a requirement to return and participate as a jury member in future youth court proceedings. Through civics education – the training provided to student court volunteers and active participation in the process of the trial and sentencing – students, including offenders, have the opportunity to learn about the law or rules that were broken and how our court procedures protect an individual's right to due process.

It's time to overhaul a counterproductive approach to discipline in the schools that is related to higher rates of poor academic performance, school dropout, future misbehavior, and juvenile and criminal justice involvement, and less satisfactory ratings of school climate[16] and seize this emerging strategy – a collaborative school and justice partnership – that allows the full development of each student, protects students from discrimination, uses discipline opportunities to teach students about their rights and the rights of others and provides a quality education that prepares them to thrive in today's challenging world. ■

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Southampton Town Youth Court Swearing-In Ceremony 2010.

Youth Court Member Personal Essays

EJ Feld, Huntington Youth Court

I can still clearly remember my first Huntington Youth Court meeting, just over three years ago. I had only shown up because, a few weeks prior, my mom showed me a brochure about the program and urged me to join so I would have more extracurricular activities when I eventually applied for college. I had absolutely no interest in becoming a lawyer, and I didn't know a single other person from my school that would be attending the first training session aside from myself. To be honest, I didn't even know what a "youth court" *was* – let alone what my responsibilities would be as a member. As I awkwardly sat my 10th-grade self down in a row all by myself and waited disinterestedly for someone to start talking at the front of the room, I had no idea what to expect.

> The **youth court has helped me grow immeasurably** – as a courtroom attorney, a leader, a person, and a friend.

I never could have imagined that in three years, I would learn the skills necessary to conceptualize courtroom arguments, cross-examine witnesses, construct and deliver opening and closing statements, become an effective public speaker, and think quickly and improvise on my feet. I never would have anticipated that I would spend as many Wednesday nights as I could spare being present at trials, at the expense of nearly all my other activities. And I certainly never expected that I would become a member of the Youth Advisory Board, serving as a role model for new inductees, a leader in discussing and implementing objectives to better the program as a whole, and a reliable trial attorney to fill in at the last moment.

My involvement with the Huntington Youth Court has become my fondest memory of high school. I have made incredible friendships and developed long-lasting relationships with peers and supervisors that I will cherish for years to come. The youth court has helped me grow immeasurably – as a courtroom attorney, a leader, a person, and a friend. It has instilled in me a sense of hard work, dedication, and community devotion that will undoubtedly be with me for the rest of my life. From walking through the entire town of Huntington on a Saturday afternoon collecting donations for the program, to borrowing my dad's four-wheel-drive SUV so that I could make it to a trial on a snowy mid-January evening, to rushing home after track practice for a three-minute shower and a three-minute dinner before the night's first trial, I have developed an intense love for Huntington Youth Court.

Call me a cliché, but I can say with complete honesty and pride that if it weren't for the youth court, my friends and my community, my life would *not* have been the same.

Mikaela Suders, Warren County Youth Court

Every so often in life, everyone sits back and reflects on where they'd be if something hadn't happened, and they can't even fathom the thought of it. For myself (and many others, I'm sure), youth court is one of these things. I cannot even imagine what my life would be like at this point (almost three years later) if I had never signed up for Youth Court. What's maybe most amazing is that I joined Youth Court on a whim – my interest in criminal law told me, "Hey, why not? Sounds interesting enough." I decided to try it out, had a friend sign up with me, and we've been deeply involved with youth court ever since. I could never have expected such a small decision would have impacted my life so much.

I joined youth court at a vital point in life: junior high school. During this time period, adolescent brains are still developing; they are easily impressionable and often have difficulty saying 'no' to peer pressure and differentiating right from wrong. These are a few reasons why positive influence is crucial to youth.

Fortunately, I did not fall to peer pressure or get into trouble; youth court has helped me to form my own views and opinions, it has helped me become more social, it has made me more comfortable and confident vocalizing my thoughts, and it has given me a way to give back to the community. Youth court has given me so many real-life experiences and numerous opportunities – to present my abilities and who I am – that have really helped to shaped my character.

> This program showed me **there are different ways to handle problems**, and it can change a child's life with just one sanction.

There are many components that join together to make a good courtroom, and ours is no different. Our courtroom is set up the same as any other: we are the attorneys, the jury, the judge, the bailiff, you name it, we do it. I've worked my way up from juror to jury foreperson, learning to express myself and my opinions to others and becoming a leader amongst my fellow jurors, to prosecution, all the way learning respect for the law, for the courtroom, for my peers, and for myself. The years I have participated have increased my confidence and my public speaking skills. I have also improved my writing and critical thinking skills while working as second chair for the prosecution and developing opening and closing statements. I am still working on trying to muster up the confidence to ask the questions during a trial, and I am sure that once the senior members move on and pass the torch, after learning from them and being mentored by them, I'll be ready to do just that. Working together in this way, as well as on the jury, we all learn teamwork, as well as respect for others' opinions.

> I never could have imagined that in three years, **I would learn the skills necessary** to **conceptualize** courtroom arguments, **cross-examine** witnesses, **construct and deliver** opening and closing statements, become an effective public speaker, and think quickly and improvise on my feet.

I believe we make a difference when we give offenders their sentence, and once they complete it, they often opt to stay with youth court and volunteer alongside those who sentenced them. I have even become friends with one such case. One girl has gone from an offender to one of our most dedicated members, participating in everything and volunteering at most of our community service activities – which is quite an undertaking, considering that we have multiple service activities each week. I have volunteered at a few of these service days and they were hard work; mostly beautifying our community by raking all the leaves from a few trails, planting flowers, getting rid of graffiti, and one of my favorites, painting a mural at a playground in one of our local rural communities. The effort and dedication

> Youth court has helped me to **form my own views** and **opinions**, it has helped me become **more social**, it has made me **more comfortable** and **confident** vocalizing my thoughts, and it has given me a way to **give back to the community**.

of all the youth, offenders and volunteers goes a long way towards making our community a nicer place to live.

Youth court is the combined force of all the youth working together in different ways. I believe youth court is vastly important to our respective communities and provides a fantastic opportunity for youth to find themselves. Quite simply, youth court changes lives.

We give offenders their sentence, and once they complete it, **they often opt to stay with youth court and volunteer** alongside those who sentenced them. One girl has gone from an offender to one of our most dedicated members.

Carter Jones, Town of Babylon Youth Court

Surrounded by lots of negative activity such as fighting, gangs and other kids with poor self images, I was in need of positive ways to get the attention and acceptance that I craved. . . . Youth court gave me the chance to meet new people and take part in the effort to change the way young people, like myself, view the criminal justice system.

Sasha Harrington, Red Hook Youth Court

I was a former respondent for a case of assault. The jury believed I deserved the sanction of five hours' community service and conflict resolution. I thought about it and what if it wasn't five hours' community service – it could have been five months or five years in jail, gone from everybody I love and care about. This program showed me there are different ways to handle problems, and it can change a child's life with just one sanction. I know it did for me. I went through training and became more involved in the program. Working in Youth Court gives me a feeling of accomplishment, the feeling of knowledge, and the feeling of a good deed being done, and I would never trade those feelings in for anything in the world. As a new Youth Court member, I have become a better person in my community. ■

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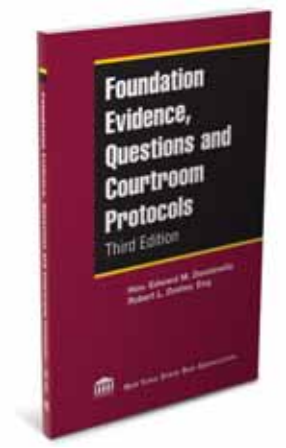

Foundation Evidence, Questions and Courtroom Protocols

Third Edition

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AUTHORS & PRODUCT INFORMATION

Hon. Edward M. Davidowitz
Bronx County Supreme Court, Criminal Court (Retired)
Robert L. Dreher, Esq.
Office of the Bronx County Executive Assistant District Attorney

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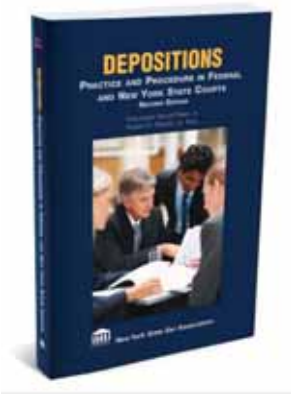

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AUTHORS & PRODUCT INFORMATION

Honorable Harold Baer, Jr.
District Court Judge, Southern District of New York
Robert C. Meade, Jr., Esq.
Director, Commercial Division, New York State Supreme Court

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Syracuse University College of Law fellow, Ali Benchakroun, advises Chris Mothersell and Howard Manning-Logan, members of the prosecution team from Fowler High School Student Court, as they prepare for a case.

Judy Wolfe has worked extensively with youth courts for nearly 14 years and is currently the Program Supervisor for the Syracuse City School District Student Court Program. She is also the President of the New York State Youth Court Association and a trustee with the National Association of Youth Courts.

Robert V. Wolf is the Communications Director at the Center for Court Innovation.

An Interview With Judy Wolfe: School Courts Use Positive Peer Pressure to Change Behavior

By Robert V. Wolf

Robert Wolf: I wanted to talk to you about the student courts that you are operating in the Syracuse City School District. Is there a difference between a "student court" and a "youth court"?

Judy Wolfe: What makes our student court different from a youth court is that in the schools we hear only disciplinary cases involving school misbehavior, violations of the school code of conduct. We handle the lower-level offenses. We don't handle weapons charges. We don't handle anything sexually related. We don't handle drug dealing and stuff like that. And we stay away from gang-related offenses or the more serious charges where a student can actually be removed from a school.

In both school- and community-based courts, however, we're trying to hold young people accountable early on, trying to correct the behavior, give them the services that they need, and hopefully get them on track to be successful.

Robert Wolf: One hopes that it's enriching and a positive experience for the respondents, but it must also be an enriching experience for the youths who are participating in the court and playing the various roles. What kind of training do they get?

Judy Wolfe: In the Syracuse schools, we're totally youth-run. We train all year long in public-speaking skills and the courts and law. They get to think on their feet, and it allows them a say in what's acceptable behavior in the school.

Robert Wolf: You run the student court as a class where students come during a certain time of day, just like any class?

Judy Wolfe: Yes. In the high schools it's a business law class or a government class, but the focus is the student court. In our middle schools we are more of a club design, which meets during the school day. We work very closely with third-year law students on fellowship from Syracuse University. They help teach life skills, and give students an introduction to college and law school. We do field trips to the law school, the courts and to the Onondaga County Justice Center, which is our county jail. And we have guest speakers from different criminal justice agencies to speak with the students. Working with the law fellows has been such a rewarding experience for the younger students. And a number of law fellows have remarked that out of the three years they've had in law school, the most memorable and rewarding time has been working with the students in our district.

Robert Wolf: How old are the students in the class?

Judy Wolfe: We are working with three of our high schools this year, and classes consist of 11th and 12th graders. We are also in the process of expanding to four

middle schools – two are already training students. Student members are 7th and 8th graders.

Robert Wolf: How many kids are in the class?

Judy Wolfe: It varies. Two classes have over 20 students, whereas another has 13. The middle school groups have around 15 students. It takes eight students to operate a court session.

Robert Wolf: And when you have a hearing, the respondent comes into the classroom and these eight are then performing the function of the hearing while the rest of the class is observing?

Judy Wolfe: They're observing and then we talk about it at the end and give constructive criticism. I have had instances where we've held two courts at the same time in different classrooms. It just depends on if I have extra adult help.

Robert Wolf: So you always have an adult in the room too, observing?

Judy Wolfe: There is usually myself, the teacher or advisor, and at least one law student with us, so we can all help to keep things running smoothly.

Robert Wolf: Give me an example of a kind of charge that would be brought to the court's attention – and walk me through the various steps to show how it's handled.

Judy Wolfe: A typical charge might be inappropriate behavior in a classroom. The teacher would make a discipline referral to an administrator. The administrator – typically a dean of students – would determine whether it's a good case for the student court. If they decide the case is appropriate, the dean sits down with the student and offers them the student court program, instead of the traditional route. So instead of spending a day at in-school suspension or being sent home, they would have an opportunity to be heard in front of a court of their peers.

Robert Wolf: When the student is sent to the peer court, what happens next?

Judy Wolfe: The administrator calls the student's parent or guardian to get their consent. Then we call the student out of class and explain what's going to happen. Our defense advocates talk to that student in private and get their view of what happened and find out a little bit about them, what they're involved with, where they are struggling in school, how their grades are, is this something that's been going on for a long time, what do they think they need to do to get back on track, and just do kind of a general interview.

Our judges submit some questions that they'd like to ask based on what they see on the discipline referral, and our prosecution advocates think in terms of how the student has harmed other students in the classroom, not only themselves.

We are in schools where the students are having a lot of difficulty getting to the point of graduation. If we can help them understand how they're hurting themselves, if we can get them to feel good about coming to school, and if we can get them the services they need, our hopes are that the graduation rates will start going up.

Working with the law fellows has been such a **rewarding experience** for the younger students.

Robert Wolf: How quickly does a trial take place?

Judy Wolfe: There's a quick turnaround. We can often hold a trial on the same day the administrator makes the referral. The hearing takes place during an 80-minute class. Later on I'll meet with the student, pull the student out of class, and sit down and see how things are going. That's how we check if they're running into any problems.

A number of law fellows have remarked that out of the three years they've had in law school, the most **memorable** and **rewarding** time has been working with the students in our district.

Robert Wolf: And the hearing is not to determine guilt.

Judy Wolfe: Right. The respondent has to admit guilt upfront to participate.

Robert Wolf: So then the focus of the hearing becomes this dialogue discussing the impact of the infraction, or the impact of the negative behavior, and then the mitigating circumstances, from the perspective of the respondent?

Judy Wolfe: Exactly. Oftentimes we've found that the students appearing in student court are much more open

to people closer to their age than they would be to an adult. So our student court uses positive peer pressure. The students on the court talk about how they overcame their own problems, or how they dealt with a particular teacher that a respondent might be having difficulty with.

Robert Wolf: Have any of the student court participants – those playing the roles of judge, prosecutor, defense advocate – themselves gone through the student court as respondents?

Judy Wolfe: Every year I've had maybe a handful of students who have actually gone through the system, which is great. We want them to become part of the solution rather than the problem.

Robert Wolf: Often when people talk about peer pressure it's spoken of as a negative, and when we raise our kids, we tell them not to judge others. I think it's interesting that in student court, there's an inversion: you're putting peer pressure to good use.

Judy Wolfe: I'm amazed at how accepting the students are of students who have differences. During the training I tell them that this is not a put-down session, that the respondent will take you much more seriously if you act very professional. If respondents walk into a solemn situation where the students are taking it seriously, they're going to really listen.

If we can help them understand how they're hurting themselves, if we can get them to **feel good about coming to school**, and if we can get them the services they need, our hopes are that the **graduation rates will start going up**.

Robert Wolf: Do students ever express discomfort playing these roles that require them to judge or discipline their peers?

Judy Wolfe: Probably one of the most common questions that people have is about retaliation. Are kids afraid that kids are going to retaliate against them? The answer is no. We train them to stay professional, and the student coming in understands that the students are playing a role in a discipline process.

Robert Wolf: Why would a student, a respondent, participate in this rather than just take the conventional route?

Judy Wolfe: Typically the conventional route is being sent home, being suspended, or being sent to the in-school suspension room for a day where they're not getting general classroom instruction. Student court is a quicker way to deal with the charge. And although participants may not realize this going in, it's also a way to get extra help. If we can get to them to really let us know what they're going through and how they're feeling, we'll get them involved in something that's going to help them go back into that class and do well.

We are in schools where the students are having a lot of **difficulty getting to the point of graduation**.

Robert Wolf: That doesn't entirely explain to me what the incentive is for the student because it sounds easier just to get a day off from school. If you were an unmotivated student would you really be eager to go before your peers and get all of this great help?

Judy Wolfe: Not all of them want to be kicked out of school. Sometimes kids feel very safe in their school, especially if they're coming from neighborhoods that are really having a lot of challenges with violence. Schools are a safe haven. If a student successfully completes the sanctions set forth by student court there is no record of that incident on their permanent disciplinary record.

Robert Wolf: In addition to keeping kids in school and helping link them to services, do student courts have other benefits?

Judy Wolfe: Yes. For the teachers and the school administrators, it's a much more meaningful way to address negative behavior. It allows the schools to focus on the more serious offenders while the smaller offenses come through us. And if we intervene early, hopefully there will be a reduction in behavioral problems down the road. As far as the respondent is concerned, they get a more meaningful consequence. The sanction is tailored to them instead of just a cookie cutter thing that applies to everybody.

Robert Wolf: What are some typical sanctions?

Judy Wolfe: It depends on the charge. A lot of times it's very positive things like tutoring, hooking them up with mentors. It might be an apology letter to the teacher or the person that was offended. We've had students write essays based on their charges. We've had kids do book reports about someone that they really admire and write a book report about them. We've also sentenced kids to join youth programs. We had one student who had a lot of learning disabilities write a rap song about the incident. Occasionally respondents are sentenced to community service.

Robert Wolf: And if someone isn't compliant, is there another level of discipline that then occurs or some other consequence?

Judy Wolfe: Yes. It goes back to the administration and the traditional way of dealing with things.

Robert Wolf: In your student courts in Syracuse, how many cases do you handle generally a year?

Judy Wolfe: In a typical school between 50 and 60, which is low in my opinion. It has not been an easy thing for the school district to grasp. Sometimes there's a resistance to change but lately it's become a more acceptable way of handling some of the low-level cases. I think part of the problem is that administrators are so busy with all kinds of other stuff, especially being in an urban district, and just one more program is hard for them to grab onto. This year, with an increased number of schools participating, I expect our caseload to double.

Robert Wolf: You mentioned that the number of youth courts has actually dropped a bit recently mainly due to funding problems. What does the future look like from your perspective as the President of the New York State Youth Court Association?

Judy Wolfe: From the phone calls I get from around the country, it is something people are extremely interested in putting in their own areas. And I think with strong financial support, New York State programs that are closed might be able to open again. But the interest is out there. It's become a worldwide diversion program. ■

Jury members of the Red Hook Youth Court weigh in on sanction options during deliberations.

Nancy Fishman is the Project Director for Youth Justice Programs at the Center for Court Innovation. The Center for Court Innovation, an award-winning public private partnership between the New York State Unified Court System and the Fund for the City of New York, currently operates four youth courts in New York City as part of an overall effort to support innovative approaches to reducing delinquency and encouraging positive youth development.

Youth Court as an Option For Criminal Court Diversion

By Nancy Fishman

Youth courts in New York State, like the over 1,000 youth courts around the country, accept referrals for diversion from a range of sources. Police officers send young people, usually first-time offenders, to youth courts instead of arresting them and sending them on to probation. Probation officers use youth courts as a reason to adjust a case, to give a teenager an opportunity to answer for a bad judgment call before a petition can be filed in family court and a more damaging record established. Schools use youth courts as an alternative for school disciplinary matters, holding students accountable for problematic behavior without suspension or other exclusionary disciplinary actions.

Virtually unique to New York, however, are referrals to youth court from criminal court. In a survey of New York State youth courts conducted by the Center for Court Innovation in 2009, only eight of the 58 courts that responded indicated that they accepted cases of 16- to 18-year-olds referred by criminal court judges. (New York is one of only two states left in the country where youth between 16 and 18 are automatically under the jurisdiction of the adult criminal court. North Carolina is the other.) The fact that these referrals are unusual suggests that the youth court option remains relatively unknown among criminal court judges and practitioners.

The experience of jurisdictions that have made use of youth courts for criminal court cases demonstrates that these courts represent an untapped resource for responding effectively to low-level offenses by older teens. Youth courts, whose volunteer members generally range in age from 13 to 18, require young people cited for a variety of misbehaviors to answer to a court of their peers. In New York, these courts are dispositional only: they do not determine guilt or innocence and young people opting to participate must first accept responsibility for their actions. Youth court members, serving as judge, jury and advocates, use a hearing to understand what happened and determine an appropriate sanction, based generally on the nature of the offense, the respondent's understanding of its effect on others, and the respondent's needs, talents and aspirations. Sanctions can include community service, jury duty for the youth court, workshops, and letters of apology. Respondents are held accountable but are afforded the chance – by peers whom they respect – to move beyond the kind of bad decisions that are not uncommon in teenagers. After completing their sanc-

tions, respondents are often recruited to become youth court members themselves.

Criminal courts, particularly in high-volume jurisdictions, have limited ability to respond effectively to low-level offenses by first-time offenders. Youth courts in these cases may actually expect more of respondents, but those who comply do not end up with a criminal record, which can limit their future educational and employment opportunities, among other things. And youth court sanctions are restorative, focused on engaging youth in their communities. The court system benefits as well, in that these less-serious cases are handled outside the regular docket.

There is no section in New York law that specifically provides for diversion to youth court, but judges have made use of their discretion to adjourn cases in contemplation of dismissal (an ACD), either before or after youth court participation. While defendants must accept responsibility for the actions underlying the charges as part of participating in youth court, the referring criminal courts have agreed that statements made in youth court cannot be used should the case end up before the criminal court. If a young person does not complete the youth court sanction or is arrested during the six-month ACD period, the case will be sent back to the referring court for regular processing. According to the youth court staff and participating judges, this is a rare occurrence.

Below I describe how criminal courts have worked with youth courts in several jurisdictions, including how the youth courts in each case began to accept criminal court referrals, how the process works, and what is known about outcomes. One of the great strengths of the youth court model is its flexibility: programs can be shaped to fit the context of a particular jurisdiction. These three programs demonstrate how this variation works in practice.

Staten Island Youth Court

The Staten Island Youth Court was opened in 2009 by the Center for Court Innovation, as part of the Staten Island Justice Center, which also includes an alternative to detention, a program known as Project READY (Richmond Engagement Activities for Determined Youth). The youth court component was suggested by former New York State Chief Judge Judith Kaye, who was struck by the fact that New York did not have a youth court that addressed older youths at risk of a criminal record. The Staten Island District Attorney's office joined as a program partner, but had no history of offering ACDs as an opportunity for diversion for young defendants. They were concerned that business leaders wouldn't be amenable to youth court as an appropriate response to shoplifting, one of the most common charges bringing youth into the criminal court. The Center met with business owners and security personnel at the local mall and discovered that they were not at all averse to youth court, having already seen youth under 16 having shoplifting cases adjusted and being required to perform community service. With the addition of leadership and support from Staten Island's criminal court judges, the program was under way.

The Staten Island Youth Court now accepts both criminal court referrals and probation adjustment and violations cases. The number of criminal court cases has gradually increased as all of the justice system partners have become more confident in the program. These referrals now make up almost half the docket. The types of cases are generally the same regardless of their referral source, primarily petit larceny, graffiti and possession of marijuana. Cases appropriate for the youth court are identified in advance by the District Attorney's office, and then the option is discussed by the prosecutor with the youth and his or her defense counsel, using materials provided by the youth court. If the defendant wants to participate in the court, and the judge is willing, the court grants an ACD, with participation in the youth court included as an explicit condition. The defendant is not required to make a formal admission of responsibility in the criminal court but must do so in the context of participating in the youth court hearing.

> The experience of jurisdictions that have made use of youth courts for criminal court cases demonstrates that **these courts represent an untapped resource** to respond effectively to low-level offenses by older teens.

Staten Island uses a youth judge model, with youth court members rotating through the roles of judge, bailiff, juror, youth advocate and community advocate. The youth advocate meets with the respondent on the day of the hearing and is responsible for presenting the case to the jury. The community advocate serves as the prosecutor, but focuses his or her statements on the impact that the offense has had or could have on the community, rather than on the particular failings of the respondent. The jury members are responsible for questioning the youth. The court does not question other witnesses. After closing statements, the jury deliberates and reaches a consensus on an appropriate sanction. Sanctions include

community service, essays, letters of apology, and workshops. Youth court staff will also connect the young person and/or the family to community services as needed. Respondents who complete their sanctions and stay out of trouble for the time remaining on their six-month ACD will have their charges dismissed.

The court is on track to complete 160 cases in 2010. According to Melissa Gelber, Director of the Staten Island Youth Justice Center, 90% of youth court respondents complete their sanctions successfully, and the rate for criminal court referrals is even higher. Among former respondents, the older teens are most likely to apply to become members of the youth court after they have completed their sanctions.

The Rochester Teen Court is the only youth court in New York to **focus solely on young people aged 16 to 18** referred by the criminal court. Established in 1997, the idea was the brainchild of Rochester's then-Mayor, William Johnson, following a Youth Summit addressing issues facing young people in the city.

Rochester Teen Court

The Rochester Teen Court is the only youth court in New York to focus solely on young people, aged 16 to 18, referred by the criminal court. Established in 1997, the idea was the brainchild of Rochester's then-mayor, William Johnson, following a Youth Summit addressing issues facing young people in the city. With leadership from the top, the initial planning team included judges, probation officers, law enforcement, the Jury Commissioner, court personnel and representatives from the school district and other city agencies, and the program has continued to have considerable support from the criminal justice system and the City of Rochester. Initially structured as an initiative within the City of Rochester, the program shifted around for several years, funded fitfully by the city, before landing at the Center for Youth, an independent not-for-profit. Being at the Center for Youth has enhanced the social service component of the program as well as its stability, making private fundraising possible to help sustain and expand the program.

The Rochester program hears cases referred by the Rochester City Court and town courts from a number of suburban communities surrounding the city. Judges refer first-time offenders between the ages of 16 and 18 who have been charged with non-violent misdemeanors and violations. Primarily, these are cases involving petit larceny, criminal trespass, low-level drug possession, and criminal mischief. A teen court staff member conducts a preliminary intake interview immediately after arraignment to assess the appropriateness of the case for teen court disposition and provide information to the youth and his or her parent or guardian. Staff members make a recommendation to the judge, at which point the defendant and his or her parent or guardian, defense counsel and the prosecutor sign an agreement, in which the defendant accepts responsibility for the actions that led to the referral. The defendant receives an ACD, with charges dismissed upon successful completion of the teen court process within six months.

In Rochester, an adult judge presides over the hearings, and teen court members assume all other courtroom roles, including prosecutor and defense attorney, bailiff, deputy and juror. The adult judge model, which predominates in youth courts nationally but is less common in New York State, was chosen because the planning committee believed that defendants would take the proceedings more seriously, according to Judge Frank Geraci, who was part of the committee and now serves as one of the youth court judges. Since the Center for Youth took over the teen court and increased its capacity, the caseload has doubled and now some cases, typically the less complicated ones, are instead referred to a trained attorney facilitator, who works with all of the parties – defendant, parent or guardian, teen advocates – to reach a suitable disposition.

Teen attorneys receive case assignments at least one week before scheduled hearings, which occur twice per month. They are expected to contact their clients and prepare their cases in advance, and are responsible for making opening and closing statements and questioning witnesses. Teen court respondents always testify and their parents or guardians sometimes testify as well. The youths serving as defense and prosecution attorneys may also call law enforcement officers and victims to testify.

The jury, composed of youth volunteers and sanctioned defendants, deliberates immediately following the hearing and must reach a unanimous decision regarding sanctions, which must include at least jury service and an assessment conducted by social work staff at the Center for Youth. Other sanctions include performing community service, enrolling in educational programming,

drug screening, writing essays and letters of apology, and attending one of two behavioral workshops. The sanctions chosen by the jury have to be approved by the judge.

The Rochester Teen Court has heard, on average, 105 cases per year, but that number has grown considerably and the program now aims to serve 300 cases in the coming year. While it has not been formally evaluated, program staff report that sanction completion rates exceed 80%.

Town of Colonie Youth Court

The Town of Colonie Youth Court was established in 1993. The youth court began hearing cases of youth up to and including age 18 from the very beginning, and the planning team engaged the town's three justices on an advisory board where they helped develop the criteria for cases that would be referred by the town court to the youth court. Initially an independent not-for-profit, it was taken over by the Town of Colonie in 2004. Located in the same building as the police department, the program is now funded by the town through the police department's budget. Referrals from the town court now make up about 60% of all of the youth court's cases. The remainder are referred by the Albany County Department of Probation and the Colonie Police Department.

Cases coming through the town court are pre-screened by youth court staff who identify those that fit the criteria based on the defendant's age and the type of offense. At the time of the first appearance in town court, staff conduct an intake with the youth and his or her parent or guardian, and then make a recommendation to the judge as to whether the case is suitable for youth court. The town court can refer first time non-violent misdemeanors or violations. The most common charges are petit larceny and marijuana possession. The parent or guardian of the youth must be present and sign a release form, and the defendant must acknowledge responsibility for the conduct underlying the charge. Violet Colydas, the program's director, estimates that 98% of those offered the youth court option accept it. Those who do not generally cite transportation issues or conflicting school activities.

The Town of Colonie uses a youth judge model, with youth court members serving in all courtroom roles and a jury drawn from a larger pool of volunteers and respondents. The program averages over 100 members annually, who are assigned to six-person teams. The teams receive case assignments on four-week rotations. At least one week before the hearing, the teams are provided with information about the case, including a detailed description of the incident, and other basic information regarding the respondent. The youth advocates serving as defense counsel are expected to prepare theirs client in advance of the hearing, and victim advocates are expected to communicate with any victims.

Youth Judge Jamie Manhertz presides over the Greenpoint Youth Court.

As in Rochester, the respondent and his or her parent or guardian usually testify at hearings, and victims are encouraged to testify. Youth serving as the defense and prosecution question the witnesses, make opening and closing statements and recommend sanctions to the jury and the presiding youth judge. The jury deliberates immediately after the hearing and must reach a unanimous verdict regarding sanctions. Sanctions typically include community service, jury service, and writing essays and letters of apology. All respondents attend a two-hour educational class, addressing issues like shoplifting prevention and resisting peer pressure. Youth court hearings are closed to the public.

The Town of Colonie conducts approximately 75 to 85 hearings annually. Program staff report that the sanction completion rate for all youth court cases is 99%. According to Judge Peter Crummey, who has been a town judge since 1999, the recidivism rate during the six-month ACD period (which in Colonie begins after the youth court process is complete) is "next to nil."

The Town of Colonie conducts approximately **75 to 85 hearings annually**. Program staff report that the sanction **completion rate for all youth court cases is 99%**.

These examples suggest that youth courts are a viable option for criminal courts to address offenses committed by older teens. A well-run youth court provides age-appropriate, thoughtful sanctions as well as links to services, while helping young people avoid a criminal record that can be a lifetime scar. Judges in courts that refer to youth courts have been pleased to have this additional tool to respond to young offenders appearing before them. Finally, these programs also help lighten the burden on criminal courts, with no apparent reduction in public safety. ■

An Amherst Youth Court hearing, with Judge Jason Keefe presiding.

Supreme Court Judge **Sharon S. Townsend** is a former Erie County Family Court Judge and former Administrative Judge for the Eighth Judicial District, and is currently Vice Dean for Family and Matrimonial Law of the New York State Judicial Institute. **Ann F. Arnold** is a Senior Attorney with the Office of Court Administration Eighth Judicial District.

Youth Courts: A Judicial Perspective

By Sharon S. Townsend and Ann F. Arnold

Imagine entering a courtroom and looking around, only to see that the average age of the prosecutor, the defender, the judge, jurors and court staff is 16. This is a youth court in session, a real-life case, and the young people in the courtroom are specially trained to function as their adult counterparts from the court system. They will hear arguments from the prosecution and listen to the youth's defense. They will ask questions. They will deliberate thoughtfully and decide upon a sanction befitting the offense.

A Win-Win for Everyone

I witnessed for myself the power of youth court in my own hometown of Amherst, New York. On a recent Saturday morning, a 15-year-old appeared with his father before the Amherst Youth Court, held in the Amherst Town Court, on a charge of petit larceny for stealing a shirt from the local mall. He approached the bench with his defense attorney and the prosecutor, both students from local high schools. The judge, another student wearing a black robe, asked the respondent very direct questions about why he felt he needed to take the shirt without paying for it. While admonishing the young man, the judge also showed compassion and empathy for the youth. She sentenced him to community service and to write a letter of apology to the store.

I was struck by how sensitive and insightful the judge was in handling the responsibility at such a young age. Her words were similar to those I have said many times, after many years of experience, to young offenders who appeared before me in family court. It was obvious to me that her words were even more meaningful because of her age in relation to that of the respondent.

The respondent's mother also spoke up at the sentencing, an unusual event in youth court, I was told. She pleaded for help for her son before he got into more trouble. The family, who did not live in the same household, was referred by the youth court for counseling. After the session, I was impressed by the help the youth and the family had received from these very mature young people. At the same time, the experience that the youth court members had gained by dealing with a scenario that repeats itself every day in family court is invaluable. It was a "win-win" for everyone.

Currently, New York has approximately 80 youth courts operating across the state. Each court has its own characteristics, governed largely by the needs and resources of the community it serves. "As youth courts continue to be established across the state people are beginning to realize the importance of early intervention," said Michael Torillo, past president of the Association of New York State Youth Courts.

Benefits All Around

Why do these courts tend to be more successful than traditional juvenile justice settings? Youth courts hold young people accountable by requiring them to take responsibility for their actions and restore the harm done to the community. The young offenders are linked with community services such as tutoring, mentoring and conflict resolution classes. Youth court sanctions emphasize restoration and encourage respondents to make amends through such actions as writing letters of apology or writing essays, paying restitution, attending victim impact panels and performing community service.

There are also multiple benefits to the public. Each youth court varies in response to the needs and the resources of its particular community, but the prevailing view is that the court brings "restorative justice" to the community.

Erie County Court Judge Thomas P. Franczyk (one of the judges who developed the City of Buffalo Youth Court) observed, "The main benefit of this court is that kids respond to their peers more effectively than they do when adults talk down to them. Their age group responds to negative peer pressure, so why not positive peer pressure?"

Judge Franczyk has incorporated interesting instructional methodology in his training of participants. He has been known to give exams in the form of a rap song. The Buffalo model trains each participant in all court positions in an attempt to familiarize them with how the system works for the community. Trainees then become a core group of teenagers willing to articulate standards of behavior. They are "setting norms for other teenagers," noted Judge Franczyk.

Another City of Buffalo Youth Court mentor, Craig H. Hannah, stated,

> The active learning allows you to teach them without letting them know you are teaching them. . . . The kids were amazing. The students always wanted to meet on Thursdays and Fridays at night to prepare for their 15 cases in court on Saturday morning. Half the time at the end of the day [the judges] were tired, but we were re-energized by being with the kids. Their enthusiasm was impressive.

In the City of Buffalo model, all referrals to the court are made by the Erie County Probation Department. The Juvenile Probation Officer refers matters to the youth court in lieu of charges in family court. Offenses range from violations to misdemeanors; the offense may be for such matters as property damage, curfew violations, assault and vandalism.

Respondents participating in youth court must first admit guilt and then submit to the sentence imposed by their peers. Sentences can range from community service and restitution to attending counseling. The youth court acts as a team, working together in the offender's best interest. Offenders pick up on this, which is one of the reasons they feel more comfortable in this setting. After considering all the information, the court team decides on a fair and appropriate penalty that holds the youth accountable and makes restitution for the actual or potential harm done to the community. Youth court staff then work closely with respondents to ensure that they complete sanctions as mandated. Successful completion of sanctions imposed by the youth court typically results in favorable disposition of the case by the referring agency.

The average age of the prosecutor, the defender, the judge, jurors and court staff is 16. This is a **youth court in session**, a **real-life case**, and the young people in the courtroom are specially trained to function as their **adult counterparts from the court system**.

I was struck by how **sensitive** and **insightful** the judge was in handling the responsibility at such a young age.

Peer Intervention

Judge Hannah's experience as both a Buffalo City Court Judge and an Acting Family Court Judge gives him a perspective for comparison of the adult and youth models. He noted, "The best part of it is peer intervention. There sometimes is a disconnect between adolescents and

Colonie Youth Court member James Fox delivers his opening remarks as Prosecutor during a mock Youth Court hearing at the NYSBA Headquarters in Albany in October, 2010.

adults. When the participants all are from a similar age group and socio-economic background, the respondents may receive their sentence more willingly."

In a recent article in the *New York Times*, one 18-year-old youth court member said, "We're not here to punish them, we're here to help them out." Another participant was quoted in the same article as saying, "I was known as the troublemaker in school – I was the stereotype." After being referred from criminal court to youth court for petit larceny and carrying out his sentence of four hours of community service, attending a decision-making workshop, writing a letter of apology to his mother and an essay on how petit larceny affected his neighborhood, he attended the training to participate in running the court sessions and began hearing cases. He said, "Before, nobody trusted me besides my family; now I'm on the other side. You see things going on out in the street and you see them coming here. You have the opportunity to help them."[1]

An Alternative Model

Another model youth court in the Eighth Judicial District is operating in Cattauraugus County, where Laurie Peterson has been the youth court coordinator for the past 13 years. Cattauraugus County offers challenges to the coordination of these cases because of the large rural geographic area it encompasses. Accordingly, she has set up the court in two locations, one in Machias to serve the northern half of the county, and one in Little Valley for the southern half. Referrals come from the county's Probation Department for matters such as petit larceny, property offenses, simple assaults, drugs, alcohol, harassment, bullying or fighting.

Ms. Peterson is solely responsible for all training, data tracking and case management. She provides training in many of the high schools in her county and has gotten positive responses from the schools. In her own words: "There has never been enough emphasis on the team members, who are taught to think outside the box. They learn a greater respect for rules and authority. They pause and think what does this law do for me?" In addition to a greater sense of responsibility, and a civic sense, she said, "They learn speaking skills." Quoting Judge Kaye, Peterson added, "It's the right message from the right messengers."

As Erie County Court Judge Sheila DiTullio said about her visit to youth court:

> They were very serious and thorough. They thought carefully about the sanctions handed down. Some of the things they thought of would not have occurred to me as an adult, but as teenagers they were right on point, taking away things that really mattered to the respondent.

It was obvious to me that the **youth court judge's words were even more meaningful** because of her age in relation to that of the respondent.

As a former Erie County Family Court Judge, I strongly support the existence of youth courts. I applaud New York State Bar President Stephen P. Younger, who has urged that every community in the state should have a youth court. ■

1. Tim Stelloh, *Ensuring Petty Crimes Don't Lead to Big Ones*, N.Y. Times, Sept. 21, 2010 p. 22, col. 1.

BY DAVID PAUL HOROWITZ

DAVID PAUL HOROWITZ (david@newyorkpractice.org) practices as a plaintiff's personal injury lawyer in New York and is the author of *New York Civil Disclosure* (LexisNexis), the 2008 Supplement to *Fisch on New York Evidence* (Lond Publications), and the *Syracuse Law Review* annual surveys on Disclosure and Evidence. Mr. Horowitz teaches New York Practice, Evidence, and Electronic Evidence & Discovery at Brooklyn, New York and St. John's law schools. A member of the Office of Court Administration's CPLR Advisory Committee, he is a frequent lecturer and writer on these subjects.

More "Enjoyment of Life" (Part I)

Prologue (Mea Culpa!)

In the first week of December I received nearly identical calls from several friends and colleagues, including Frank Quinn and Harold Herman. Both began with the question: "Is everything all right?"

The reason for their concern? No "Burden of Proof" column in the November/December 2010 *Journal*. The reason for no "Burden of Proof" column? Not death, infirmity, or act of God, but something more prosaic, a *Frye* motion. A *Frye* motion, *in limine*, which occupied my life for a few critical days, including the deadline day for the *Journal*.

Quoting Mark Twain, I responded to each query, "The report of my death was an exaggeration."[1] To those who did not call, I extend a global *mea culpa* for marring what was otherwise a wonderful holiday season.

With a personally heightened sense of the enjoyment of life, I return to the topic of claim for the loss of enjoyment of life.

Introduction

September's column[2] discussed the damages claim of loss of enjoyment of life, and concluded with the question: "To what extent does the assertion of a claim for loss of enjoyment of life waive the physician-patient privilege?" Coincidentally, the July/August column[3] addressed the topic of the split in the Appellate Divisions over the extent to which, if any, special circumstances need to be established in order to demonstrate entitlement to non-party disclosure. This and the next issue's column will address the question posed in September, and highlight the split in the Appellate Divisions over the scope of disclosure when these damages are claimed.

Many personal injury plaintiffs' bills of particulars contain a boilerplate allegation that as a result of the defendant's negligence the plaintiff has suffered of what many plaintiffs' attorneys do not realize is that the "loss of enjoyment of life" claim may open the injured party's entire physical and mental medical history to scrutiny. The rationale adopted by the courts that find the door to be opened is that the broad nature of the claim trumps what is generally the limited waiver of the medical privilege in personal injury actions. "Since the nature and severity of the plaintiff's prior medical conditions may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life, the records regarding those preexisting medical conditions are material and necessary to the defense."[4]

The Door Is Wide Open in the Second Department

In the Second Department, claiming loss of enjoyment of life as an item of damages opens the door to broad disclosure of a plaintiff's past medical history, notwithstanding the rule that a personal injury plaintiff's waiver of the physician-patient privilege is limited to injuries and conditions claimed in the lawsuit:

> Here, the plaintiff affirmatively placed her entire medical condition in controversy through the broad allegations of physical injury and mental anguish contained in her bill of particulars. In addition, the nature and severity of the plaintiff's previous injuries and medical conditions are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to her current foot injury.[5]

The Second Department set forth the general rule on furnishing medical authorizations, and applied the rule in the context of a claim of loss of enjoyment of life:

> A party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue, and CPLR 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action, regardless of the burden of proof. Here, information as to the nature and severity of the injured plaintiff's previous right shoulder injury and right shoulder surgery are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life

due to the current injuries sustained by him in the subject motor vehicle accident. Accordingly, that branch of the defendants' motion which was to compel the plaintiff [], to provide authorizations for the release of his medical records pertaining to a prior right shoulder injury and surgery should have been granted.[6]

However, the Second Department will deny the exchange of records where the proper foundation is not established:

> Here, the Supreme Court providently exercised its discretion in denying the motion of the defendant . . . pursuant to CPLR 3124 to compel the plaintiff to provide an authorization pursuant to the Health Insurance Portability and Accountability Act of 1996 for the release of the plaintiff's psychiatric treatment records and in granting the plaintiff's motion for a protective order. [Defendant] failed to establish that the records she sought to discover were material and necessary to the defense of this action. Moreover, although the decedent's medical records are clearly discoverable here, the plaintiff's psychiatric treatment records are privileged. The mere fact that the plaintiff commenced this action did not result in an automatic waiver of the physician-patient privilege and there is no evidence that the plaintiff affirmatively placed her psychiatric condition in issue so as to effect a waiver of the privilege and permit disclosure. Accordingly, the plaintiff's psychiatric treatment records are not subject to disclosure.[7]

The Door May Be Open in the Third Department

In *Lamot v. Gondek*,[8] the Third Department agreed with the defendant that the trial court erred in dividing non-pecuniary damages into separate awards for pain and suffering and loss of enjoyment of life. Holding "[m]ental suffering is an element of the pain and suffering experienced by injured parties [citing *McDougald*]," [9] a new trial was ordered unless plaintiff consented to a reduction in the award corresponding to the amount separately awarded for loss of enjoyment of life. Despite the agreement with *McDougald* that loss of enjoyment of life is a component of pain and suffering, the case does not discuss any disclosure issues in the action prior to trial.

In *Coddington v. Lisk*,[10] where the plaintiff's drug use/addiction was in controversy, the Third Department explained, "Plaintiff seeks damages for, *inter alia*, alleged 'permanent weakness and instability,' 'permanent effect of pain' and 'loss of enjoyment of life' resulting from the incident."[11] The plaintiff had sought to prevent the disclosure of records of methadone treatment based upon a claim that the records might reveal information concerning the plaintiff's HIV status, and the trial court denied the defendants' motion to compel the exchange of an authorization.[12] The Third Department held:

> We note that no argument has been advanced that discovery would cause undue harm to plaintiff. There is a strong presumption of disclosing all relevant material. Notwithstanding Supreme Court's broad discretion, under the circumstances presented here we find that the court erred in denying defendants' request to compel plaintiff to execute an authorization for records pertaining to her Methadone Program records. . . . Inasmuch as plaintiff's drug addiction records may be useful in preparation for trial and "may lead to relevant evidence bearing on plaintiff's claim for damages," we conclude that such evidence should be disclosed.[13]

In *Syron v. Paolelli*,[14] the plaintiff was injured in an automobile accident. While not alleging loss of enjoyment of life, the plaintiff did claim "mental anxiety" and "emotional distress." The defendant requested records of the plaintiff's psychiatric and/or psychological treatment, and the plaintiff opposed the demand, arguing the records were privileged. The Third Department held:

> Generally, in a personal injury action, the medical records of a litigant, who affirmatively places his or her physical condition or mental or psychological status in issue, are subject to disclosure. However, plaintiff maintains that she is not obliged to disclose her psychological and psychiatric records because she has "not filed a claim alleging an aggravation or development of an emotional trauma or psychological condition," and hence has not waived the physician-patient privilege with respect to these records. We disagree, for in her complaint and bill of particulars alike she specifically alleges that she suffers permanently from "mental anxiety" and "emotional distress" as a result of the accident.
>
> Moreover, our in camera review of these records discloses that they relate, in part, to therapy and treatment plaintiff received in connection with her complaints of chronic pain stemming, inter alia, from the physical injuries she sustained in the accident, as well as for the emotional distress occasioned

What many plaintiffs' attorneys do not realize is that the claim of "loss of enjoyment of life" may open the injured party's entire physical and mental medical history to scrutiny.

thereby. They cannot, therefore, be considered irrelevant to the present action.[15]

Accordingly, there is authority in the Third Department directing the exchange of records based, at least in part, upon a claim of loss of enjoyment of life, although cases dealing with drug use/addiction may not provide guidance across the board. Claims of mental anxiety and emotional distress, which are often reflexively listed as boilerplate claims in bills of particulars, appear to open the door under *Syron*.

The Door Closes in the Fourth Department

In an action for the negligent prescription of medications, wherein plaintiff alleged "in her bill of particulars that her injuries included a perforated gastric ulcer, the effects of which resulted in, inter alia, loss of enjoyment of life and pain and suffering,"[16] the defendants sought numerous authorizations for, *inter alia*, records of physicians and mental health providers.[17] "Plaintiff asserted in opposition to the motion that she had never sought treatment from seven of the providers, and that the remaining 11 providers had treated her for injuries and conditions unrelated to the injuries at issue in this action."[18] The Fourth Department denied the defendants' request for an authorization directing the release of the records:

> [T]he waiver of that privilege "'does not permit discovery of information involving unrelated illnesses and treatments.'" "The determinative factor is whether the records sought to be discovered are 'material and necessary' in defense of the action," or whether the records "may contain information reasonably calculated to lead to relevant evidence." Here, as plaintiff correctly contends, defendants failed to establish that the records sought "related to any physical or mental conditions affirmatively placed in controversy by" plaintiff in this action against defendants.[19]

(Interim) Conclusion

The next issue's column will complete this review of claims of loss of enjoyment of life. In the meantime, I hope to see you at the January Annual Meeting. ■

1. N.Y. Journal, June 2, 1897.

2. David Horowitz, *Enjoyment of Life*, N.Y. St. B.J. (Sept. 2010) p. 16.

3. David Horowitz, *No Longer Special*, N.Y. St. B.J. (Jul./Aug. 2010) p. 21.

4. *Amoroso v. City of New York*, 66 A.D.3d 618, 618, 887 N.Y.S.2d 163 (2d Dep't 2009) (citations omitted).

5. *Diamond v. Ross Orthopedic Grp., P.C.*, 41 A.D.3d 768, 839 N.Y.S.2d 211 (2d Dep't 2007) (citations omitted).

6. *Weber v. Ryder TRS, Inc.*, 49 A.D.3d 865, 866, 854 N.Y.S.2d 480 (2d Dep't 2008) (citations omitted).

7. *Napoli v. Crovello*, 49 A.D.3d 699, 699–700, 854 N.Y.S.2d 176 (2d Dep't 2008) (citations omitted).

8. 163 A.D.2d 678, 558 N.Y.S.2d 284 (3d Dep't 1990).

9. *Id.* at 679. *See McDougald v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937 (1989).

10. 249 A.D.2d 817, 671 N.Y.S.2d 826 (3d Dep't 1998).

11. *Id.* at 818.

12. *Id.* at 817.

13. *Id.* at 818 (citations omitted). ("Plaintiff seeks damages for, *inter alia*, alleged 'permanent weakness and instability,' 'permanent effect of pain' and 'loss of enjoyment of life' resulting from the incident. Inasmuch as plaintiff's drug addiction records may be useful in preparation for trial and 'may lead to relevant evidence bearing on plaintiff's claim for damages,' we conclude that such evidence should be disclosed." *Id.* (citations omitted).

14. 238 A.D.2d 710, 656 N.Y.S.2d 419 (3d Dep't 1997).

15. *Id.*

16. *Bozek v. Derkatz*, 55 A.D.3d 1311, 865 N.Y.S.2d 163 (4th Dep't 2008).

17. *Id.* at 1311–12.

18. *Id.* at 1312.

19. *Id.* (citations omitted).

Justin S. Teff (justinteff@ralphmkirk.com) is a senior attorney in the Law Offices of Ralph M. Kirk in Kingston, New York. Over the course of his career, Mr. Teff has represented insurance carriers, the Special Funds Conservation Committee and, most recently, injured workers in all aspects of workers' compensation proceedings. A graduate of the State University at Albany, he received his J.D. from Albany Law School.

After *Burns v. Varriale*: Essential Lessons for Workers' Compensation Third-Party Action Attorneys

By Justin S. Teff

When a work-related injury occurs, and the wrong of a third party is involved, the injured worker normally need not elect between maintaining a workers' compensation claim and a third-party lawsuit against responsible contributors; the worker may pursue both claims. In keeping with the principle of preventing double recovery, however, the Workers' Compensation Law (WCL) provides the liable compensation insurance carrier with lien and offset rights viz. a claimant's third-party recovery. The carrier's lien – the sum of past benefits paid on the claim – is reimbursed at the time of settlement or judgment, and the carrier is then permitted to offset, or withhold payment of, future benefits in an amount equal to the remaining net recovery.

Because the carrier obtains such a substantial benefit from the recovery in the third-party action, it is only reasonable, and as such the law provides, that it must contribute to this equation its equitable share of the costs involved in obtaining that recovery. The process of calculating and applying the equitable apportionment of the costs of third-party litigation can have a significant effect on a worker's overall return, and it is therefore crucial that third-party and compensation counsel are fully versed in the subject. Indeed, a once intricate issue has become more so in the aftermath of the courts' decisions in *Burns v. Varriale*.[1] This article discusses third-party liens and offsets, as well as matters third-party action attorneys must manage during lien / offset negotiations to appropriately represent the claimant.

Lien and Offset Rights

Background

The Workers' Compensation Law specifically provides that when a worker's injury or death is occasioned by

the negligence or wrong of a third party, not in the same employ, the worker "need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other" but may do both, subject to certain limitations.[2] Perhaps the most consequential limitation is that the compensation carrier's written consent to settle the third-party action (TPA) must be obtained, absent court approval, or a claimant risks forfeiting all future workers' compensation benefits.[3]

To prevent the claimant from being paid twice for a single harm, WCL § 29 contains another important limitation in the form of the carrier's statutory lien and offset rights against the net third-party proceeds.[4] The carrier has the right to recoup its compensation outlay up to the time of TPA recovery in the form of a lien on the net proceeds[5] and a separate right to an ongoing offset (often called a holiday, or a period in which the carrier is not liable for actual payment of benefits) against future compensation benefits to the extent of the remaining net recovery.[6]

Once the benefits to which the claimant is entitled under the WCL exceed the amount of the remaining net third-party recovery, the carrier's holiday is over, and it must resume actual payment of ongoing compensation benefits.[7] This resumed liability for actual payment is commonly termed deficiency compensation.

Given that the compensation carrier obtains such a considerable benefit as a result of the TPA recovery, it is only reasonable that it should share in the costs of obtaining that recovery. The statute itself provides that in the event of a recovery – by settlement, judgment, or otherwise – the claimant may apply to the court for an order "apportioning the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor."[8]

The carrier's equitable apportionment percentage share, also known as the percentage cost of litigation (PCOL), is the percentage of the gross recovery represented by the sum of costs/disbursements and attorney fees.[9] As explained by the Court in *Kelly v. State Insurance Fund*,[10] the purpose of WCL § 29(1) is to

> stem the inequity to the claimant[], arising when a carrier benefits from an employee's recovery while assuming none of the costs incurred in obtaining the recovery, and to ensure that the claimant receives a full measure of the recovery proceeds in excess of the amount of statutory benefits otherwise due the claimant.[11]

In practice (prior to *Kelly*, discussed below), this provision typically resulted in a reduction of the carrier's lien by the PCOL at the time of TPA recovery, with the carrier permitted to retain its future offset to the extent of the remaining recovery, but with no additional contribution to account for its equitable share of the costs of obtaining that offset.

Kelly and *Burns*

The decision in *Kelly v. State Insurance Fund* altered this equation inasmuch as it concluded that a carrier must not only reduce its lien by a proportionate share of the TPA costs, but must pay additionally for the benefit derived from the future offset. *Kelly* involved a compensable death case in which the future benefits due the widow could be approximated by reference to actuarial tables. The Court noted in this regard, "The value of future compensation payments that a carrier has been relieved of paying due to a third party recovery is not so speculative that it would be improper to estimate and assess litigation costs against this benefit to the carrier."[12]

This principle gave rise, in practice, to performance of a so-called *Kelly* calculation to determine the present dollar value of the future compensation liability extinguished by virtue of the offset right, a percentage of which (PCOL) would then represent the carrier's equitable share of costs for obtaining the offset. As *Kelly* required the carrier also to contribute this amount to the equation, the result was generally a further reduction of the carrier's lien at the time of TPA recovery, or even "fresh money" (an actual monetary payment in addition to full lien negation) being paid to the claimant, in exchange for the full future offset right.

Such was the state of the law from 1983 until 2006, when the decision of the Third Department in *Burns v. Varriale*, affirmed by the Court of Appeals in 2007, again substantially altered the lien/offset landscape.[13] The Court of Appeals in *Burns* pronounced the newly operative principle at the outset:

> that the value of future workers' compensation benefits for a claimant with a nonschedule permanent disability is speculative, that the present value of these benefits cannot be ascertained at the time claimant recovers damages in a third-party action, and that claimant is not entitled to an apportionment of attorney's fees based on such future benefits.[14]

In particular, the Court agreed with the Third Department that "if a claimant does not receive benefits for death, *total* [permanent] disability or schedule loss of use, the carrier's future benefit cannot be quantified by actuarial or other reliable means."[15]

As a result of *Burns*, claimants who have been classified with a permanent partial disability (PPD) in their compensation claim at the time of TPA recovery, and arguably those with no finding of permanency, are not entitled to have the carrier immediately contribute its PCOL share of the offset. Rather, the Court held, in such cases "the carrier should be required to periodically pay its equitable share of attorney's fees and costs" as benefits accrue.[16] The decision directed that "[t]he trial court,

in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue and monitoring (e.g., by court order or stipulation of the parties) how the carrier's payments are made."[17]

Generally the equitable share of the offset is accounted for by the carrier making ongoing *Burns* payments to the claimant, calculated as the PCOL share of the claimant's ordinary weekly benefit entitlement (e.g., $500 weekly WCL benefit X 35% PCOL = carrier actually pays $175 per week). *Burns* likewise suggests that the carrier should be responsible for its PCOL share of ongoing medical costs as they accrue.

Counsel must be cognizant that both *Kelly* and *Burns* require a carrier not only to immediately discount its lien by the PCOL pursuant to WCL § 29(1), but additionally contribute its pro rata share viz. the future offset. By no means does *Burns* hold that a carrier need not contribute at all for the future benefit; instead *Burns* merely recognizes another means of accounting for this aspect of the equitable apportionment of costs. Thus if *Kelly* does not apply, and no immediate *Kelly* contribution is made, then *Burns* does, and the carrier must be subject to some pay-as-you-go arrangement pursuant to the holdings of both the Third Department and Court of Appeals.[18]

Lien and Offset Issues in Practice

Because the carrier's consent to settle the TPA is required, lien and offset negotiations usually occur within the context of obtaining said consent. However, these matters must be addressed with equal precision in a post-judgment context, either by stipulation or request for court order. If a stipulation cannot be reached, *Burns* indicates that the trial court has jurisdiction to determine the issue. The claimant's compensation counsel should be involved early to help coordinate and maximize benefits in all forums and provide a clear statement of the claimant's rights and the carrier's obligations after third-party recovery.

Whether *Kelly* or *Burns* applies is dependent upon the claimant's legal status under the WCL at the time of recovery. A worker will, for these purposes, either have (a) no finding of permanent disability; (b) a finding of scheduled permanent disability for appendages, and vision and hearing loss (facial disfigurement awards likely fall into this category);[19] (c) a classification of a permanent partial disability (e.g., *Burns*);[20] (d) a classification of a permanent total disability;[21] or (e) a work-related death (e.g., *Kelly*).[22]

At this time, it seems reasonable to presume that should the Third Department encounter the issue, categories (a) and (c) will require that *Burns* apply, and no immediate contribution be made as to the future offset, and categories (b), (d), and (e) will remain in the *Kelly* category, as iterated by the Third Department and Court of Appeals.

Practice Points Post-*Burns*

While it is accurately stated that the carrier's lien and offset rights exist to prevent a double recovery by the claimant, the notion that a permanently disabled individual ever receives a double recovery is in some respects a dramatic overstatement. In a perfect world, all compensatory recoveries would adequately restore the injured party to a pre-injury state, to the extent this can be accomplished by any monetary amount, but in reality – which includes comparative negligence and insurance policies of limited coverage – such recoveries rarely do so.

Considering all the factors involved, the true balance to be struck, in this equation, is between avoiding a double recovery to the claimant and preventing what is in essence a double windfall to the carrier. Though the claimant has indeed received WCL benefits and the third-party recovery, the TPA affords the carrier a substantial windfall, which is obtained via little or no effort on its part and in connection with a loss for which it duly wrote the risk and accepted a full premium. This windfall persists even as compensation carriers are required, or at least expected, to pay their PCOL share for the benefit they receive in connection with lien recoupment and the future offset / holiday.

Third-party attorneys must be vigilant, then, in requiring the carrier to pay its fair share for the benefit received by way of the TPA recovery, immediately in connection with the repayment of its lien, and either at once or thereafter in connection with the offset right. Any advantage a carrier is permitted to take without paying the full PCOL share represents a double windfall. Put another way, the initial windfall received by the carrier will be paid for entirely by the injured worker. Any result contrary to a carrier's full PCOL contribution for both the lien and offset rights is incorrect as a matter of law (*Kelly* and *Burns*) and equity, as this surely results in an unjust enrichment to the carrier.

Counsel must be cognizant of the various tactics compensation carriers employ in letters of consent to settle, the essential document used by the board to ascertain the parties' agreement if entitlement questions later arise. No letter of consent should be accepted from a carrier that recognizes the obligation to pay its PCOL share of the lien but disclaims responsibility for additional contribution per *Kelly*, per *Burns*, or both. Such a provision, if accepted, represents nothing short of a gift to the carrier in the amount of its PCOL share of the future offset it will take against the claimant's WCL benefits.

Counsel must be aware that acceptance of a consent letter with adverse provisions and disbursement of the settlement proceeds represents a contract, the terms of which are unlikely to be altered by a court or the board. Only a clear resolution of the carrier's PCOL contribution responsibilities, set forth in the letter of consent, or better yet a stipulation of the parties in writing or in open

court, will suffice to protect the claimant. In a recent case before the board, the carrier in its letter of consent recognized its obligation to discount its lien by the PCOL, but disclaimed responsibility for any additional contribution under *Kelly*, with no mention of further rights under *Burns*; *Kelly* did not apply to the facts of the case. When the claimant sought ongoing *Burns* payments, the board denied the request, finding – as it has in a series of recent cases – that failure to provide for a specific agreement in the consent letter to make continuing *Burns* payments constitutes a waiver by the claimant, and the board has no jurisdiction to alter the terms of the parties' agreement. Thus the board has taken the position, consistently as of late, that the claimant must preserve his or her own right to *Burns* money, or the right will be waived.

To err on the side of caution, the letter of consent must contain more than a mere reservation of the claimant's rights to future benefits under *Burns*. If ongoing *Burns* payments are not specifically delineated in the consent agreement, the carrier is free to argue that the claimant must periodically petition the board for a lump-sum *Burns* adjustment, a strained and unreasonable interpretation of *Burns*. Any payments being made to the claimant at the time of TPA recovery should continue, in the amount of the PCOL share of the overall weekly benefit, subject only to such affirmative defenses as the carrier is otherwise always permitted to assert. To arrange otherwise is again to bestow a double windfall upon the carrier. It should be recognized that these are benefits to which a claimant would otherwise be entitled but from the third-party recovery.

If it is determined that *Burns* applies, and the carrier makes no upfront contribution for the offset, it is recommended that a stipulation be obtained in writing or in open court, substantially as follows:

1. The compensation carrier consents to the third-party settlement;
2. The carrier's right to recover its lien is subject to immediate discount by the full PCOL, including costs and disbursements;
3. The carrier shall continue to pay the claimant a weekly benefit equal to the PCOL of the claimant's overall weekly WCL benefit, to the full extent its offset remains;
4. The carrier shall be responsible to pay its PCOL share of any benefits not presently due the claimant, but which are thereafter found to be due, such as in the case of an unanticipated worsening of the claimant's medical condition, resulting in additional lost wages or medical expenses;
5. The carrier shall pay its PCOL share of all causally related medical benefits as the same accrue, to the full extent its offset remains; and
6. The carrier's obligation to pay its continuing PCOL share of benefits is subject only to such affirmative defenses as may be available irrespective of the third-party recovery.

In case of an intransigent carrier representative, a simple motion to the court with notice to the compensation carrier – with a copy of the proposed order / stipulation – will usually suffice to involve the carrier's specialized compensation counsel, and the motion will not need to be brought to fruition.

As a final practical matter, a compensation carrier likely would be motivated to resolve all issues in the compensation claim at the time of TPA recovery (by way of WCL § 32 agreements), including residual entitlement to WCL benefits viz. the PCOL share of continuing benefits and any potential deficiency compensation claim. Such resolution would reduce the carrier's overall liability and administrative expense, a savings to be passed on to its clients.

Regarding further developments in this area, it may be argued that the only truly equitable way to deal with the offset contribution issue is to have the *Burns* formulation apply in all instances. Indeed, even the benefits payable pursuant to a finding of permanent total disability or a compensable death, calculated with reference to actuarial tables, are by their nature no less speculative than a PPD benefit; a permanently totally disabled claimant may die

before his or her projected life expectancy, and ongoing death benefits are payable to a spouse under similar circumstances, yet only until the point of remarriage, and are limited to surviving children under various circumstances.[23] *Kelly* thus imposes the unnecessary, perhaps unreasonable burden on the carrier of having to pre-pay for what is still a speculative loss. The most equitable means of calculating the offset contribution is to have *Burns* apply in all cases; the result would be a fair and balanced allocation of the costs of litigation. ■

1. 34 A.D.3d 59, 820 N.Y.S.2d 655 (3d Dep't 2006), *aff'd*, 9 N.Y.3d 207, 849 N.Y.S.2d 1 (2007).

2. *See* WCL § 29(1).

3. *See* WCL § 29(5); *Johnson v. Buffalo & Erie Cnty. Private Indus. Council*, 84 N.Y.2d 13, 613 N.Y.S.2d 861 (1994).

4. *See* WCL § 29(1). If a work-related accident involves a motor vehicle covered under New York's no-fault laws, different rules will likely apply for lien and offset issues. In essence, a carrier has no lien against any motor vehicle TPA recovery for its WCL outlay to the extent it is made "in lieu of first party benefits which another insurer would have otherwise been obligated to pay under article fifty-one of the insurance law." *See* WCL § 29(1-a).

5. *See* WCL § 29(1). The amount of the lien is the sum of the carrier's expenditures for medical expenses and disability indemnity benefits through the time of TPA finalization.

6. *See* WCL § 29(4).

7. *See id.*

8. *See* WCL § 29(1).

9. An important but often neglected point is that the carrier's equitable percentage share is not one-third per se, but the exact PCOL, which is almost always greater. The figure one-third is customarily utilized in practice as an abbreviated version of the PCOL, but is not technically correct. Indeed some contingency fees are greater than one-third, and rarely does a lawsuit cost zero dollars to prosecute. While one-third is often asserted by carriers as the figure they are willing to use, its application is almost always to the monetary detriment of the claimant.

10. 60 N.Y.2d 131, 138, 468 N.Y.S.2d 850 (1983).

11. *Id.* at 138; *Burns*, 9 N.Y.3d at 213–14.

12. *Kelly*, 60 N.Y.2d at 139.

13. *See Burns v. Varriale*, 34 A.D.3d 59, 820 N.Y.S.2d 655 (3d Dep't 2006), *aff'd*, 9 N.Y.3d 207, 849 N.Y.S.2d 1 (2007).

14. *Burns*, 9 N.Y.3d at 209. The terms classification and permanent partial disability are compensation terms of art that refer to a legal permanent disability status entitling a claimant to ongoing weekly wage benefits payable under WCL § 15(3)(w). This is what is meant by the court in referring to a "nonschedule permanent disability."

15. *Burns*, 9 N.Y.3d at 215 (emphasis in original). In decisions since *Burns*, the board has, to various ends, limited the holding's applicability to claimants who have been classified PPD. However, given that the essence of the holding is the non-quantifiable nature of benefits, and given the courts' explicit statement that benefits are likely speculative if not involving a schedule award, a death claim, or permanent total disability, it seems unlikely the Third Department would agree. This issue has yet to be addressed by the court.

16. *Burns*, 9 N.Y.3d at 217.

17. *Id.*

18. Carriers will at times take the position that because they are "willing" to discount the lien by one-third (the PCOL), no further arrangement is required to account for PCOL of the offset. This assertion is inaccurate, and in fact ignores the essential holdings of both *Kelly* and *Burns*. Yet often substandard agreements are reached in which a carrier discounts the lien by one-third, but no additional money is immediately contributed for the offset (*Kelly*), and no pay-as-you-go arrangement has been made (*Burns*).

19. *See* WCL § 15(3)(a)–(u).

20. *See* WCL § 15(3)(w). WCL § 15(3)(v) provides for ongoing benefits in certain instances in which a worker sustains a scheduled permanent injury in excess of a 50% loss of use. Ongoing benefits paid pursuant to WCL § 15(3)(v) will likely fall into the category with speculative permanent partial disability benefits.

21. *See* WCL § 15(1).

22. *See* WCL § 16.

23. WCL § 29(1-b) provides that should a surviving spouse with no children remarry, the spouse is then entitled to only a lump sum payment of "two years' compensation." Dependent children are allotted benefits when under the age of 18 (up to age 23 if "enrolled and attending as a full time student in an accredited educational institution") or are blind or otherwise physically disabled.

BY JUDITH S. KAYE

Commercial Litigation in New York State Courts, 3rd Ed., edited by Robert L. Haig (West, 2010)

During the weeks since I so quickly accepted Bob Haig's invitation to write this review for the *Journal*, I have several times taxed myself with the question: why did I agree to do this? Bob's a great advocate but, honest, I gave him no resistance.

We did linger a moment over any "conflict" issues. My deep entanglement with the Commercial Division, authorship of Chapter 1 of the first and second editions (now superbly supplemented by Chief Judge Jonathan Lippman), and long marriage to the late Stephen Kaye (author of the original magnificent chapters on actually trying commercial cases, start to finish) are already matters of full disclosure. Anyway, a "bad" review is utterly unthinkable. The many prior reviews of the earlier editions – up to Justice Thomas Mercure's fabulous *New York Law Journal* review of the newest edition (N.Y.L.J., Nov. 22, 2010, p. 6) – are uniformly glowing, a conclusion amply buttressed by the fact that the books are in wide use, regarded as essential by practitioners, and generating substantial revenues for the New York County Lawyers' Association.

No, the lure was different. Justice Mercure, in his recent review, observed, "This set of books is an exemplary response to substantial changes in the field of commercial litigation." Having watched from the treasured vantage point of the Court of Appeals bench since the Commercial Division and the treatise made their debut, I wanted to page through the volumes and take a fresh, lawyer's look at where things had come. What's new and different, what has (or has not) fared well in this brave new world of ours? So I won't squander any more of my precious 800-word limit on the added bulk of the volumes – new authors and chapters, more pages. Just reserve a shelf – it's worth it! I'll turn to the substance.

As in the past, the book is naturally structured around the progress of a case, from sparks to ashes, but it is also replete with sections on the underlying substantive, procedural and strategic issues on avoiding, expediting and managing litigation at every juncture. Here, significant changes in the field are immediately evident – from Consumer Protection, to Crisis Management, to E-Commerce, to Health Care, to Information Technology Litigation, to Not-for-Profits, to White Collar Crime and far beyond. Judge Graffeo's brand-new chapter on CPLR Article 78 is a gem.

I can't imagine contemplating commercial litigation without checking the subject matter indices (the various indices have their own separate volume). A quick reference to, say, Insurance, or Class Actions, or Provisional Remedies, connects the reader to the universe of relevant laws, cases and forms as well as infinite electronic age databases. But even more critically, it offers the reader the latest insights and aids from our most seasoned practitioners in the area.

Evident in the newest edition are the solid interrelationships in commercial litigation that have been built between the New York State courts and the federal courts, as well as the burgeoning universe of alternative dispute resolution. Heightened awareness of, and mutual respect for, one another's role in our global world can only yield enormous benefit all-around. None of us does, or can do, this alone.

Do I see dramatic change in the field of commercial litigation wrought by today's business climate? Have the intensity of competition, the technology and other factors made the practice of commercial litigation law today meaner, crasser, "unprofessional"?

Different, yes. How could it be otherwise? The subject of discovery, of course, leaps first to mind. Indeed, the treatise's Deposition and Disclosure *indices* alone are eight fully printed pages, clue to the enormous impact of electronic communications on litigation, and necessarily on litigators in their business and personal lives. Crisis management, cost control, lack of civility – the signs of change are everywhere throughout the volumes, most often accompanied by a wealth of generously shared constructive steps so that colleagues can anticipate, evaluate and respond to these modern-day developments.

But in the end, the treatise reflects what endures as well as what is different, starting with the fact that hundreds of lawyers and judges freely gave of their time and talents to create these new volumes, attesting to a commitment to the highest professional values. This is "mentoring" of another sort, different admittedly from the cherished person-to-person sessions of a bygone era, but sage advice and counseling nonetheless.

The books additionally reflect the high value of what we all do both individually to serve clients and collectively to assure the pre-eminence of New York State as a world commercial capital. From the first-rate authors' extraordinary product and their everyday performance, it is clear to me why New York State is so often specified in agreements as the governing law.

So I thank you, Bob Haig, for precipitating yet another great edition – and for inviting me to review it. ■

JUDITH S. KAYE, formerly Chief Judge of the State of New York, is now Of Counsel to Skadden, Arps, Slate, Meagher & Flom.

sistent remedies. For example, a court will not grant specific performance and rescission of a contract.

Also, as explained in Part I of this series, don't include a specific dollar amount in personal injury, wrongful-death actions, medical-malpractice actions, and any action against a municipal corporation. Exception: If the action is in New York State Supreme Court, allege in your complaint that the amount of "damages exceeds the jurisdictional limit of all other courts that might have jurisdiction."[8] The defendant may request a supplemental demand asking that you specify the total amount of damages you're seeking; you have 15 days from the request to serve the supplemental demand.[9]

The demand for relief is also required in other pleadings: counterclaims, cross-claims, interpleader complaints, and third-party complaints.[10]

5. Indorsement and Signature

At the end of the complaint, if you are a pro se plaintiff, sign your name and give your address and telephone number. Also, print or type your name directly below your signature. If attorneys represent you, the attorneys should provide their name, address, and telephone number. You or your attorney may also want to include the following: (1) the date you indorsed the complaint; (2) the place where you drafted the complaint; (3) the party that counsel represents; and (4) the person(s) you served the complaint. The CPLR now requires that your attorney sign.[11] Underneath the attorney's signature, have the attorney print the attorney's name. The purpose of the signature requirement is to ensure that you or your attorney has read the complaint and that you or your attorney is bringing the claim in good faith — a complaint that isn't frivolous.[12] A signature also verifies that there is, or will be, evidentiary support for the plaintiff's factual allegations.[13] If a court determines that your complaint is frivolous, you as the plaintiff or your attorney, or both, is subject to sanctions. The court might also strike your complaint.[14]

The signature requirement applies to every pleading you serve on another party and file with the court. If you or your attorney omit a signature and you haven't corrected the omission, a court may strike your pleadings.

6. Verification

A verification is a party's sworn statement that the party asserts the allegations in the pleading are true according to the party's knowledge and belief, except as to those matters alleged in the pleading on "information and belief."[15] Some causes of action require verified complaints, including sales of goods and performance of labor under CPLR 3016(f), summary proceedings to recover possession of real property under Real Property Actions and Proceedings Law § 741, and matrimonial actions under Domestic Relations Law § 211.[16] If a pleading is verified, each subsequent pleading must also be verified. Exceptions: an answer by an infant, information that may be privileged, or any exception specified by law.

In a multiparty case, only one party need verify the pleading. If a domestic corporation is a party, a corporate officer should verify the pleading. If a party is a governmental body, any person acquainted with the facts may verify the pleading. An attorney may also verify the pleading. In verifying the pleading, the attorney asserts that the attorney has some knowledge of material facts in the pleading after having consulted with a client or reviewed certain documents.

Example of verification by a party: "I, John Johnson, being duly sworn, state: I am the plaintiff in this action. The foregoing complaint is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true."

If an agent or attorney verifies the pleading, use the following language: "The ground of belief as to all matters not stated upon knowledge is that . . . ." (Indicate what documents you've reviewed or conversations you've had with a witness, for example.) "The reason a party did not make this affidavit (or affirmation, if completed by an attorney) is that . . . ." (Insert reasons, such as the party is not in the county where the party's attorney has an office.)

Under CPLR 2106, an attorney, physician, osteopath, or dentist whom the law authorizes to practice in the state and who is not a party to the action may affirm the verification statement "to be true under the penalties of perjury" rather than swear before a notary.

CPLR 3022 explains the remedies for a defective verification when verifications are optional as opposed to when they're mandatory.

Read the complaint from the point of view of each of your different audiences: the court, your adversary, and your client.

Edit and Rewrite

Once you as the attorney have finished drafting the complaint, consider your clients.[17] Have them read the complaint to make sure that they understand it and that the complaint is accurate. Clients should be able to read and understand pleadings easily. Your clients are in the best position to see factual errors in a complaint. The complaint should be "geared to their level of sophistication and legal knowledge."[18] If your clients can't understand the complaint, you've alienated those whose help you need. Have your clients review the complaint to check that the facts are accurate and to confirm that the claims in the complaint are the ones your clients want to pursue.

Read the complaint yourself, once for organization and structure and a second time for accuracy and clarity. Be certain you've expressed the allegations simply: "genuinely confusing allegations will give the defendant the opportunity to deny what would otherwise have to be admitted."[19] Proofread carefully; check that paragraphs are numbered consecutively and that references to earlier paragraphs are correct.[20]

Draft each aspect of the complaint so that you won't waste time and money pursuing fruitless claims or defending your complaint against challenges. The time spent on this careful drafting is minimal compared to the time it takes to respond to motions your adversary raises and for you to bring motions to amend defects in your complaint.

Test the Consequences

Once you finish drafting the complaint, answer the complaint yourself. This exercise will reveal drafting and pleading defects and whether the defendant can avoid answering allegations because of loose drafting. Statements in a pleading are admissions. You should force the other side to make admissions while avoiding making them yourself.

> If your clients can't understand the complaint, you've alienated those whose help you need.

Read the complaint from the point of view of each of your different audiences: the court, your adversary, and your client. Begin with your most hostile audience: your adversary. The defendant might seek to dismiss the case for lack of jurisdiction, improper venue, failure to state a claim or cause of action, and failure to state facts in sufficient detail.[21] Anticipate these grounds and edit your complaint so that your adversary won't raise them. For every claim you set forth, make sure to list sufficient facts to support each element.

Evaluate the complaint from the judge's viewpoint — an objective standpoint. Consider the tone of the complaint. Does the story portray the plaintiff sympathetically without being melodramatic or maudlin? Is the complaint consistent? Are there contradictions? Before arguing in the alternative, weigh the risks and benefits of doing so: "If you decide to plead in the alternative, use language that makes it clear that you're making alternative arguments, not just contradicting yourself."[22]

Attaching Documents to Your Complaint

To substantiate your claims, you may mention documents that corroborate your claims, including checks, contracts, letters, memorandums, and reports (medical, police, and corporate).[23] Documents attached to your complaint become part of the complaint.[24] You might want to attach documents to the complaint to legitimize your claims[25] and to show that you have provided the requisite notice of a default and an opportunity to cure, if you must allege them. Including other documents shows the court and your adversary that there's substance to what you're alleging. By attaching documents, you're authenticating the documents you've attached at the outset. Although attaching documents might be advantageous to you, consider the disadvantages.[26] One disadvantage is that the documents you've attached might not be admissible; they might contain inadmissible evidence. The documents might also contain information harmful to your client. Also, attaching too many documents to the complaint might make the complaint lose its overall persuasive effect. By attaching documents, your complaint will look like a motion for summary judgment.[27] That's not what your complaint should look like.

If you're attaching documents to your complaint, make sure to attach them as exhibits. Label them as exhibits and mark them in numerical or alphabetical order. In the complaint, reference your documents. Example: "In a contract dated October 10, 2010, defendant agreed to ship 200 widgets. A copy of that contract is attached as Plaintiff's 1 and incorporated by reference into this complaint."

In the next issue's column, the Legal Writer will continue with techniques on writing pleadings. ■

Gerald Lebovits is a judge of the New York City Civil Court and an adjunct professor at St. John's University School of Law and Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Which is correct, "mistake ridden" or "mistake riddled"?

Answer: To respond with the so-called "lawyerly" answer, "that depends." But in this case, the answer *is* "that depends." Although the two past participles are often synonymous, meaning "full of," *riddled* has a more slanted sense. *Ridden*, the past participle of the verb *ride*, is found in phrases like "error-ridden" and "guilt-ridden," with the meaning of "replete with."

To say something is "mistake riddled" may mean it is "rife with error," probably a stronger condemnation than "mistake ridden." The past participle *riddled* is derived from the Old English noun *hriddil*, which meant "a coarse sieve." By the Middle English period, when Chaucer wrote his *Canterbury Tales* and other works, it had become a verb meaning "to sift." But during the modern English period, its meaning has worsened.

That pejoration in the meaning of *riddled* may be due to its use in phrases like "riddled with bullet holes." *The American Heritage Dictionary* (which is the source of these definitions) quotes *The New Republic*'s pejorative use of *riddled*, in "The political campaign [was] riddled with demagogy and worse." Words, like people, are often judged by the company they keep, and *riddled* has been the victim of unfortunate association.

Question: My question is about what I call "throwaway words," words like "frankly, "honestly," "sincerely," and "truthfully," which in my opinion add nothing to the dialogue and are now increasingly being added to statements. Do you have an explanation for why such expressions are used?

Answer: What you have dubbed "throwaway words" (a great name) are usually called "intensifiers." When they use them, people intend to emphasize what comes next, or at least to call attention to it. But, in fact, intensifiers weaken the language that follows. In addition, those words cast doubt on the sincerity of language that is not so-labeled. The reader who submitted this question said that when members of his family use throwaway words, he asks, "If you add 'truthfully,' here, what should I think when you don't use that word?"

Other types of intensifiers are words like "very," "greatly," and "especially." The classic example of what happens when you fasten an intensifier to a word is the down-grading of the adjective "unique." It originally meant "one of a kind," a translation of the Latin word *unicus*, meaning "only, or sole." But when people began to attach intensifiers to "unique," the adjective gradually lost its force. So now we have "very unique," "somewhat unique." *Unique* has become a synonym of "unusual."

Propping up your adjectives not only weakens them, but increases verbiage. For forceful writing, try to find the right adjective and let it stand alone.

Question: A reader who asks that his name not be mentioned asks, "Please comment on the meaning and use of the word *noir*."

Answer: The adjective *noir* is of Latin origin, and currently retains the meaning "black" in Modern French. English has borrowed *noir*, first in the phrase "noir genre" to describe crime literature, which features tough, cynical characters and bleak settings. More recently it has become the popular English phrase *film noir*, describing Hollywood-type crime films, especially those that emphasize cynical and sexual attitudes.

It has also been borrowed for marketing purposes as a name for pricey sunglasses and jewelry. The Hotel Charles in Boston has a "Noir Bar." Words like "noir," borrowed for special contexts sometimes merge into general usage and their source is forgotten. Most such words, however, do not become popular and they disappear. The name for those words is "nonce terms."

In the January 2010 "Language Tips," there was a discussion of new uses for words, prompted by a reader's question about the noun *venue*. The new meanings of *venue* have been widely accepted by the public, and *venue* now seems firmly established with its expanded meanings.

On the other hand, the noun *desk*, was turned into a verb in the phrase, "He's just desking it." That neologism was vigorously protested by several readers who apparently spoke for many Americans, for it has never taken root in English. (It seems almost a pity, for it aptly defines an executive loafing at his desk – and we all know people that would describe.)

From the Mailbag:

The following quotation was seen in the journal *Chemical and Engineering News*, and was sent by a reader who did not provide the date of the publication. The verses printed below are only the first and the last verse of a poem containing 146 lines; the contributor, a Dutch native who grew up in Haarlem, the Netherlands, said that he and his classmates had to memorize all 146 lines in order to pass their English class:

> Dearest creature in creation
> I will teach you in my verse
> Sounds like corpse, corps, horse, and worse.
> I will keep you, Susy, busy,
> Make your head with heat grow dizzy

The poem continues, ending with the verse below:

> Finally: which rimes with "enough"
> Though, through, plough, cough
> Caught, or coughed?
> Hiccough has the sound of "cup."
> My advice is – give it up!

Readers who are native speakers of English should be happy not to have to be taught the correct pronunciation of these words. You might misspell them, but you learned how to pronounce them long ago at your mother's knee. ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.); *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association).

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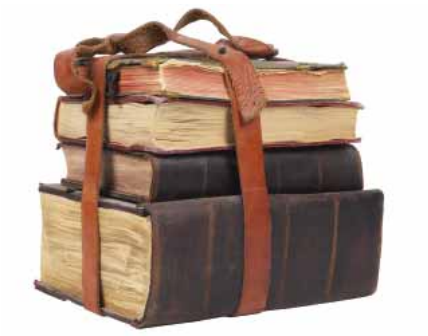

Drafting New York Civil-Litigation Documents: Part IV — The Complaint

The *Legal Writer* continues with writing the complaint.

4. The Demand for Relief

In the demand or prayer for relief, also known as the ad damnum clause, state precisely what you, the plaintiff, want the court to do. This demand universally begins with the word "WHEREFORE."[1] Depending on the cause of action, you might ask for compensatory damages, punitive damages, costs, or attorney fees.

Recoverable costs and disbursements vary by jurisdiction but can include fixed and limited docket fees, examination before trial (EBT) transcription fees, filing fees, out-of-pocket expenses for service of process and subpoenas, sheriff fees, witness fees, and other expenses.[2] To preserve claims for costs, include a demand for all costs in your complaint. Whether you can get attorney fees, which are recoverable when the parties agree to them or a statute authorizes them,[3] might aid in determining which causes of action you'll bring. To recover punitive damages and attorney fees, you need not plead them as a separate cause of action. For punitive damages, include in the complaint allegations that show the significant public harm. For attorney fees, include in the complaint these allegations that show the applicable statute or contract provisions that entitle you to obtain attorney fees. Example of a demand:

> DEMAND FOR RELIEF
>
> WHEREFORE, plaintiff demands judgment against all defendants as follows:
>
> 1. On and for the FIRST CAUSE OF ACTION (breach of contract), awarding compensatory damages in the amount of $500,000 plus consequential damages in the amount of $150,000;
>
> 2. On and for the SECOND CAUSE OF ACTION (negligent misrepresentation), awarding compensatory damages in the amount of $500,000;
>
> 3. On and for the THIRD CAUSE OF ACTION (fraud), awarding compensatory damages in the amount of $500,000 plus punitive damages in the amount of $1,000,000; and
>
> 4. On and for the FOURTH CAUSE OF ACTION (rescission), rescinding the contract between plaintiff and defendants;
>
> 5. Plaintiff's attorney fees and legal costs of this suit;
>
> 6. Interest at the legal rate;
>
> 7. Such other and further relief as the Court deems just and proper.[4]

In this example, the demand for relief is at the end of the complaint. This is the most common method, although many attorneys place the demand for relief at the end of each cause of action when the relief sought in each cause of action is different and when separating the relief will clarify things for, rather than confuse, the reader.

Make your demand for relief complete. In the event of a default, you might be limited to the recovery sought in the complaint.[5] Although some exceptions exist, the court may grant whatever relief is appropriate even if you haven't specifically demanded it so long as it's within the court's jurisdiction and the evidence supports the relief.[6] Include the following language: ". . . and such other and further relief as the Court deems just and proper." If you've proven more than what you've demanded in your complaint, move under CPLR 3025(c) to amend the demand in your complaint to conform the pleadings to the proof. Exceptions to the court's granting relief you didn't demand: (1) if the plaintiff doesn't want the relief; (2) if it would cause prejudice to the defendant; or (3) if plaintiff seeks a default judgment.[7] For example, a court may not grant the plaintiff a divorce if the plaintiff isn't seeking a divorce, the plaintiff sought only a legal separation, and the defendant never counterclaimed for a divorce. Prejudice exists if the defendants show that they have been hindered in preparing their case or have been prevented from supporting their position. For a default judgment, which occurs when a defendant fails to answer or appear, the court may not award relief that exceeds the amount sought or is different from the type of relief demanded.

You may request different types of relief (equitable or legal relief) in your complaint. As explained in Part II of this series, you may plead in the alternative; likewise, you may request relief in the alternative. For example, you may seek different remedies for the defendant's negligent conduct and, alternatively, intentional conduct. A court will not, however, grant incon-

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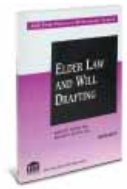

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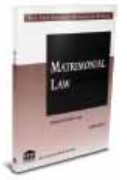

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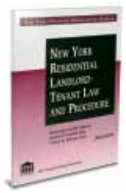

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