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Keeping current

Alumni Convocation explores changes in four key practice areas

It could be said that maintaining a general law practice is a lot like Steven Wright's joke about the time he went to a general store: "They wouldn't let me buy anything, specifically."

That is, sometimes when there is so much change taking place in the law, the general practitioner may find herself hard-pressed to keep up with the specifics of everything her clients might need.

That was the background for the 22nd annual Alumni Convocation, a joint endeavor of UB Law School and the UB Law Alumni Association. The Convocation was held on Nov. 8, 1997, at the Hyatt Regency hotel in Buffalo. Titled "Keeping Current and Competitive," the assembly addressed changes in tax law, matrimonial procedures, supplemental needs trusts and

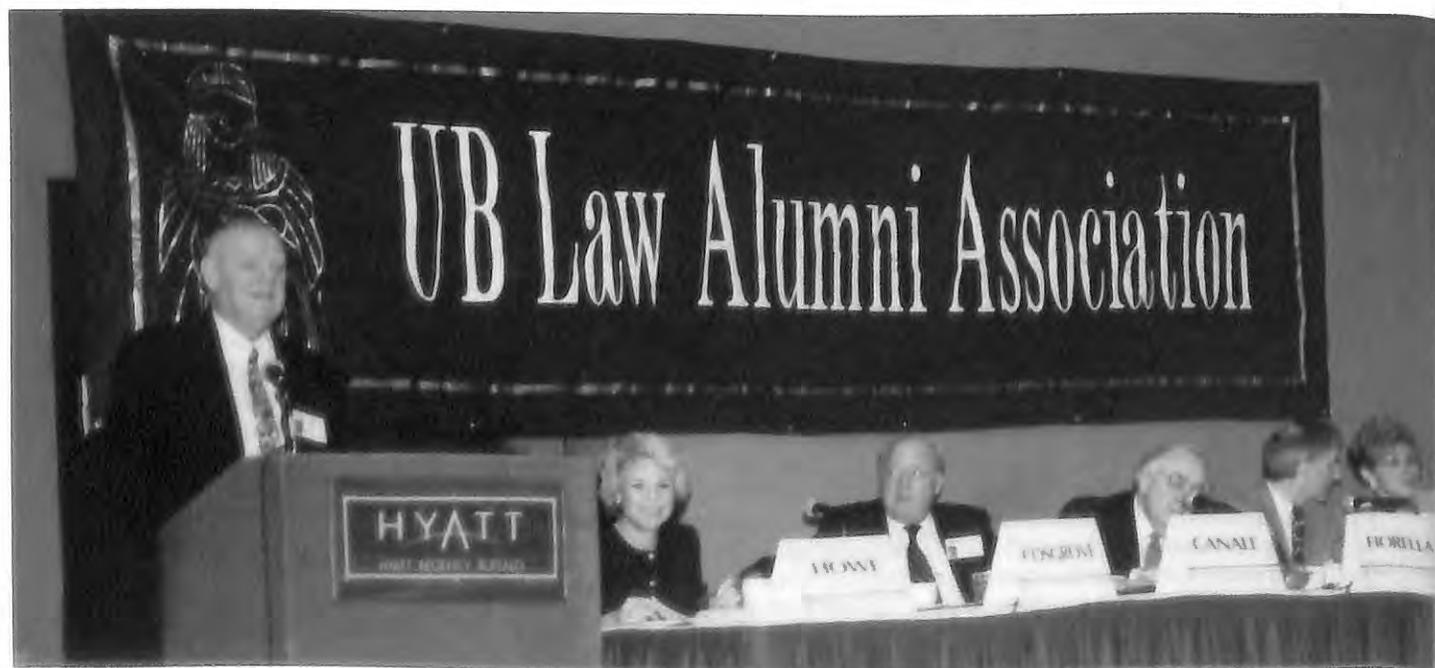
jury selection – four key practice areas in which the law has changed dramatically in the past few years.

The forum was moderated by the Hon. Barbara Howe '80, president-elect of the Law Alumni Association. She first introduced a fellow jurist, the Hon. Nelson H. Cosgrove '74, who began with his perspective on some recent changes in New York State's rules regarding jury selection.

Those changes, Cosgrove said, came about because of some longstanding problems in the jury system, especially in civil trials. In New York City, for example, jurors would try a case, then be sent back to the "bullpen" potentially to try another until their two weeks' service was over. Perhaps as a result, down-state courts had trouble even persuading jurors to show up for the job. And the roster of exemptions was long, a list that



Ann B. Bermingham '80



PHOTOS: K.C. KRATT

now has been nearly eliminated. "Nobody gets off now," Cosgrove said. "Even judges have to serve."

Now, he said, a set of rules instigated by an upstate judge, Robert White, has brought some elements of criminal procedure into civil trials. For example, once a juror is chosen, he can be sworn in and sent home while jury selection continues. This saves the juror some waiting time, but as Cosgrove notes,



Honorable Barbara Howe '80



Professor
Kenneth F. Joyce

"You can't go back later on and get rid of that juror."

However, "What we have been finding in the last couple years since the O.J. (Simpson) case is some jurors with agendas. If you can't get them off the jury, you are going to mess up that case. It is supposed to be a fair and impartial jury."

And sending a juror home once he is sworn in presents its own problems. "In picking a jury," Cosgrove said, "we are all amateur psychologists. We try to analyze the responses, the facial expressions, the body language of the prospective juror to make a determination about whether he or she is going to be helpful to our case."

"You try to pick a balanced jury. In the old days you would have that jury in front of you until the last challenge was exercised, and then you could make up your mind. Now it is harder to compose a jury."

Make no mistake, Cosgrove said, jury selection is the key to any trial. "I consider jury selection absolutely the most important part of the trial," he said. "That jury is going to decide your case. And the impression you make on that jury in jury selection is going to be the only time that you get to talk with them. You will be talking to them throughout the trial, but jury selection is the only

time you will be talking with them. I think it is most important to take every advantage that you can have in talking with that jury in jury selection."

And new time limits on questioning prospective jurors put the squeeze on attorneys for both sides of the case. How best to use the five minutes each side is allotted per juror? Cosgrove suggested:

- Make your questions as pointed and simple as you can, and be sure the

juror understands them.

- If there is a general question, such as "Have you or a relative ever had an injury similar to the plaintiffs?" ask for a show of hands. Don't repeat the question for each juror.

- Don't waste time trying to change the mind of a strongly opinionated juror.

- Be sure your questions are proper. This saves the time that would be spent in arguing with your opponent.

"This has been an interesting few years to be a matrimonial lawyer," said the next speaker, Patrick C. O'Reilly '80, senior managing partner of the Buffalo law firm Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria. "The changes have been coming so fast and furious that few of us can keep track of them. It's consumer protection meets the legal profession."

The state's new Committee on Matrimonial Practice, he said, has attempted to address complaints that divorce was too expensive and took too long, and that there is a lack of communication among all parties. New rules governing such practice, he said, involve regulating the business relationship between lawyer and client; streamlining the judicial process by providing for early judicial intervention and improved case management; and regulating certain areas of conduct by attorneys.

"The problem with being a matrimonial lawyer," he said, "is that when you meet a client for the first time, you are seeing a person who is probably at the worst time of their life." That does not make for a good business discussion, he said. The new rules require a client bill of rights, a written retainer agreement, the issuance of an itemized bill at least every 60 days, and arbitration of fee disputes - mandatory at the option of the client.

In case management, the new rules regulate the timeline of the case and expand the preliminary conference, which must take place within 90 days of the divorce filing, "to take hold of these cases and get them under control." At that conference, both sides present their version of a net worth statement, and the clients must be present - "you can talk to them then and there and narrow the issues." Attorneys for both divorcing spouses can reach agreement on what

issues are already resolved, what remains unresolved, and what discovery is needed to reach agreement on the disputes. "A large percentage of these cases," O'Reilly said, "are done within three or four months. They are out of the system and people are getting on with their lives."

Among the new rules governing conduct, O'Reilly noted that an attorney must ask permission from the court before taking a security interest in a piece of property as payment. Another rule bars lawyers from commencing a sexual relationship with their clients during the course of representation. That was the only one, he noted wryly, that made the New York Times.

Peter J. Fiorella Jr. '63, a matrimonial and family law practitioner with the Buffalo firm of Fiorella & Palmer, spoke next on further aspects of changes in matrimonial practice. Citing a case in the 4th Department, *Wadsworth v. Wadsworth*, he noted the court held that, where there is maintenance to be awarded based on the value of a professional license, the court must reduce the value of the enhanced earnings by the amount of the maintenance.

That led to an interesting twist in a case of Fiorella's in which, representing the wife, he decided to waive any request for maintenance. Instead, the wife agreed to accept her share of the husband's enhanced earnings over 10 years, at 9 percent interest. This has a couple of advantages, Fiorella said: Those payments will continue even if she remarries, whereas maintenance would cease; the same holds true if she were to get a job and become substantially better off.

He also cited a 4th Department case of child support for an out-of-wedlock child, and the difficult issues it raises because the father, a famous athlete, made so much money. "What happens when incomes go off the chart?" Fiorella asked. "You must go back and look at what is the standard of living of the child. But how do you establish a standard of living for an out-of-wedlock child? There is no family history, no trips they have taken, no planning for his educational needs."

Ann B. Birmingham '80, a vice president and senior trust officer at

Marine Midland Bank, spoke at length on supplemental needs trusts, which she defined as "a discretionary spendthrift trust to benefit a disabled person. The trustee has the discretion to spend both principal and income for the benefit of the beneficiary."

Often a supplemental needs trust is formed with proceeds from a personal injury or malpractice settlement. "The creation of a supplemental needs trust is intended not to pay for items that government funds will pay for," she says. "The beneficiary will get government benefits, mainly Supplemental Security Income and Medicaid."

of the World Almanac.

The statute lowers the tax rate on long-term capital gains, he said, from 28 to 20 percent, but increases the holding period from 12 to 18 months. "We have now probably six different rates for capital gains, depending on your income bracket and how long you have held the assets," he said.

As well, the old "rollover" provisions involved in selling a home are history. Under the new rules, up to \$250,000 in gain can go untaxed, or up to \$500,000 for a married couple filing jointly. This is an exclusion, not a deferral, and there is no age limit.



Patrick C. O'Reilly '80, left, and Peter J. Fiorella Jr. '63

Choosing a trustee for such a trust, she said, is very important. "The trustee has to be prepared to make distinctions between an invasion request for a handicapped-accessible van to take the beneficiary some place, and the pickup truck that might take Dad to work. ... You don't buy a bedridden child who might be blind and deaf a computer.

"These trusts are set up so disabled folks can have things that government benefits don't pay for: extra therapies, specialist doctor treatments. But I have also approved using the money for such things as making a wedding video, so a woman could have the pleasure of watching her daughter get married over and over again."

UB Law Professor Kenneth Joyce spoke next on tax law changes, particularly those coming out of the Taxpayer Relief Act of 1997 - a document the size

Some other features of the taxpayer-friendly act: the Roth IRA, in which after-tax money is invested but the proceeds (after five years and over age 59 1/2) are tax-free; the vaunted \$500 per child tax credit, which phases out for higher-income tax brackets; and an increase in the lifetime exclusion for estate and gift taxes, from \$600,000 to \$1 million.

The presentations were followed by a luncheon at which the 1997 Jaeckle Award was presented to Professor Louis A. Del Cotto '51, who is retiring from the Law School. (See related story.)

The Convocation was sponsored by Harold C. Brown & Co. Inc., patron; Marine Midland Bank, sponsor; and Commonwealth Land Title Insurance Co., donor. The Convocation Committee was chaired by Paula L. Feroletto '82 and Nicholas J. Sargent '69. ■