Keeping Current: Alumni Convocation Explores Changes in Four Practice Areas

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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, downstate courts had trouble even persuading jurors to show up for the job. And the roster of exemptions was long, a list that
now has been nearly eliminated. "Nobody gets off now," Cosgrove said. "Even judges have to serve."

Now, he said, a set of rules instituted 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,

"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 plaintiff's?" 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 dis-
putes. "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 profes-
sional 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 substan-
tially 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 stan-
dard 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. Bermingham '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 gov-
ernment funds will pay for," she says.
"The beneficiary will get government
benefits, mainly Supplemental Security
Income and Medicaid."

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 handi-
capped-accessible van to take the benefi-
ciary 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, particu-
larly those coming out of the Taxpayer
Relief Act of 1997 - a document the size
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 cap-
tal gains, depending on your income
bracket and how long you have held the
assets," he said.

As well, the old "rollover" provi-
sions involved in selling a home are his-
try. Under the new rules, up to
$250,000 in gain can go untaxed, or up to
$500,000 for a married couple filing joint-
ly. This is an exclusion, not a deferral,
and there is no age limit.

Some other features of the taxpay-
er-friendly act: the Roth IRA, in which
after-tax money is invested but the pro-
ceeds (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., patro-
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Commonwealth Land Title Insurance
Co., donor. The Convocation Commitee
was chaired by Paula L. Feroletto '82 and
Nicholas J. Sargent '69.