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New York Court of Appeals Concludes Law Enforcement Officials Must Have Reasonable Suspicion that a Residence Contains Illegal Drugs Before Conducting a "Canine Sniff" of the Premsies

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Payton violation issue, and the court's analysis should have focused on whether the defendant's confession was sufficiently attenuated from his illegal arrest.[52]

Although the state has a compelling interest in protecting the rights of criminal suspects, it has a superior interest in protecting society from an admitted murderer. The *Payton* rule, intended to protect the sanctity of a suspect's home, is preserved by suppressing any evidence acquired while in the home. The effect of suppressing a defendant's voluntary, station-house confession is to burden criminal prosecutions without providing a corresponding deterrent to illegal police action. The *Harris* court, citing the interplay between two separate and distinct state constitutional provisions, suppressed a station-house confession despite the existence of probable cause to arrest the defendant. As the dissent correctly exhorted, "[t]he history of [the] NY Constitution . . . and its proud right to counsel tradition . . . do not support leapfrogging beyond the United States Supreme Court's decision in this procedurally convoluted case."[53]

Maryann Gianchino

New York Court of Appeals concludes law enforcement officials must have reasonable suspicion that a residence contains illegal drugs before conducting a "canine sniff" of the premises

The fourth amendment of the United States Constitution, as well as its New York State Constitution counterpart, is designed to safeguard against unreasonable searches and seizures.[1] Exactly

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Dep't) (en route to Central Booking and before *Miranda* warnings given, defendant spontaneously made admissible statements), *appeal denied*, 76 N.Y.2d 860, 561 N.E.2d 900, 560 N.Y.S.2d 1000 (1990).

[52] *See Harris*, 77 N.Y.2d at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting). Judge Bellacosa cites a key chain of attenuating events: change of scene from "protected" dwelling to "unprotected" precinct; passage of about one hour; and renewed *Miranda* warnings and waivers. *Id.* (citing People v. Harris, 124 A.D.2d 472, 475, 507 N.Y.S.2d 823, 824 (1st Dep't 1986), *rev'd*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988), *rev'd*, 110 S. Ct. 1640 (1990)).

[53] *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

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[1] *See* U.S. CONST. amend. IV. The fourth amendment provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

what constitutes a search, however, continues to become more difficult to determine as law enforcement officers employ increasingly innovative and probing investigative techniques.[2] In recent years, for example, drug agents have successfully used specially trained dogs to assist them in detecting controlled substances.[3] In *United States v. Place*,[4] the United States Supreme Court determined that although "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment[,] . . . the manner in which information is obtained through

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Id. The language of the analogous section of the New York State Constitution is identical. *See* N.Y. CONST. art. I, § 12. Accordingly, the rights conferred by each are generally similar. The New York courts in the past, however, have not hesitated to interpret this provision of the state constitution more liberally than its federal counterpart. *See, e.g.*, People v. P.J. Video, Inc., 68 N.Y.2d 296, 307, 501 N.E.2d 556, 561-62, 508 N.Y.S.2d 907, 912-13 (1986) (requiring more exacting standard for issuance of search warrant under New York State Constitution), *cert. denied*, 479 U.S. 1091 (1987); People v. Class, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (declining to adopt Supreme Court interpretation as matter of state constitutional law on remand); People v. Bigelow, 66 N.Y.2d 417, 424-26, 488 N.E.2d 451, 456-58, 497 N.Y.S.2d 630, 635-36 (1985) (declining to apply *Gates* rule, which examined "totality of the circumstances" in determining probable cause); People v. Johnson, 66 N.Y.2d 398, 406-07, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985) (same).

[2] *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 736 (1979) ("pen register" used to record telephone numbers dialed by monitoring electronic impulses); People v. Katz, 389 U.S. 347, 353-54 (1967) (FBI used electronic surveillance equipment to monitor conversation in public telephone booth). Although it is relatively simple for a court to determine whether law enforcement officials have conducted a typical, *i.e.*, physical, search, the advent of modern technology has complicated the issue of what constitutes a search within the meaning of the fourth amendment. *See Katz*, 389 U.S. at 352. Although the *Katz* Court noted that "[i]t is true that the absence of . . . [physical] penetration [of a given place] was at one time thought to foreclose . . . Fourth Amendment inquiry," this requirement of penetration is no longer representative of the law today. *Id.* at 352-53. Thus, by recognizing that the fourth amendment is designed to protect people, and not places, the *Katz* Court extended the scope of fourth amendment inquiry, thereby complicating the determination of whether implementation of a particular investigative procedure constitutes a search. *See id.*

The Supreme Court noted this dilemma as early as 1963: "This Court has by and large steadfastly enforced the Fourth Amendment against physical intrusions . . . [b]ut our course of decisions, it now seems, has been outflanked by the technological advances of the very recent past." Lopez v. United States, 373 U.S. 427, 471 (1963).

[3] *See, e.g.*, United States v. Place, 462 U.S. 696, 696 (1983) (canine sniff at airport successful in detecting contraband in passenger's closed luggage); United States v. Colyer, 878 F.2d 469, 471-72 (D.C. Cir. 1989) (canine sniff revealing narcotics within Amtrak sleeper compartment); United States v. Mayomi, 873 F.2d 1049, 1050 (7th Cir. 1989) (canine sniff revealed presence of narcotics in mail packages); *see also* Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. REV. 329, 331-32 (1984) (noting success of canine sniff in *Place* and touting its effectiveness in protecting innocent citizens and in fighting crime).

[4] 462 U.S. 696 (1983).

. . . [a canine sniff] is much less intrusive than a typical search."[5] The Court also noted that since "the sniff discloses only the presence or absence of narcotics[,] . . . the information obtained [about the contents of the luggage] is limited."[6] Therefore, the Court concluded that the "exposure of the respondent's luggage, which was located in a public place, to a trained canine . . . did not constitute a "search" within the meaning of the Fourth Amendment."[7] Recently, however, in *People v. Dunn*,[8] the New York Court of Appeals held that a canine sniff conducted by police in a common hallway[9] outside of a defendant's apartment door constitutes a search under article I, section 12 of the New York State Constitution,[10] notwithstanding its conclusion that because the *Place* rationale is equally applicable to canine sniffs in the residential context, fourth amendment protections are not invoked.[11]

In *Dunn*, after obtaining information that illegal drugs were

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[5] *Id.* at 707. The Court stated that since the canine sniff procedure does not require law enforcement officials to open one's luggage, it therefore does not expose non-contraband items that typically remain hidden from public view. *Id.* Thus, the Court reasoned that this technique is minimally intrusive since it is less revealing than an ordinary search, such as when an officer detains a passenger to physically rummage through his closed baggage. *Id.*

[6] *Id.* The Court explained that although the canine sniff enables police to detect the presence of narcotics within personal luggage, it does not subject the owner of the property to the possible embarrassment and inconvenience that can result from "less discriminate and more intrusive investigative methods." *Id.*

[7] *Id.* The Court based its holding on the following rationale: "In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.*

[8] 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

[9] *Id.* at 21, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389. The court noted that since the defendant failed to preserve the issue of whether the police were lawfully present in the common hallway outside of his apartment, this was not a proper subject for review. *Id.* at 21 n.2, 564 N.E.2d at 1055 n.2, 563 N.Y.S.2d at 389 n.2.

[10] *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

[11] *Id.* at 23-24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391. The *Dunn* court reasoned that under the *Place* rationale, the fact that the target of the canine sniff was a residence rather than a piece of luggage was irrelevant to the determination of the defendant's rights under the fourth amendment of the United States Constitution. *Id.* The court based this conclusion on its interpretation of *Place* and stated that since the determinative factor in the *Place* decision was the fact that the canine sniff reveals only evidence of criminality, regardless of where the procedure is conducted, the mere fact that the defendant's residence was subjected to this investigative technique did not warrant fourth amendment protection. *Id.* While the narrow category of evidence revealed by a canine sniff was clearly one of the factors that the *Place* court considered in reaching its conclusion, it is suggested that the *Dunn* court was incorrect in concluding that this factor alone was determinative. *See Place*, 462 U.S. at 707.

being stored in an apartment leased by the defendant,[12] the police arranged for a narcotics detection dog to perform a canine sniff in the corridor outside of the defendant's door.[13] The dog "alerted,"[14] indicating that narcotics were located inside the apartment.[15] Based on both the dog's reaction and previously obtained information,[16] the police procured a search warrant, entered the defendant's residence, and seized large amounts of cocaine and marijuana.[17] A subsequent search of another apartment leased to the defendant similarly resulted in the seizure of contraband.[18] Facing various drug related charges, the defendant moved to suppress all of the evidence that had been seized during these searches, asserting that the canine sniff itself constituted a warrantless search unsupported by probable cause.[19] The defendant's motion was de-

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[12] People v. Dunn, 155 A.D.2d 75, 78, 533 N.Y.S.2d 257, 258 (4th Dep't), *aff'd*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991). Before the police conducted the canine sniff, they had already acquired a substantial amount of information which led them to believe that drugs were being stored in the defendant's apartment. *Id.* Among other things, police were aware of the following: State Police Sergeant Kenneth Gellart, one of the defendant's neighbors, had smelled marijuana odors emanating from the defendant's apartment on numerous occasions. *Id.* Additionally, Jeffrey Osgood, the apartment complex's maintenance man, had entered the defendant's apartment approximately three and one-half months prior to the canine sniff and observed what he believed to be cocaine in various locations within the defendant's apartment. *Id.* Osgood also observed a triple-beam scale, plastic bags, marijuana roaches, and sticks of incense in the apartment. *Id.* Finally, Osgood smelled a strong odor of marijuana emanating from a closed closet in the defendant's bedroom. *Id.*

[13] *Id.* at 79, 553 N.Y.S.2d at 259.

[14] *Id.* Amber, a highly trained drug-sniffing canine, is certified and annually evaluated by the Canine Training Center, and upon picking up the scent of marijuana, cocaine, heroin, hashish, or crack, she is trained to scratch. *Id.* This scratching is known as an "alert", and the court noted that Amber had correctly alerted on many occasions in the past. *Id.*

[15] *Id.* After arriving in the hallway where the defendant's apartment was located, Amber headed directly for the defendant's apartment and began scratching the door. *Id.* The officers conducting the investigation did not enter the apartment, however, until they had obtained a warrant. *See id.*

[16] *Id.* Officers Gramaglia and Senecal, who had conducted the canine sniff, surmised that drugs were on the premises after considering all of the information that they had obtained. *Id.*

[17] *Id.* Based on affidavits submitted by officers Gramaglia and Senecal, the magistrate issued a warrant authorizing the search of the defendant's Hamburg, New York apartment. *Id.* The police executed the warrant and found large quantities of cocaine and marijuana, drug paraphernalia, two handguns, and $6,200 in cash in the apartment, on the defendant's person and in his car. *Id.* at 77, 553 N.Y.S.2d at 258.

[18] *Id.* The second warrant was executed the next day at the defendant's apartment in Cheektowaga, New York, and additional drugs and contraband were seized by the police. *Id.*

[19] *Id.* at 79-80, 553 N.Y.S.2d at 259. The defendant's counsel argued that since the canine sniff constituted a warrantless search, and the remaining allegations against the defendant were insufficient to establish probable cause, the original warrant application was

nied, and he was subsequently convicted in the Supreme Court, Erie County, after a jury trial.[20] The Appellate Division, Fourth Department, affirmed and granted leave to appeal.[21]

Upon further review, the New York Court of Appeals affirmed the courts below, but solely on the ground that the police had a reasonable suspicion that the defendant's apartment contained illegal narcotics prior to conducting the canine sniff.[22] Writing for the court, Judge Titone explained that although the defendant's fourth amendment rights had not been violated under the rationale set forth in *Place*,[23] it was necessary to ascertain whether the New York State Constitution provided greater protections.[24] The *Dunn* court determined that the "analysis adopted by the Supreme Court in [*Place*] . . . threaten[s] to undercut the right of [New York] citizens to be free from unreasonable government intrusions."[25] Based on this conclusion, the *Dunn* court expressly rejected the *Place* rationale[26] and focussed its analysis on whether there had been an intrusion into an area where the defendant was entitled to a reasonable expectation of privacy.[27] Grounding its de-

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insufficient to justify the issuance of a search warrant. *Id.*

[20] *Id.* at 77, 553 N.Y.S.2d at 257-58.

[21] *Id.* at 89, 553 N.Y.S.2d at 266.

[22] *Dunn*, 77 N.Y.2d at 22, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

[23] *Id.* at 23-24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391; *supra* note 11 and accompanying text.

[24] *Dunn*, 77 N.Y.2d at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391. The court was careful to note that its previous decision in People v. Price, 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981), was not clearly applicable to the *Dunn* facts in determining whether a search had occurred. *Dunn*, 77 N.Y.2d at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391. The court in *Dunn* distinguished the facts of *Price* by indicating that they were more similar to the facts considered by the United States Supreme Court in *Place* since both cases involved the exposure of one's luggage at an airport to a canine sniff. *Id.* However, the court also made one point perfectly clear: "Nowhere in *Price* did we even intimate that the investigative tool employed there did not constitute a search because it could disclose only the presence or absence of contraband." *Id.* Thus, the *Dunn* court stressed the fact that the grounds upon which it decided the *Price* case, namely, the reduced expectation of privacy one has in luggage once it is placed in the hands of a common carrier, were inapposite to those relied upon by the Supreme Court in *Place*. *Id.*

[25] *Dunn*, 77 N.Y.2d at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

[26] *Id.* The *Dunn* court stated, "Because we conclude that the *Place* analysis [would diminish the expectation of privacy enjoyed by New York citizens], we decline to follow it." *Id.*

[27] *Id.* at 24-25, 564 N.E.2d at 1057-58, 563 N.Y.S.2d at 391-92. The court reasoned, "It is one thing to say that a sniff at an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy." *Id.* at 25 n.4, 564 N.E.2d at 1058 n.4, 563 N.Y.S.2d at 392 n.4 (quoting United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir.),

cision on the premise that the home "has traditionally been accorded a heightened expectation of privacy,"[28] the court ruled that the canine sniff of the defendant's residence constituted a search under the New York State Constitution.[29] However, the court thereafter noted the discriminate nature of this investigative technique[30] and recognized its effectiveness in combatting crime,[31] and thus required only that police have a reasonable suspicion that illegal narcotics are located within a residence before performing a canine sniff.[32]

In an effort to protect the citizens of New York state from unreasonable government intrusions,[33] it appears that the *Dunn* court has instead unnecessarily broadened the scope of the term "search" within the meaning of article I, section 12 of the New York State Constitution. The *Dunn* court appropriately directed its analysis towards determining whether the privacy of the defendant's home had been violated.[34] However, the court initially disregarded the sui generis[35] nature of the canine-sniff procedure in concluding that a search had occurred only to subsequently rely on the uniqueness of this investigative technique as the basis for imposing a minimally restrictive reasonable suspicion standard on the police.[36] This bifurcated dependence on the character of the

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cert. denied, 474 U.S. 819 (1985)) (emphasis in original).

[28] *Id.* at 25, 564 N.E.2d at 1057-58, 563 N.Y.S.2d at 391-92. The *Dunn* court was unwilling to consider the fact that the canine-sniff technique can disclose only evidence of criminality in determining whether a search had occurred. *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391. The court simply observed that the police were able to obtain private information about the contents of the defendant's residence, making no reference to the nature of such information, and noted that the home "has traditionally been accorded a heightened expectation of privacy." *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

[29] *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

[30] *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

[31] *Id.*

[32] *Id.* Although the court concluded that the canine sniff of the defendant's apartment constituted a search, it did not impose the typical probable cause standard on police. *See id.* Rather, the court announced a more relaxed reasonable suspicion standard under which the police were to operate in the future. *See id.*

[33] *Supra* notes 25-26 and accompanying text.

[34] *See Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. It is asserted that while the court's analysis was properly directed, its conclusion that the privacy of the defendant's home was violated is erroneous. *See infra* notes 35-42 and accompanying text.

[35] *See Place*, 462 U.S. at 707 (noting that canine sniff is sui generis); *supra* note 7 and accompanying text.

[36] *See Dunn*, 77 N.Y.2d at 24-25, 564 N.E.2d at 1057-58, 563 N.Y.S.2d at 391-92. In the initial phase of its analysis of whether a search had been conducted, the court ignored (1) the fact that the canine sniff only discloses evidence of criminality, (2) the nonintrusive

canine-sniff technique is unpersuasive when viewed in light of the more consistent rationale adopted by the appellate division, namely, that "[a] suspect has no greater or more reasonable expectation of privacy in the public air outside of his residence than in the public air outside of his belongings."[37] Although the *Dunn* court correctly maintained that the absence of physical entry into a defendant's residence is not itself determinative of the issue concerning whether the constitutionally protected sanctity of his home has been violated,[38] it is suggested that the majority improperly neglected to consider the atypical qualities of the canine-sniff technique in the initial phase of its analysis.[39] While the canine sniff does enable the police to detect the contents of a private place, the means of detection cannot be ignored.[40]

Under the approach adopted by the court in *Dunn*, it is difficult to contemplate any investigative procedure that would enable

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manner in which the evidence is obtained, and (3) the unique and discriminate nature of the technique. *See id*; *supra* note 28.

However, after reasoning that the use of the canine-sniff technique under these circumstances constituted a search, the court immediately noted that its inquiry was yet incomplete. *Dunn*, 77 N.Y.2d at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. At this juncture, the court stated that it was necessary to take into account the unique qualities of the canine-sniff procedure, as well as the fact that the police could effectively employ the canine sniff to combat crime. *Id.* Thus, after evaluating these considerations, the court diluted the traditional prerequisite threshold for conducting a search from probable cause to reasonable suspicion. *Id.*

[37] People v. Dunn, 155 A.D.2d 75, 86, 533 N.Y.S.2d 257, 264 (4th Dep't), *aff'd*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991). It is necessary to note that Judges Simons and Bellacosa concurred only in the result of the Court of Appeals' decision. *Dunn*, 77 N.Y.2d at 26, 564 N.E.2d at 1059, 563 N.Y.S.2d at 393. These judges stressed that in their view, in accordance with the opinion by Judge M. Dolores Denman of the appellate division, a search had not occurred. *Id.*

[38] *See Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. The court indicates, by example, that it is certainly possible to conduct a search without entering one's residence. *Id.* (noting that implementation of electronic surveillance technique constitutes search).

[39] *See id.* The *Dunn* court attempted to draw an analogy between the odors emanating from the defendant's apartment to sound waves that can be harnessed by electronic surveillance equipment. *Id.* However, although there is some similarity in the evidence to be detected, it is suggested that the court placed too much reliance on this likeness. The court should also have directed its analysis at the means used to obtain such evidence. Under such an approach, it is clear that while sound waves and drug odors are in some respects alike, the techniques by which each is detected are entirely different. *Cf. id.* (noting that each technique allows police to detect evidence emanating from private area). Although both techniques enable police to acquire information about the contents of one's home, only the canine-sniff procedure does so without the risk of detecting lawful, private activity. *See supra* note 7.

[40] *See supra* note 39 and accompanying text.

law enforcement officers to detect the contents of a residence in a manner that would not be considered a search.[41] Given the destructive impact that drugs have on modern society and the investigative ingenuity, nonintrusiveness, and effectiveness that the canine-sniff technique represents, it is suggested that the *Dunn* court erred when it failed to consider the nature and character of the canine-sniff procedure in reasoning that a search had occurred. As a result of the holding in *Dunn*, it seems that "as between cops and crooks, the [New York Court of Appeals] gave [crooks] the upper hand."[42]

Mark A. Varrichio, Jr.

CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 7-104(A)(1): New York Court of Appeals fashions "alter ego" test to determine whether corporate employees are shielded from ex parte *communications*

Disciplinary Rule 7-104(A)(1) of the *New York Lawyer's Code of Professional Responsibility* makes it unethical for attorneys to engage in *ex parte* communications with a "party" known to be represented by counsel, absent the consent of that party's counsel.[1] The scope of the term "party" is not clear when a corporation is

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[41] *See Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. Under the *Dunn* court's approach, it is apparent that anything located in a private residence that is detected by means of a supersensitive detection device is deserving of New York State constitutional protection against unreasonable search and seizure. *See id.*

[42] Loewy, *supra* note 3, at 331. Professor Loewy, in reference to the Supreme Court's decision in *Place*, suggests that the Court gave the police the upper hand in fighting crime by concluding that the use of the canine-sniff technique did not constitute a search. *See id.* It is suggested that as a result of the New York Court of Appeals' decision in *Dunn*, the police are at a severe disadvantage in attempting to thwart the efforts of crafty drug dealers.

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[1] N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-104(A)(1) (1990). DR 7-104(A) provides in part:

> During the course of the representation of a client a lawyer shall not:
> 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id.

The rule was derived from Canon 9 of the *American Bar Association Canons of Professional Ethics*, which was superseded by the *American Bar Association Model Code of Professional Responsibility* in 1970. *See* Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 685 (1979).